MINUTES

MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN DUANE GRIMES**, on February 6, 2003 at 9:00 A.M., in Room 405 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: Valencia Lane, Legislative Branch
Cindy Peterson, Committee Secretary

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

Committee Business Summary:
Hearing & Date Posted: SB 298, 2/3/2003; HB 116, 2/3/2003; SB 311, 2/3/2003
Executive Action:

HEARING ON SB 298

Sponsor: **Sen. Fred Thomas, SD 31, Stevensville**

Proponents: **Tom Ebzery, Self**
Don Allen, Western Environmental Trade Association
Al Smith, Montana Trial Lawyers' Association

Opponents: **Chris Tweeten, Chief Counsel,**
Attorney General's Office

Informational Witnesses: **Tim Reardon, Chief Counsel,**
Department of Transportation
Wade Sikorski, Self
Russell Cater, Chief Legal Counsel,
Montana Department of Health and Human Services

Opening Statement by Sponsor:

SEN. FRED THOMAS, explained that SB 298 has to do with when a lawsuit is brought in the state of Montana. Current law brings all cases to Lewis and Clark County, First Judicial District. The intent of this legislation is to end that practice. If there is an issue in a community somewhere else in the state, that action can be brought and decided locally. This will alleviate shopping for a judge in Helena who has a track record with a particular issue. **SEN. THOMAS** explained there may be an issue with the language of the bill and requested the Committee to work on it. **SEN. THOMAS** would like to eliminate venue shopping, not create it. **SEN. THOMAS** does not believe the bill should allow him to file a lawsuit anywhere he wants, but rather keep the suit local, where the issue is involved.

Proponents' Testimony:

Tom Ebzery, an attorney from Billings representing himself, feels SB 298 makes sense. He stated the result of reorganizing the judicial system as provided in another bill, could result in an additional judge for Lewis and Clark County. This is due to the heavy caseload of Lewis and Clark County judges. SB 298 would lessen the caseload in Lewis and Clark County. Most state agencies have offices in Billings, and any activity in that area would be a logical spot for an action to be filed. **Mr. Ebzery** feels this bill makes sense and will balance the court system throughout the state.

Don Allen, representing the Western Environmental Trade Association (WETA), stated his organization represents agriculture, timber, snowmobiling, all activities across the state that deal with natural resources. Decisions are being made farther and farther away from where people live and communities are impacted. Therefore, it makes sense to have issues discussed and brought before local courts in local communities.

Al Smith, representing the Montana Trial Lawyers' Association, thinks it is a good idea to let plaintiffs bring their lawsuits in their own communities, if that is where they choose to bring them. **Mr. Smith** cautioned about inserting mandatory language, but as the bill stands, he supports it.

Opponents' Testimony:

Chris Tweeten, Chief Counsel for the Attorney General's Office, stated it is a fallacy to assume the majority of litigation involving state agencies is brought in the First Judicial District. **Mr. Tweeten** is currently defending a half dozen lawsuits regarding the validity of Initiative 143, the game farm initiative, and none of those cases were originally brought in Lewis and Clark County. Instead, they were brought in Sheridan, Ravalli, Blaine, and Fergus counties. Current law allows a plaintiff in a case against the state to bring the case in the county of plaintiff's residence. In other cases, venue can be where the claim arises or where the defendant resides. However, in cases against the state, there is an exception to that rule and the plaintiff is allowed to file in the county where he resides. The general rule regarding venue is the plaintiff chooses where to file the lawsuit. Current law allows the plaintiff to sue in either Lewis and Clark County, the county where the claim arose, or the county where the plaintiff resides. Therefore, the plaintiff has three choices under existing law. This bill does nothing to change the rule. Unless you are prepared to draft a bill that says no claim can be brought in Lewis and Clark County, or you want to make a rule that the plaintiff no longer has the right to choose venue, there is no way to fix the problem that the proponents are trying to fix with this bill. **Mr. Tweeten** feels the premise of the bill is fundamentally flawed. Further, **Mr. Tweeten** feels it is not necessarily good policy to make decisions as to the amendment of general law based on the fact that the legislature may not like the direction court decisions are going in a particular judicial district at a particular time. Given that the political makeup of the bench changes from time to time, **Mr. Tweeten** feels the proponents of this bill may, at some point in the future, be sorry they brought this bill. The way the bill is drafted in stating suit can be brought anywhere the agency has an office is

a recipe for endless litigation over venue. **Mr. Tweeten** wonders what the definition of "agency" will be. Is it a department, division, or bureau? Depending on how that term is defined, the scope of the bill could be very narrow or very broad. In the Department of Justice, they are responsible for indemnifying county attorneys when malicious prosecution claims are brought. There are 56 county attorneys so, therefore, the Department of Justice may have offices in all 56 counties. Likewise, the Montana Highway Patrol detachments are centered in a half dozen locations. Does this mean that any claim against the Department of Justice may be brought in any of those communities? This certainly creates fertile ground for extensive litigation before the courts as to what this bill might ultimately mean. In the 1990s the legislature passed extensive revisions to the venue laws based on proposals made by the Supreme Court's Commission on Evidence. At the time those proposals were brought before the Legislature, the Commission observed there was no area of law dealing with civil procedure that had produced more litigation and contradictory and confusing decisions by the Montana Supreme Court than the area of venue. One reason for this was the Legislature was constantly tinkering with the principles. **Mr. Tweeten** urged the Committee to consider whether it is a good idea to continue to tinker with these principles when they have not been given a compelling reason for doing so. The existing law allows a plaintiff plenty of latitude in choosing a venue.

Informational Testimony:

Tim Reardon, Chief Counsel for the Department of Transportation, was glad to hear **SEN. THOMAS** say he is willing to consider changes to the bill. **Mr. Reardon** feels as the bill is drafted, it will expand forum shopping rather than limit it. Two questions **Mr. Reardon** has is the use of the term "office" and what that entails. **Mr. Reardon** seriously doubts that **SEN. THOMAS** intended to have a maintenance shed with a personal computer, telephone, and desk to qualify as an office. This needs to be clarified. **Mr. Reardon** is also concerned because most construction contracts they have with contractors contain a venue clause, and that venue is in Lewis and Clark County. Contractor claims usually involve a dispute over whether additional funds are owed for a construction project. **Mr. Reardon** informed the Committee this issue would need to be addressed.

Wade Sikorski, a resident of Powell County, filed a suit against the Department of Public Health and Human Services (DPHHS), over what he felt was an epidemic of childhood leukemia in Powell County. Part of his strategy was to get representatives from DPHHS to Powell County. So far, the state has not complained

about the venue, so **Mr. Sikorski** feels it is possible to file a complaint in local courts.

Russell Cater, Chief Legal Counsel for the Montana Department of Health and Human Services, testified that department has offices in every judicial district in the state of Montana and almost every county. This bill would permit a person to file in any county in the state or any judicial district. Currently, the law allows for actions to be filed in places other than Lewis and Clark County. **Mr. Cater** agrees with **Mr. Tweeten's** comments, but also agrees with **SEN. THOMAS's** comments. However, **Mr. Cater** cannot support the bill as written. **Mr. Cater** feels plaintiffs should not be able to forum shop.

Questions from Committee Members and Responses:

SEN. MIKE WHEAT stated that before the hearing, he did not feel there was a problem with the bill, but he feels persuaded by **Mr. Tweeten's** arguments. It looks to **SEN. WHEAT** that the plaintiff, under current law, has the right to file in either Lewis and Clark County or the county of plaintiff's residence. **SEN. THOMAS** agreed. **SEN. WHEAT** asked what they were trying to accomplish with the bill. **SEN. THOMAS** responded that he would like to see the case handled in the community where the cause of action arose more so than anything else. **SEN. THOMAS** is not so concerned with the plaintiff as he is with seeing the issue resolved in the community involved. As an example, **SEN. THOMAS** spoke about Golden Sunlight Mine in Jefferson County versus Helena. If a plaintiff is located in Missoula or Seattle and is suing for something that occurred in Hamilton, **SEN. THOMAS** would like to see them be able to file in Hamilton not Helena. **SEN. THOMAS** added the term "agency" is defined in current law and does not feel this will ultimately be a real problem.

SEN. WHEAT stated the way the bill is structured now, it is not mandatory and inquired whether **SEN. THOMAS** wanted it to be mandatory.

SEN. THOMAS said he tends toward mandatory, but would like to remain flexible. **SEN. THOMAS** suggested wording that would require the venue to be the county where the issue arose to be the first place to file, unless there is a compelling reason shown.

SEN. BRENT CROMLEY asked if on line 13 putting a "." after the word arose would accomplish **SEN. THOMAS's** desire.

SEN. THOMAS replied it might provide the solution he is looking for and would be very close.

SEN. JERRY O'NEIL posed if it would make any difference if a they are talking about a defendant being sued by the state as opposed to a plaintiff suing the state.

SEN. THOMAS replied that to his knowledge, it did not make a difference.

CHAIRMAN GRIMES asked **Mr. Cater** if DPHHS has a problem using other venues or locations for actions against the agency.

Mr. Cater stated DPHHS does not have an objection to venues other than Lewis and Clark County if it is in the place where the action arose or the individual is a resident. He just would like to avoid forum shopping.

CHAIRMAN GRIMES then asked the same question of **Mr. Reardon.**

Mr. Reardon replied contractual actions where there is a venue clause are routinely filed in Lewis and Clark County. Court actions filed against the department, such as snowplow accidents, are brought in the county where the accident occurred or where the resident resides in nearly every instance.

(Tape : 1; Side : B)

Most contractor disputes, however, are filed in Helena.

CHAIRMAN GRIMES asked **Mr. Tweeten** to brief the Committee on venue principles. Specifically, nationally, is it always the case where an action can be brought other than the place where the cause of action arose?

Mr. Tweeten stated he cannot speak to local laws in other jurisdictions. There are specific federal statutes, for example, that require specific kinds of actions to be filed in the district court for the District of Columbia, such as federal agency decisions. Montana law is generally pretty consistent with the rules of venue that exist across the country. These laws provide, in most cases, claims either need to be brought where the incident which gave rise to the law suit arose, or where the defendant lives. Plaintiffs are given a choice as to which of those venues to select. In Montana, plaintiffs have had the three options in the law now. The can file either where the claim arose, where the plaintiff lives, or Lewis and Clark County. Plaintiff is given the choice of venues. **Mr. Tweeten**

believes this is consistent with the way systems work across the country.

CHAIRMAN GRIMES then asked if it would make sense that there would be certain actions which would be more appropriate in the place where it arose rather than where the state was domiciled?

Mr. Tweeten responded plaintiffs take that into consideration all the time. In terms of how that decision should be made, plaintiff and plaintiff's attorney are as capable as anyone in selecting a venue in which their claim is most likely to succeed. This is the determining factor in selecting a venue. Where a person gets into trouble is when you open up venue to where a plaintiff can select virtually anywhere. The Legislature has wrestled with this issue before in dealing with FELA actions against railroads and the federal principles that govern railroads in those cases.

CHAIRMAN GRIMES remembered in FELA cases the Legislature decided the most appropriate venue was the place where the action occurred as opposed to where ever the railroad happened to have a station. **CHAIRMAN GRIMES** stated this seems to be working quite well. The reason they did that was because they felt there were a couple of locations in the state where they would get more sympathetic juries. **CHAIRMAN GRIMES** wondered if that violated any venue ethics or principles.

Mr. Tweeten stated that decision was a narrowing of the usual approach in determining venue. That was what the court did with the FELA cases and the court has spoken to those amendments on several occasions and the Legislature has had to revisit that issue from time to time. This a completely different question, because of the overlay of federal law.

SEN. WHEAT asked **Mr. Tweeten** that as he understands the issue of FELA cases prior to the legislative enactment of new laws, a plaintiff could file anywhere in the state where the railroad is found. Now, it has changed to where the action arose. The way this bill is presently structured, this would allow a plaintiff to file just about anywhere in the state, basically, any one of the 56 counties. It would be a broadening of the venue for plaintiffs rather than a restriction of the venue, such as what was done in FELA cases.

Mr. Tweeten replied that was true. For instance, theoretically, DPHHS could be sued anywhere.

Closing by Sponsor:

SEN. THOMAS closed saying SB 298 needs work and feels the questions from the Committee were very good. **SEN. THOMAS** feels **SEN. CROMLEY's** suggestion about deleting the "." on line 13 gets very close to his intent. However, **SEN. THOMAS** thought the Committee should consider whether making that change would cause a conflict with other statutes. Also, he would like the Committee to consider the word "claim" and how broad that definition should be. In addition, **SEN. THOMAS** suggested adding "unless there is good cause shown, this case should be moved to the First Judicial District" or something of that nature. Certainly, the use of "office," if that language is retained, would need to be clarified because the intent is not to pick up the offices located in maintenance sheds throughout the state. The idea is to let the communities hear these issues where the cause of action occurred. **SEN. THOMAS** added the fiscal note indicated the fiscal impact to be zero.

HEARING ON HB 116

Sponsor: **REP. CHRISTINE KAUFMANN, HD 53, Helena**

Proponents: **Ali Bovingdon, Assistant Attorney General, Department of Justice**
Matthew Dale, Director, Office of Victim Services Department of Justice
Judy Wang, Missoula Assistant City Attorney
Beth Satre, Montana Coalition Against Domestic and Sexual Violence
Detective Brian Fischer, Helena Police Department
Jim Kembel, Montana Association of Chiefs of Police
Wade Sikorski, Self

Opponents: **None.**

Opening Statement by Sponsor:

REP. KAUFMANN opened by speaking of a double murder suicide which occurred in Butte, Montana, which left Butte teacher, Kathy Sullivan, her boyfriend, and former husband dead. This tragedy left law enforcement, friends, and family asking if there were ways that systems in the community may have performed more effectively and been able to prevent the events that lead up to that tragedy. Questions asked included were the victims or the offender in contact with social service agencies? Which

agencies? Were those agencies talking to one another? Were there other agencies that might have provided services that were never contacted? Were there events where intervention could have been sooner or more effective? In short, could this tragedy have been prevented in any way? The Justice Department responded by creating a Domestic Violence Fatality Review Commission to work with professionals in the community to answer these questions. The 14 members of that Commission include victims' advocates, criminal justice professionals, law enforcement, child protective service specialists, a forensic psychiatrist, and medical personnel. During a review, these individuals go into a community where they have been invited and work with their counterparts to determine if a safety net might have been able to be more effective. More importantly, could these answered questions do better in preventing the next death from domestic violence? The questions is can we work to improve the system we use to protect battered spouses and children in this state?

HB 116 formalizes this Commission, its membership, and its duties. The bill allows agencies to share information with the Commission. It requires the Commission to report its findings and recommendations to the Legislature, the Attorney General, the Chief Justice, and to the Governor. Most importantly, it allows the communities to understand the role of this Commission and how such a review might serve them, and to make clear to the community what access the Commission has to information and what rules for confidentiality apply. **SEN. KAUFMANN** is carrying the bill for the Department of Justice.

Proponents' Testimony:

Ali Bovingdon, Assistant Attorney General, representing the Department of Justice, testified HB 116 will create a Domestic Violence Fatality Review Commission to better coordinate multi-agency efforts to protect individuals most at risk of domestic homicide. In Montana since 2000, at least 11 individuals, including three children, have been killed by a family member. The Commission has reviewed these homicides with a goal of identifying how agencies, who have contact with victims, can improve their services in the future. The goals of the Commission would be to identify trends in the failure of the social service system and to work to improve the system being used to protect battered women and children. Reviews will only be conducted after a community has extended an invitation to the Commission, and will only be conducted in cases that do not involve pending criminal or civil actions. HB 116 will help the Commission accomplish its goal of system improvement by allowing the Commission to request and receive information that would otherwise be confidential. The Commission would maintain the

confidentiality of any information it receives. The purpose of this Commission is not to find fault with any particular agency, but to work in conjunction with local agencies in order to strengthen the domestic violence support system used by the state. **Ms. Bovingdon** submitted a fact sheet regarding H HB 116. **EXHIBIT(jus26a01).**

Matthew Dale, Director of the Office of Victim Services, Department of Justice, spoke in support of HB 116. Fatality Review Commissions vary from state-to-state and Montana would be the 26th state in the country to form a Commission. These Commissions have two major purposes: prevent domestic violence homicides and to increase community awareness of domestic violence. This Commission, as stated, is not looking to find fault and place blame. The review is guided by the assumption that the agencies that worked with the individuals could not have predicted the homicide and did what they could to aid the victim. It is the perpetrator who is ultimately to blame for the death. At the same time, it is conceivable that changes or improvements in the social service and criminal justice systems might prevent other homicides in the future. Re-examining the events leading up to the deaths may provide clues as to how to tighten up the community safety net for domestic violence victims. Carefully designed death reviews will help social service systems become safer, fairer, seamless, and coordinated. Creating a Domestic Violence Fatality Review Commission is a concrete step of intervention in a social problem that kills Montanans every single year. This Commission would work to create a culture of safety in order to review domestic violence death effectively, honestly, and openly.

Judy Wang, an Assistant City Attorney with the City of Missoula, provided the Committee with background information about Kathy Sullivan and the circumstances surrounding her death. The three individuals involved in this case were all professionals, hard-working, and smart. All three of these individuals were excellent educators, and all three of them are gone. They cities of Butte and Missoula were very concerned about these homicides/suicide and put together an informal Review Commission to look at this case. Their Review Commission had no budget but wanted to determine what the state could do to keep something like this from happening again. The Commission met twice and came up with a number of recommendations. **Ms. Wang** submitted her written testimony, **EXHIBIT(jus26a02),** as well as written testimony from Commission member **Gary Taylor, University of Montana Police Officer, EXHIBIT(jus26a03),** and **Cindy Weese, YWCA Executive Director, EXHIBIT(jus26a04).** The Commission recommended that police officers have a check list to use in identifying high-risk cases. As recommended by the Legislature,

Orders of Protection are beginning to be entered into the federal data base so all Orders of Protection are accessible nationwide. Another recommendation was that teachers be educated about domestic violence, both so they know about domestic violence and so they recognize it when it is happening to them. Even though the Commission felt they made good recommendations, at the same time they were concerned about violating open-meeting laws. They also were limited to reviewing public records since they were unable to access confidential information. HB 116 will create a permanent review group that, upon invitation from a community, can go in and help brainstorm what we can do differently from stopping these homicides from happening. **Ms. Wang** feels this is a good way to take tragic events and turn them around and change the way we as a community, we as a state, look at domestic violence.

Beth Satre, representing the Montana Coalition Against Domestic and Sexual Violence, thanked Attorney General Mike McGrath for understanding the need for a Domestic Violence Fatality Review Commission. **Ms. Satre** testified they have great hopes that this Commission can prevent future fatalities by fostering greater understanding in the ways victims do or do not seek help from agencies. In addition, it can foster increased cooperation between agencies. Finally, it can foster greater confidence on the parts of victims that these systems can help and protect them. These murders and murder/suicides are preventable. Murders and murder/suicides are often the culmination of an escalating history of abuse. **Ms. Satre** submitted a letter to the Committee from **Sally Sjaastad** of Billings, whose daughter and grandchildren died in a domestic fatality murder/suicide in Billings, **EXHIBIT(jus26a05).**

Brian Fischer, a Detective with the Helena Police Department, currently sits on the informal Review Commission, and testified that domestic violence touches all communities in Montana and often leads to homicide. Domestic violence homicide can drive victims of domestic homicide into further seclusion which puts them at risk in the future. Domestic violence is on increase both in Helena and throughout the state. **Detective Fischer** works with families, victims, children of the victims, friends, co-workers, community members, and all the resources available for victims of domestic violence. There is a pattern with domestic violence and until the pattern is broken, the children of those victims will go on to offend and be victims themselves having led that type of lifestyle. Detective Fischer can see these patterns develop and it is very important to be able to identify clues and intervene. That is what the development of the Commission is for. Far to often, victims blames themselves. The purpose of the Commission is not to place blame. Blame can be something

that is very difficult to carry. Domestic violence offenders can control their victims with a stare, the pointing of a finger, by the raise of an eyebrow. Officers who investigate these situations, have a tendency to not get the whole story.

(Tape : 2; Side : A)

Resources, manpower, community size all have a significant impact on domestic abuse. These communities need help to develop guidelines to identify domestic abuse. Many times, law enforcement is the first to deal with domestic violence cases. These are the most dangerous cases for officers because they often have to deal with people who are under the influence of alcohol and in a rage. The Domestic Violence Fatality Review Commission would provide guidelines for all who deal with domestic violence so intervention can begin at an earlier stage. It will also provide safety and comfort for the victims and their families. This Commission will help make sure Montanans can live safe and happy.

Jim Kembel, representing the Montana Association of Chiefs of Police, supports the proposed legislation. Also, **Mr. Kembel** testified on behalf of himself and a resident of Helena. **Mr. Kembel** serves on the Board of Directors for The Friendship Center, which serves victims of domestic violence. Unfortunately, business has been booming for The Friendship Center. **Mr. Kembel** stated they would appreciate any help they could get.

Wade Sikorski, representing himself, testified that he has known several people who have been victims of domestic violence. **Mr. Sikorski** feels law enforcement has not been terribly effective in dealing with domestic violence. In the cases he was familiar with, **Mr. Sikorski** testified no one was surprised when the victims were beaten. Therefore, **Mr. Sikorski** feels the abuse could have been prevented.

Opponents' Testimony: None.

Questions from Committee Members and Responses:

SEN. AUBYN CURTISS reviewed the letter from Officer Taylor, University of Montana Police Officer, which refers to the Orders of Protection. **SEN. CURTISS** assumes a data base has been compiled, and asked **Detective Fischer** how far along that project is, and how much help that data base has been.

Detective Fischer responded that Orders of Protection are now entered into a National Crime Information Center. Officers who

respond to a domestic violence situation check to see if a person is wanted. If they have an Order of Protection in place, that information will show up because it is mandatory reporting. Detective Fischer recently worked on a case where there was an Order of Protection issued in Florida, and that person followed the victim to Montana. The only problem he foresees is the speed at which Orders of Protection are entered into the system.

SEN. CURTISS asked **Judy Wang** what additional tools this Commission will give them and what they will expect to do to identify potential violence.

Judy Wang stated the makeshift Commission was a volunteer group with no tools or authority from the state. They had no authority to obtain records and had to rely solely on public records. There was a confidentiality agreement among themselves, but they were very concerned people would not discuss candidly what needed to be done. The informal group was a success, but with this bill and the authority that goes with it, the permanent group will have more experience and training, and it will be able to do a much better job.

SEN. CROMLEY then asked **Ali Bovingdon** if the informal group **Judy Wang** was speaking of will be the official Commission. **Ms. Bovingdon** replied the group **Ms. Wang** was speaking of was formed after the 1999 Sullivan homicide, and it was not attached to the Department of Justice. However, after the Attorney General had been approached by law enforcement officers in both Butte and Missoula, who expressed concern that there had been a breakdown in the system and communication in the system, the idea of establishing a permanent Domestic Violence Fatality Commission came about. The group **Ms. Wang** was referring to is a different group than what they have been working with now. There is a Commission currently working; however, it is just in preliminary stages, and they have not conducted a fatality review yet.

SEN. CROMLEY followed up by asking if there were documents creating that Commission and, if so, do they follow the standards set up in HB 116.

Ms. Bovingdon responded that to the best of her knowledge, there are no formal documents creating the Commission. Rather, Attorney General McGrath decided to go forward with the Commission and worked with **Matthew Dale** from the Office of Victim Services. The potential listed membership is taken from those individuals currently working on the informal Commission, and most of what the legislation tries to address comes from previous meetings of the Commission where they discussed what they would need in legislation in order to do this work effectively.

SEN. DAN McGEE noticed that among the list of individuals to serve on the Commission, there are no former offenders. **SEN. McGEE** inquired whether there was a reason for not including a former offender.

Ms. Bovingdon responded that from her perspective, and she has not had this conversation with Attorney General McGrath, that could be a very threatening person to have on a Commission where people are encouraged to be open and honest.

SEN. McGEE followed up by adding he is not necessarily advocating that a murderer be on the Commission, but he feels they are only looking at this from one perspective. What you are not looking at is the people who actually do the perpetrating of the crime, so you will never be able to determine why these people went off.

Ms. Bovingdon felt **SEN. McGEE** had a good point, and it would be helpful if they could get into the psyche of an offender and determine why they commit these crimes. **Ms. Bovingdon** added that a criminal defense attorney would sit on the Commission, and while it is not an offender, it is someone who works with offenders. **Ms. Bovingdon** feels the decision to have an offender on the Commission is a decision for the Committee to make.

SEN. McGEE expounded that he is not trying to upset an applecart, but he is not sure what the goal is. If they are trying to make sure there is a safety net people are not going to fall through, you should try to find out why these things occur. If you do not know, why, you are always going to be on the reaction side of the equation.

SEN. McGEE explained that on the Sentencing Commission, they had legislators appointed as well. This Commission has representatives from the Department of Justice, Department of Public Health and Human Services, and Corrections, which are all agencies of the Executive Branch. One of the results of this Commission may be directions toward legislation, but there are no legislators on the Commission. Therefore, the Commission will be mulling things over, reach decisions, arrive at solutions, and then the Commission will have to educate a legislator with regard to all those issues. **SEN. McGEE** asked if they considered inviting a legislator to sit on the Commission.

Ms. Bovingdon responded that they had not discussed inviting a legislator to sit on the Commission, but she agrees with **SEN. McGEE** that it would be a good idea.

SEN. JEFF MANGAN asked the sponsor, **REP. KAUFMANN**, if one of the things this Commission may or may not do would be to interview previous victims in an attempt to gather information.

REP. KAUFMANN re-referred the question, but commented the purpose is not to specifically investigate a particular crime. Rather, it is to look at patterns and trends across the state to educate ourselves about the services. By the time the Commission begins its work, the police have already conducted an investigation.

Ms. Bovingdon responded it was the intention that, where a family member is willing to talk to those individuals about the history of the relationship, and family members of the offender were willing to come and talk to the Commission, these people would be interviewed. Basically, they would try to access whoever has information about the offender, the victim, the homicide itself, and gather as much information as possible.

SEN. MANGAN wondered then if it would be helpful to have a counselor or therapist on the Commission and whether there would be a referral process then for people who may have trauma.

Ms. Bovingdon explained the Commission has not discussed this possibility, but she feels it is a very good suggestion in light of the fact they will be asking family members to talk about events which are obviously traumatic. This would be something the Commission could do on its own and would not have to be mandated in the bill. The Commission would have to be aware of what resources were available in a community in order to make referrals.

SEN. MANGAN stated further that it may be appropriate to have someone on the Commission who is a therapist or a professional who has insight on both sides, offenders and victims, be available to work one-on-one with a family member.

Ms. Bovingdon again stated if the Committee feels it is appropriate to include one of those individuals, there office would not have a problem doing this. Attorney General McGrath would like to outline particular areas of expertise and not be mandated to have an individual from each area on the Commission. Attorney General McGrath is concerned about the Commission being too big and not being effective.

SEN. O'NEIL questioned **Judy Wang** whether Kathy Sullivan was killed by her husband. **Ms. Wang** clarified Kathy Sullivan was killed by her estranged husband, and there was a dissolution proceeding, but she is not clear where they were in that process.

SEN. O'NEIL then asked if Kathy Sullivan was with her boyfriend when she was killed. **Ms. Wang** answered yes, she was seeing another person, Scott Bardsley, who was also shot and killed by Tim Sullivan.

SEN. O'NEIL then asked if the Commission ever considered if the offender had not been barred from going to court to litigate marital misconduct, that he may had vented his anger in another forum.

CHAIRMAN GRIMES did not feel this question pertained directly to the bill and asked **SEN. O'NEIL** to rephrase.

SEN. O'NEIL asked whether the Commission considered domestic misconduct in a divorce as a precipitating factor in domestic fatalities.

CHAIRMAN GRIMES felt this was a legitimate question and enlightened **Ms. Wang** on **SEN. O'NEIL's** bill regarding marital misconduct in the case of dissolution.

Ms. Wang responded that the Commission was limited to public record, and there was a huge amount of information that they were not able to access.

SEN. CROMLEY noticed the bill says the Attorney General can appoint from among the disciplines, but there is no set number on the Commission, and wondered if it was the intent to have exactly 18 members on the Commission, consisting of exactly one from each of the disciplines mentioned. **SEN. CROMLEY** also wanted to know if **Ms. Bovingdon** thought that number was reasonable.

Ms. Bovingdon explained the intention is just to indicate that any individual from any of these disciplines could serve on the Commission, but not to set a number that the Commission needs to operate. Right now, **Ms. Bovingdon** believes there are 15 or 16 individuals who have been working on this Commission. **Ms. Bovingdon** stated the Attorney General prefers not to have an exact number set in statute so there is flexibility in terms of finding people.

SEN. GARY PERRY recalled the Commission would meet four times a year, and wanted to know when and where the Commission would meet.

REP. KAUFMANN stated for purposes of developing a fiscal note, it was estimated the Commission would meet an average of four times a year. REP. KAUFMANN explained where the Commission would meet

has not been determined, but it would depend on the access they need to members in the community.

SEN. CURTISS had a question with the fiscal note and whether the costs would be absorbed by the Attorney General's Office.

REP. KAUFMANN stated the money will come from federal special revenue. The Commission has applied for a grant through the Montana Board of Crime Control.

SEN. CURTISS noted the language on page 2, lines 17-20, looks to be pretty mandatory, and would like to know who decides who receives a request from the Commission.

REP. KAUFMANN explained the Commission will try to determine what type of information it will need in order to conduct a review. At that point, the Commission will ask people to come forward from the community. **REP. KAUFMANN** re-referred the question to **Ms. Bovingdon.**

Ms. Bovingdon responded one of the primary things that language is aimed at is confidential criminal justice information. The Commission would like to be able to access witness statements, the actual report filed by the officer, things that are currently confidential.

(Tape : 2; Side : B)

SEN. McGEE assumed that these records are confidential because the Commission will be looking at records prior to the disposition of the case.

Ms. Bovingdon explained the Commission will only review cases where there is no pending civil or criminal action. If there is pending criminal prosecution or a potential civil suit, they would not be reviewing that particular homicide until those cases are resolved. The reason for confidentiality of the information is because they hope to be able to access confidential information, which will require them to maintain that confidentiality. In turn, the individuals they speak with can be given some peace of mind in knowing what they tell the Commission will be confidential.

SEN. McGEE asked if the Commission would be taking sworn testimony.

Ms. Bovingdon replied that was not their intention.

SEN. McGEE sought to know if the Commission would be looking at cases such as the Sullivan case, or would they look at Sullivan cases with the idea of trying to figure out future Sullivan cases, and how the Commission could do that and not have open meetings.

Ms. Bovingdon explained the intention of the Commission is to look at both individual homicide cases with a goal of looking at how the system worked in that case and being able to recommend system improvements for the future so there will not be another Sullivan case. If there were no more domestic homicides, the Commission would not exist because it is specific to domestic violence fatality review.

SEN. McGEE asked if domestic fatality review means the cases will be reviewed as they come up.

Ms. Bovingdon replied that is correct, upon the invitation from a community. The Commission will only work if they are invited by a community. The invitation would have to be more broad than a family member of a victim inviting the Commission. The intention is once they get an invitation to work with law enforcement and county prosecutors, to make sure they are coming into a community that wants the Commission to be there. If not, the Commission will not be able to get the type of information they need. The reason for the confidentiality in closing the meeting was simply so people will feel they can share honestly what they know about this domestic violence homicide without having a member of the press there.

SEN. WHEAT would like to follow up on the make up of the Commission. **SEN. WHEAT** is surprised there is not a psychologist, psychiatrist, or someone from the State Hospital at Warm Springs on the Commission.

Ms. Bovingdon, again, thinks this is a good suggestion, and has no reason why that person was not concluded. The membership was derived from the individuals currently serving on the informal Commission. The suggestions made by the Committee are great suggestions. **Ms. Bovingdon** feels someone with that knowledge and background could be very helpful with these cases.

SEN. WHEAT then spoke to the use of "shall" on page 2, line 18, and the fact that it is mandatory language. **SEN. WHEAT** wonders what happens when a person is contacted by the Commission, and they do not want to cooperate.

Ms. Bovingdon replied the language of the bill is mandatory to give the Commission ability to request information and point to

the authority by which they can receive it. There is nothing in the bill that states if the person refuses to provide information that they are subject to civil or criminal sanction. If someone does refuse to provide information, the Commission will need to decide what approach they will take.

CHAIRMAN GRIMES assumed that they have given thought to staffing in preparation for the Commission and that will be handled within the department and is not reflected in the fiscal note.

Ms. Bovingdon replied that assumption is correct.

CHAIRMAN GRIMES summarized the purpose of the bill as being because of confidentiality requirements and the Commission will need to access more data than they otherwise could.

Ms. Bovingdon agreed that is a good summary and added there are other states wanting these types of Commissions. Some of this idea has come about through the national training Matt Dale has attended, and Montana is being more proactive.

CHAIRMAN GRIMES then discussed page 2, line 20, and about the Commission not being criminally or civilly liable since they will be receiving very delicate information. **CHAIRMAN GRIMES** then wanted to know if there would be cases where the information would be deemed too sensitive to be released to anybody.

Ms. Bovingdon agreed that situation could arise and would have to be dealt with on a case-by-case basis. It is not the intention of the Commission to ask or and require information they should not be entitled to.

CHAIRMAN GRIMES rephrased that the intention is to have more information than they currently have access to, but not necessarily have unlimited access, in some cases.

Ms. Bovingdon reiterated that from the Commission's perspective, the more information they can obtain, even if it is confidential, the better work the Commission can do. **Ms. Bovingdon** can imagine cases where an individual may not want to release certain information, and the Commission would have to show some level of sensitivity.

One of **CHAIRMAN GRIMES'** concerns is that information like this could put people in jeopardy by requiring them to reveal things.

Ms. Bovingdon responded that on page 3, lines 3-6, requires if a member of the Commission discloses any confidential information, they will be subject to a civil penalty.

SEN. PERRY asked **Ms. Bovingdon** about the number of domestic violence deaths that have occurred within the last three years.

Ms. Bovingdon stated the number she is aware of which is 11 individuals have been killed by a family member since 2000.

SEN. PERRY re-referred his question to **Mr. Dale** who responded that there are domestic violence fatalities every single year for the last three years. The most recent fatality related to domestic violence in the state was in Butte approximately six months ago when a woman went to pick up her child at daycare at a trailer and her boyfriend shot her has she entered the trailer. He is confident these fatalities will continue in Montana.

Closing by Sponsor:

REP. KAUFMANN closed by stating the bill had a lot of support in the House. The same questions were raised in the House. **REP. KAUFMANN** believes if the bill is amended and sent back to the House, it will fare well. **REP. KAUFMANN** does not have a problem including the individuals suggested by the Committee. This will give the Attorney General more categories to choose from when looking at the makeup of the Commission. **REP. KAUFMANN** stated the public needs to have confidence in the Commission and know the Legislature has had oversight, helped to establish the purpose of the Commission, and provided for rules of confidentiality.

REP. KAUFMANN stated the red plywood cutouts on display in the Capitol Building tell tragic stories, and there are quite a few more this session. The woman from Billings, who was murdered by her husband, also has a figure down there. Her mother, **Sally Sjaastad**, contacted **REP. KAUFMANN** and said in the context of that whole case, she was really dismayed to read in the paper the comment of one of the professionals in the community that, "There just is not a lot you can do to prevent homicides." **Ms. Sjaastad** believes there is something that can be done, and she supports this bill in an effort to stop the next case. **REP. KAUFMANN** urged the committee to pass HB 116 in an effort to decrease the number of plywood cutouts added to the display next session.

HEARING ON SB 311

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

Proponents: **Richard Barber**
Al Smith, Montana Trial Lawyer's Association

Opponents: **John Sullivan, Montana Defense Trial Lawyers' Association**
Jacqueline Lenmark, American Insurance Association
Mona Jamison, The Doctors' Company
Susan Good, Neurosurgeons, Orthopedic Surgeons, and Anaesthesiologists

Opening Statement by Sponsor:

SEN. WHEAT calls this bill the "Sunshine in Litigation Act." The bill is modeled on a statute enacted in Florida in 1990. The purpose is to open up what is filed in court to public. The bill will prohibit a court from entering a judgment or order that conceals a public hazard, which is defined in the statute, or conceals information which would be useful to members of the public protecting themselves from injury that may result in a public hazard.

Public hazard is defined to mean an instrumentality, including but not limited to, a device, instrument, procedure, product, or a condition of a device, instrument, procedure, or product that caused, or is likely to cause, injury. This is defined in Section 27-1-106. This arises almost exclusively in areas of product liability. We read about cases all the time where products are unsafe and hurt people and, ultimately, those products are taken off the market or the design is changed. This bill is designed to, in those instances where a lawsuit has been brought, and information is discovered through prosecution of that case that the product is defective, dangerous, and has hurt people, that the court is prohibited from entering an order which would keep that information secret or concealed from the public. Subsection (5) exempts trade secrets or other confidential information under federal or state law. Primarily, this bill is designed to prohibit the courts into entering protective or confidentiality orders. This often occurs during the discovery process or during settlement negotiations. Many times during settlement, the plaintiff will be required to enter into a confidentiality agreement whereby they agree all information related to the defective product is returned to the manufacturer, the plaintiff is prohibited from discussing the nature of the defect with anyone, so information about the defectiveness of the product gets concealed and becomes secret. The plaintiff's

lawyer gets caught in between because if there is a settlement offer which adequately compensates the plaintiff, then the plaintiff usually takes it, even though they will be sworn to secrecy. This bill will take away that bargaining chip from defendants who have defective products. They will lose their leverage against victims who have been injured by those defective products.

The last section of the bill provides a procedure whereby if one of the defendants wants to keep information from being disclosed, the court will review it in camera and make a decision as to whether the information will be made public. **SEN. WHEAT** feels this is a good bill and furthers Article II, Section 9, of our Constitution, "Right to Know," which states, "No person shall be deprived of the right to examine documents, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." **SEN. WHEAT** feels this bill will decrease litigation, and is a bill in the best interest of the consuming public.

Proponents' Testimony:

Richard Barber, Manhattan, Montana, explained that over the last couple of years he has been involved in activity over a defective product which claimed the life of his son. **Mr. Barber** asked the Committee to remember that you can replace any material thing, but family is something that cannot be replaced. **Mr. Barber** found it very offensive that he was offered money for his silence. He also refused to go to court and refused to take a lawyer's word about the alleged defect in the product. **Mr. Barber** conducted his own research and found many things about the system offensive. **Mr. Barber** ran across numerous protective orders sealing files.

(Tape : 3; Side : A)

Mr. Barber testified Montana is not unique in considering this type of legislation. There are 13 other states looking at adopting this type of legislation. **Mr. Barber** submitted information relating to Firestone Tires as an example of the effects of confidentiality agreements in product liability cases, **EXHIBIT(jus26a06)**. **Mr. Barber** received numbers of 101 to 148 deaths due to Firestone tires, and somewhere between 600 to 700 injuries. These deaths and injuries could have been prevented, but there were secret settlements which hid the information and prolonged the defective product remaining in the public domain. Phen-fen (?) was another example, as was the Ford Pinto. Pinto was the first case where the company was caught doing a cost-benefit analysis in order to determine whether it was cheaper to

recall the product, or leave the product out in the public and settle cases.

Mr. Barber cannot see where a corporation's right to secrecy should ever override the public's right to health and safety. Several states, including Florida and Texas, **EXHIBIT(jus26a07),** and California, **EXHIBIT(jus26a08),** have strong statutes barring concealment of information related to public hazards. Insurance companies and defense lawyers say this bill will cause an onset of litigation; however, **Mr. Barber's** research indicates the opposite. In fact, an Orange County defense lawyer claims that as a result of anti-secrecy measures being implemented in California, lawsuits are down 40 to 50 percent in Orange County. Florida has implemented this type of legislation, and it has been standing since about 1990. Per capita, lawsuits have been reduced in Florida. Companies do not fear settling cases, they fear punitive damages. Therefore, they will discontinue their deceptive practices or recall the product.

Mr. Barber stated in the history of his investigation, he tracked documentation back to 1946 where they talk about a theoretical unsafe condition. In 1947 piolet line inspections made to the effect that the malfunction which claimed the life of his son was exhibited by a very prominent engineer with the firm. In 1948 the original designer and patent holder on the mechanism urged the company to make changes to the design. This goes to the extent of July 11, 1950, that the malfunction is actually stated in the patent. They knew, but yet did nothing. The product was first implemented to the public in 1948 which means they knew about it two years before they released the product to the public. **Mr. Barber** did not want to take the money offered to him in exchange for his silence. **Mr. Barber** urged the Committee to attend to the needs of public health and safety.

Al Smith, representing the Montana Trial Lawyer's Association, noted that **Mr. Barber** contacted him several years ago, and it is **Mr. Barber** that has been driving this legislation. They feel other families in Montana need to be protected.

Secrecy orders keep vital health information away from the public. This information could prevent injuries and deaths. Since the mid-1970s, this practice has spread across the country. It very often happens during settlement negotiations in a lawsuit where the companies will settle, but a person will have to sign a confidentiality agreement prohibiting the person from discussing the lawsuit. In Montana, we have a constitutional right to know. In state government, we have statutes which prevent the state from hiding settlements. This should apply to everybody. If there is a public hazard out there, the public has the right to

know about it. Commons sense will tell you this will decrease the amount of litigation. Information about dangerous products will prevent injuries and deaths.

This bill does not cover a "dangerous person," as contained in Florida's bill. They considered including it, but decided against it. **Mr. Smith** used Catholic Priests as an example where priests, who had sexually molested children, were allowed to continue serving in the church because of confidentiality agreements. SB 311 only deals with dangerous products or practices.

Mr. Smith stated that these confidentiality agreements place plaintiff's counsel in a bad position, because if a person was injured and has massive medical bills, many times, these plaintiffs will have to eventually settle to provide for medical care.

In the Ford Firestone cases, there is evidence indicating possibly 200 lives could have been saved if the public had known early on. Why shouldn't the public be able to know? Companies can defend their suits in courts, but why shouldn't the public have that knowledge? **Mr. Smith** cited the use of car seats as another example, informing the Committee the weight was wrong for proper usage, and children died. A number of children were killed because the company said the car seat was safe for up to 30 pounds, but in reality the seat could only protect a 22-pound child. This defect was kept secret for years because of confidentiality agreements. **Mr. Smith** gave other examples where companies knew early on that they were killing people, but yet through secrecy agreements, that knowledge was kept from the public and, at times, even the Food and Drug Administration. Sidesaddle fuel tanks in GM trucks and defective heart valves are other examples of defective products which were the subject of confidentiality agreements. It is good public policy to give this added protection to the public and will save lives. Our number one concern should be to inform the public that there are unsafe products out there.

Opponents' Testimony:

John Sullivan, representing the Montana Defense Trial Lawyers' Association, opposes this legislation. **Mr. Sullivan** feels the questions we need to ask are do we need this bill? **Mr. Sullivan** is sympathetic to **Mr. Barber**. We are not here to deal with the merits of particular liability cases. This bill is aimed at the sealing of court files and secret agreements which conceal public hazards. You must ask if there is an epidemic of secrecy in the litigation world that is not already being addressed. Only four

states have this legislation, so there is not a lot of public support for the legislation. Some states have court rules which deal with the issue. Court rules are a matter of discretion with the Montana Supreme Court. Sealed court files are extremely rare things. The court can always refuse to seal a court file. In some litigation, there are agreements which deal with confidentiality. There are protective orders entered in a lot of litigation that protect confidential information. These orders are usually negotiated by the attorneys and entered by the court. These documents allow a flow of information in litigation. Once the protective order is in place, the party that has the confidential material, will pass it over to the plaintiff, and the plaintiff is allowed to use that information to build his case. Therefore, instead of fostering secrecy, those agreements allow the exchange of information in litigation.

Mr. Sullivan further explained confidential settlement agreements have been used for about 15 years, and it is the standard of practice. The settlement agreement does not protect information about a public hazard; rather, it creates a release and states the amount of money paid. The model agreement in Montana contains the statement: "The terms of this confidential settlement agreement and release may be disclosed in response to a court order, subpoena, or valid inquiry or governmental agency or regulator, or as otherwise may be required by law." In other words, even a confidential settlement agreement is something that can be obtained if a party makes an appropriate showing to a judge.

The third use for confidential settlement memorandums is in the mediation process. This mediation process is to keep cases from clogging the court system. Part of this process is selecting a mediator and providing them with confidential settlement memorandums. Rule 26, Montana Rules of Civil Procedure, deals with protective orders in litigation. This rule says a protective order will be entered if there is good cause. It leaves the job of determining good cause to the court. **Mr. Sullivan** found a summary of article done by a Drake University Law Professor in 2000, on the American Trial Lawyers' Association website. This article concluded both sides of the confidentiality debate make many legitimate points and courts do not have to embrace one view or another. Court's should accommodate the various competing interests. In the end, the case-specific nature of this balancing approach makes this a task ideally suited and best committed to the sound discretion of a court. In other words, courts should be able to deal with this situation on a case-by-case basis balancing public safety and the public's right to know with other interests in the case. **Mr. Sullivan** feels the courts are doing this right now. **Mr. Sullivan**

spoke to a case in federal court before Judge Molloy in Missoula where GM released settlement information concerning one of its trucks. That case was appealed in the Ninth Circuit Court of Appeals, which vacated Judge Molloy's order and sent it back for reconsideration. Generally, the public can gain access to litigation documents and information produced during discovery unless the opposing party shows good cause why a protective order is necessary. Rule 26(c) Montana Rules of Civil Procedure, allows the court to override confidentiality if good cause is shown. Because of the language in Rule 26(c), **Mr. Sullivan** does not feel this legislation is necessary.

In asking if this is the legislation we want to adopt, **Mr. Sullivan** feels the definitions are as broad as the state of Texas. "Public hazard" is defined as anything which causes an injury, and then goes on to list inclusions. This legislation is not limited to products liability cases. It will literally encompass every personal injury lawsuit filed in Montana.

(Tape : 3; Side : B)

Under this bill, "any information" means you cannot have protective orders, confidential information, confidential information disclosed in settlement memorandums for mediation, and the protection granted to trade secrets is extremely narrow. Trade secrets can be obtained if the information may be useful to the public concerning injuries which may result from things which may cause injury. This does not afford much protection for trade secrets. A protective order is not as easily entered as it was before if this bill is passed, because defendants will fight long and hard about giving out that information. In addition, problems will occur in settlements, and lawyers will spend more time and money on discovery disputes. Mediators will not be fully-advised or well-equipped with the ability to find a way to settle litigation. **Mr. Sullivan** feels the medication for the problem already exists in Rule 26. The medicine proposed in SB 311 is more harmful than the problems it would seek to cure.

Jacqueline Lenmark, representing American Insurance Association, stated the companies she represents are often the companies that would be involved in providing defense to individuals involved in the litigation affected by this proposed legislation. **Ms. Lenmark** reiterated to the Committee that the bill has a more sweeping effect than might be readily apparent at first reading. **Ms. Lenmark** is concerned about the definition of "public hazard." Also, "instrumentality" is a very broad word and, as **Mr. Sullivan** pointed out, the definition includes, but is not limited to, a number of other things. This means that people who look at this law, will not know what an "instrumentality" is. **Ms. Lenmark**

further commented there is a presumption that the only individuals who would want to keep this information confidential is a corporation. In **Ms. Lenmark's** experience frequently the individual who wants information protected is the plaintiff. This fact is not addressed at all in the bill.

Mona Jamison, representing The Doctors' Company, spoke in opposition to the bill. Ms. Jamison stated that the constitutional provision applies to state agencies, boards, and different levels of local governments. At this point in Montana, it is not clear that it applies to courts. It applies to both documents and meetings, but it is not clear that it applies to the documents in meetings, of the court, or the Supreme Court. The issue has been raised in the Montana Supreme Court as to whether the Justices' conferences should be kept open to the public. There is disagreement on this issue even among the Justices. Ms. Jamison asked that as the Committee hears the proponents say that is a requirement by the Montana Constitution, understand that issue is not resolved and, in fact, the Supreme Court of Montana has chosen to keep its conferences closed.

Ms. Jamison agreed that "public hazard" is broad. When used in conjunction with the language on line 15 "including, but not limited to," you have not defined the term. **Ms. Jamison** explained that if you have a list of apples, oranges, and bananas, and you have language "including, but not limited to," other fruits can be added. Therefore, if you have a specific list, and you have left something off the list, then you intended to leave it off. "Public hazard" is defined quite broadly, but with the language "including, but not limited to," which leaves it wide open. The word "procedure" definitely includes medical procedures used by physicians and their staff. This would now be included in the definition of public hazard. **Ms. Jamison,** does not do defense work but, as an attorney, she feels subsection(6) is a standing issue. Who can bring issues before the court for resolution? The bill says any affected person, "including but not limited to," representatives of the news media, has a standing to contest an order that violated this section. Whether the news media always has standing is an issue **Ms. Jamison** would not like to address. Here, again, the language "including but not limited to" expands who would have standing to file these actions in court to challenge confidentiality agreements. **Ms. Jamison** suggested comparing litigation in Montana to the frequency of litigation in the bigger markets like California, Florida, New York, and Texas is not an appropriate comparison.

Susan Good, representing Neurosurgeons, Orthopedic Surgeons, and Anaesthesiologists, echos the concern about the term "procedures" contained in the definition of "public hazard." In 1962 if you

had a heart attack you were sent home on bed rest and that would be the extent of your treatment. New procedures not heard of a few years ago, are relatively common place now. At one point, these procedures were considered experimental and out on the edge. **Ms. Good** is concerned this bill may have a chilling effect on some pioneering procedures. For this reason, **Ms. Good** hopes the Committee will consider whether the word "procedure" is fitting language for the Montana Code.

Questions from Committee Members and Responses:

SEN. CROMLEY stated to **Mr. Sullivan** that he does not feel the bill is as dangerous as he indicated. **SEN. CROMLEY** asked **Mr. Sullivan** to provide an example of a public hazard which should justifiably be concealed in a written agreement or contract.

Mr. Sullivan responded that he was referring to subsection (3) which states, "a court may not enter any order or judgment that has the effect of concealing a public hazard or any information concerning a public hazard." This is the broad language **Mr. Sullivan** is concerned about. The language **SEN. CROMLEY** questioned about is something different that states, "any portion of a written agreement or contract that has the effect of concealing a public hazard or any information concerning a public hazard is contrary to public policy, void, and may not be enforced." A written agreement or contract could be, for example, an agreement to enter into a protective order. Many protective orders are stipulated to by the parties. A settlement agreement is a contract and a written agreement as well. What is contained in subsection (3) and in subsection (4) are two different things, and they are together broadly aimed at any information concerning a public hazard. Any information is the broadest possible prescription you could make. This will walk over the top of trade secrets, business confidential information, all kinds of things. It will walk over the top of information relating to instrumentality that has caused an injury in a settlement memo or settlement agreement.

SEN. CROMLEY then questioned with regard to the settlement agreement itself, why a public hazard should not be available.

Mr. Sullivan responded that settlement agreements do not contain information about public hazards. This information is found in substantive discovery information, engineering drawings or trade secret information. Second, as a practicing attorney, **SEN. CROMLEY** should be aware that a confidentiality provision in a settlement agreement is standard. Settlements involving private parties are routinely made confidential subject to a provision which allows a court in a proper case to override that

confidentiality. Settlement agreements are meant to protect the amount of settlement. If that information needs to be accessed, it can be without this legislation.

SEN. CROMLEY asked **SEN. WHEAT** if the plaintiff is losing something by giving up his bargaining chip of not entering into a confidentiality agreement.

SEN. WHEAT backtracked by stating this legislation is attempting to avoid keeping secret a public hazard. There are two parts to this language. First, it has to be an instrumentality, including but not limited to, any devise, instrument, procedure, product, or a condition of that instrumentality that has caused an injury and is likely to cause injury. It does not apply to any instrumentality which falls out of the air, it addresses instrumentality that hurts people. Instrumentality that has hurt people and will likely hurt other people. If you have a settlement agreement which is designed to hide something that qualifies as a public hazard, it would fall under this statute. Most settlement agreements do not talk about public hazards. Most settlement agreements have confidentiality agreements about the amount of the settlement. That is acceptable common practice. This bill is not attempting to say every settlement agreement is going to be open and subject to public scrutiny. This bill will just make sure that if you are going to have settlement agreement that attempts to hide a public hazard, that settlement agreement is going to be void.

SEN. CROMLEY then questioned whether **SEN. WHEAT** envisioned these confidential settlement memoranda to be accessible if this bill were to pass.

SEN. WHEAT stated he did not. Confidential settlement memorandums allow the attorney to convey information to the mediator including case analysis, strategies, evidence, and allows for the attorney to be open and forthright about why the case should settle. **SEN. WHEAT** cannot imagine a lawyer like John Sullivan representing a manufacturer who has a defective product and placing that information in a confidentiality agreement. That is not the nature of these settlement memoranda.

(Tape : 4; Side : A)

SEN. CROMLEY then asked whether how an attorney evaluated a case to his client would be accessible.

SEN. WHEAT responded he did not believe it would be accessible because first, we are talking about a court not entering an order or judgment and, second, any portion of a written agreement or

contract pursuant to civil litigation that has the purpose or effect concealing a public hazard. Settlement memoranda are not a contract entered into during the course of civil litigation. In addition, attorney-client privilege would prohibit access of such information. It is not **SEN. WHEAT's** intent that this bill invades the attorney-client privilege.

SEN. McGEE asked if on line 21, there is an additional comma, which should not be there.

Valencia Lane agreed the comma should not be there.

SEN. PERRY tried to look at obvious products that could be construed as public hazards. **SEN. PERRY** recalled that a few years ago, he was wearing sports goggles while playing basketball and had such an impact with another player, that the goggles broke and cut his cheek. **SEN. PERRY** was curious, by the definition in the bill, would safety sports goggles be a public hazard?

SEN. WHEAT replied they could under the right circumstances. Assuming the manufacturer did impact testing in their lab and determined the goggles shattered under low impact. However, it would be too expensive to change the composition of the plastic, so they proceeded to manufacture the goggles knowing they could shatter. As time passes, the manufacturer begins to receive reports that people are being injured by these glasses. The goggles would fall under the purview of this bill because they caused injury and it is likely to cause injury to somebody else.

CHAIRMAN GRIMES asked **Mr. Sullivan** to enlighten the Committee on Rule 26(c), Montana Rules of Civil Procedure. **CHAIRMAN GRIMES** wondered if the bill was addressing information that would be normally obtained through discovery.

Mr. Sullivan feels the bill is broader than that. **Mr. Sullivan** feels he could obtain a confidential settlement memorandum real fast under this bill. If he were the sponsor of this bill, the information he would be after would be the information obtained during the discovery process. That is where the substantive information about a product is going to exist. This bill is far broader than products liability because it includes instrumentality and goes way outside the margins of any products liability case. The Ninth Circuit case says the court has the power to control who gets access to that discovery information. Initially, it is assumed the information is public. Only under Rule 26(c) does a litigant get to ask a court not to grant public access to information. This bill grants a right of access to the news media, and it was the news media in Judge Molloy's case that

wanted the information. Both the Ninth Circuit and Judge Molloy said the news media had standing to challenge that. **Mr. Sullivan** repeated it is a problem that already has a cure.

CHAIRMAN GRIMES then asked **Mr. Smith** that there could be plaintiffs who would prefer not to have information disclosed for various reasons, but then the news media could pursue that information. It seems to **CHAIRMAN GRIMES** that this is a double-edged sword.

Mr. Smith thinks we should backup and realize the presumption they are trying to establish is that the public comes first. The rights and safety of the public is first before litigants. **Mr. Smith** feels it is double edged. This bill says public policy in Montana says we should first look to the public. **Mr. Smith** directed the Committee to subsection (7) which allows every situation the proponents talked about to go to court and say it should be kept confidential for these reasons. Currently, we have the litigants controlling what is public information and the court has to go to court to get that information. This legislation is saying the public should come first and they should have access. Anybody else will have to go to court and show cause as to why the information should be kept confidential.

CHAIRMAN GRIMES asked then if the bill was changing the burden of proof.

Mr. Smith stated that is correct. There is still a mechanism under the law to convince the court the information needs to be protected. Also, very often in settlement agreements, there is a clause in the settlement agreement that says neither the plaintiff nor the plaintiff's attorney may discuss any information which was brought out in discovery. If that is the case, the public never knows.

CHAIRMAN GRIMES asked **Ms. Jamison** about the issue of the net effect of a sunshine approach in other states reducing litigation and asked if she felt that would be the case.

Ms. Jamison made two comments saying she did not know exactly what the statutes were in other states and, on the second point, she believes this particular bill would increase litigation. Settlements in medical malpractice cases are made even when the physician adamantly believes they have not been negligence. The trauma which results from being involved in litigation prompts many physicians to settle the cases. If you are a physician and you believe you did nothing wrong, and you know the settlement document could be publically disclosed, why not go to trial? **Ms. Jamison's** last point is that whether or not something is a public

hazard or likely to cause injury is for the trier-of-fact. This is conclusion yet to be reached. Settlement occurs before you get to the conclusion, so how can that be determined? **Ms. Jamison** stated she could read in the bill that a vehicle is a public hazard. In truth, a vehicle, if not driven properly, is a public hazard.

SEN. O'NEIL asked **Mr. Sullivan** if this bill would apply to out of court mediating.

Mr. Sullivan responded he thought the bill could apply to mediating.

SEN. O'NEIL asked how **Mr. Sullivan** came to that conclusion.

Mr. Sullivan answered the bill does not seem necessarily constrained. Even though the bill refers to sunshine in litigation, in reading the bill subsection (4) is confined to litigation, but subsection (3) is not.

SEN. O'NEIL then asked if it would apply to out-of-court arbitration.

Mr. Sullivan answered it would since arbitration is a form a civil litigation recognized by Montana statute.

Closing by Sponsor:

SEN. WHEAT closed the hearing by stating the opponents believe the sky is falling. The bill is limited in scope and definition of public hazard. It is further limited to an instrumentality or public hazard that has caused injury or is likely to cause injury. It is confined to court documents and other agreements entered into in the prosecution of litigation. It provides a mechanism for those individuals who believe the information should not be made public. **SEN. WHEAT** feels it will not impact arbitration or out-of-court mediating. It will have an impact on instrumentalities that will hurt people. This bill will establish a policy statement that we reject secrecy that involves public hazards. That is what this bill is designed to do. This is a way to tell our constituents what rights we believe in and how we can protect those rights.

ADJOURNMENT

Adjournment: 12:30 P.M.

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SEN. DUANE GRIMES, Chairman

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CINDY PETERSON, Secretary

DG/CP

EXHIBIT(jus26aad)