

MINUTES

MONTANA SENATE 59th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN MIKE WHEAT**, on February 21, 2005 at 8 A.M., in Room 102 Capitol.

ROLL CALL

Members Present:

Sen. Mike Wheat, Chairman (D)
Sen. Aubyn Curtiss (R)
Sen. Jon Ellingson (D)
Sen. Jesse Laslovich (D)
Sen. Jeff Mangan (D)
Sen. Dan McGee (R)
Sen. Lynda Moss (D)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)
Sen. Gary L. Perry (R)
Sen. Jim Shockley (R)

Members Excused: Sen. Brent R. Cromley (D)

Members Absent: None.

Staff Present: Valencia Lane, Legislative Branch
Mari Prewett, Committee Secretary

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

Committee Business Summary:

Hearing & Date Posted: SB 464, SB 474, SB 475, SB 476, SB
473, SB 485, 2/14/2005
Executive Action: SB 485, SB 464, SB 452, SB 473, SB
474, SB 475, SB 476, SB 351

HEARING ON SB 464**Opening Statement by Sponsor:**

SEN. JERRY O'NEIL, SD 3, COLUMBIA FALLS, opened the hearing on SB 464, a bill that would allow Caucus nomination of U.S. Senate candidates. Written testimony was read into the record.

[EXHIBIT\(jus42a01\)](#)

Proponents' Testimony:

Charles Lincoln, Self, Austin, TX, supports the bill and is in favor of political reform. He stated that if it is important how Montanans spend their money on the National level, the control of the expenditure can be better maintained if the legislature has some say in who represents the state in Congress. A two-tier program will put state government back into the U.S. Senate.

Opponents' Testimony: None.

Informational Testimony: None.

Questions from Committee Members and Responses: None.

Closing by Sponsor:

SEN. O'NEIL closed and asked the Committee to support SB 464 so it could go to the Senate floor for debate.

HEARING ON SB 474

{Tape: 1; Side: A; Approx. Time Counter: 9.9}

Opening Statement by Sponsor:

SEN. JERRY O'NEIL, SD 3, COLUMBIA FALLS, opened the hearing on SB 474, a bill to allow the legislature to govern eligibility in the practice of law. He said that public input is needed into who can practice law. A Supreme Court Petition regarding Dana M. Culver, and a written opening statement were handed out.

[EXHIBIT\(jus42a02\)](#)

[EXHIBIT\(jus42a03\)](#)

Proponents' Testimony:

Charles Lincoln, Self, Austin, TX, discussed separation of powers, rules of entry to the Montana Bar, and judicial immunity.

Opponents' Testimony:

Chris Manos, Executive Director of the State Bar of Montana, handed out and discussed the following, "Current Judicial Regulation of the State Bar Provides Public and Attorney Services" and "The Montana Supreme Court Regulates the Practice of Law; the Legislature Does Not".

[EXHIBIT\(jus42a04\)](#)

[EXHIBIT\(jus42a05\)](#)

{Tape: 1; Side: B; Approx. Time Counter: 4.9}

Informational Testimony: None.

Questions from Committee Members and Responses:

SEN. SHOCKLEY asked Mr. Lincoln to elaborate on prior testimony. **Mr. Lincoln** stated that all the bill says is that the power needs to be given back to the people. In a Democratic society, the people make the law, not the lawyers.

Closing by Sponsor:

SEN. O'NEIL closed by saying that with the Supreme Court having the say in who takes the Bar Exam, that gives them the option of saying how many attorneys there will be in Montana. This bill will give the legislature the power to say what the entrance requirements are to practice law in Montana.

HEARING ON SB 475 and SB 476

{Tape: 1; Side: B; Approx. Time Counter: 11}

Opening Statement by Sponsor:

SEN. JERRY O'NEIL, SD 3, COLUMBIA FALLS, opened the hearing on **SB 475**, a bill to revise the penalty for practicing law without a license, and **SB 476**, a bill to exclude preparation of certain documents from the practice of law. He handed out a written statement, "SB 475-SB 476 - Revisions to Definition of the Practice of Law and the Unlicensed Practice of Law". These bills

would amend the law to allow what is already current practice, and the people who are performing these functions won't be wrongfully punished.

EXHIBIT(jus42a06)

Proponents' Testimony:

Charles Lincoln, Self, Austin, TX, discussed the abilities of paralegals and gave his personal background in law. He commented that passing the Bar is important, but education and licenses are only wall decorations. They are not substitutes for the practice of law; much of what is learned in the practice of law is gained through experience.

Opponents' Testimony:

Chris Manos, Executive Director, State Bar of Montana, said the State Bar opposes both bills. SB 476, in particular, because it would make changes in the practice of law by allowing individuals to write separation agreements, and family law mediation agreements. He stated that these matters are the result of litigation and a permanent injunction issued by Kim Christopher, District Judge, on January 7, 2005, where she found that Jerry O'Neil engages in the practice of law and is not authorized to do so. The issues are estate planning, tax consequences, child support, medical and health issues, and parenting issues. All require some knowledge of the law, some application of that knowledge, and some drafting. SB 476 would allow anyone to prepare these documents, with no guarantee that they would have any training, background, or experience in those areas. He added that Judge Christopher had made it clear she was not preventing mediators from practicing their profession, she was just clarifying the limitations.

Neil Haight, Self, said these bills subject the Montana Judicial System to an "egg-beater". He suggested that if the system needs review, that the review be undertaken by a group of qualified, experienced people that can evaluate it and find out what is going on in other parts of the country. Then, they can come back to the legislature with suggestions.

Informational Testimony: None.

Questions from Committee Members and Responses:

SEN. SHOCKLEY stated that it seemed presumptuous to say that the Bar supports or doesn't support a bill when they haven't been polled. **Mr. Manos** said, "Not at all, because it has been clear

from rulings by a district judge that the matters which are the subject of this bill are in fact a practice in law and it is also a fact that these matters are on appeal to the Supreme Court, which will have some say over whether that district judge's opinion, which the Bar members are obligated to follow at this point, is correct or not". **SEN SHOCKLEY** noted that it is not final. **Mr. Manos** stated that the matter is on appeal, but the permanent injunction is actually in place.

SEN. PERRY discussed the conflicting ideas and asked if he had heard correctly, that because of a judge's ruling, that would represent the perspective of the Bar Association. **Mr. Manos**, said he did not understand the question and asked to have it repeated. **SEN. PERRY** withdrew the question.

Closing by Sponsor:

SEN. O'NEIL closed and said people have been coming to him because attorneys were out of their price range. For example, if a couple are each making less than \$10,000/year and there is a divorce case, it is hard to find an attorney that has the time and the desire to help.

These two bills will open up less antagonistic divorces, more mediated settlements, and will allow more access to joint discussion. He said he hoped people would take the separation agreements and parenting plans by an attorney and have them checked, but at least the court will be the final guide to see if they are in the best interests of the child, and that they are proper agreements.

If someone mediates for a couple that does not have money and does not have access to an attorney, the mediator is still required by duty to prepare a separation agreement. He stated that most attorneys are willing to critique separation agreements and parenting plans for little or no fee, and this bill would eliminate a problem in case they aren't.

HEARING ON SB 473

{Tape: 2; Side: A; Approx. Time Counter: 1.6}

Opening Statement by Sponsor:

SEN. JERRY O'NEIL, SD 3, COLUMBIA FALLS, opened the hearing on **SB 473**, a bill to exclude certain minors receiving abortions from the application of liability caps. He passed out an amendment. He said these services could have a vast impact on someone's life

and this should apply to all such services whether there is notification or not. He said, "Let a jury decide the liability, don't let the state restrict it. There should be recourse to the courts if damages are incurred."

EXHIBIT(jus42a07)

Proponents' Testimony:

Eric Schiedermayer, Montana Catholic Conference, read his written testimony.

EXHIBIT(jus42a08)

Gilda Clancy, Montana Eagle Forum, said that an abortion by someone who may have no knowledge of a girl's prior medical or psychological history poses many dangers that could be avoided by parental involvement. A parent would be able to provide information about allergies, provide pertinent medical or psychological information, and provide authorization for release of data from family physicians. If complications develop when the patient returns home, and the parent knows there was an abortion, their knowledge may be very important to ensure timely treatment. She said that the **Montana Family Foundation** and **Montana Family Coalition** also support the bill.

Stephen Ertelt, Editor of LifeNews.com, and also representing the National Right to Life Committee, spoke about several cases of botched abortions where the parents were not told their daughter was going to have an abortion. In one case, the parents had to pay \$27,000 for additional hospitalization. He noted a North Dakota clinic that purchased malpractice insurance from a bogus insurance company in Bermuda, and expressed concern that many others do so also.

Jackie Trude, Right to Life of Montana, said this is a pro-parent, common-sense bill and she believes that while children are minors, the parents should make all decisions regarding their safety. She stated that there were 270 abortions performed on girls ages 12-17 during 2003 in Montana.

Charles Lincoln, Self, Austin, TX, said this is a broader bill than was suggested. The present bill as amended has all the benefits that the proponents have been talking about and is more likely to avoid any scrutiny than a bill that addresses only abortion. It is broad-based and relates to obstetrics, gynecology, fertility, and reproductive law in general. He said that is approximately the scope that the Court in the Armstrong

case was stating that a bill needed to have in order to avoid the strict scrutiny test. He urged support of the bill.

Opponents' Testimony:

Jan Van Riper, American Civil Liberties Union (ACLU) Montana, said the bill as amended is different than the one proposed, and it is outside the scope of the title. Now that it applies to a broad scope of physicians, there are a number of physicians, organizations, health care organizations, and insurers that might want to address this. She stated, "They are not able to do that because of the lack of notice in the title".

She said the Armstrong case goes past the Supreme Court decision in these issues, and recognizes that people in Montana have a specific right to privacy. She said, "Women have a fundamental right to abortion protection with respect to their reproductive rights". There is a constitutional right for minors to enjoy all the constitutional and fundamental rights that adults have, and those cannot be infringed upon with compelling State interests.

She commented briefly that the Parental Notice of Abortion Act has been held unconstitutional and unenforceable, and the Attorney General of Montana has issued an order as such.

Jerri Duran, Lobbyist and Public Affairs Director for Planned Parenthood of Montana, stated that Mr. Ertelt's testimony was not updated, and the case against a Planned Parenthood Provider has since been dropped. She addressed the actual health risks of procedures, and stated that it is more than 12 times safer for a young woman to have an early abortion rather than deliver a full-term pregnancy. Also, there are only ten abortion providers in Montana; all of them provide a wide range of other services, some of which are available to low-income Montanans. Additional malpractice risks would affect a provider's ability to provide abortions, but would also potentially keep them from providing low-cost health care to their patients.

{Tape: 2; Side: B; Approx. Time Counter: 6.6}

Kate Cholewa, NARAL Pro-Choice Montana, said they support access to safe reproductive care and they want to protect patients without restricting access. She suggested the approach of lifting the cap on punitive damages for everyone's healthcare and questioned targeting particular providers. They oppose legislation that would restrict access to reproductive healthcare for women of any age.

Brad Martin, Executive Director, Montana Democratic Party, voiced opposition to the bill because it instructs doctors to comply with a law that has already been declared unconstitutional. He urged that the proposal be tabled.

Informational Testimony:

Al Smith, Montana Trial Lawyers Association (MTLA), said this bill is a good example of why damage caps are wrong and why the amount of damages should be left to the jury. If this bill got rid of all caps on punitive damages and medical malpractice, they could support it. This bill points out that the non-economic damage cap for medical malpractice most severely hits women and children. He said that one of the non-economic damages is loss of fertility, and there is a cap on that loss in Montana.

Questions from Committee Members and Responses: None.

Closing by Sponsor:

SEN. O'NEIL closed by saying that full judicial review of these cases needs to be reinstated, and asked for support of the bill.

HEARING ON SB 485

{Tape: 2; Side: B; Approx. Time Counter: 10.6}

Opening Statement by Sponsor:

SEN. JON ELLINGSON, SD 49, MISSOULA, opened the hearing on **SB 485**, a bill to establish a next-of-kin registry which will be housed within the Attorney General's office. He said that the statutes are very specific about the joint interests, obligations, and powers of a husband and wife, but the statutes are silent on the next-of-kin issue. This bill allows a tool for handling someone's personal affairs.

Comment: **SEN. MANGAN** left the room.

Proponents' Testimony:

Eric Schiedermayer, Montana Catholic Conference, read written testimony for the record.

EXHIBIT(jus42a09)

Anita Roessmann, Attorney for the Montana Advocacy Program, said she would like the Committee to think of this bill as one that

would benefit people with disabilities. They tend to experience medical crises more often and tend to have non-traditional family or support structures more than the rest of the population.

Having a simple way to register next-of-kin, and having a crisis plan in place is really important for people with disabilities. She noted that several times a year they get calls from people who are in the hospital and are unable to get visitation rights or other recognition for individuals who are the closest people in the world to them.

Charlie Briggs, representing several disability associations in Montana, expressed support for the bill.

Scott Crichton, Executive Director, American Civil Liberties Union (ACLU), said this goes a long way toward helping the rights of single people and urged support.

Terry Kendrick, Montana Human Rights Network, expressed support.

Karl Olson, Director, PRIDE, sent written testimony.

[EXHIBIT\(jus42a10\)](#)

Opponents' Testimony: None.

Informational Testimony: None.

Questions from Committee Members and Responses: None.

Closing by Sponsor:

SEN. ELLINGSON closed by thanking the Committee and urging favorable consideration of SB 485.

Comment: SEN. CROMLEY entered the room.

EXECUTIVE ACTION ON SB 485

{Tape: 2; Side: B; Approx. Time Counter: 22.6}

Motion: **SEN. ELLINGSON** moved that SB 485 DO PASS.

Discussion: **SEN. ELLINGSON** said he did not sign the Fiscal Note because he did not feel it would cost \$50,000/year to set up the registry. He said that the Attorney General's office already has a site in operation and it could be expanded to include this.

SEN. MCGEE asked if this could be done, currently, with a Living Will or something similar. **SEN. ELLINGSON** said that a Durable Power of Attorney for Healthcare Purposes allows designation of someone else to make decisions if an individual is not able to. There is no provision for designating who has a right to visit a patient in a nursing home or a hospital, and no designation for someone to receive the individual's body at their death.

SEN. CROMLEY asked if there should be anything more specific about the fee in the bill. **SEN. ELLINGSON** said it gives the Attorney General the ability to impose the fee through rules. He felt they should have the opportunity to set the fee.

SEN. MCGEE asked if the Attorney General's office in New Section 3 of the bill is considered to be a department. **Ms. Lane** answered, yes, and will check to make sure that is not a problem.

SEN. CURTISS asked why the registry wasn't being put in the Department of Human Services. **SEN. ELLINGSON** said the Attorney General expressed an interest in having this registry. They are already putting into place another registry that complements this one, so it might be cheaper to put it there.

SEN. CURTISS said this gives total rule-making ability to the Attorney General, and asked if there will be a public hearing initiated in response to the proposed rules he will be making.

SEN. ELLINGSON said there needed to be public input whenever an agency makes rules. Notice will go out for public participation, and the input will be considered.

SEN. CURTISS asked if the rules would be printed in the Administrative Register. **SEN. ELLINGSON** said that was correct.

Vote: Motion carried 9-3 by voice vote with **SEN. CURTISS**, **SEN. MCGEE**, and **SEN. PERRY** voting no. **SEN. MANGAN** voted yes by proxy.

EXECUTIVE ACTION ON SB 464

{Tape: 3; Side: A; Approx. Time Counter: 0.3}

Motion: **SEN. O'NEIL** moved that SB 464 DO PASS.

Discussion: **SEN. O'NEIL** explained that the bill would give the State Legislature some voice in the U.S. Congress, which they used to have prior to the 17th Amendment. This bill works with the 17th Amendment and does not repeal it.

SEN. CURTISS said she would support the bill. She noted that all that can be done now as a legislature is to submit resolutions, and regardless of what is sent, they often have their own agenda.

Vote: Motion failed 5-7 by roll call vote with **SEN. CURTISS**, **SEN. MCGEE**, **SEN. O'NEIL**, **SEN. PERRY**, and **SEN. SHOCKLEY** voting aye. **SEN. MANGAN** voted no by proxy.

Motion/Vote: **SEN. LASLOVICH** moved that SB 464 BE TABLED AND THE VOTE REVERSED. Motion carried unanimously. **SEN. MANGAN** voted yes by proxy.

EXECUTIVE ACTION ON SB 452

{Tape: 3; Side: A; Approx. Time Counter: 4.5}

Motion: **SEN. ELLINGSON** moved to bring SB 452 off the table for the purpose of adding an amendment and reconsidering the bill.

Discussion: **SEN. ELLINGSON** said his amendment would make the no-contact order effective for up to 36 hours, so it would not be so onerous on the person who was arrested.

SEN. SHOCKLEY said, "Orders are for courts, not for policemen, regardless of the time".

SEN. PERRY said he favored the motion.

SEN. LASLOVICH opposed the motion and said that the Supreme Court of Utah made a ruling on a similar statute in Utah. They said it was unconstitutional because of due process concerns.

Vote: Motion passed 7-5 by roll call vote with **SEN. CURTISS**, **SEN. LASLOVICH**, **SEN. MCGEE**, **SEN. O'NEIL**, and **SEN. SHOCKLEY** voting no. **SEN. MANGAN** voted yes by proxy.

Motion: **SEN. ELLINGSON** moved that SB 452 DO PASS.

Motion/Vote: **SEN. ELLINGSON** moved that CONCEPTUAL AMENDMENT to change the no-contact order to 36 hours DO PASS. Motion carried 10-2 by voice vote with **SEN. MCGEE** and **SEN. SHOCKLEY** voting no. **SEN. MANGAN** voted yes by proxy.

Motion: **SEN. ELLINGSON** moved that SB 452 DO PASS AS AMENDED.

Discussion: SEN. SHOCKLEY said this is not a good idea, but it also is not needed, and explained current law. If they are in jail, the restraining order is not needed.

SEN. ELLINGSON said he understood from testimony that the accused is arrested, brought to jail, and then makes phone calls to the person that he probably abused. Often those phone calls are intimidating and threatening, and result in the alleged victim withdrawing the complaint, so it doesn't go anywhere. He emphasized that this kind of protection is needed for the probable victims of domestic violence.

SEN. SHOCKLEY said that phone calls from jail are "collect calls". He did not think the argument had merit.

Vote: Motion carried 9-3 by roll call vote with SEN. LASLOVICH, SEN. MCGEE, and SEN. SHOCKLEY voting no. SEN. MANGAN voted yes by proxy.

Comment: Committee Meeting recessed until 1:19 PM. All members were present for the afternoon portion of the meeting.

EXECUTIVE ACTION ON SB 473

{Tape: 4; Side: A; Approx. Time Counter: 0.5}

Motion: SEN. SHOCKLEY moved that SB 473 DO PASS.

Motion: SEN. O'NEIL moved that AMENDMENT DO PASS.

Discussion: SEN. MANGAN asked whether the Amendment is within the scope of the title. Greg Petesch, Director, Legal Services Division, said he felt that the Amendment changes the purpose of the bill, and the title is not broad enough.

SEN. O'NEIL withdrew the Amendment.

CHAIRMAN WHEAT asked for discussion on the bill. SEN. O'NEIL said the bill provides protection for minors who are receiving abortions.

SEN. CURTISS asked for clarification of Mr. Petesch's comments. CHAIRMAN WHEAT explained that the title of the bill was not broad enough to incorporate all of the proposed amendments.

Vote: Motion failed 4-8 by voice vote with SEN. CURTISS, SEN. MCGEE, SEN. O'NEIL, and SEN. PERRY voting aye.

Motion/Vote: SEN. MANGAN moved that SB 473 BE TABLED AND THE VOTE REVERSED. Motion carried 11-1 by voice vote with SEN. O'NEIL voting no.

EXECUTIVE ACTION ON SB 474

{Tape: 4; Side: A; Approx. Time Counter: 5.5}

Motion: SEN. O'NEIL moved that SB 474 DO PASS.

Discussion: SEN. O'NEIL explained that SB 474 allows the legislature to say who can take the State Bar exam. It does not take away the Supreme Court's authority to regulate the practice of law.

Vote: Motion failed 5-7 by roll call vote with SEN. CURTISS, SEN. MCGEE, SEN. O'NEIL, SEN. PERRY and SEN. SHOCKLEY voting aye.

Motion/Vote: SEN. MANGAN moved that SB 474 BE TABLED AND THE VOTE REVERSED. Motion carried 11-1 by voice vote with SEN. O'NEIL voting no.

EXECUTIVE ACTION ON SB 475

{Tape: 4; Side: A; Approx. Time Counter: 7.8}

Motion: SEN. O'NEIL moved that SB 475 DO PASS.

Discussion: SEN. O'NEIL said SB 475 will change 37-61-210, of the Montana Code, to make it a definitive statement, rather than an open-ended statement. He asked Mr. Petsch to explain the bill.

Greg Petesch explained the bill. This bill provides that, except in cases of fraud, no other penalty can be imposed on a person for providing advice in the course of their profession or occupation. The only penalty for the unauthorized practice of law would be a contempt citation.

Vote: Motion failed 5-7 by voice vote with SEN. CURTISS, SEN. MCGEE, SEN. O'NEIL, SEN. PERRY, and SEN. SHOCKLEY voting aye.

Motion/Vote: SEN. MANGAN moved that SB 475 BE TABLED AND THE VOTE REVERSED. Motion carried 11-1 by voice vote with SEN. O'NEIL voting no.

EXECUTIVE ACTION ON SB 476

{Tape: 4; Side: A; Approx. Time Counter: 7.8}

Motion: SEN. O'NEIL moved that SB 476 DO PASS.

Discussion: SEN. O'NEIL explained that the bill addresses mediation. He said that not every decision should be litigated, and that it is fairer to mediate some items.

SEN. CURTISS commented that SEN. O'NEIL has a big heart and is well-respected in his community. She said that he should not be eliminated from assisting people that need mediation just because he is not an attorney, and that she would support the bill.

CHAIRMAN WHEAT said the bill addresses the issue of finding various ways to provide poor folks with representation, whether it is with a lawyer or someone who is a paralegal, etc.

Vote: Motion failed 4-8 by voice vote with SEN. CURTISS, SEN. MCGEE, SEN. O'NEIL, and SEN. PERRY voting aye.

Motion/Vote: SEN. MANGAN moved that SB 476 BE TABLED AND THE VOTE REVERSED. Motion carried 11-1 by voice vote with SEN. O'NEIL voting no.

EXECUTIVE ACTION ON SB 351

{Tape: 4; Side: A; Approx. Time Counter: 15}

Motion: SEN. MCGEE moved to take SB 351 off the table for the purpose of reconsideration.

Discussion: SEN. MCGEE explained this is the bill on gender discrimination in insurance. He said, "I don't want my daughters to have to pay insurance premiums for your sons".

After talking with SEN. LASLOVICH, CHAIRMAN WHEAT determined this bill had not been tabled; the vote had been tied 6-6 in Committee. SEN. MCGEE withdrew his motion to reconsider.

Motion/Vote: SEN. MCGEE moved that SB 351 DO PASS. Motion failed 5-7 by roll call vote with SEN. CURTISS, SEN. MCGEE, SEN. O'NEIL, SEN. PERRY, and SEN. SHOCKLEY voting aye.

Motion/Vote: SEN. MANGAN moved that SB 351 BE TABLED AND THE VOTE REVERSED. Motion carried 11-1 by voice vote with SEN. MCGEE voting no.

{Tape: 4; Side: A; Approx. Time Counter: 18.9}

With no further business, **CHAIRMAN WHEAT** adjourned the meeting.

ADJOURNMENT

Adjournment: 1:38 P.M.

SEN. MIKE WHEAT, Chairman

MARI PRUETT, Secretary

LINDA KEIM, Transcriber

MW/mp/lk

Additional Exhibits:

EXHIBIT ([jus42aad0.PDF](#))