

MINUTES OF MEETING  
SENATE JUDICIARY COMMITTEE  
February 15, 1979

The thirty-eighth meeting of the Senate Judiciary Committee was called to order on the above date by Senator Everett R. Lensink in Room 331 of the Capitol building at 9:32 a.m.

ROLL CALL:

All members were present with the exception of Steve Brown, who was excused.

CONSIDERATION OF SENATE BILL 394:

This bill is an act to require extension of certain constitutional rights to a youth detained for investigation of questioning under the Montana Youth Court Act. Senator Stimatz stated that this bill was introduced at the request of the youth probation judge in Silver Bow County, and he said that HB 464 was on the same question. There seemed to be some confusion so Senator Lensink said that we would take up another bill while Senator Stimatz checked this out.

CONSIDERATION OF SENATE BILL 382:

Senator Thomas gave an explanation of this bill, which revises the law relating to time limitations for a proceeding alleging a youthful delinquent or in need of supervision, etc.

Steve Nelson, representing the Youth Justice Committee, stated that they were in favor of this bill.

Tom Honzel, representing the Association of County Attorneys, stated that they supported this bill.

Senator Towe moved that the bill do pass. The motion carried unanimously.

CONSIDERATION OF SENATE BILL 386:

This bill is an act to disapprove the supreme court's rules on disqualification and substitution of judges and to adopt the federal rule. Senator Blaylock stated that there were some problems in some of our multiple-judge districts and that the judges will not solve their own problems. He said that he has fought pay raises as he feels that they should get their own house in order before their pay is raised. He stated that lawyers are the only ones who really know how the system works, one lawyer said that he was not afraid to stand up and criticize a judge and that mockery laughter filled the room.

He read a statement from Judge Luedke, wherein he said that there is an imbalance that does not allow for the proper distribution of judges. He quoted statistics to show how much disparity there was which showed in one department they had only eleven cases and to a maximum of 106 cases in another department. He stated that the purpose of the bill is to cause our system to follow the federal rules: you must give a cause to disqualify a judge. He stated that this would stop the business of shopping for judges and he said that he is aware that some day he may be sorry if he ever has to appear before one of these judges and he felt that if something wasn't done, that the situation will just drag on.

Tom Honzel, representing the Montana Association of Counties, stated that their interest is one of criminal loads across the state. He said that county attorneys have a six-month speedy trial rule and this causes a number of problems and that one of these problems is the disqualifications of judges in these criminal matters.

J. Fred Bourdeau, the county attorney for Cascade County, stated that he was here to discuss this with the committee if they wished.

Mike Greely, the attorney general for the state of Montana, appeared in support of the elimination of disqualification in the criminal area of law and in the civil area.

Senator Turnage stated that he wants to go down as a proponent and he felt that if we are going to establish a respect for our court system that we ought to seriously consider doing away with the pre-emptory challenge on jurisdiction. He stated that he did not think any lawyer will dispute the fact that this is abused.

Jim Beck, Chief R/W Attorney for the Department of Highways, stated that they have nine lawyers on the staff, they try cases in almost every county in the state, and he gave examples of how judges give out these cases. He said that one judge had entered into a land development partnership with another lawyer and he stated he has trepidation going before the court with that particular judge.

Don Robison, a lawyer in private practice in Butte and representing the Montana Legal Protection Plan, stated that he was interested in the civil side rather than the criminal. He said that the reason they disqualify is that the attorneys feel that there is a disparity in treatment but that he felt that the bill would make the judges less accountable rather than more accountable.

J. C. Weingartner, representing the Montana Bar Association,

spoke in opposition to this bill and he said that this is not going to stop lawyers from shopping. He stated that the other reason why the federal rule doesn't work in Montana or other states is because our judges do not serve for a lifetime and our judges are elected by the people. He said that sometimes certain lawyers prefer to be before certain judges and some judges are referred to as hanging judges and he felt that if this bill passes, a lot of people will be denied a fair trial.

Mike Meloy, representing the Montana Trial Lawyers Association, stated that this bill not only will not prevent the abuses, but will give a substantial advantage to the plaintiff's lawyers and county attorneys particularly in those districts where there are more than one judge. He stated that some county attorneys just wait for a judge's number to come up and then file that case and he said that the defense attorney does not have that option. He further said that we would profit by this bill but we oppose this matter.

He also explained that he knew how difficult it is for a judge to have a pre-emptory challenge and he stated that he knows that the judge takes that challenge very personally, that he knows how difficult it is for a lawyer to exercise a pre-emptory challenge. He noted that judges are human and are subject to the same kind of prejudices that everyone is and that he therefore would oppose this bill.

Senator Blaylock stated that he had to disagree with Mike Meloy on pre-emptory disqualifications and he explained that some lawyers say when a certain judge comes up, they just automatically disqualify and he wondered how does the lay public really get this problem solved and the courts are the losers and the judges are our servants.

Senator O'Hara stated that the problem seems to be in the attorneys picking which judge and he wondered if this could be done away with. Senator Turnage said no. Senator Towe stated that there were four judges in Yellowstone County and they operate on a rotation basis.

Senator Turnage said that this started in Butte, Montana and that they probably needed it then. He stated that the prejudice may be against a client, not a lawyer and the prejudice passes back and forth between the judges and the lawyers and he did not think there is any mechanical way to solve it.

Senator Towe and Turnage raised some questions about what the federal law really is.

Senator Lensink stated that not all states had copper barons and wondered how the other states are in relation to this. Senator Van Valkenburg stated that the system is generally in effect in the western part of the country but not in the eastern. He said that the supreme court changed this just a year ago and you are not going to let any time pass and you are just judging on what has happened in one year. He said that it was changed to ten days after the case was filed rather than fifteen days before trial, and that there has not been sufficient time to see if a change in circumstances has helped.

Senator Blaylock said that he didn't think what the supreme court laid down is really going to change this. He felt that we are working our good judges to death literally; and that he means one who is fair, knows the law and knows procedure and we load him up. He said where one had 106 trials and the other had eleven that this is not a good system and he did not think this ruling was going to change that.

Senator Towe asked if he really thought this was going to change that system and he wondered why they didn't submit this to the judicial standards committee and raise these questions with them. He said that this very thing has been brought to them before and maybe one more complaint might solve the problem.

Senator Blaylock stated that there was not just one, and the lawyers tell him so, and they never lie.

There were no further comments and questions and hearing on this bill was closed.

CONSIDERATION OF SENATE BILL 444:

This is an act to revise the rights of an unwed father. Senator Story stated that he was trying to see what he could do to improve the rules of adoption and would like to make things easier for adoptive parents and perhaps, the woman who carried the child. He stated that there was an anomaly - a mother can abort this child without any father's consent, but if she chooses to place this child up for adoption, then she has to get this man's consent, if he can even be found. He stated as to the right of the unwed father, any right should be fairly minute. He said that SRS has to chase this man down and see if he is agreeable to an adoption and he stated that in this bill he is able to retain this right, but he must assert that right. He said that quite often the woman who is bearing this child doesn't like this guy, and she feels that if she identifies him he will obtain some hold over her that she does not want, and she doesn't want to have anything to do with him.

There were no further proponents.

Alan Cain, representing the Montana Children's Home & Hospital, at Shodair, said that he agreed wholeheartedly with everything that Senator Story said, but he stated that they are interested in making as sure as we can that out adoptive parents are not disturbed. He said he dreams at night of some father coming to our agency and starting a lawsuit forcing us to tell him where that child has been placed. He said that traditionally, the fathers of illegitimate children have been thought to have no rights and that the mother has care, custody and control. He stated that unfortunately, a case arose in Illinois - Stanley vs. Illinois - which involved a common law marriage. The mother died, he had raised the children, he didn't seek custody and all he wanted to do was to keep his children. The supreme court looked at the situation, made some statements about what the rights of an illegitimate child were. He said that our next legislature changed not only this legislation that is to be amended, but changed the statute which said both the mother and child have an equal right. He stated that the committee do not pass this bill at this time.

Joe Mazurek, representing the Catholic Social Services of Montana, stated that he did not think he could say to his staff that you can rely on this bill and that they are doing their best with what we consider a bad ruling.

Tom Honzel, representing the Montana Association of County Attorneys, stated that they have to agree for the same reasons.

Burt Annin, representing the Social Rehabilitation Services, wanted to add their support to these statements.

Senator Story stated that the future of this bill looks bleak, but wondered if the last sentence in this would not help.

Mr. Masurek said that what concerns him with a statement such as that is that it says by statute, the mother and father have equal rights and unless you repealed that section along with this bill, that it would not mean anything.

Senator O'Hara asked how did the supreme court come to this conclusion. Senator Towe said that there was a peculiar law in Illinois and the kids were in the teens at the time of the mother's death. The state came in and said that they were illegitimate and that they were going to take them and place them somewhere else. The supreme court reversed the state of Illinois and made a statement that fathers do have some rights. Senator Towe said that the court might reverse itself, but if they do not go out and look for the father, look at the jeopardy that is placed on the adoptive parents.

There were no further questions and no comments. The hearing on this bill was closed.

CONSIDERATION OF SENATE BILL 393:

This is an act to generally revise the laws relating to the treatment of the mentally ill. Senator Towe said that he wanted to acknowledge the help of Valencia Lane who drafted most of this bill. Senator Towe went over this bill, section by section. He introduced Dr. Donald Harr, psychologist in Billings.

Dr. Harr, representing the Montana Psychiatrist Association, stated that he saw many instances from the psychiatrist point of view where the person is legally mentally ill, but does not meet the legal definition of "seriously mentally ill". He gave an example of a 40-year old divorcee who had sole custody of minor children and these children were left to care for themselves because of the mother's mental disorder. He also gave an example of a 40-year old single person who was jailed because of mental disorder wherein an attempt had been made two weeks previously to treat him but he did not meet the legal medical definition.

Jim Johnson stated that he represents more of these people from Warm Springs and this is his job. He stated that voluntary commitment can be a very coercive thing. He said that on page 5, lines 16 and 21 that this is a bad amendment and on page 10, this has the effect of committing people to the hospital without a hearing, there is going to be cost of transportation, etc., it is indefinite and he wondered how long a person is going to be held. He also said that on page 11, he had some problems on the reports. He also stated that on page 18, he is somewhat uncertain about this, and he thinks there are going to be patients who want to see their records.

There were no further proponents and no opponents. There were no questions and the hearing was closed.

Dr. Harr also gave his views on the other bill, which would eliminate insanity as a defense and he stated that he had a great deal of concern in this matter. He said that psychologists throughout the state realize the abuse of the plea of legal insanity as a defense. He stated that he is generally in favor of the concept of separating the two.

Senator Towe requested that this bill be held up for awhile and the request was granted.

There being no further business, the meeting was adjourned.

*Everett R. Lensink*  
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SENATOR EVERETT R. LENSINK, Chairman  
Senate Judiciary Committee

Date July 15, 1979

ROLL CALL

JUDICIARY COMMITTEE

46th LEGISLATIVE SESSION - 1979

NAME	PRESENT	ABSENT	EXCUSED
Lensink, Everett R., Chr. (R)	✓		
Olson, S. A., V. Chr. (R)	✓		
Turnage, Jean A. (R)	✓		
O'Hara, Jesse A. (R)	✓		
Anderson, Mike (R)	✓		
Galt, Jack E. (R)	✓		
Towe, Thomas E. (D)	✓		
Brown, Steve (D)			✓
Van Valkenburg, Fred (D)	✓		
Healy, John E. (Jack) (D)	✓		

Each Day Attach to Minutes.

DATE Feb 15, 1979

COMMITTEE ON Justice

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Opp
Donald C. Redisa	Montana Legal Protective Plan	5 386		X
ALAN F. CAIN	MONTANA CHILDREN'S HOMES & HO.-O.	5 444		X
Tom Hensel	County Attorney	386 382 5 386	X	
J. FRED BOURDEAU	County Attorney Casualty	386	X	
James Don Johnson	Montana Legal Services	393	X	
Joseph Watson				
Karen Nikota	League of Women Voters			
Donald L. Harr	Montana Psychiatric Assoc.	393	X	
Steve Nelson	Youth Justice Council	382	X	
Mark Full	ATTORNEY GENERAL	5 386	X	
James M. Fitch	Hyamp	5 386		X
J.C. Wemacke	State Bar of Mont.	386		X
John Frankino	Cath. Soc. Serv. of Mt.	444		
Mike Abney	Mont. Supreme Court	586		
Jim Brown	Mental Health Assn.	393		
Phil Powers	Dept. of Institutions	393	X	



TO: Senate Judiciary Committee

FROM: James Dorr Johnson  
Montana Legal Services Association

RE: S.B. 393 - An act to generally revise the laws relating to the treatment of the mentally ill.

Except for the following provisions we endorse the above bill:

1. On page 5, lines 16-21, the proposed amendment should be stricken. Mental health directors are not experts in medicaid, and other government and private benefits. The effect of this would be to coerce poor people into going to Warm Springs because providers thought they wouldn't be able to pay medical bills. It would be grossly unfair to persons who can reconstitute fairly quickly in a community hospital but who don't have a place to return to if they're removed from the community.
2. On page 3, line 25; page 4, line 1 - "severe psychological injury" should be stricken. The phrase is extremely vague and the words will mean what the professionals say they mean. This is an unfortunate innovation where people's freedom is at stake.
3. On page 10, the underlined material in lines 4-7 should be stricken. The effect of this provision would be to commit persons for an indefinite period of time awaiting the actual commitment hearing. It would deny respondents a speedy hearing.
4. On page 11, lines 24 and 25 and page 12 lines 1-3, this provision is intended to eliminate hearsay in professionals' reports taken from hospital records concerning actions of respondents. However, unless the reports are denominated investigative reports under Rule 803 (8), M.C.A. rather than statements for purposes of medical diagnosis under Rule 803 (4), M.C.A. many courts will continue to allow them as exceptions to the hearsay rule.
5. On page 12, line 6 - Professional persons should not be allowed to testify to seriously mentally ill (the ultimate fact) because in it is freely admitted by mainline professionals that they are not experts in predicting dangerous behavior.

Alan Stone, M.D., Professor of Law and Psychiatry at Harvard wrote: "The law...asks the psychiatrist to prognosticate dangerous behavior. That is absurd because it is a rare event and the capacity for such prognostication is absent. What the mental health professional can prognosticate is the mental state and the likley course of the illness of the patient." Mental Health and Law: A System in Transition, N.I.M.H. (1975)

Thus professionals should not be allowed to testify to the ultimate issue.

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6. On page 18, lines 12 and 13 - The meaning of this previously was that persons authorized by patients could have records and that records were available to the Board of Visitors. Now it means that records are available to persons only after approval by the Board of Visitors. There is no reason why the Board of Visitors should have this authority.