JUDICIARY COMMITTEE
February 1, 1977

The regular meeting on the House Judiciary Committee was called to order by Chairman Scully at 8:00 a.m. in room 436 of the Capitol Building, Helena, Montana on Tuesday. Members not in attendance were Representatives Day, Dussault, Ramirez and Seifert.

Scheduled for hearing were House Bills 279, 498, 500 and 513.

HOUSE BILL #513:

REPRESENTATIVE GILLIGAN, DISTRICT #38:
This bill is concerned with the carrying of concealed weapons. We added a new section about sawed-off shotguns, with the fine being 500 dollars or imprisonment in the county jail for a period not exceeding 6 months, or by both such fine and imprisonment. There was another change in the repealer, page 3, outside of a city or town. It is not illegal in the entire state.

TOM HONZEL, COUNTY ATTORNEYS:
I would ask that 94-A-210 and 94-A-211 be repealed, lines 23 and 24 should be stricken. These are the penalty sections and are present law. Our intent is that we have tried to consolidate the two sections, change within or without the city limits and make the penalty the same.

PROPONENT, TOM DOWLING, COUNTY ATTORNEYS:
We support the bill.

REPRESENTATIVE DUSSAULT CAME IN.

There was discussion about how a sawed-off shotgun could be called a concealed weapon or if it could even be concealed. Mr. Honzel showed how it might be done, with an overcoat or oversized pockets, etc. It was mentioned that it might be put into a pantleg also.

The hearing closed on House Bill #513.

THE HEARING OPENED ON HOUSE BILL #500:

REPRESENTATIVE DRISCOLL, DISTRICT #91:
This bill is one of many introduced by the post-audit committee, it came up after the state tax appeals board. There is no statute that makes the attorney general the overriding opinion. The intent is very simple. This would specify the effect of an attorney generals opinion and clarify his duties.

MIKE McGRATH, ATTORNEY GENERALS OFFICE:
We are very much in support. It is a cheaper method of getting questions answered. There isn't any statute that gives authority over other attorneys.

TOM DOWLING, MONTANA COUNTY ATTORNEYS ASSOCIATION:
We would support the concept of this bill, because of the conflict between the executive and attorney generals office. The attorney generals office should have the controlling say.

REPRESENTATIVE ROTH:
Do you mean that this was not the law about the attorney general.

REPRESENTATIVE DRISCOLL:
Yes, that is right. We have so much potential for conflict.

REPRESENTATIVE HAND:
What is the function of the post-audit committee.

REPRESENTATIVE DRISCOLL:
An interim committee that audits on a schedule, might audit a board, etc. We would pick up irregularities on the audit.

REPRESENTATIVE TEAGUE:
Might there be a conflict between the attorney general and the county attorneys?

MR. DOWLING:
That situation does occur.

The hearing closed on House Bill #500.

CHAIRMAN SCULLY asked Representative Teague to take over the meeting in order that he might present two of his bills.

THE HEARING OPENED ON HOUSE BILLS 279 and 498:

REPRESENTATIVE SCULLY, DISTRICT #76:
There is one thread that runs through all of the malpractice bills. There is only one bill that I am aware of that speaks to this problem, concerning frivolous actions. This bill is basically taken from California law. The plaintiff has to show a certificate of merit showing that he has met with a physician in the state that states that the case has merit. The judge may impose a monetary penalty against the attorney. You might find that another physician will not take a stand (about the clients case), you have an obligation that is above that, to decide it on its merit. This bill, in one respect, is different from California. That deals with specialists.

There are 2 reasons the trial lawyers might oppose it. 1. the unavailability of the test from the medical profession and 2. the obligation to decide if the case has merit. We don't see this problem in any other profession at this time. I don't think any bill will be an all-out cure for the problem.

This particular bill will have an impact and if it doesn't then the district courts are not cleaning out their profession and if that is the case, then it should be brought to our attention.

JERRY LEINDORF, MONTANA MEDICAL ASSOCIATION:
This bill does prevent frivolous lawsuits. Now, how this bill might help us. Of the premium dollar about 16% goes to the injured patient. In this bill we are concerned about the money that never gets to the patient.

TOM DOWLING, MONTANA TRIAL LAWYERS:
How do you try a case on medical malpractice without expert testimony? There has to be a physician that is going to testify. You have the locality rule. Why limit it to the medical profession. This bill is defective in that manner. How about a certificate of no merit. Lets be fair. If the system has problems it is not always one-sided. Basically, those are our comments.

GREG MORGAN, STATE BAR OF MONTANA:
I think we could be hurt by this bill. Should this bill pass it will provide the attorney on the other side with all the information he would need to file a malicious prosecution. We are in the second year of a mandatory bar examination in Montana. When I sign a complaint I sign it with rule 11 in mind. The only thing worse than cutting off a lawyers tongue is cutting off his license.

W. S. MURFITT, STATE BAR OF MONTANA:
I am disturbed by this bill. I think every lawyer in Montana takes his oath seriously. If it is clear-cut that there is no possibility of recovery by your client then I agree, on the other hand as a lawyer, I cannot. I cannot impose my will upon the client. This is the beginning, as I interpret it, to start limiting. We want the right to have medical malpractice eliminated in the courts and that is not right. All a lawyer is, is an advocate. Am I going to be conservative as some lawyers have been, stepped out in front and protested the rights of the people. I can envision this happening, requiring you to get a physician in the state of Montana. If you were to say that, if this bill is passed, and requires him to say that before he files a lawsuit that the medical profession will respond, I don't believe this is the direction we want to take. We are digressing, not progressing. People don't know what the statute of limitations is until he walks into your office and you tell him.

He went on to discuss the possiblities of what might happen in limiting the rights of people. I think it is lousy legislation. I think this committee ought to bury it deeply.

REPRESENTATIVE SCULLY:
I am happy to see the lawyers showing some emotion. I am not so sure

that the good etchings of yesteryear are here to stay. We keep hearing about these malpractice bills as part of a package. There is no package. Some apply to general tort review and some apply to clients rights.

I have the obligation of advocacy. If this bill has the bar association in a tremor, then I am surprised, because I don't think it does. Talk about a conspiracy of silence, from lawyers. The only response was from the medical profession. I don't mind the amendment of Mr. Dowlings concerning any licensed physician. I think this is one reason that we are having problmes in the legal profession. There is no way that we should recover a million dollars for one person. I don't think any one person is worth that much. However, I do appreciate the comments that have been made. I am sorry if they are hurt, but I think more people will be hurt by a frivolous law suit.

There followed general discussion about the discovery, in Montana, 3 years from date of discovery. Also discussion about rule 11.

REPRESENTATIVE KEYSER:
What is disciplinary action?

MR. MORGAN:
The most severe is losing your license. We would hope that some of these malpractice dollars will be spent on follow-up for these frivolous claims.

REPRESENTATIVE LORY:
In this certificate of merit, what is the responsibliity back on the physician.

REPRESENTATIVE SCULLY:
I would imagine that the attorney would leave some kind of justification of the reasons set forth. Most problems in malpractice are created after the filing of the case.

REPRESENTATIVE CONROY:
Would there not be fear on the part of the doctor to testify against a member of his own profession, wouldn't there be censure?

REPRESENTATIVE SCULLY:
You are talking about two different things. You have to have someone take that part of the case eventually. There aren't too many sanctions leveled with this little gem, (rule 11). There are an awful lot of cases that were there that shouldn't have been.

REPRESENTATIVE ROTH:
Is it a fact or a rumor that there are more of these cases filed?

MR. MURFITT:
The medical malpractice case is a hard case to win. I recognize that doctors have to be positive.

REPRESENTATIVE ROTH:
I cannot understand why this certificate of merit would cause so many problems. Is this hurt feelings or guilt feelings.

REPRESENTATIVE EUDAILY:
Will the consulting physician have any liability? Will his insurance have to cover him, will it have any effect on his insurance?

REPRESENTATIVE SCULLY:
I don't think so. The rates are figured on his skill or level of practice.

MR. DOWLING:
There was another bill earlier, this week, that very thing might be possible.

REPRESENTATIVE SCULLY:
I am getting tired of this package deal. I answered your question on the basis of this bill. The set of circumstances in California has not figured in the facts and figures in the insurance rates. I have gone through the whole inflationary figure and nowhere does it figure.

REPRESENTATIVE DAY:
Don't the insurance companies, in fact, base their premiums on the amount of claims paid.

MR. MURFITT:
By cutting out the frivolous suit this should save some amount of money.

REPRESENTATIVE DAY:
Assume a surgeon has to sue another surgeon. Won't he know that his rates will go up. It is my feeling that this will cause malpractice rates to rise. Is that not right?

MR. LEINDORF:
Yes, every good claim would.

The hearing closed on House Bill #279.

THE HEARING OPENED ON HOUSE BILL #498:

REPRESENTATIVE SCULLY:
This is another of the county attorneys package bills. It is, as a matter of fact. Everybody has subpoena power except the county

attorney. In many other states you have sort of a dual process. The other method is by grand jury. I guess the derivative of the bill is that people don't want to get involved. This bill speaks to the people on the fringe who might help bring about the filing of an action. The county attorneys throughout the state have a great need for this type of legislation. This bill would allow the county attorneys to make investigative inquiries through the subpoena process.

ROBERT L. DESCHAMPS, COUNTY ATTORNEY:
I would in fact, draft this bill or at least an earlier version of it. We researched about 2 months to see how it would apply in this state. Essentially, this bill, what it amounts to, is to give more investigative authority in criminal cases. In section 1, it puts in a safeguard that many other states do not have, and section 2 provides for the inquiry. Section 3 is the most controversial, concerning sel-incrimination and immunity, both transactional immunity and use immunity.

I think there are some serious problems with this present immunity statute. The immunity we are talking about here is the use immunity.

Section 3 also has a provision for privilege. Section 4 is the procedure whereby if you get a witness in another state, you get a subpoena here and it is enforced in the other state. In essence, there is a definite need for it.

MIKE McGRATH, ATTORNEY GENERALS OFFICE:
I would like to offer an amendment, on page 1, section 1, line 13, following; "investigate", insert; " alleged unlawful activity". We support this bill. This subpoena power is not present at all so it is very essential that some kind of subpoena power get placed on the books. It is much less cumbersome than a grand jury. This bill is not being proposed to circumvent the grand jury process. I like this bill, I like it a lot. It has some good safeguards. It must be issued by a court to prevent harassment, supported by an affidavit. There are also some provisions so that you could go into court and quash the subpoena.

The reason I suggest this amendment is because of the anti-trust violations. I support this bill and urge its passage.

TOM HONZEL, COUNTY ATTORNEY:
We support this bill. During the last session we had a bill that was killed in the Senate Judiciary Committee. We need the subpoena power. We are asking you to grant the subpoena power. I would ask that you accept the amendment and give it a do pass recommendation.

REPRESENTATIVE DUSSAULT:
Can you give me some idea of when it would be more appropriate to use this than a grand jury.

MR. McGRATH:
Where the anti-trust laws might be involved.

REPRESENTATIVE HAND:
Would it work for both civil and criminal cases.

MR. McGRATH:
With the amendment.

There were no further questions from the committee and the hearing closed on House Bill #498.

The meeting adjourned at 9:50 a.m.

JOHN P. SCULLY, CHAIRMAN

Mary Ellen Connelly

Mary Ellen Connelly, Secretary

each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

History: En. Sec. 10, Ch. 13, L. 1961.

Compiler's Note

This rule is identical with the Federal Rule.

DECISIONS UNDER FORMER LAW

Misjoinder of Causes

Where two causes of action are improperly united, a demurrer, and not a motion to separately state and number, is the proper remedy. McLean v. Dickson, 58 M 203, 209, 190 P 924.

Separate Statement of Causes

A demurrer cannot be invoked to cure a complaint containing several causes of action, defective because such causes are not separately stated and numbered as required by former statute. Roberts v. Sinnott, 55 M 369, 372, 177 P 252.

The objection that causes of action are not separately stated and numbered cannot be raised by demurrer, the proper remedy for such a defect being a motion to make the complaint more definite and certain by separately stating the causes of action. Jorud v. Woodside, 63 M 23, 25, 206 P 344.

(c) ADOPTION BY REFERENCE—EXHIBITS. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

History: En. Sec. 10, Ch. 13, L. 1961.

Compiler's Note

This rule is identical with the Federal Rule.

Collateral References

Pleadings⇐15, 307.

71 C.J.S. Pleading §§ 9, 371 et seq.

Maps, records, deeds, and papers allowed to complete or correct insufficient or inaccurate description in pleading. 111 ALR 1200.

Rule 11. Signing of pleadings.

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

History: En. Sec. 11, Ch. 13, L. 1961.

Commission Note

The proposed rule is identical with the Federal Rule, except for the omission of the sentence abrogating the rule in equity with respect to evidence to overcome an answer under oath. The sentence omitted would seem unnecessary in view of our statutory provisions on evidence.

Collateral References

Pleading⇐287-304.

71 C.J.S. Pleading §§ 339-366.

41 Am. Jur. 483, Pleading, §§ 278-287.