MINUTES

MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN DUANE GRIMES**, on January 16, 2003 at 8:00 A.M., in Room 303 Capitol.

ROLL CALL

Members Present:
Sen. Duane Grimes, Chairman (R)
Sen. Dan McGee, Vice Chairman (R)
Sen. Brent R. Cromley (D)
Sen. Aubyn Curtiss (R)
Sen. Jeff Mangan (D)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)
Sen. Gary L. Perry (R)
Sen. Mike Wheat (D)

Members Excused: None.

Members Absent: None.

Staff Present: Judy Keintz, Committee Secretary
Valencia Lane, Legislative Branch

Please Note:
Audio-only Committees: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:
Hearing & Date Posted: SB 139, 1/13/2003; SB 141, 1/13/2003; SB 147, 1/13/2003; SB 156 1/13/2003
Executive Action: None

HEARING ON SB 147

Sponsor: **SEN. FRED THOMAS, SD 31, STEVENSVILLE**

Proponents: **None**

Opponents: **Loren Tucker, District Judge, Fifth Judicial District**
SEN. BILL TASH, SD 17,
Kurt Krueger, District Judge for the Second Judicial District Court, Butte, MT,
David Cybulski, Fifteenth Judicial District Judge
Steven J. Shapiro, Attorney
Bob McCarthy, County Attorney,Butte/Silver-Bow County
REP. DEBBIE BARRETT, HD 34, BEAVERHEAD COUNTY
Robert Zenker, Madison County Attorney

Informational Testimony: Dorothy McCarter, First Judicial District Judge, Montana Judges Association

Opening Statement by Sponsor:

SEN. FRED THOMAS, SD 31, STEVENSVILLE, introduced SB 147. He stated that in the 1989 Session he was successful in creating a position for a district court judge in Ravalli County. This legislation also considered the aspects of redistricting the district courts but did not prevail. He provided a copy of the 2001 Annual Report of the Montana Judiciary, **EXHIBIT(jus09a01).** The focus of SB 147 is to provide an even caseload in the judicial districts throughout the state. This bill is presented as a starting point. The Legislative Council asked **Susan Fox, Legislative Services,** to provide a redistricting plan that was even in the number of judges and also considered the caseload, mileage, and distances between the courts. The current caseloads are unequal in number. The judicial districts are not subject to the one man, one vote scenario. The proposal provides that certain judges in rural areas will retain a caseload that is over 30 percent less than average but will have a greater area to cover. This legislation would go into effect in 2006. Current judges would remain in office in their district until that time. He asked that the district numbers remain the same.

He provided a map of the State of Montana Judicial Districts, **EXHIBIT(jus09a02).** Mileage and geography have been taken into consideration in the plan. The Eighteenth Judicial District in Bozeman is a standout that needs to be addressed. In the

northeast corner of the state, two judges will be retained in the Seventh Judicial District. In the northeast corner, the judgeship would be transferred. District Court Fifteen would be eliminated and divided between Districts Seventeen and Seven. Due to the caseload in the Billings area, there would be an addition of one judge. In the middle of the state, Broadwater County would be moved into the Fourteenth Judicial District. This area would be removed from the First Judicial District. Lewis and Clark County would gain one judge. In the southwest corner of the state, Beaverhead and Madison Counties would be joined with Silver Bow County.

SEN. THOMAS provided a letter he had received from **Steven J. Shapiro, Attorney, EXHIBIT(jus09a03).** He also provided a letter and attachments from District Judge Richard A Simonton, **EXHIBIT(jus09a04).**

{Tape: 1; Side: B}

Proponents' Testimony: None

Opponents' Testimony:

Loren Tucker, District Judge, Fifth Judicial District, presented his written testimony in opposition to SB 147, **EXHIBIT(jus09a05).** He claimed that the data used to propose the bill was not reliable data. He has not found any judge or clerk of court who has confidence in the reliability of the data found in the Annual Report of the Montana Judiciary. The area he serves has an average caseload and an average population. For the year 2002, the caseload has increased by almost one-third.

SEN. BILL TASH, SD 17, rose in opposition to SB 147. He remarked that rural areas need to have service and recognition.

Kurt Krueger, District Judge for the Second Judicial District Court, Butte, MT, provided his written testimony in opposition to SB 147, **EXHIBIT(jus09a06).**

{Tape: 2; Side: A}

David Cybulski, Fifteenth Judicial District Judge, stated that in the substitution rule, judges in Montana take cases from different districts because there is no other judge in the district to take the case. If he takes a case in Malta, this involves three hours of driving time each way. Under the proposal in SB 147, judges would be traveling 175 to 200 miles for a hearing. He provided a copy of cost per case in the judicial districts, **EXHIBIT(jus09a07).**

In Williston, N.D., which is across the border from Roosevelt County, they have had thirteen meth lab busts in 2003. He believes the people in his area would be under served by a reduction to their access to the courts.

Steven J. Shapiro, Attorney, rose is opposition to SB 147. He presented his written testimony, **EXHIBIT(jus09a08).**

Bob McCarthy, County Attorney for Butte/Silver-Bow County, spoke in opposition to SB 147. They have a particularly difficult time in his county due to the close proximity of the state mental hospital and the fact that there is an extensive mental health program in Butte. Mental health cases require judges to attend to them immediately.

REP. DEBBIE BARRETT, HD 34, BEAVERHEAD COUNTY, claimed that Beaverhead County is the largest county in the state. She is opposed to the redistricting of the Second and Fifth Judicial Districts.

Robert Zenker, Madison County Attorney, rose in opposition to SB 147. He believed the quality of the judiciary will be greatly diminished under this plan. Two judges would handle the law-in-motion calendar as well as the trial calendar in four different counties. Given the travel time, this would be almost impossible. Involuntary commitments and Youth Court offenses must be handled in an expedient manner. This bill affects the citizens of those four counties. They elected their judges because they know them and trust them to handle the most important of their affairs.

Wally Congdon, Deputy County Attorney for Beaverhead County, spoke in opposition to SB 147. When he practiced law, he was a member of the Fourth Judicial District Bar. This included Lake, Sanders, Ravalli, Mineral, and Missoula Counties. Reapportionment of judges has been addressed in respect to Lake County and Sanders County. Besides caseload, other factors were used in this decision. He requested that these other factors be considered at this time. The first issue involved was travel time. Missoula is located 102 miles from Thompson Falls. When attending law-in-motion day, the judge traveled four hours every day. Polson, the Lake County Seat, was 70 miles from Missoula. Given these circumstances, the Legislature created a new district which now has two judges. There are law-in-motion days in Beaverhead, Madison, and Jefferson Counties. Under this proposal which provides for a judge from Butte to serve these counties, the judge will need to cross the Continental Divide to travel to Dillon, Virginia City and Boulder. He doesn't believe the sponsor of the bill is familiar with the issues of geography,

proximity, and present caseload. If there is a need to redistrict, perhaps a task force should be set up to look at all the issues and not the single issue of caseload.

Al Smith, Montana Trial Lawyers Association, rose in opposition to SB 147. It is important to look at the workloads of our courts throughout the state but this is the wrong forum to address the issue. An interim study should include public comment.

Harold Blattie, Assistant Director of MACO, remarked that with the addition of a judge in Yellowstone County, it would be necessary to address additional space requirements and perhaps an additional courtroom. This is a cost that would be retained by the county.

Michael Larson, Fifth Judicial District Bar, stated that this bill does not apply to the one person, one vote principle. Each case involves many lives.

Donna Sevalstad, Beaverhead County Commissioner, rose in opposition to SB 147. She provided a spreadsheet in regard to the effects of the redistricting, **EXHIBIT(jus09a09).**

Mike McGinley, Beaverhead County Commissioner, rose in opposition to SB 147. He raised a concern that the redistricting plan proposed may actual cost the state more funding.

Frank Nelson, Madison County Commissioner, rose in opposition to SB 147.

Gary McDonald, Roosevelt County Commissioner, rose in opposition to SB 147.

Jack Whalen, Butte Silver-Bow County Judge, rose in opposition to SB 147. His main concern is that the Second and Fifth Judicial Districts would be unable to serve the people they have been elected to serve.

Andy Suenrum, Attorney, claimed that reapportionment involved counting the people and the number of representatives and then dividing the numbers equally. There are numerous other factors that need to be considered. Good reliable data needs to be developed to address these factors.

Tom Lythgoe, Jefferson County Commissioner, rose in opposition to SB 147.

{Tape: 2; Side: B}

Lori Maloney, Butte Silver-Bow Clerk of District Court, stated the plan set out in SB 147 would result in a nightmare for her office. Everyone would need to fax their orders to catch up with the traveling judge.

Informational Testimony:

Dorothy McCarter, First Judicial District Judge, Montana Judges Association, stated that the Montana Judges Association has not taken an official position on SB 147. Ballots were issued to district judges in the state. The results were half were in favor while half were opposed to this bill. Among the judges who were in favor of redistricting, concerns were voiced because they were not sure of the reliability of the data used. Many judges suggested waiting until there is some equilibrium in the state administration of the courts, when reliable and consistent data can be obtained to determine the best way to redistrict. The rural judges are concerned about their increased geographical areas that would result from the bill. One judge in eastern Montana stated that nine district judges preside over about 48 percent of the geographical area of the state. She provided letters from the district judges, **EXHIBIT(jus09a10).** Most judges agree that redistricting is inevitable and necessary to accommodate demographic changes and caseload changes. They are concerned that any redistricting only be done after careful study to assure that the redistricting is equitable and in the state's best interests.

Questions from Committee Members and Responses:

SEN. AUBYN CURTISS asked **Judge Tucker** what percentage of his time was spent on the road. **Judge Tucker** stated that strictly for judicial business purposes, he has put approximately 44,000 miles on his automobile in the last two years.

SEN. CURTISS noted that **Mr. Blattie** raised a concern regarding additional space being needed. **Mr. Blattie** stated that counties would be required to provide the necessary office space for the district court functions. Two counties were awarded additional judges in the 2001 Session. Both of those counties have built new courtrooms and additional office space for the support staff for the two new judges.

SEN. MIKE WHEAT questioned whether a fiscal note was available. **SEN. THOMAS** stated that a fiscal note was not available at this time. The number of judges would remain the same under the proposal. The aspect of staffing rests with the court administrator.

SEN. WHEAT asked whether the data used to develop SB 147 took into consideration the two new judges who took office in January. **SEN. THOMAS** stated that it did not. The current report of district court cases is for 2001. The chart projecting future caseloads is in the data provided.

SEN. WHEAT asked **Susan Fox, Research Analyst for Legislative Services,** if she was familiar with a document entitled "Assumptions Used for Redistricting Scenario". **Ms. Fox** stated that she had prepared the document for a judicial redistricting study by the Legislative Council in the previous interim.

SEN. WHEAT questioned whether the document was used in preparing SB 147. **Ms. Fox** stated that it was not. The direction from the Legislative Council for SB 147 was to maintain the same number of judges and use caseload numbers.

SEN. JEFF MANGAN stated that the Annual Report of the Montana Judiciary showed that Lewis and Clark County had 307 more case filings and 157 more dispositions. In Flathead County there were 286 new case filings but their case dispositions decreased by 194. He asked **Judge McCarter** what issues would be involved in this data. **Judge McCarter** explained that criminal cases have quick dispositions. Probates can take years for disposition. Civil lawsuits take a long time. Lewis and Clark County has a large number of class action lawsuits, state lawsuits, and injunction cases which last for years. There are different ways of recording the filing and disposition of cases which is peculiar to each clerk of the court. The reporting is not uniform so it is not completely accurate. It can be deceptive. In a divorce case, following the petition for divorce, one of the litigants may file a request for a protective order a few months later. In some counties, this would be contained in the same court file while in other counties it may be filed as a separate action.

SEN. MANGAN questioned whether the numbers needed to be reviewed in depth to obtain an understanding of the meaning of the numbers. **Judge McCarter** believed that would be important.

SEN. MANGAN asked **Ms. Fox** why Gallatin County was not addressed. **Ms. Fox** explained that she started with a more elaborate scheme. In looking at the distribution of cases across the state, she made some assumptions. Due to the variables in judicial districts, she started from the outside and looked at the two districts that had the lowest caseload per judge and the two districts that had the highest caseload per judge. Had she gone to the third tier, Gallatin County would have been highlighted.

SEN. MANGAN noted if it were not for the state's present budget situation, this hearing may be about adding judges instead of taking judges away. **SEN. THOMAS** affirmed this may have been the situation. The redistricting plan could be about adding judges instead of apportioning them due to the budget situation. Given the current situation, it is better to reallocate the resources available.

SEN. BRENT CROMLEY asked whether there had been an opportunity for public input, prior to today, in regard to formulating this plan. **SEN. THOMAS** explained that this was the first hearing. He added that **Ms. Fox** was available to discuss the plan with anyone during the drafting and consideration of the issue. Some individuals worked with her.

SEN. GARY PERRY questioned the sources used in developing Exhibit 7. **Judge Cybulski** explained that one source was the 2001 Annual Report of the Montana Judiciary and the other source was the FY2001 Data - FY2003 Base Budget, State Assumed District Court Costs.

{Tape: 3; Side: A}

SEN. PERRY asked if consideration was given to the value of the mean, median, and standard deviations of both the costs and the caseloads in preparation of the maps provided. **Ms. Fox** explained that her directive was to use caseload numbers. She was not directed to use cost per case nor did she have that information.

SEN. PERRY stated it was his understanding that four new districts were proposed that would gain a judge and reduce caseloads. **SEN. THOMAS** clarified that the plan would involve moving two judges. A judgeship from the northeast corner of Montana would be moved into the Yellowstone District. One judgeship from the Silver Bow, Beaverhead, and Madison areas would be moved into the Lewis and Clark District.

SEN. PERRY remarked that the caseload in District Thirteen would be reduced. District Twenty-One would be changed to District Five without a change in boundaries. With no change in boundary, there would be an increase from one to two judges. **SEN. THOMAS** explained that District Five had gained a judge from the prior legislative session.

SEN. PERRY raised a concern in that two districts would gain a judge and decrease their workload, but there were no proponents present for the hearing. **SEN. THOMAS** stated that the charge was to come up with a fair plan with the best data available. The

data has been criticized. If the judiciary has a data problem, they should fix it.

SEN. CURTISS asked whether there was a large backlog of cases in the First District Court. **Judge McCarter** affirmed there was. Her trial docket is into the fall of 2004. Her criminal trial settings are stacked approximately ten cases deep for every week. A civil complaint that is filed in Lewis and Clark County may take up to two or three years to get to trial. She was surprised to see that Lewis and Clark County would be provided another judge while Broadwater County was being removed from their jurisdiction. This plan has not been discussed with the district court judges.

SEN. CURTISS asked whether facilities were available for another judge. **Judge McCarter** stated accommodations were not available for a new judge at this time.

SEN. WHEAT asked whether the opinions of the district court judges, through the Montana Judges Association, was a necessary part of redistricting. **Judge McCarter** affirmed it was. Many of the judges were surprised they were not asked for their opinions in this process.

SEN. WHEAT asked **Judge McCarter** whether she agreed that redistricting is an issue that this legislature should be reviewing. **Judge McCarter** explained she could not speak on behalf of the Montana Judges Association. Personally, she believed redistricting needed to be reviewed at some time. She questioned whether this was the appropriate legislature to do so. It needs to be studied.

Closing by Sponsor:

SEN. THOMAS stated Gallatin County has some issues in their caseload temperature. The Legislative Council charged **Ms. Fox** to use the best available data and prepare a plan. This is a good starting point. Issues have been uncovered that need to be reviewed. No one has contacted him in regard to this bill. The issue is the distribution of services to the State of Montana.

HEARING ON SB 139

Sponsor: **SEN. DEBBIE SHEA, SD 18, BUTTE**

Proponents: **John Paradis, Deputy Compact Administrator for the Interstate Compact on Juveniles, Montana Department of Corrections**

Opponents: **None**

Opening Statement by Sponsor:

SEN. DEBBIE SHEA, SD 18, BUTTE, introduced SB 139 which addressed the Interstate Compact for Juveniles. Authorized under Article I of the U.S. Constitution and dating back as far as the 1780s, compacts have been created to address a wide variety of issues that arise among states. The Interstate Compact on Juveniles was established in 1955 to manage the interstate movement of adjudicated youth. This compact was written before the interstate highway system, advanced computer technology, and readily accessible air transportation. The Interstate Compact on Juveniles is outdated and cannot meet the public safety and juvenile welfare concerns of our nation. The existing compact is problematic in a multiple of ways. At issue is the management, monitoring, supervision, and return of juveniles and status offenders who are on probation or parole and have absconded, escaped, or run away from supervision and control to states other than the one in which they were sentenced. Also at issue is the safe return of juveniles who have run away from home and, in doing so, have left their state of residency.

{Tape: 3; Side: B}

In 1999, the Federal Office of Juvenile Justice and Delinquency Prevention conducted a detailed survey of the states uncovering many contentious issues within the current compact and asked for recommendations to address these concerns. Advisory and drafting groups have been developed with representation from all the states. Collectively, this compact has been created. The primary changes to the original compact are the establishment of an independent compact operating authority to administer ongoing compact activity including a provision for staff support. Another component is Governor appointed representation of all member states on a national governing commission which meets annually to elect the compact operating authority members and to attend to general business.

The Commission is the key component. It will oversee, supervise, and coordinate the interstate movement of juveniles. Article IX establishes a state council that will be responsible for exercising oversight and advocacy concerns.

Proponents' Testimony:

John Paradis, Deputy Compact Administrator for the Interstate Compact on Juveniles, Montana Department of Corrections, stated that he has been involved with the Compact since 1972. The

Compact, as it exists today, is totally outdated. In many cases it is unenforceable.

Opponents' Testimony: None

Questions from Committee Members and Responses:

SEN. WHEAT asked how many states had ratified the Compact. **Mr. Paradis** stated this is the current cycle for the new Compact. Montana and North Dakota have legislatures in session that are considering the Compact. Three other states will be considering the Compact within the next two or three months.

SEN. DAN MCGEE asked for more information on the role of the commission in this bill in comparison to its role in the past. His concern was the creation of an intermediate level of government that would promulgate rules. **SEN. SHEA** stated that it was her understanding that there is no commission at this time. The bill would establish this governing body with representation, one vote, from each state in order to develop the bylaws. Without this governing body there would not be consensus from each state.

SEN. MCGEE questioned whether there would be costs associate with travel for the commissioner. **SEN. SHEA** stated there would be no changes for this biennium. In the future, there would be funding costs of approximately $18,000 for the commission.

SEN. CURTISS asked whether federal funding would be available. **SEN. SHEA** was not aware of any federal funding. In the bill itself, there is a statement that the state could leave the Compact at any time.

SEN. CURTISS asked **Mr. Paradis** if passage of the bill would make the state eligible for federal funding for juvenile programs. **Mr. Paradis** stated that currently the Compact does not access any federal funding from programs due to the makeup of the Compact Association. Passage of the bill may increase the probability that a council could apply for federal grants to help administer and offset costs of an interstate compact.

SEN. WHEAT questioned how governmental liability would be limited under Section 2. **Mr. Paradis** will provide the information to the Committee.

Closing by Sponsor:

SEN. SHEA noted that the juveniles of our country are an investment for all of us. The Compact will offer an effect in their lives that will be very positive.

HEARING ON SB 141

Sponsor: **SEN. MIKE WHEAT, SD 14, BOZEMAN**

Proponents: **John Connor, Attorney General's Office and the Department of Justice**
George Corn, Ravalli County Attorney, Montana County Attorneys Association
John M. Shontz, Montana Newspaper Association,
Jim Kembel, Montana Assoc. of Chiefs of Police

Opponents: **None**

Opening Statement by Sponsor:

SEN. MIKE WHEAT, SD 14, BOZEMAN, introduced SB 141. He claimed this bill will modify the Montana Criminal Justice Information Act. One of the purposes of this Act was to establish effective protection of individual privacy in confidential and non-confidential criminal justice information collection, storage, and dissemination. The Act does not contain a process to release confidential criminal information to the public and the media. There is nothing in the Act addressing the length of time criminal justice information is considered confidential. In many instances, confidential criminal information is relevant in civil cases, filed after the collection of the information. In such instances, courts will require the release of the information as it relates to that civil litigation. Prosecutors and law enforcement agencies have no authority, or mechanism, for releasing such information.

This bill is an attempt to provide a mechanism to the courts and the prosecuting authorities that will expedite the release of this confidential criminal justice information when it is requested. It provides a procedural roadmap for the prosecutors to file a civil action related to the release of the information. It also aids the courts in review of the information. Nothing in the bill is intended to interfere with any existing legal rights of individuals or organizations. The bill does not prevent any individual or organization from seeking the release of information by any other legal means. The bill also provides for the release of confidential criminal justice information to fire services engaged in the criminal investigation of a fire.

He provided an amendment, **EXHIBIT(jus09a11)**. The amendment would state the procedures set forth in SB 141 are not an exclusive remedy. A person or organization could file any action for dissemination of information that the person or organization considered appropriate or permissible.

Proponents' Testimony:

John Connor, Attorney General's Office and the Department of Justice, remarked they often receive requests for file information in criminal cases they have prosecuted that tend to be high profile in nature. The media will ask to see the investigative file. However, they are not allowed to release it. They have an obligation to make information available to victims as long as it doesn't prejudice the prosecution of a case. This bill will give prosecutors a procedural means of expediting the request. They will provide the court with information in both original and redacted form so that the court can consider the request and determine what should be released. The amendment specifically states that the procedures set forth are not an exclusive remedy. This is a process for prosecutors to bring requests to the court's attention and to expedite the request. Once the litigation is finalized, they have no interest in maintaining the confidentiality but they have no process to make it available without waiting to be sued. These lawsuits can be very costly to the counties.

George Corn, Ravalli County Attorney, Montana County Attorneys Association, rose in support of SB 141. This bill involves a balancing tool in regard to the public's right to know and the right to privacy. It provides a logical process so that the district court judge can review what is appropriate to be released without invading a victim's privacy and at the same time let the public satisfy the constitutional right to know.

{Tape: 4; Side: A}

John M. Shontz, Montana Newspaper Association, rose in support of SB 141. He presented his written testimony, **EXHIBIT(jus09a12)**.

Jim Kembel, Montana Association of Chiefs of Police, rose in support of SB 141.

Opponents' Testimony: None

Questions from Committee Members and Responses:

SEN. JERRY O'NEIL remarked that in the situation of a rape case, a newspaper may want to review the file. If the rape victim

resisted this action, she would hire an attorney using this legislation for resisting the action. He questioned whether this was the intent of the bill. **Mr. Connor** explained that it is universally the policy of the media not to publish the names of rape or sexual assault victims. If the request was made and it appeared that information would be released that might involve the use of the name of the victim, under the terms of this bill, the prosecutor could present the court with a version of the file that had the named crossed out. He would make the argument to the court that the individual right of privacy exceeded the public's right to know.

SEN. O'NEIL questioned whether in circumstances other than rape or sexual assault, the individual would need to pay his or her own attorney's fee even though this information should not be provided. **Mr. Connor** affirmed that to be true. However, that would be the case currently.

SEN. O'NEIL questioned whether the language on page 6, lines 8 and 9, would change that law. **Mr. Connor** clarified that in the case of a witness to a crime, the person may not want his or her name released to the public. Under this bill, if an action were filed, before the information was presented to the court, he would delete the name. The witness would be a private party with a reasonable expectation of privacy. The language on lines 8 and 9 relates to the situation when prosecutors file the action. It is limited in scope only to the amendments proposed to the Act in this bill. It would be the prosecutor's responsibility to protect the individual's right to privacy. The witness could still retain an attorney but he or she would pay the attorneys fees. The county or the state should not pay the attorneys fees under the terms of this bill.

SEN. PERRY questioned whether the bill would help or hinder public access to information regarding class three sexual predators. **SEN. WHEAT** explained that the Sheriff's Office in Gallatin County posts a list of all the people required to be listed by law because they are violent or sexual offenders. **Mr. Connor** noted that this information is available on the Department of Justice's website. Anyone can access information, by county, regarding the registered violent and sexual offenders that live in a particular county.

SEN. PERRY further explained that he was addressing access to criminal activity for which the perpetrator had been convicted. **Mr. Connor** stated if a citizen requested information from him regarding the background and history of a particular offender, the information would be considered confidential criminal justice information. He could not release the investigative details. He

could provide the court records relating to the person's offense, which would include a description in the charging documents of how the offense came about. He could not provide information regarding investigative background on the individual or his criminal record which might be part of the investigative file. If the demand were made upon him, he could use this bill as a process to release the information. He could go to the court and explain that the request had been made to release the information but he did not believe he had the authority to do so without a court order. The court would then handle the matter.

SEN. MANGAN stated his understanding of the bill was if someone wanted this information, it would be necessary for the individual to ask the prosecutor to petition the judge in order to receive the information. **Mr. Connor** affirmed. He added that the individual could still hire an attorney and file a lawsuit requiring the information be released.

SEN. MANGAN stated in Great Falls there have been several older homicide cases in which the police department has reopened the cases to investigate new leads. Under the terms of this bill, would individuals be able to ask a prosecutor to provide that information? **Mr. Connor** stated this would involve an open case subject to investigation and would still be considered confidential.

SEN. MCGEE asked whether the fire service agency or fire marshal was being included because they have the primary authority for investigation of a fire. **Mr. Connor** affirmed that fire service agency representatives asked the Attorney General to prepare legislation that would enable them to access criminal justice information when they are involved in the investigation of an arson. The law does not currently acknowledge this.

CHAIRMAN DUANE GRIMES asked for more information in regard to the exclusive remedy language in the amendment as it related to the media. **SEN. WHEAT** explained if the bill passed without the amendment, the press would be forced to file a lawsuit. Their concern is because the language has a remedy for accessing that information, an argument could be made to the district judge that this is the exclusive remedy. The amendment allays those fears. If the press wanted to review the files, the amendment would allow them to file any action they deemed appropriate.

CHAIRMAN GRIMES inquired as to the confidentiality standards which were currently in place that the court would need to consider when a request is made by the press. **SEN. WHEAT** explained that there is an entire chapter in Title 44 of the Montana Code that deals with criminal justice information. It

contains sufficient information and definition of the terms to provide the court guidance in determining confidential information.

CHAIRMAN GRIMES further questioned whether the bill would change the balance of the current confidentiality standards. **SEN. WHEAT** pointed out that this involves confidential criminal investigative information from a case that has been terminated. This language is found on page 5, lines 17 and 18. On page 6, (b) the language states that when the judge is conducting the in camera inspection, it is necessary for him or her to find a specific written finding that the demands of individual privacy do not clearly exceed the merits of public disclosure. This would force the judge to make that policy decision.

CHAIRMAN GRIMES inquired as to the types of requests prosecutors received in this regard. **Mr. Connor** stated that some time ago he prosecuted some "Freemen" in eastern Montana. There was a subsequent civil lawsuit filed by two of the individuals. The court wanted to review the information in the investigative file before making any decision about whether or not to release it. This involved many boxes of information with some of the information only peripherally related to the claim. The judge told him that he didn't have the time nor the inclination to review all the information. Most recently there was a situation in Lewis and Clark County in which their office declined to prosecute a case that involved a public official. The media wanted the information. The county attorney who had asked him to assume the case, due to a conflict of interest, discussed the fact that he had just had a similar situation occur where the county had been sued and ended up going through lengthy litigation to receive information which he did not care to continue to retain. A declaratory judgement action was filed. The litigation was resolved when the request for the information was withdrawn. The process had been expedited. They can now use this mechanism. He hoped the bill would inform other people in the same situation that there is a process in the statute to allow them to expedite the delivery by going to the court instead of waiting to be sued.

{Tape: 4; Side: B}

SEN. MCGEE questioned the situation if the court decided the information should not be released. With the addition of the amendment, could the media sue the court or the county attorney. **Mr. Connor** noted that the media would be the losing party and they would have a right to appeal the decision. The court needs to review existing case law.

SEN. MCGEE claimed this should help counties in that they would not have to defend actions. **Mr. Connor** affirmed this to be the case.

SEN. PERRY asked **Mr. Shontz** if their concerns had been addressed in the hearing. **Mr. Shontz** believed they had. Their primary concern was that this would be the exclusive remedy, not only for the press but for any citizen.

Closing by Sponsor:

SEN. WHEAT summarized that the bill offers the prosecuting attorneys a mechanism for allowing the judge to decide what kind of information can be released to the public in a criminal case that has been terminated. It requires the judge to balance the individual rights of privacy against the public's right to know.

HEARING ON SB 156

Sponsor: **SEN. O'NEIL, SD 42, COLUMBIA FALLS**

Proponents: **None**

Opponents: **Andy Suenrum, State Bar of Montana**
John Connor, Chairman of the Supreme Court's Commission on Unauthorized Practice
Molly Shepherd, Attorney
Al Smith, Montana Trial Lawyers Association

Opening Statement by Sponsor:

SEN. O'NEIL, SD 42, COLUMBIA FALLS, introduced SB 156. This bill would provide help for the resolution of legal battles for the poor, handicapped, and abused. He provided his written statement, **EXHIBIT(jus09a13).** He further provided the dissent of Justice Terry N. Trieweiler in regard to the Opinion handed down in regard to Dana M. Culver which he discussed in his statement, **EXHIBIT(jus09a14).**

Proponents' Testimony: None

Opponents' Testimony:

Andy Suenrum, State Bar of Montana, rose in opposition to SB 156. The bill proposes an amendment to the Montana Constitution that would limit the Montana Supreme Court's power over admission to the bar and the conduct of its members. The language in the bill starts out to address discrimination as we presently know it and

continues in terms of race, color, and religion. The items they are concerned about are the references to "formal education" and "social condition". This language is included as an afterthought. These words are the whole purpose of this legislation and the proposed amendment to the Constitution. The bill also elevates the practice of law to a constitutionally protected right. The practice of law is a privilege, not a constitutionally protected right. Neither the U.S. Constitution nor the United State Supreme Court have ever recognized a right to practice law. The U.S. Supreme Court specifically stated that there is no vested right in an individual to practice law. The Montana Supreme Court has similarly declined to elevate the practice of law to a right and specifically stated that it is conditional privilege rather than a vested right or a property right. The Montana Constitution does not list the practice of law anywhere in its declaration of rights. The combination of these two seemingly innocent changes to our Constitution, elevating the practice to a right and including formal education and social condition, as protected classes in SB 156, will have far reaching effects. Specifically, it would limit the court's jurisdiction over the practice of law and it would strip the court of it's authority to impose standards of education as a condition to practice.

Currently applicants must graduate from an American Bar Association (ABA) accredited law school before they can sit for the Montana bar exam. The ABA spends enormous amounts of resources and time in developing uniform national standards of education for lawyers. Our Court stated that they would defer to the ABA. It held that neither the Court itself, or any of its commissions, have the time or resources to evaluate an applicant's education. The amendment would impair the Supreme Court's authority to impose character and fitness standards as conditions of practice. Applicants who sit for the Montana bar exam, need to go through an extensive character and fitness screening. The purpose of that screening is to assure the protection of the public and safeguard the justice system. The Montana Supreme Court has appointed a commission on character and fitness that investigates and considers evidence of unlawful conduct as well as acts involving dishonesty, fraud, deceit, mental illness, drug or alcohol problems, and neglect of financial responsibility.

This bill elevates "social origin or condition" to a protected class and it fails to define the term. The CASA volunteers go through a training program and their function in the court is very limited. Paralegals, under the supervision of attorneys, are permitted to perform limited functions.

He provided a position paper on SB 156, **EXHIBIT(jus09a15)**.

John Connor, Chairman of the Supreme Court's Commission on Unauthorized Practice, remarked there are many persons practicing law without a license. Their Commission attempts to protect the consuming public. Lessening the standards for those who practice law, is not the way to address the problem. There are a number of people practicing law without education and skills.

{Tape: 5; Side: A}

Molly Shepherd, Attorney, presented her written testimony in opposition to SB 156, **EXHIBIT(jus09a16).**

Al Smith, Montana Trial Lawyers Association, agreed there is a problem with access to justice for low and middle income people in this state. This bill is not the way to solve that problem.

Questions from Committee Members and Responses:

SEN. CURTISS questioned whether one was qualified to practice law simply by passing the state bar exam. Denial of the application to take the exam makes her question the adequacy of the exam. **Mr. Suenrum** explained a board of bar examiners has considerable data available. There are several components to the bar exam. The first day of the exam is a multi-state bar exam which is a uniform test graded on a national average. The second part of the test consists of seven hours the second day and three hours the third and final day. This is the Montana portion of the bar exam that is specific to Montana questions of law. The questions are authored and designed by the Board of Bar Examiners to test the applicant's knowledge. Montana has historically had a very high passage rate of people who take the bar exam.

SEN. CURTISS questioned how they could determine whether or not an applicant is qualified to take the exam until they have met certain standards. **Mr. Suenrum** clarified that the bar exam is the last step in a process of meeting the qualifications to become a lawyer in this state. The Supreme Court and the State Bar have established the criteria for practicing law in Montana. Persons must go through the screening process before they are allowed to take the bar exam because there is no purpose in allowing them to sit for the exam if they do not meet the other criteria to practice law in the state.

SEN. CURTISS asked whether the standards in Montana were higher than the standards in other states. **Mr. Suenrum** explained that there are other states that have a more open standard. California allows graduates of unaccredited law schools to take the exam. Sometime ago the State of California allowed someone to challenge the bar exam if they met certain criteria. That

criteria was basically the old principle of interning in a lawyer's office for a number of years. The passage rate of attorneys passing the bar exam in California is significantly lower.

SEN. MCGEE asked **Mr. Connor** if he agreed that the Constitution is written for people and not necessarily for attorneys. He stated that under Article II, Section 1, of the Montana Constitution, it stated that "All political power is vested in and derived from the people. All government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole." Section 2, "The people have the exclusive right of governing themselves as a free, sovereign and independent state." Section 3, "All persons . . . enjoying and defending their lives . . . protecting their property . . . in all lawful ways". Section 4, "No person shall be denied the equal protection of the laws". Section 7, "No law shall be passed impairing the freedom of speech or expression. Every person shall be free to speak or publish whatever he will on any subject." Section 8, "The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law." Section 16, "Courts of justice shall be opened to every person, and speedy remedy afforded for every injury of person, property or character. No person shall be deprived of this full legal redress." Section 17, "No person shall be deprived of life, liberty, or property without due process of law." In all of those sections, there is only one reference to counsel. He believed the bill attempted to say there are persons who may not have had the opportunity to go to law school, much less sit for the exam, but who may know something about the law and should be able to practice law.

Mr. Connor recalled when he graduated from the University of Montana, aside from the Montana Department of Transportation, there was one state agency that had a lawyer. He went to work in the Attorney General's Office in l972 where there were six attorneys in the civil related division. He represented several agencies including the Department of Health. Currently there are several hundred lawyers in state government mostly due to the increase in laws. Every time a law is passed there needs to be a mechanism to implement it. Laws have become so complex and specific that the only area of law in which he could practice today is prosecuting criminal cases.

Closing by Sponsor:

SEN. O'NEIL stated that he would be agreeable to changing the word "right" to "privilege". He believes there is a First Amendment right to petition the court. In regard to social origin or condition as a protected phrase in the practice of law, it would appear the Supreme Court would not want to allow people who have grown up on Indian Reservations to be lawyers. ***{Tape: 5; Side: B}***

If a person had a surveying business and someone applied for a job, he or she could not look at their criminal record if that was part of social origin or condition. In regard to the requirement that law schools have an ABA accreditation, he referred to the dissent of Justice Trieweiler in the Dana Culver case. In the dissent he states that the Montana School of Law is ABA accredited and to allow a graduate of law school not accredited by the ABA may make the legislature provide less funding to the University of Montana Law School. We already have an evaluation on each person sitting for the bar exam in regard to morals and fitness. As far as evaluating their knowledge, that is why persons take the bar exam. What is onerous about allowing someone to take an exam when the person taking the exam pays a large fee.

In regard to conduct of attorneys, the bill would not change the Bar Association or Supreme Court's authority to oversee the conduct of attorneys. They would have the same oversight. The only change is that they could not preclude persons from taking the bar exam based upon what school they attended. This bill would make the public support the regulation of unauthorized practice of law because they know the Supreme Court is not improperly excluding people from practicing law based on criteria that does not apply to the job. It would also allow more people to take the bar exam and have a lower debt load. Without the large debt load of law school, there would be more attorneys to represent lower income people. In regard to the assertion that competition would not help the public, he believed competition always helps the public. It may not necessarily help the persons in the monopoly. In regard to the State Bar Association providing legal services, he noted these are good programs. If more people took the bar exam and became members of the bar, there would be more bar association dues paid to provide more funding for the Montana Legal Services Association and the State Bar's Access to Justice Program.

ADJOURNMENT

Adjournment: 12:05 P.M.

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SEN. DUANE GRIMES, Chairman

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JUDY KEINTZ, Secretary

DG/JK

EXHIBIT(jus09aad)