

MINUTES

MONTANA SENATE 52nd LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Chairman Dick Pinsoneault, on February 13, 1991,
at 10:00 a.m.

ROLL CALL

Members Present:

Dick Pinsoneault, Chairman (D)
Bill Yellowtail, Vice Chairman (D)
Robert Brown (R)
Bruce Crippen (R)
Steve Doherty (D)
Lorents Grosfield (R)
Mike Halligan (D)
John Harp (R)
Joseph Mazurek (D)
David Rye (R)
Paul Svrcek (D)
Thomas Towe (D)

Members Excused: none

Staff Present: Valencia Lane (Legislative Council).

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

Announcements/Discussion:

CONFIRMATION HEARING ON JUDGE JAMES E. PURCELL

Presentation and Opening Statement:

Rick Bartos, Chief Legal Counsel for Governor Stan Stephens, told the Committee it was a privilege and honor to ask for favorable consideration of the nomination of Jim Purcell who was appointed to succeed District Judge Arnold Olson, deceased.

Mr. Bartos said Judge Purcell was born in Helena in December, 1929, and has resided in Butte since a very early age. He said the Judge was educated in the Butte school system and attended the then Montana College of Mineral Sciences in Butte. Mr. Bartos continued, saying, Judge Purcell earned his BS in Journalism, and his JD from the University of Montana Law School in 1958. He said the Judge was admitted to the Bar to practice law that same year.

Mr. Bartos explained that Judge Purcell earned an ad valorem (AV) rating by Martindale-Hubbell in 1977. He said this is the highest rating a practicing attorney can receive. Mr. Bartos told the Committee Judge Purcell first joined the firm of Myer and Myer, and left to form a new partnership in 1970.

Mr. Bartos stated that Jim Purcell has worked in contract law, probate, estates, personal injury and litigation, real estate, partnerships, and corporate law, in addition to representing "ma and pa" businesses and area citizens. He said Judge Purcell has extensive trial experience and, more recently, complex litigation in personal injury action, human rights and workers' compensation issues, and tax appeals.

Mr. Bartos advised the Committee that Judge Purcell has devoted a significant amount of time to community interests and community service. He said the Judge was elected to the school board in 1978, and served on the University of Montana Board of Visitors from 1980 to 1983, in addition to Kiwanis and Elks projects. He further stated that Judge Purcell was active in fund-raising for Butte Central High School and the Butte Symphony Orchestra, and has served on the State Bar Committee on Practice since 1978.

Mr. Bartos commented that Judge Purcell ranked first in order of ranking in the judicial nominating system. He reported that Judge William Murray of Butte and others had sent letters of endorsement. Mr. Bartos read from one of those letters.

Proponents' testimony:

Chief Justice Turnage said he supported the confirmation of Judge James Purcell to the District Court bench in Silverbow County. He told the Committee that, particularly in the past six years, he found Judge Purcell to be highly regarded by the Commission.

Chief Justice Turnage told the Committee that a high rating by Martindale-Hubbell is difficult to come by, as it is, in part, an evaluation by colleagues. He stated Judge Purcell would be a credit to the judiciary.

C.W. Leaphart, advised the Committee that he is the Secretary of the Judiciary Nominating Committee. He said he has known Judge Purcell since they were young men, as both individuals and attorneys. He stated that, from a personal standpoint, Judge Purcell deserves the nomination.

Mr. Leaphart reported that, although Judge Purcell was the Commission's first choice, that does not bind the Governor. He explained that the Governor was sent four names from the ten applications, and added that the Governor is aware of the lawsuit against Judge Purcell. He asked the Committee to support the nomination.

Don Peoples, former Chief Executive Officer, Butte/Silverbow, said he has known Judge Purcell for more than 20 years. He stated the Judge is a man of integrity and professionalism, and explained that Judge Purcell had represented Butte/Silverbow in a tax case against the Anaconda Company.

Mr. Peoples stated he has a great deal of respect for Judge Purcell as a ten-year member of the school board, and for his support of the Catholic high school in Butte. He said he took great pleasure in giving the highest personal and professional recommendation to Judge Purcell.

Chairman Pinsoneault advised those present of his phone conversation with attorneys representing the Merzlack's in their suit against Judge Purcell.

R.D. Corette, attorney representing Judge Purcell in the Merzlack suit, commented that lawsuits are filed all the time by anyone. He explained that this suit was filed against Judge Purcell six years after the accident occurred in which the Judge had represented the Merzlack's. He stated that there were four people in a car being driven down the highway near Superior, and a semi slid across the lane (to avoid hitting another truck), hitting them head-on.

Mr. Corette advised the Committee that Judge Harkin called Mr. Purcell's representing the Merzlack's a "theoretical conflict of interest". He said Mr. Purcell also represented the driver of the car (deceased) and his wife, and Judge Harkin found that Mr. Purcell should not have represented all the passengers since it was "theoretically possible" the driver could have been in error. Mr. Corette told the Committee that Judge Harkin found no malice or ill-will on the part of Mr. Purcell. He reported that Judge Harkin said Mr. Purcell should return the \$12,000 fee from the case which Mr. Purcell wants to do.

Mr. Corette stated that a \$50,000 settlement was reached within two years outside of court. He commented that he does not believe this is a reflection on Judge Purcell, and said he believes "hate mail" is a disturbance to the judicial system.

Mr. Corette told the Committee he is representing Judge Purcell in this situation. He said he has practiced both with and against Judge Purcell, and believes Mr. Purcell is an excellent judge. Mr. Corette reported that his uncle, John Hauk (deceased) had said Mr. Purcell was always a gentleman and an understanding person.

Mr. Corette said Judge Harkin found that the damages in the Merzlack case were fair, and he urged the Committee to approve the nomination of Judge Purcell.

Chairman Pinsoneault said he appreciated Mr. Corette's comments. He stated that the last thing he wants to do is let

people think the Committee is kicking the issue under the rug, and that is why this matter was brought to light.

Rick Orizotti, a practicing attorney in Butte and President of the Butte/Silverbow Bar Association, said Judge Mark Sullivan requested that he express his complete and total support of this confirmation. Mr. Orizotti said Judge Sullivan also wished to express high regard for Judge Purcell's honesty, integrity, and confidence.

Mr. Orizotti expressed the support of the Butte/Silverbow Bar Association, and told the Committee that although he has only been an attorney for ten years, Judge Purcell always treated him with a high degree of integrity.

Mr. Orizotti said he wished to underscore Judge Purcell's dedicated support of the schools in Butte, and noted that Mr. Purcell served as chairman for school funding the past ten years. He said he believed Judge Purcell would uphold the integrity of his office.

Jack Whalen, Butte, told the Committee he has been a practicing attorney for the past 26 years. He said Judge Purcell has worked long and hard as a contributing member to civic organization, and is very highly thought of because of his hard work. Mr. Whalen stated he believes Judge Purcell's integrity is beyond question.

Gus Gustafson, Butte, Montana Bank System, advised the Committee he has used Mr. Purcell's law firm on retainer for the past 22 years. Mr. Gustafson commented that he became very well acquainted with Judge Purcell in his role as the first chairman of the Council of Commissioners in 1977. He said Mr. Purcell was instrumental in getting Butte/Silverbow started.

Mike Sherwood, Montana Trial Lawyers Association, said he would be remiss in not supporting the nomination. He stated that the Plaintiff's Bar also supports the nomination, and made reference to Judge Purcell's even temperament.

Allen Chronister, State Bar of Montana, stated his support of the nomination.

Chairman Pinsoneault read Judge Purcell's letter to the Committee (Exhibit # 1), and said he had letters from W.W. Murray, Jr. and James W. Johnson in support of the nomination (Exhibits # 2).

Judge Purcell advised the Committee that he stood in this same room 33 years ago, swore to uphold the constitution, and became a lawyer. He said he was grateful the Governor thought enough of his qualifications to nominate him for this position. Judge Purcell stated that two years ago he ran against Judge Arnold Olson, had a great campaign, and lost by 900 votes. He told the Committee he

met with Judge Olson many times during that campaign to discuss issues. Judge Purcell said he was urged by supporters to apply for the position after Judge Olson's death. He stated he has tried to be honest and frank with all concerned.

Judge Purcell referred to his wife of 33 years and his two daughters, and told the Committee he could not say more than has already been said. He commented he is grateful for the people who have supported his nomination and confirmation, and said he hopes he can stand and rule impartially.

Judge Purcell said Butte is his home town, that he loves it, and that he hopes he can give something back to it.

Opponents' Testimony:

There were no opponents of the nomination.

Questions From Committee Members:

Chairman Pinsoneault asked Mr. Corette if there were anything he wished to address in the findings of Judge Harkin. Mr. Corette replied that the findings of fact and conclusions of law show where Judge Harkin stands. He asked the Committee to keep in mind that this matter is still standing before Judge Harkin on motions.

Mr. Corette advised the committee that Judge Harkin found no malice, and only conflict of interest on page 4 of his findings of fact and conclusions of law.

Chairman Pinsoneault stated that he strongly believes in capital punishment, and referred to a judge in Bozeman who insisted that a county attorney make a recommendation to the court on capital punishment. Chairman Pinsoneault asked for Judge Purcell's statement on the death penalty in Montana. Judge Purcell replied, "that is a difficult question to field". He said that, "if one takes on the responsibility of a district judge, then he or she is obligated to consider, under the statute and the facts as they exist, whether the penalty is warranted, and what he or she has to do."

Judge Purcell stated the situation may not be very good or he may not feel good about it, but it must be done with concern for the public. He said he told the Governor and the Nominating Commission the same thing, in answer to a similar question. Judge Purcell said he "supposed the judge should consider some recommendation from the jury or someone else, but should also look at it from a legal standpoint and how it fits in with the crime."

Senator Halligan asked Judge Purcell about the letter from Mrs. Spear, and said he was concerned how the Judge might deal with attorneys, especially those dealing with domestic relations. Judge Purcell replied that she was his first secretary 33 years ago. He said they both got angry over an incident in the law office and she

walked out. He stated that Mrs. Spear then took her unemployment compensation issue all the way to Helena where it was awarded.

Judge Purcell told the Committee he is a firm person and feels that if he tells someone to do something, it is in the best interest of the job. He commented that this was the second or third time this issue had come up with Mrs. Spear. Judge Purcell said he would have patience on the bench with attorneys, especially those dealing with domestic relations. He commented that he has been on the other side when judges became angry with counsel, and said that in his two months on the bench he has had no incidents of this nature. Judge Purcell further stated that one attorney made a remark about his patience.

Judge Purcell stated he could say he learned a lesson which he would carry over to the bench.

Senator Svrcek asked the Judge to address new legislation on fully informing juries on matters of law and fact, and how the judiciary would be served by this legislation. Judge Purcell replied he was unaware of the legislation.

Senator Rye told Judge Purcell he was sponsoring the legislation referred to by Senator Svrcek. He said the bill would be heard next week and would require that juries have the right to knowledge of the law, as well as the fact, in criminal cases only. Senator Rye used an example of a pre-meditated killing of an abusive husband by his wife. Judge Purcell replied he is not always sure that juries have followed the law in the past. He said he believes juries are becoming very intelligent, use their innate feelings, and listen very carefully. He said he has talked with jurors after they have made decisions, who have commented that a certain law doesn't seem to be very good.

Senator Harp asked Judge Purcell to respond to the comment that low judicial salaries are preventing the brightest and best attorneys from applying for positions as judges. Judge Purcell replied that, as a whole, District Court and Supreme Court Judges are underpaid. He commented that he has had a good, successful practice, and applied for the position as a change of pace and to do something for the legal profession and the community. Judge Purcell said the District Judges have been abreast of this issue.

Senator Harp asked Judge Purcell, if at age 59 and after a very successful practice, he believed salary increases would attract people in their 40s to apply for judicial positions. Judge Purcell replied that there are some real bright young attorneys, and that he believed salary increases would attract them to the bench. He said today's law schools are putting out students with a better feeling for the law now, as they are doing and learning more practical things. Judge Purcell added that 33 years ago law students learned more theory.

Closing by Mr. Bartos:

Rick Bartos told the Committee he had participated in six previous nominations, and said this nomination has demonstrated unsurpassed support of Judge Purcell. On behalf of Governor Stephens, Mr. Bartos asked the Committee to support the nomination.

EXECUTIVE ACTION ON CONFIRMATION HEARING

Motion:

Senator Mazurek commented that the procedure used for confirmation in State Administration is different this year. He said the Committee needs to request that a resolution be drafted.

Senator Mazurek made a motion that a resolution be drafted for consideration by the Committee, recommending the confirmation of Judge Purcell to the 2nd Judicial District of Butte/Silverbow.

Discussion:

There was no discussion.

Amendments, Discussion, and Votes:

There were none.

Recommendation and Vote:

The motion made by Senator Mazurek carried unanimously.

EXECUTIVE ACTION ON SENATE BILL 154

Motion:

Discussion:

Valencia Lane explained that amendments to the bill were provided Friday, February 8.

Senator Towe said he believed the retroactivity part of the bill should be limited. He commented that one case the Committee heard would still be open, and the second has been closed (except under rule 60). He said he believes remedy should be through a special claim through the Legislature.

Senator Towe read the proposed amendment (Exhibit # ³) and made a motion that it be approved.

Senator Halligan asked why the retroactivity clause needs to be kept in the bill. Senator Towe replied it must be clarified or the logical presumption will be the time the accident happened. He said the key is, "Has it been reduced to judgment?"

Valencia Lane reported that it could be interpreted that the law in effect at the time of the accident would rule in the case, and said she did not know if Senator Towe's language applies to settlement. Senator Towe replied that is already covered.

Senator Grosfield asked if it would help to say "reduced to final judgment" on page 3. Senator Towe replied he would agree to that language.

Senator Svrcek said he would like to back away from the amendments and get the Committee's sense on retroactivity, as there are more than two cases which need to be addressed. He said that if retroactivity were pulled altogether, it would preclude the Helena couple with the bad well from taking action against the responsible governmental entity. Senator Towe replied he did not believe that would be the effect. He stated that, unless the incident has passed the statute of limitation, those injured can still file as their case hasn't been reduced to judgment.

Senator Svrcek asked what would happen if no action has been filed as of this date. Senator Towe replied it would apply to whether the case has or has not been filed, and only those cases which have received final judgment are precluded.

Senator Mazurek questioned whether the Committee can "get away without retroactive language, since the bill deals with common law as it is now, which is a limited retroactivity". Senator Towe replied that it applies retroactively to the act within 1-2-109, MCA.

Senator Mazurek said he did not know if it were fair, but he did not want the retroactivity to be wide open.

Valencia Lane asked Senator Towe if he wanted to say "on or before the effective date of this act".

Senator Yellowtail asked if language could say "by the effective date". Senator Towe restated his motion as follows: "this act is effective upon passage and applies retroactively within the meaning of _____, MCA, to cause of actions not reduced to judgment on or before the effective date of the act." The motion carried unanimously.

Chairman Pinsoneault referred to the school board amendments (Exhibit #4). Valencia Lane said it may be appropriate to say "or school board policy". She said she was concerned with including "or other official action taken by school boards". She further

stated that Title 20 of statute lists duties of school boards, and that the amendment would be appropriate.

Chairman Pinsoneault said he would like to extend as much immunity to school boards as possible since their official duties are mandated by law, 20-3-324, MCA.

Senator Towe commented that the Committee has worked hard to get as far as it has on this issue, and said he did not understand the concerns. He said he believes the authors of the bill want to give immunity where it is entitled.

Senator Harp said he agreed with the amendment, but wanted to look at the duties of school boards. Senator Mazurek stated there are three pages of duties, covering everything, in the Code.

Chairman Pinsoneault said he had the same problem with immunity with cities and towns. He told the Committee his hope is to find middle ground.

Senator Grosfield said that without the amendment, it is clear that subsection (a) applied to policy decisions of school boards. Senator Towe replied that the declaration of a public policy clearly applies.

Chairman Pinsoneault noted that subsection (b) states explicitly that school boards be included.

Senator Towe commented that communities and school boards declare public policy, but don't make it law. He said buying a vehicle is not legislative action, but keeping kids in school for certain periods is.

Senator Grosfield asked if it would then be a policy decision if a school decided it did not have the money to keep ice off the steps. Senator Towe replied it would be.

Senator Halligan said he disagreed with Senator Towe's interpretation. He stated that the specific administrative action of not shoveling ice is negligence. Senator Towe replied that is exactly what he was trying to say.

Senator Pinsoneault submitted the amendments prepared by Alec Hansen and commented that they are "pretty verbose". Valencia Lane advised the Committee that these amendments are the same provided by Mr. Hansen at the hearing of SB 154.

Alec Hansen told the Committee the amendments were put together by Stan Kaleczyk, and said there are five amendments in the final set. Mr. Kaleczyk proceeded to go through the amendments for the Committee (Exhibit # 5).

Amendments, Discussion, and Votes:

Senator Towe made a motion that amendments 1, 2, and 3 be approved.

Senator Grosfield suggested modifying amendment 2, lines 17-18. He stated that conservation districts are referred to as local government entities in some places in statute, and as a subdivision of state government in others. He asked if "conservation districts" could be inserted before "school districts".

Senator Mazurek asked what term would encompass all such districts. Valencia Lane replied "political subdivisions of the state" is usually used.

Senator Mazurek stated that the language could be broadened as long as if soil conservation districts have legislative powers, it doesn't matter.

Senator Halligan asked what proper language would be. Mike Sherwood, Montana Trial Lawyers, replied he believes language should say "any other local government entity", in order to make amendments 2 and 3 consistent.

Senator Towe suggested adding "or other political subdivisions of it", and said he didn't believe it would actually be necessary.

Senator Mazurek commented that governmental entity should be defined as an entity and not referred to by its power. He said this should be done in subsection (b) and not subsection (a).

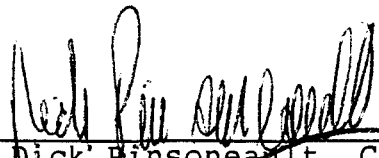
Chairman Pinsoneault advised the Committee that Senator Crippen suggested a subcommittee be appointed to study this matter. He appointed Senators Svrcek and Grosfield, and asked Senator Towe to chair.

Recommendation and Vote:

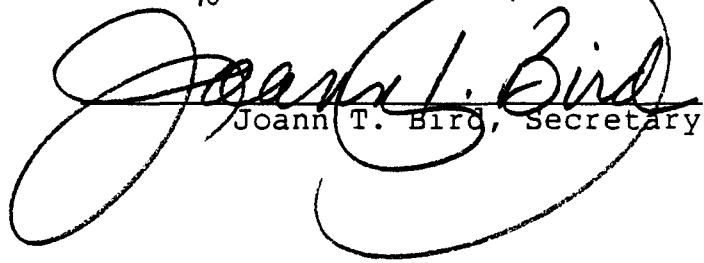
There was none.

ADJOURNMENT

Adjournment At: 12:00 noon



Senator Dick Hinson, Chairman



Joann T. Bird, Secretary

DP/jtb

ROLL CALL

SENATE JUDICIARY

COMMITTEE

52nd LEGISLATIVE SESSION -- 1999

Date 13 Feb 99

NAME	PRESENT	ABSENT	EXCUSED
Sen. Pinsonneault	✓		
Sen. Yellowtail	✓		
Sen. Brown	✓		
Sen. Crippen	✓		
Sen. Doherty	✓		
Sen. Grosfield	✓		
Sen. Halligan	✓		
Sen. Harp	✓		
Sen. Mazurek	✓		
Sen. Rye	✓		
Sen. Svrcek	✓		
Sen. Towe	✓		

Each day attach to minutes.

District Court of the State of Montana

SECOND JUDICIAL DISTRICT
SILVER BOW COUNTY COURTHOUSE
BUTTE, MONTANA 59701



CX /
2-13-91
Confirmation
Hearing

PAUL L. GRANT

Court Reporter
723-8262
Ext. 287

FEB. 9 1991

JAMES E. PURCELL

Judge, Dept. I
723-8262
Ext. 288

February 7, 1991

Senator Dick Pinsoneault
Montana State Senate
Capitol Building
Helena, MT 59620

Re : Confirmation Judicial Appointment

Dear Senator Pinsoneault:

As you are aware, my appointment as District Judge of the Second Judicial District is scheduled for confirmation before your Judiciary Committee on Wednesday, February 13, 1991 at 10:00 a.m.

I know that my confirmation has been discussed among at least some members of the Senate, but I wanted to let you know that I look forward to appearing before the Committee and I thank you for the opportunity to appear.

Sincerely,

James E. Purcell
District Judge
Second Judicial District

JEP:bao

THE LAW OFFICE OF
W. D. MURRAY, JR., P.C.

EX 2
2-13-91
JAN 26 1991
Confirmed
Heavily

January 22, 1991

The Hon. Dick Pinsoneault, Chairman
Judiciary Committee
State Senate
Capital Station
Helena, MT 59601

Dear Senator Pinsoneault:

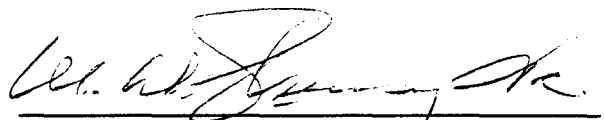
I write to urge confirmation of Honorable James E. Purcell as District Judge in the Second Judicial District.

As a practicing lawyer in Silver Bow County I want to assure you that Governor Stevens appointment of Jim Purcell was excellent for the people of this County and for the administration of justice.

Jim is a fair and compassionate man and more importantly an excellent trial lawyer. He is a concerned citizen who actively participated in public affairs and held public office prior to ascending to the bench.

These traits commend Jim to me, my friends and my clients and I hope that they move you to exercise your duty by confirming Jim Purcell as District Judge.

Best Personal Regards,


W.D. MURRAY, JR. P.C.
Attorney at Law

WDM/bjs
CC: Senate Judiciary Members

United States District Court
District of Montana
Butte, Montana 59701

JAN. 28 REC'D

Ad 2-13-91

Confirmation
Hearing

Chambers of
W. D. Murray
Senior United States District Judge

January 24, 1991

The Hon. Dick Pinsoneault, Chairman
Judiciary Committee
State Senate
Capital Station
Helena, MT 59601

RE: Confirmation of Hon. James E. Purcell

Dear Senator Pinsoneault:

Judicial ethics prohibits my involvement in political affairs.


However, professional ethics require that I do all things necessary and desirable to improve the quality of the administration of justice within our legal system.

With this in mind I considered it my duty, as a professional, and not as a political activity, to advise you that James E. Purcell is highly qualified and deserving of your confirmation as a District Judge for the State of Montana.

I have known Jim Purcell for decades and he has appeared frequently as an advocate before me in the United State District Court. At all such times, Mr. Purcell contributed well to the administration of justice by conducting himself as a well prepared professional, and ethical trial lawyer.

He will, in my opinion, be a very good trial Judge and a credit to the State of Montana and our profession.

Very Truly Yours,


W.D. Murray
U.S. District Judge

CC: Members Judiciary Committee

x2
2-13-91
Confirmation
Hearing
FEB. 9 1991

LAW OFFICES OF
WARDEN, CHRISTIANSEN, JOHNSON & BERG
221 FIRST AVENUE EAST
P. O. BOX 3038
KALISPELL, MONTANA 59903-3038

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BRUCE MCEVOY
THOMAS R. BOSTOCK
KENT P. SAXBY
MARK L. STERMITZ
KEVIN R. CALLAGHAN

February 6, 1991

OF COUNSEL
MERRITT N. WARDEN
TELEPHONE (406) 755-5535
TELEFAX (406) 756-9436

3.1

Senator Richard Pinsoneault
The Senate Judiciary Committee
State Capitol
Helena, Montana 59620

Dear Senator Pinsoneault:

I am writing to you in strong support of the confirmation of James E. Purcell as District Judge in the Second Judicial District in Butte-Silver Bow.

I am currently President elect of the State Bar of Montana and have been on the Board of Trustees for 9 years. In various capacities with the State Bar I have worked with Jim in several areas, primarily with him in his role representing the Commission on Practice of the State Supreme Court. I have nothing but admiration for Jim's many years of dedication to not only the practice of law, but volunteering many hours to the betterment of the profession from the ethical side of things. In addition, he practices what he preaches in the sense that in the few cases I have had against him, I have found him to be a very straightforward and competent practitioner. I have no doubt that he will make an excellent District Court Judge based upon his many years of trial practice.

My main purpose in writing this letter is to attempt to counteract the unfortunate hate mail campaign against him which is apparently being perpetrated by a disgruntled former employee

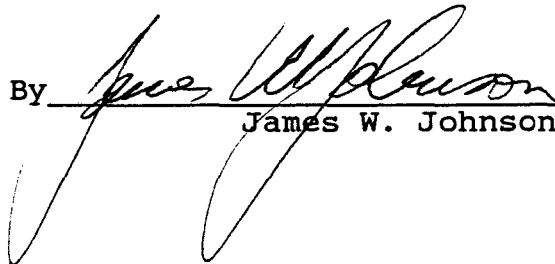
Ex. 2
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Confirmation
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Senator Richard Pinsoneault
February 6, 1991
Page 2

of his. I would hate to see that unfortunate circumstance
deprive Butte-Silver Bow of a highly qualified Judge.

Yours very truly,

WARDEN, CHRISTIANSEN, JOHNSON & BERG

By _____
James W. Johnson

JWJ:fmv

Judge told to refund fees in malpractice decision

By MICHAEL MOORE
of the Missoulian

James Purcell, recently appointed as a state district judge by Gov. Stan Stephens, was ordered Friday by District Judge Douglas Harkin to repay more than \$12,000 in fees paid by clients who sued him for legal malpractice.

The case arose from a November 1982 accident involving a former Montana couple now living in Snohomish County, Wash. Joe and Janene Merzlak, who both suffered injuries in the accident near Superior, sued Purcell, 60, in 1988.

Purcell was appointed to the bench to replace Arnold Olsen, who died Oct. 9. His appointment is still subject to confirmation by the state Senate in 1991, and it remains unclear whether Friday's decision will have any effect on that confirmation.

The Merzlak case went to bench trial in late October before Harkin, who deemed Purcell's representation negligent, but did not assess any punitive damages.

Harkin said Purcell's representation was negligent because he did not keep them advised of settlement negotiations, didn't obtain their consent on a settlement and settled their case without getting current information on their medical condition. Also, Purcell did not advise the Merzlaks of the possible causes of actions against the estate of the driver in whose car they were traveling when the accident occurred, Harkin said.

The Merzlaks were passengers in a car driven by Kerry Hansen, whose wife, Ruth, was also in the car when the group left Butte to travel to Spokane. On an icy interstate 90 near Superior, Kerry Hansen's car collided with a tractor trailer that had swerved to avoid a pickup truck disabled on the highway.

Kerry Hansen was killed, and the Merzlaks suffered serious injuries. They eventually contacted Purcell and met with him about three weeks after the accident. In addition to representing the Merzlaks, Purcell also represented the Kerry Hansen estate and

Ruth Hansen, who had worked in his office before the accident.

"At no time during his representation of Joe and Janene did Purcell inform them of a possible conflict of interest ..., " Harkin wrote in reference to the fact that the Merzlaks had potential claims against Kerry Hansen's estate and State Farm Insurance, which insured the car Hansen was driving.

In June 1983, Purcell told the Merzlaks that their case was worth about \$260,000. However, Purcell claimed that at a May 7, 1984 meeting in Butte the Merzlaks agreed to settle for whatever he thought was best. The Merzlaks said no such meeting ever took place, and Harkin said all available evidence indicates the meeting was not held.

In August 1984, Purcell settled with Livestock Transport Co. of Moses Lake, Wash., which owned that truck that collided with Hansen, for \$50,000.

"Purcell described it as a done deal and (said) that Joe and Janene could pick up a check at his office," Harkin states.

Purcell told Joe Merzlak at the time of the statement that the value of the Merzlak claim had dropped because a witness allegedly had seen Kerry Hansen speeding prior to the wreck. Merzlak had no reason to doubt Purcell's statements, Harkin wrote.

Although Purcell no longer represented the Merzlaks after June 1987, he continued to represent Ruth Hansen and her husband's estate in pending claims against other insurance companies involved in the case. The remainder of the claims settled out at \$25,000, which the Merzlaks and Hansen split.

According to Harkin's findings of fact, an attorney is not entitled to his fee when the basis of his representation is negligent. Because he spent little time on the Merzlaks' case, Purcell had reduced his fee to a quarter of the \$50,000 he got for the couple.

Harkin ordered that amount — \$12,398 plus interest — returned to the Merzlaks, and ordered Purcell to pay their court costs.

Amendments to Senate Bill No. 154
First Reading Copy (White)

Requested by Senator Pinsoneault
(League of Cities and Towns)
For the Committee on Judiciary

Prepared by Valencia Lane
February 7, 1991

1. Page 1, line 17.

Strike: "includes"

Insert: "means only"

2. Page 1, line 18.

Strike: "and"

Following: "districts"

Insert: ", and any other local government entity vested with
legislative power by statute"

3. Page 1, lines 21 through 23.

Following: "and" on line 21

Strike: remainder of line 21 through "boards" on line 23

Insert: "that branch or portion of any other governmental entity
empowered by law to consider and enact statutes, charters,
ordinances, orders, rules, policies, resolutions, or
resolves"

4. Page 2, line 16.

Following: line 15

Insert: "(4) A governmental entity and its members, officers,
employees, and agents are immune from suit for damages
arising from the undertaking or failure to undertake any
judicial or quasi-judicial act, including but not limited to
the approval or denial of a license, permit, or zoning
matter, when an administrative remedy is available. This
provision does not preclude judicial review, otherwise
allowed by law, of any administrative decision.

(5) (a) A governmental entity and its members,
officers, employees, and agents are immune from suit arising
out of any defect, including but not limited to lack of
repair or lack of maintenance, of any public area or public
works when:

(i) the governmental entity did not have prior notice
of the defect; or

(ii) the legislative body, in the face of competing
financial demands, had duly adopted a plan of upgrade,
maintenance, or repair of certain public areas or public
works and the suit alleges a defect in a public area or
public work that is either included in or excluded from the
plan.

(b) The immunity provided by this section does not serve to immunize a governmental entity from negligence arising out of acts or omissions of its employees in carrying out ministerial functions.

(c) As used in this subsection (5), the following definitions apply:

(i) "Public areas" means any highway, street, alley, sidewalk, boulevard, parking area, causeway, bridge, airport runway or taxiway, or any other public place or grounds dedicated to public use and all appurtenances necessary for the control of the ways, including but not limited to street signs, traffic lights and controls, parking meters, and guardrails.

(ii) "Public works" includes but is not limited to any sewage disposal system, water supply system, and garbage disposal system.

(6) A governmental entity and its members, officers, employees, and agents are immune from suit for any act or omission arising out of the operation of a 911 emergency number service, including but not limited to answering and dispatching the 911 telephone call and responding to the 911 telephone call location. This immunity does not apply to gross negligence or willful and wanton acts or omissions.

(7) The acquisition of insurance coverage, including self-insurance or group self-insurance, by a governmental entity may not be considered to waive the immunity provided by this section."

Renumber: subsequent subsection

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Amendments to Senate Bill No. 154
First Reading Copy (White)

Requested by Senator Pinsoneault
(School Boards Association)
For the Committee on Judiciary

Prepared by Valencia Lane
February 7, 1991

1. Page 2, line 1.

Following: "policy"

Insert: "or school board policy or other official action required
to be taken by a school board"

Amendments to Senate Bill No. 154
First Reading Copy (White)

Requested by Senator Towe
For the Committee on Judiciary

Prepared by Valencia Lane
February 7, 1991

1. Title, line 11.
Strike: "A RETROACTIVE"
Insert: "AN"

2. Page 3, lines 2 and 3.
Following: "applies" on line 2
Strike: remainder of line 2 through "1-2-109," on line 3

3. Page 3, lines 3 and 4.
Following: "action" on line 3
Strike: remainder of line 3 through "been" on line 4

4. Page 3, line 4.
Strike: "by"
Insert: "on or after"

