

MINUTES

MONTANA SENATE 53rd LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Sen. Bill Yellowtail, on January 13, 1993, at 10:00 a.m.

ROLL CALL

Members Present:

Sen. Bill Yellowtail, Chair (D)
Sen. Steve Doherty, Vice Chair (D)
Sen. Sue Bartlett (D)
Sen. Chet Blaylock (D)
Sen. Bob Brown (R)
Sen. Bruce Crippen (R)
Sen. Eve Franklin (D)
Sen. Lorents Grosfield (R)
Sen. Mike Halligan (D)
Sen. John Harp (R)
Sen. David Rye (R)
Sen. Tom Towe (D)

Members Excused: NONE

Members Absent: NONE

Staff Present: Valencia Lane, Legislative Council
Rebecca Court, Committee Secretary

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

Committee Business Summary:

Hearing: SB 117
Executive Action: SB 12
SB 19
SB 29
SB 64

HEARING ON SB 117

Opening Statement by Sponsor:

Senator Halligan, District 29, opened by stating that SB 117 would place family disputes into a mediation or resolution dispute oriented format. SB 117 would authorize mediation in family law proceedings. It would be voluntary, to allow mediation to occur. If a dissolution was submitted to a Court, it would automatically assign it to a special person to handle

the case so it would not end up in a public setting. SB 117 places the proceeding into a more relaxed setting where attorneys could have input, but the mediator has control over the situation. The Court could use the mediation process if the petition was just starting or already existing. Senator Halligan summarized all sections of SB 117.

Proponents' Testimony:

NONE

Opponents' Testimony:

NONE

Questions From Committee Members and Responses:

Senator Grosfield questioned Senator Halligan about Section 7. Senator Halligan responded mediation training is available in Montana on a regular basis. There are ample therapists in Montana who specialize in family law and already meet the 40 hour mediation training.

Senator Grosfield asked Senator Halligan if certified mediators would have training in family problem areas. Senator Halligan responded the mediators would have to have knowledge in child development along with 40 hours of mediation training.

Senator Grosfield questioned Senator Halligan about Section 1. Senator Halligan said he would like to make a provision in SB 117 stating the Court must order the mediation and not request it.

Senator Blaylock asked Senator Halligan about the proposed amendment. Senator Halligan said the amendment would include the provision that the mediation agreement must be submitted to the court.

Senator Rye questioned Senator Halligan about the effective date of SB 117. The effective date would be October 1.

Senator Towe asked Senator Halligan about confidentiality in SB 117. Senator Towe suggested a provision that if the parties object to the full agreement being filed and being a part of public record, a summarized version could be submitted. Senator Halligan agreed this would be a better approach.

Senator Towe asked Senator Halligan regarding the provision in Section 1 paragraph 2. Senator Halligan stated if the Court has found probable cause to suspect sexual or physical abuse of a child, it will go to go to the Department of Family Services and they would conduct an investigation. The Court may not be qualified in mediation skills in order to deal with sexual or physical abuse.

Senator Towe asked Senator Halligan about giving the Court the discretion in requiring a mediator. Senator Halligan responded by saying there was no problem giving the Court the discretion, if there is evidence of physical or sexual abuse.

Closing by Sponsor:

Senator Halligan closed stating SB 117 is the first attempt to build an informal, yet formal mechanism to allow parties to get out of the court structure and into a more informal and productive session with non-attorneys to resolve matters. It gives the Courts discretion to provide standards and criteria to have productive sessions. SB 117 would reduce the case load of District Court Judges, therefore making them more productive.

EXECUTIVE ACTION ON SB 12

Motion:

Senator Franklin moved to amend SB 12.

Discussion:

Senator Franklin explained the amendments.

Chair Yellowtail said normally a statement of intent is necessary to give guidance to the administrative agency for the purpose of rule writing. Chair Yellowtail questioned Senator Franklin whether the proposed reduction in the language in the statement of intent would still preserve that principle. Senator Franklin replied that it will and that the rest of the language is editorial and does not serve any purpose.

Senator Towe questioned Senator Franklin about the language: "Therefore it is additionally the intent of the legislature by requiring, if a person convicted of a sexual abuse offense undergo HIV testing to eliminate the traumatic aftermath of such crimes of the victim." Senator Franklin responded the language makes a presumption that this will help reduce any traumatic aftermath.

Senator Towe further questioned Senator Franklin about striking "aftermath of such crimes." and whether it was helpful to the victims. Senator Franklin replied the degree to which it is helpful it is already stated in SB 12 lines 8 through 11.

Vote:

Motion carried to amend SB 12. Senators Rye, Crippen, Harp voting no.

Motion/Vote:

Senator Halligan moved SB 12 DO PASS AS AMENDED. Motion CARRIED UNANIMOUSLY.

EXECUTIVE ACTION ON SB 19

Motion:

Senator Blaylock moved SB 19 DO PASS.

Discussion:

Senator Rye would like to go on record voting no. Senator Rye stated the School Board Association had a legitimate point that SB 19 would remove a bargaining chip which is traditionally in school board teacher negotiations. His aversion to any increase in litigation is also a factor in his decision.

Vote:

SB 19 DO PASS. Senators Rye, Harp, Grosfield voting no.

EXECUTIVE ACTION ON SB 29

Motion:

Senator Towe moved to amend SB 29.

Discussion:

Senator Towe explained the amendments.

Senator Grosfield questioned Senator Towe on the terminology of the first amendment. Senator Towe replied the word "conviction" would create confusion. The Criminal Code most of the time uses the word "committed" and not "convicted." That is why the word was changed.

Senator Grosfield asked Senator Towe whether SB 29 is close to treading on the concept "innocent until proven guilty." Senator Towe explained when dealing with two or more alleged offenders, one of them is convicted, and the other implicated but judged innocent, there is no longer a crime of gang rape. If the word "committed" is used the County Attorney in each trial would have to prove beyond a reasonable doubt that the offenses occurred or they wouldn't get a gang rape conviction with the higher penalty.

Senator Crippen asked Mr. Conner, Assistant Attorney General, about the language in SB 29. Mr. Conner stated the word "conviction" ought to be left in SB 29. If SB 29 is changed to two or more persons who "committed" the offense, the defendant would go to prison for a longer amount of time even though they were not convicted. In our system, defendants have to be convicted of a crime before going to prison. Mr. Conner felt "conviction" should be left in and maybe define the term gang rape. The word "conviction" is defined in the Code as a judgement of conviction after trial or a plea of guilty.

Vote:

Motion carried unanimously to amend SB 29.

Discussion:

Senator Blaylock asked if Senator Towe would strike line 1 from the amendments. Senator Towe said he would remove line 1.

Senator Towe questioned Mr. Conner about accountability. Mr. Conner replied the language defines accountability. Under the theory of accountability if a person aids, abets, or assists another person in a crime then that person is equally guilty of the crime. Under the law they can receive the same penalty as the statute provides for the crime.

Senator Towe asked Mr. Conner whether we should define gang rape and a penalty. Mr. Conner replied it would be cleaner if defined, but does not feel it would cause a conviction to be overturned if it was not.

Senator Towe asked if the Committee would like to define a new defense and penalty for SB 29. No request was made.

Motion:

Senator Towe moved SB 29 DO PASS.

Senator Crippen asked Ms. Lane whether the amendment that was stricken, was better language than what is in SB 29 now. Ms. Lane answered that it was.

Senator Halligan questioned Senator Towe about the penalties of rape. Senator Towe referred to a letter from Bob Court which stated, "there should be a more severe penalty for gang rape than rape." Senator Towe agreed. The offense of rape requires a penalty of not less than 2 years, or more than 20 years. Under SB 29 the offense of gang rape would require a penalty not less than 10 years or more than 40 years.

Chair Yellowtail told the Committee that Senator Towe deleted part one of the amendment. The Committee will address part 2, 3, and 4 of the amendment.

Senator Crippen questioned Senator Halligan about the 10 year provision and the flexibility the judges have in suspending or modifying sentences. Senator Halligan replied mandatory minimums exactly what they mean. Mr. Powers also replied, if the statute says not less than a certain period of time, the Court can suspend or defer the sentence after the minimum time is served.

Senator Towe asked Senator Crippen whether he wanted to reduce the 10 year provision. Senator Crippen agreed a two year minimum sentence is not enough, but judges need to have flexibility in suspending or deferring a sentence.

Senator Blaylock stated bills like these have gone through the

legislature toughening up and sending people to prison for longer terms. Judges have responded and Deer Lodge Prison is full. The prison is a large part of the deficit problem. Senator Blaylock asks if we would be doing our duty by saying we are going to get tougher and send more people to prison for longer terms when we can not really afford to do that.

Motion:

Senator Towe made a substitute motion that SB 29 be amended on page 2 line 13 to strike 10 and insert 5.

Discussion:

Senator Towe stated his belief in leaving as much discretion as possible to the judges because of situations that arise. Looking at the offense generally, you may think we can not think of anything in which we would want less than a 10 year sentence. It is conceivable that could happen, so we ought to be setting policies and less mandates.

Senator Blaylock asked Senator Towe whether judges in Montana have been abusing their duties and about increasing the penalty for gang rape. Senator Towe stated the most important part of SB 29 is allowing a judge to increase a penalty from 20 to 40 years. Under the present law Judges cannot increase the penalty, therefore this would be an advantage. Senator Towe stated to his knowledge Montana has not had a gang rape incident, but it is important to address the issue. Senator Towe was not aware of any judges abusing the situation.

Senator Bartlett asked if the penalty was a five year minimum, but given the circumstances of the case, not mandatory. Mr. Conner answered that is correct.

VOTE:

Motion CARRIED TO AMEND page 2 line 13. Senator Brown voting no.

Discussion:

Senator Rye told the Committee the important part of SB 29 is personal accountability and the fact that if everybody else is doing it, that is not an excuse, nor a defense. Refusing to get apart from the crowd who is doing something wrong, is considerably more serious than doing something wrong by yourself. Senator Rye feels SB 29 is commendable and should pass.

Vote:

SB 29 DO PASS AS AMENDED by roll call vote. 9 Senators voting yes, 3 Senators voting no.

EXECUTIVE ACTION ON SB 64

Discussion:

Valencia Lane explained the amendments.

Motion/Vote:

Senator Doherty moved to amend SB 64. Motion carried unanimously.

Motion:

Senator Doherty moved SB 64 DO PASS AS AMENDED.

Discussion:

Senator Doherty told the Committee one of the process servers who testified against SB 64 felt the amendment was necessary. but would still oppose SB 64. Senator Doherty further stated SB 64 is self explanatory and feels it is a convenience measure for lawyers and will reduce the cost of litigation.

Senator Halligan asked Senator Doherty about the attorney of record. Senator Doherty stated any attorney of record could sign for the employee to serve the process.

Senator Bartlett questioned Senator Doherty about a fee to serve as a process server and whether an attorney's employee could register as a process server. Senator Doherty told the Committee that according to the Code of Ethics, attorneys are prevented from being in an outside business. Having a process server within a law firm is against the Code of Ethics for attorneys. Senator Doherty did not know the amount of the fee.

Senator Bartlett stated Valencia Lane said the fee is \$100 per a two year period.

Senator Towe stated when witnesses need to be subpoenaed and there is not time to get a process server, you may lose a witness. This is recognized in SB 64. Senator Towe further stated 10 times a year to serve is not enough and would hamper the ability of the attorney to try a case. SB 64 is opposed because process servers want a monopoly on the business. Senator Towe feels it is not a valid reason because the process servers would not lose business if SB 64 passes since it costs more to send a paralegal to serve process than it does a process server. SB 64 provides flexibility if an attorney needs process served right away. Senator Towe urges support for SB 64.


Senator Crippen questioned Senator Doherty about the responsibility of a process server's actions. Senator Doherty replied that the person who hires the process server and the process server are responsible for an improper job or a wrongful levy of execution.

Vote:

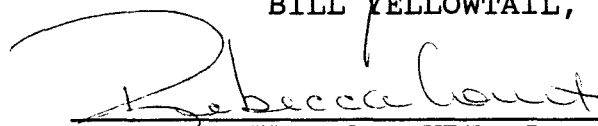
SB 64 PASS AS AMENDED. Motion carried unanimously.

ADJOURNMENT

Adjournment: 11:28 a.m.



BILL YELLOWTAIL, Chair



REBECCA COURT, Secretary

BY/rc

ROLL CALL

SENATE COMMITTEE

Judiciary

DATE

1-13-93

| NAME | PRESENT | ABSENT | EXCUSED |
|--------------------|---------|--------|---------|
| Senator Yellowtail | X | | |
| Senator Doherty | X | | |
| Senator Brown | X | | |
| Senator Crippen | X | | |
| Senator Grosfield | X | | |
| Senator Halligan | X | | |
| Senator Harp | X | | |
| Senator Towe | X | | |
| Senator Bartlett | X | | |
| Senator Franklin | X | | |
| Senator Blaylock | X | | |
| Senator Rye | X | | |
| Valencia Lane | X | | |
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Attach to each day's minutes

SENATE STANDING COMMITTEE REPORT

Page 1 of 1
January 13, 1993

MR. PRESIDENT:


We, your committee on Judiciary having had under consideration Senate Bill No. 12 (first reading copy -- white), respectfully report that Senate Bill No. 12 be amended as follows and as so amended do pass.

Signed: Wm Yellowtail
William "Bill" Yellowtail, Chair

That such amendments read:

1. Page 1, line 24 through page 2, line 7.
Strike: line 24 through "the victims." on page 2, line 7
2. Page 2, line 8.
Strike: "deadly"
3. Page 2, line 9.
Following: "if"
Strike: ", tragically,"
4. Page 3, line 1.
Following: "administered"
Strike: "a"
Following the first occurrence of: "victim"
Insert: ", "
5. Page 3, line 2.
Strike: "test"
Insert: "testing according to currently accepted protocol, using guidelines established by the centers for disease control, U.S. department of health and human services,"

-END-

 Amd. Coord.
Sec. of Senate

091253SC.San

SENATE STANDING COMMITTEE REPORT

Page 1 of 1
January 13, 1993

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration Senate Bill No. 19 (first reading copy -- white), respectfully report that Senate Bill No. 19 do pass.

Signed: Wm Yellowtail
William "Bill" Yellowtail, Chair

AW Amd. Coord.
Sec. of Senate

091252SC.San

SENATE STANDING COMMITTEE REPORT

Page 1 of 1
January 13, 1993

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration Senate Bill No. 29 (first reading copy -- white), respectfully report that Senate Bill No. 29 be amended as follows and as so amended do pass.

Signed: Wm Yellowtail
William "Bill" Yellowtail, Chair

That such amendments read:

1. Page 2, lines 10 and 11.

Following: "victim" on line 10

Strike: remainder of line 10 through "time," on line 11

Insert: "in an incident in which each offender was present at the location where another offender's offense occurred during a time period in which each offender could have reasonably known of the other's offense,"

2. Page 2, line 13.

Strike: "10"

Insert: "5"

Strike: "25"

Insert: "40"

3. Page 2, line 14.

Strike: "\$100,000"

Insert: "\$50,000"

-END-

SENATE STANDING COMMITTEE REPORT

Page 1 of 1
January 13, 1993

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration Senate Bill No. 64 (first reading copy -- white), respectfully report that Senate Bill No. 64 be amended as follows and as so amended do pass.

Signed: William "Bill" Yellowtail
William "Bill" Yellowtail, Chair

That such amendments read:

1. Title, line 6.

Following: "SERVERS"

Insert: "WHEN SERVING PROCESS IN CASES IN WHICH THE EMPLOYING
ATTORNEY IS THE ATTORNEY OF RECORD"

2. Page 1, line 20.

Strike: "or"

3. Page 1, line 21.

Following: "attorney"

Insert: ";

Following: "or"

Insert: "(c)"

4. Page 1, line 22.

Following: "when"

Strike: "acting in the course of employment"

Insert: "serving process in cases in which the employing attorney
is the attorney of record"

-END-

ADD Amd. Coord.
Sec. of Senate

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ROLL CALL VOTE

SENATE COMMITTEE Judiciary

BILL NO. 29

DATE 1-13-93

TIME 11:10

A.M. P.M.

NAME

YES

NO

[illegible]

~~Typed out~~

SECRETARY

Bill yellowtail
CHAIR

CHAIR

MOTION: motion recommended do pass as intended.

BILLS BEING HEARD TODAY: SB 117

Support Oppose

[illegible]

FIG