MINUTES

MONTANA SENATE
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **SENATOR BAER, CHAIR FOR THE DAY,** on January 12, 1995, at 10:00 a.m.

ROLL CALL

Members Present:
Sen. Bruce D. Crippen, Chairman (R)
Sen. Al Bishop, Vice Chairman (R)
Sen. Larry L. Baer (R)
Sen. Sharon Estrada (R)
Sen. Lorents Grosfield (R)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Linda J. Nelson (D)

Members Excused: None.

Members Absent: None.

Staff Present: Valencia Lane, Legislative Council
Judy Feland, Committee Secretary

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

Committee Business Summary:
Hearing: SB 59, SB 60, SB 61, SB 65
Executive Action: None.

{Tape 1; Side A}

HEARING ON SB 59

Opening Statement by Sponsor:

SENATOR BRUCE D.CRIPPEN, Senate District 10, Billings, presented the bill at the request of the Montana Sheriffs' and Peace Officers' Association. SB 59 is a bill in which a subpoena remains in effect unless quashed or until judgment, dismissal, or other final determination of the action by the court in which the action was filed or to which the action was transferred, he told the committee.

SENATOR CRIPPEN explained to the committee that any time you have a continuance in the law, that a subpoena must be re-issued, which is a cost to the taxpayers.

Proponents' Testimony:

Kathy McGowan, representing the Montana Sheriffs' and Peace Officers' Association, read from her written testimony. **(EXHIBIT 1)**

Chuck O'Reilly, Lewis and Clark County Sheriff, and a member of the Montana Sheriffs' and Peace Officers' Association Board, read his written testimony. **(EXHIBIT 2)**

Robert Henschel, Deputy Sheriff from **Yellowstone County, Billings**, spoke in favor of SB 59. In their large county, he said, where they have five district courts and two judges, these courts generate a mass of subpoenas over the year, the serving of which falls on the sheriff. Over two-thirds of the subpoenas served are re-serviced papers, he explained, where the trial has been vacated and a new trial set, and the continuous movement of the court calendar creates a horrendous amount of paperwork for his office. In many instances, he said, the court could only give his office one or two days in which to serve the subpoenas which increases the load on their department. Last year they served over 3,000 subpoenas, the deputy said. He had previously served in the Federal system, he said, in which the subpoena is enforceable until the case is disposed of by the court or the attorney involved relieves the witness of obligation. SB 59 would eliminate the duplication of services and extra work in law enforcement divisions, he said. He urged favorable consideration of the bill. He introduced a number of law enforcement officials who stood in support of the bill. Counties represented were: **Rosebud, Fergus, Custer, Cascade, Hill, Stillwater, Carter, Gallatin, Toole, Flathead, Missoula and Yellowstone**, among others.

John Connor, appearing on behalf of the Montana County Attorneys' Association and the Montana Department of Justice, spoke in support of SB 59. The problems they have had in serving subpoenas as related by the law enforcement people, he said, were the same problems experienced by prosecutors and public defenders or anyone who deals with the criminal justice system and has to call witnesses to court. It has long been unclear in the law, he observed, to whether or not witness had to be re-subpoenaed on a continuance. They always do re-subpoena them to be safe, he said, unless they are friendly witnesses that they can persuade to be in court in response to the initial subpoena. This bill would make imminent good sense, Mr. Connor said, and he encouraged support of the bill. He also reported that the **Attorney General's Law Enforcement Advisory Council** voted to support the measure, as well.

Opponents' Testimony:

None.

Questions From Committee Members and Responses:

SENATOR AL BISHOP asked **John Connor** how they would prove that a hostile witness was notified of a subsequent hearing; he asked if the witness would be able to get off the hook and not appear, claiming they did not know about it.

John Connor answered by saying that it was incumbent upon the party subpoenaing the witness to make sure that the witness is notified and be able to prove that. If the witness does not show up, he explained, that witness is in contempt of court.

SENATOR BISHOP said he was comfortable with the bill, but expressed concern with the proof of notice issue, saying he worried that a hostile witness would resist this.

SENATOR MIKE HALLIGAN wondered if they might need an amendment to the statute to say that a mailing by first class mail is sufficient notice. He wondered about due process problems associated with the mailings.

John Connor addressed the question by saying that in other areas of the law, there is a statute saying "once mailed, presumed received." He further explained that the reason to subpoena the witness is not to create a contempt situation for the witness, but rather to get them into court to testify. The intent of the bill is to tell people that the subpoena means that they have to be in court whether it's in the next week or the next six months, and the issuing party will have to provide a letter telling them when to appear. It will mean some affirmative steps on the part of the people issuing the subpoena, but it will remove the necessity of going back to the district court, getting subpoenas re-issued, having them delivered to the sheriff, and the whole expensive process, he said.

Sheriff O'Reilly reassumed the witness stand and told the committee that the wording of the bill does not restrict the re-issuance of a subpoena. It could be re-issued if you had a hostile witness, he said.

Closing by Sponsor:
SENATOR CRIPPEN reiterated the fact that another subpoena could be issued if necessary and also that the wording of the subpoena might be couched in terms that it stays in effect throughout the action. The Senator told the committee that this was an important problem to law enforcement people and certainly worth consideration. He pointed out that this would be one step in their run for "law and order" this session.

HEARING ON SB 60

Opening Statement by Sponsor:

SENATOR CRIPPEN, Senate District 10, Billings, presented SB 60, entitled, "an act extending to deputy sheriffs the rights given to police officers upon the consolidation of city and county governments." The bill was at the request of the Montana Sheriffs' and Peace Officers' Association. When we first began this bill, he said, it was to give rights to deputy sheriffs and police officers upon the consolidation of city and county governments. It was found out later that the law was already applicable to the area they were concerned with insofar as Section 1, Sub. 2 was concerned. Upon further reading of the law, it was determined by the association and others that Section 1 of the bill, which deals with job security [7--3-1344 (1)] is still appropriate and pertinent. To that end, we will hold this hearing. In executive session, he will make a motion to strike any language that is not necessary.

Proponents' Testimony:

Barry Michelotti, representing the Cascade County Sheriff's Office and the Cascade County Deputies Association, commented on the consolidation of local governments. He said that the job tenure rights were listed in the statues for police officers but not for deputy sheriffs. This change would allow the deputy sheriffs to retain their rights under consolidation.

Chuck O'Reilly, representing the Lewis and Clark County Sheriff's Office and the Board of Directors of the Montana Sheriffs' and Peace Officers' Association, told the committee that all the members from the various counties previously introduced did rise and support SB 60.

Opponents' Testimony:

None.

Questions From Committee Members and Responses:

SENATOR RIC HOLDEN asked **Sheriff O'Reilly** to explain tenure rights and the importance of them to the Sheriff.

John Connor answered the question and said that when you consolidate a department, it would not be fair to one side or the other to have an edge by statute. They feel that the deputies should have the same job protection as police officers do. He expressed concern that should consolidation occur, technically a municipality could fire all the deputies and keep the police officers if this bill does not pass.

SENATOR LINDA NELSON asked how downsizing the police force or a reduction in force would be handled.

John Connor said that he assumed it would be done through the funding process, depending on the type of government. He assumed it would be split equally between officers and deputies.

SENATOR NELSON then asked if this would establish policy, also she inquired whether or not they were under union protection.

John Connor answered that some are and some are not.

Closing by Sponsor:

SENATOR CRIPPEN addressed some comments in closing. Some communities are looking at consolidation for efficiency reasons now; they are in Yellowstone County where he lives. Legislation such as this tends to soften the objection of people wondering about consolidations, he said, and about who will have the upper hand where police officers and deputy sheriffs do the same work.

HEARING ON SB 61

Opening Statement by Sponsor:

SENATOR CRIPPEN, Senate District 10, Billings, sponsored SB 61, entitled, "an act allowing a detention center administrator to refuse custody of persons charged with or convicted of misdemeanors when the detention center is at full capacity." **SENATOR CRIPPEN** said that this bill as at the request of the Montana Sheriffs' and Peace Officers' Association. He offered clarification of the following areas:

Sec. 1, 7-32-22-2, Sub.1, dealt with the situation where within the jurisdiction of the county where there is no detention center or the detention center within that county becomes unfit or unsafe, then it provides an authority by which those normally incarcerated in that center can be removed to another area. Section, Sub. 2 goes further and provides a methodology by which it would be done and provides the responsibility to the detention center administrator of the second county, which would be primarily the same as the primary detention center.

Sec. Sub 3 , he said, would say that when a detention center is erected within that jurisdiction or when the county's detention center is rendered fit or safe, then the district judge shall revoke the original order and people can be re-incarcerated.

On page 1, Sec. 4, the changes would go further on how this is accomplished, he said. This deals with the confinement of inmates. The old language did not provide for the exception, that the detention center administrator shall accept all persons committed. This bill would provide that the center administrator may refuse to confine any person who has been charged with or convicted of a misdemeanor, as defined in 45-2-101.

SENATOR CRIPPEN explained that when the jail is full and someone is brought in at 2 a.m. on a misdemeanor, they usually have to call the judge and judges do not like to be awakened, then request that the judge authorize the release of an inmate. Over the years there has been a great deal of interest and concern expressed by society as to the status of detention centers, both on the state and local level. Once the center is overfilled, he said, then we have the situation before us where it is difficult for the administrators to ensure the safety and well-being of the inmates. The liability for exposure for injury or death of an inmate becomes greater and that liability is passed on to the citizens of the community. Until we perhaps adopt the Governor's suggestion in the State of the State message where we have more detention facilities on a cooperative basis then we will find that we have a limited number of rooms at the inn and we're going to have to make some choices.

SENATOR CRIPPEN advised the chairman that there were some amendments. **SENATOR VIVIAN BROOKE** had advised **SENATOR CRIPPEN** that there were areas where there are misdemeanors where the perpetrator should be confined at least overnight, such as domestic abuse violations. He said he agreed with that and would offer that amendment in executive session. He said the committee might also consider an amendment dealing with DUI violations.

SENATOR CRIPPEN told the committee that the problem still remains. We are crowded, he said, and there has to be a methodology whereby a detention center administrator on his/her own volition may have the authority to refuse. That does not mean that the detention center administrator has the authority to let go, but has the authority to refuse entry to the center.

Proponents' Testimony:

Kathy McGowan, representing the Montana Sheriffs' and Peace Officers' Association, read written testimony. **(EXHIBIT 3).** She added an emphasis on the discretionary nature of the bill. She told the committee that this bill does not preclude the present good, solid goal management mechanisms already in place by sheriffs' departments.

Sheriff Chuck O'Reilly, representing the Lewis and Clark County Sheriff's Department, read written testimony **(EXHIBIT 4).**

Mike O'Hara, Missoula County Jailer and Captain of the Missoula County Sheriff's Office, spoke in support of SB 61. His experience in Missoula County, he said, has been that capacity has been exceeded for adult males in centers, and that they have used juvenile cell blocks. The Board of Crime Control said that in moving juveniles to isolation cells they were in violation of the separation of sight and sound rules. They were also using a sentencing calendar, he said, whereby when a person is sentenced, they don't go to jail, they go on a reservation list called "Hotel "O'Hara." Three to six months later, they serve their

time. DUI's don't go to jail, he said, they go for breath testing and video taping, then a friend must pick them up. Ninety per cent of DUI's in Missoula County go home, not to jail. They also cancelled their contract with the federal government, he said. Because we do not house federal prisoners in our jail, we call the federal marshall when they hit capacity and they move them. They have done everything they can do in Missoula county, he said, and they are already doing what this bill suggests, releasing the lowest misdemeanant. We are releasing sentenced inmates out of the Missoula County Jail today, he said. He pleaded for support on this bill.

Bill Slaughter, Sheriff of Gallatin County, Bozeman, spoke on behalf of SB 61. He said that the detention center in Bozeman is at capacity, 39, and that they currently have 85 waiting misdemeanor violations. He reiterated upon the safety facets of the current law, saying increased inmate escape risks, assaults on prisoners and suicide are common effects of overcrowding. He said passage of this bill would assure the public that we will always have a place for violent offenders.

Barry Michelotti, representing the Cascade County Sheriff's Office and the Montana Sheriffs' and Peace Officers' Association, urged a favorable consideration of the bill. He said this bill would provide a catalyst for sheriffs and police officers, prosecutors and city and county judges to sit down and consider alternatives instead of placing everyone in the county jails. Because everyone does not see eye-to-eye, this would allow for communication between parties to mutually resolve these problems, he added.

John Connor, representing the Montana County Attorneys' Association, appeared before the committee in support of the bill. The county attorney is the legal counsel for the county and its elected officials and it is from that perspective that they support passage of SB 61, he said.

Sheriff Jim DuPont of the Flathead County Sheriffs' Office and also a member of the Montana Sheriffs' and Peace Officers' Association, gave a an example of the application of this intended law. He told of a day that the jail in his county had 84 prisoners when the capacity is 65, and he had a staff of three. At 7 p.m. another agency brought in three arrested persons that were 19 years of age for minors in possession. They were not drunk, nor had they consumed the alcohol they had in possession, but he had no recourse but to take those people. This would give him the option of saying "no." He urged passage of the bill.

Charles Brooks, appearing on behalf of the Yellowstone County Commissioners, said that **Chuck Maxwell** had asked him to consider their strong support for this measure.

Opponents' Testimony:

Alec Hansen, representing the Montana League of Cities and Towns, said that while it was difficult to argue with the logic, they do have some problems with the bill and that it that could be corrected. The opposition stemmed from the notion that "misdemeanor" doesn't mean harmless, many being a threat to society, he said, naming domestic abuse, assault, stalking, DUI and others. Sheriffs and police departments are working effectively together, he said, to keep the most dangerous people off the street. Their concern is that this law would be interpreted the wrong way and that anyone convicted of a misdemeanor would be dropped to the bottom of the list and may not end up in jail. A DUI should not go out on the street, nor a domestic abuse offender, he said. He thought it may be better to wake up a judge than to turn some misdemeanants loose.
He asked the committee to take a careful look at the amendments presented by **SENATOR CRIPPEN.**

Bob Gilbert, representing the Montana Magistrates' Association, spoke in mild opposition to the bill, he said. The bill requires magistrates to violate one set of statutes in order to comply with another, he told the committee. He hoped that the amendments would answer questions of bail and concern that the individual would flee. He reminded the committee that 45-2-104 defines those misdemeanors as crimes punishable by up to one year in jail. They are not talking about jaywalking, he admonished the committee. The society demands criminals be incarcerated, but refuses to build buildings to put them in, he said. This is not the fault of the sheriffs and police officers. He asked for time to review the amendments before executive action is taken.

Questions from the Committee:

SENATOR BISHOP asked John Connor if, conversely, the detention center is full and exceeds fire codes, they will be forced to accept a felon when the bill lists only misdemeanors?

John Connor replied that the administrator would probably have to take a felon and the center would go to a judge for resolution. This bill is intended to address those situations where potentially non-dangerous offenders either arrested or convicted of misdemeanors have presented themselves for incarceration perhaps during week-ends, pursuant to some sentence imposed.

SENATOR BISHOP asked about operation of detention centers when admitting a felon when they are at full capacity and exceeding fire codes, to which **John Connor** answered that an adjustment in the population has to be made and a decision to release someone already incarcerated would be made.

Sheriff O'Reilly added that arrangements with adjoining counties would be made when they have space and we don't.

SENATOR GROSFIELD asked if the arrangements with other counties were arrangements pursuant with this bill, and if the arrangements dealt with felons.

Sheriff O'Reilly said that is was very expensive to move prisoners and that it was not the intent of the bill, but rather dealing with misdemeanors. He thought what he was hearing was a fear of the discretionary abuse on the part of sheriffs, he said, but that exists today; sheriffs are continually making discretionary decisions on how they run their jails.

SENATOR GROSFIELD asked if he was reading that it would allow a judge to designate an adjacent or contiguous county, not other counties. If they show up at your doorstep and you refuse them, then what happens?

Sheriff O'Reilly answered that the first section of the bill, 7-32-2202 was not their request, but rather the legislative council. It is clean-up language basically, he said. It provides for the protection of the inmate. The district judge does have the authority to direct incarceration and shut down jails.

SENATOR ESTRADA asked **John Connor** to whom the detention administrator was accountable?

John Connor replied that the 1989 jail criminal code recodification said that it is the responsibility of the sheriff to manage and operate jails. The detention administrator is now part of the sheriff's office.

Sheriff O'Reilly added that the reason for the detention center administrator wording as opposed to sheriff is because there was a section of law passed previously that allows the county commissioners to contract with a private organization to run the detention center, and in order to have common language instead of saying sheriff every time, they said "detention center administrator" which covers both the sheriff and the private head.

SENATOR HALLIGAN asked a question concerning {tape very distant, garbled} court orders to let someone out of the centers.

SENATOR CRIPPEN said he would distinguish between a felon and someone prosecuted for a misdemeanor. He believed court approval would be necessary for the release of a felon. Should the situation occur, he said, wherein you have a person incarcerated for a "minor" misdemeanor and another brought for domestic abuse, in the case of full capacity, the administrator would have under this bill the right to keep this person, but transfer the other. The flexibility is built in there, he said.

SENATOR HALLIGAN questioned **Valencia Lane** about the ability to release, to which she replied that she saw nothing in the bill

about that either. The bill addresses the situation for the administrator to have the right to refuse the person newly brought to the facility but says nothing about the existing capacity.

SENATOR CRIPPEN injected a comment at this time to say the answer is on page 2, line 12, that says an administrator may refuse to confine and does not say refuse to accept, talking about someone who is not confined at the time, saying that at their discretion they could move one individual out and another in for better administration of incarcerated individuals.

SENATOR HALLIGAN said that he would like the minutes to reflect that "confine" meant "release" in some circumstances.

SENATOR CRIPPEN said that the point he was trying to make is that it does not give them the authority to release a felon.

SENATOR GROSFIELD asked if they were trying to give some discretion to transfer prisoners or potential prisoners over to the discretion of the jailer where the jail is unfit for some reason.

SENATOR CRIPPEN said it wasn't. He thought they were still hung up on sub. 1, existing law. He said some bills will contain some amendments within existing law, not necessarily with the scope for various reasons to provide clarification to present law. References to "unsafe" were in the first part. This bill is basically designed to deal with the administration of the facility.

SENATOR GROSFIELD had two or three concerns. On lines 1-15, page 1, he read "contiguous county" and asked if they turn them down, they have nowhere else to go. What if you've got one county surrounded by two other counties and the jails in both of those counties have been condemned, you might leave that county with no place to go. Also, he worried that nothing in the bill would trigger until the jail is considered "unfit" and the district judge is woke up in the night and it would be determined to take the prisoner to a contiguous county.

SENATOR CRIPPEN explained that Section 1 dealt with present law and what district courts could do. Line 16 dealt with unfit or unsafe detention center in that court's jurisdiction, or where there is none, then it provides for someone to be incarcerated. It gives the district court the authority to designate a detention center in a contiguous county. If there is no jail in the contiguous county, he said, then he assumed it to be moot. In dealing with a felon, he said, then you're going to have to make room. If there would be concern about drafting, or clean-up that would be fine, he said, but the real crux of the bill is on the second page, and it's just an exception to the rule that the detention center administrator whether it be public or private, shall accept all persons. That's the law, shall accept, and this

bill provides an exception to that.

SENATOR JABS asked about the last paragraph. He said the intent should be more clear about the refusal to confine, but rather they could let a misdemeanor out.

SENATOR CRIPPEN agreed that the language could be changed in an amendment to clarify "confined" or "continue to be confined". If it said "accept" it would be clear, instead of refuse to bring someone in.

SENATOR BAER asked the committee members to defer further question to executive session.

Closing by Sponsor:

SENATOR CRIPPEN reminded the committee that the reason for the bill is that we do have problems in our detention facilities. He said they are overcrowded and that it will be some time before it is rectified, therefore it is incumbent upon the committee and the legislature and administrators to provide a clear method of organization and operation of the detention centers so that justice can be done.

HEARING ON SB 65

Opening Statement by Sponsor:

SENATOR STEVE DOHERTY, Senate District 24, Great Falls, presented SB 65. This bill is an effort to try to tighten the already existing Montana law regarding the admission of out-of-state attorneys to practice law in the State of Montana. You cannot represent another person unless you are a member of the Montana Bar Association, he explained, and unless you have a Montana license. There are instances, however, where attorneys from another state who are members in good standing wish to practice in Montana. They make an application called pro hac vice, which is a request that a person who is licensed in another state be allowed the privilege to practice in Montana for that particular case and it is a privilege, we don't have to allow them the practice here. The privilege has been abused by both the plaintiffs' bar and the defense bar, he contended. We have far too many plaintiffs lawyers coming to Montana and far too many defense lawyers who are not licensed to practice here making a regular practice to practice here. They have to have associated a local Montana lawyer when they apply for a pro hac vice, which is usually when the local lawyer holds the briefcase while the out-of-state lawyer does the case, he said. This bill would tighten present law, **SENATOR DOHERTY** said, and it will require the person who wants to be admitted for special privilege to:
1) pay a $250.00 fee
2) file a written application filed both with the Clerk of the Supreme Court and the clerk of the court in which the individual wishes to practice, explaining that they are a member in good

standing, explain how many times they've been admitted for a special privilege in the State of Montana within the preceding two years, and certify to the court that they will be subject to the state disciplinary rules and power to regulate courts as Montana lawyers are.

Of the money subject, he explained that it would be imperative that when individuals come to Montana and use Montana's court system, whether they be plaintiffs or defendants, that they some way help pay for that court system. $200.00 of the fee would be given to the district court in which the individual appears, and $50.00 would be sent to the Supreme Court Clerk so that the Clerk could prepare a report. At the end of each year, the number of pro hac vice admissions, or the number of privileges granted to out-of-state attorneys that don't have Montana licenses could be given to the Commission on Practice and we could also begin to examine the repeated violation of that special privilege. There are special circumstances, however, he said, for instance if someone has a particular expertise, or a series of cases, they could make a special request to allow them to be admitted because of special circumstances. Frank Crowley and Candace Torgerson came to him previously with some special circumstances of some individuals who own some corporations in Montana and also happen to be lawyers who practice in the rarified air of public utility law in Montana. The court should take into account these special circumstances to allow that individual to be admitted for purposes of that action perhaps on a repeated basis. The senator related a personal experience of submitting an application in California and literally prostrating himself before the district court judge. He thought all lawyers should have the experience and would see the necessity for policing the system.

Proponents' Testimony:

Candace Torgerson, speaking on behalf of Frank Crowley and representing Billings Generation,Inc., and Rosebud Energy, Billings, said she was speaking for some clients who own property who are also attorneys from out-of-state who have expertise in this specialized area. **Ms. Torgerson** handed out written testimony. **(EXHIBIT 5)** On page 2 of the testimony, suggested amendments were presented to the sponsor. With those corrections, she said they would support the bill.

Opponents' Testimony:

None.

Questions From Committee Members and Responses:

SENATOR REINY JABS asked what proof lawyers must give that they are practicing attorneys coming from other states?

SENATOR DOHERTY answered that they submit application in affidavit form so that if the applicant lies, you've have them.

SENATOR GROSFIELD asked that in addition to California if the Senator had any idea how many other states do this?

SENATOR DOHERTY replied that he did not. All other states allow in some instances admission by individuals for purposes for a specific lawsuit. It is usually wholly discretionary to the court the lawyer appears before.

SENATOR GROSFIELD asked about a specialized attorneys. If this person appeared in several places in Montana in different jurisdictions, would the fee be $250.00 per court or per case?

SENATOR DOHERTY replied, "per case."

SENATOR GROSFIELD further questioned that if the attorney charged his client the additional $250.00, it would be the client paying the fee.

SENATOR DOHERTY answered in the affirmative.

SENATOR GROSFIELD inquired if he thought this would have a general dampening effect on people hiring attorneys from out of the state?

SENATOR DOHERTY said no, because he explained that $250.00 is really only one hour of work.

SENATOR GROSFIELD asked how common it was in Montana to have out-of-state attorneys come in and how localized he thought it was.

SENATOR DOHERTY said although he didn't know, he hoped the reporting process in this bill would answer that question, but that he thought it would be more prevalent in larger cities with airports. No hard data exists, he said.

SENATOR NELSON asked for a clear definition of "repeated appearances."

SENATOR DOHERTY said that they will have to give judges some discretion. If it is a case of some specialized expertise, then that lawyer may represent a number of like cases in that area. There are a number of plaintiffs firms, from Minneapolis and Portland primarily whose people are not licensed to practice law who pick up cases for Montanans and repeatedly practicing law in Cascade County. This bill would help give the commission on practice and judges some perspective if they know of a particular individual appearing in several places repeatedly, and then they would know it was time for that person to take the Montana Bar exam, he said.

SENATOR NELSON asked if this would slip by until someone like

himself would notice and say, whoa, this is enough?

SENATOR DOHERTY answered that this would be the case. He could never remember of anyone being turned down.

SENATOR JABS told the Senator that he knew of a tribe that had a Colorado firm on retainer. How would this bill affect them, he asked.

SENATOR DOHERTY answered that this bill would not affect federal or tribal courts because the state's writs do not run there and they have no authority there. If they repeatedly appear in district courts it would affect them; if they only appear in federal courts, it would not.

SENATOR HOLDEN asked **SENATOR DOHERTY** why he felt something was wrong with out-of-state attorneys coming here?

SENATOR DOHERTY said nothing was wrong with it. But, he added, if a lawyer repeatedly wants to practice in Montana and be subject to the disciplinary standards in the Montana Bar Association, then they need to get their license in this state. He felt the privilege has been abused.

SENATOR HOLDEN said that in his district, an out-of-state usually loses. He thought that this bill would create a bureaucracy we don't need.

SENATOR DOHERTY replied that it would not create a bureaucracy, but the money would, in fact, help the courts. Another point he wanted to look to was the fact that some of the money being currently received by out-of-state lawyers may not be reported in state taxes at this time. The report probably would be sent to the Department of Revenue at some point, he said.

SENATOR ESTRADA asked if he considered this a temporary license or a permit to operate in Montana?

SENATOR DOHERTY said yes, a permit is closer.

Discussion:

SENATOR HALLIGAN said he would be more comfortable with this bill if the record would more accurately show the meaning of "repeated occurrence" as being more than two, or more than three, or showing where we are heading with that.

SENATOR DOHERTY said he would think that if someone is appearing in Montana's courts two or three times a year, that would be a fairly substantial amount. He thought that judges should be raising their eyebrows if they are looking at an application where an individual has appeared four times in the same year in courts in Montana.

SENATOR HALLIGAN asked about consistency with other states in the wording of the amendments and the language of the bill, and not creating protection problems for attorneys who may not be owners, directors or shareholders.

SENATOR DOHERTY said that the draft of the bill came from the California statute but that he did not know if the amendment came from that source. The amendment would be an explanation of the kind of special circumstances, he said, as opposed to a rigid rule, so there should not be any protection problems there.

SENATOR GROSFIELD asked if pro hac vice is the only way a person could act in a case before the Montana court and short of taking the Montana Bar exam.

SENATOR DOHERTY answered that that was correct. A lawyer would have to be licensed in another jurisdiction.

SENATOR GROSFIELD pointed to the bottom of the first page. He asked if you can't be a pro hac vice and be a resident of Montana, or regularly employed in Montana or regularly engaged in Montana. For example a lawyer from Minnesota might own a cabin in Montana, and maybe he did one long case, would that be considered substantial business in Montana?

SENATOR DOHERTY said that it was a special privilege for people who ordinarily practice law outside the State of Montana. If a person in involved in business, professional or employment activities in Montana, then they should take the bar exam. To that extent, it may be protectionist, but it may be protectionist to Montana consumers, he said.

Closing by Sponsor:

SENATOR DOHERTY said that he thought this bill is a decent attempt to try to get a handle on what many attorneys believe is a privilege that has been abused by people coming into Montana to practice without being subject to our rules and our disciplinary standards. He said added taxes might be a long-term benefit to the state in terms of tracking. It also provides a way to track appearances, he said, and a way to help fund the cost of those appearances in our district courts. We are requiring information, but also requiring a way to pay for it, he explained. He asked for concurrence with the bill.

ADJOURNMENT

Adjournment: **CHAIRMAN BAER** adjourned the hearing at 11:50 a.m.

BRUCE D. CRIPPEN, Chairman

JUDY FELAND, Secretary

BDC/jf

MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE

ROLL CALL DATE 1-12-95

NAME	PRESENT	ABSENT	EXCUSED
BRUCE CRIPPEN, CHAIRMAN	✓		
LARRY BAER	✓		
SUE BARTLETT	✓		
AL BISHOP, VICE CHAIRMAN	✓		
STEVE DOHERTY	✓		
SHARON ESTRADA	✓		
LORENTS GROSFIELD	✓		
MIKE HALLIGAN	✓		
RIC HOLDEN	✓		
REINY JABS	✓		
LINDA NELSON	✓		

SEN:1995
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1
1-12-95
SB 59

January 12, 1995

Testimony Supporting Senate Bill 59
Provided by the Sheriff's and Peace Officer's Association

Mr. Chairman and members of the Senate Judiciary Committee, my name is Kathy McGowan. I am appearing before you today on behalf of the Montana Sheriff's and Peace Officer's Association (MSPOA). We would like to express our strong support for Senate Bill 59, and urge you to give this bill your favorable consideration.

Essentially, this is bill represents cost savings to local county law enforcement departments that have the responsibility for serving Subpoenas. The serving of Subpoenas takes time, and as you know, time is money. This money comes from local taxpayers, and MSPOA is interested in making the most efficient use possible of taxpayer dollars.

When Chuck O'Reilly, Sheriff for Lewis and Clark County, presents his testimony, he will provide you with statistical information from Lewis and Clark County that illustrates exactly how costly the subpoena process can become.

Senate Bill 59 stipulates that the original subpoena, once served, remains in effect until the final determination in the case is made by the court of jurisdiction. This should not pose a problem for the courts or for the citizens involved in a proceeding. If a proceeding must be continued, the attorneys involved have the obligation to inform their clients and any witnesses they are calling. The responsibility to inform rests with the attorneys involved in the case.

This legislation will save local law enforcement time and money. It's efficiency legislation at its best, and the kind of cleanup bill this section of the law has needed for quite some time.

Thanks for the opportunity to testify in support of Senate Bill 59. There are other proponents here today, and any of us will be pleased to respond to any questions you may have.

59-2

EXHIBIT 2
1-12-95
SB 59

1-12-95

Testimony of Sheriff Chuck O'Reilly

Representing the Montana Sheriff's & Peace Officers Assoc.

in Support of

SB #59

The information I am about to provide you is compiled from statistics representing the time period of December 1993 through November 1994.

The Lewis & Clark County Sheriff's Office, Civil Division, received in this time period a total of 274 subpoenas to serve which is 11% of all civil processes we received for service. Many times the same subpoena is served several times to the same person whenever a trial or hearing is re-scheduled. Following are some examples:

St. of Mt. v. Brandenburg
Served 4 people 4 different times for a total of 16 services. Our cost for this service went from $60 to $240.

Bell v. Mt. Rail Link
Served the same person 4 different times taking our costs from $15 to $60.

St. of Mt. v. Mason
Served 6 people 5 different times creating 30 services instead of 6 and a cost that went from $90 to $450.

State v. Johnson
Served the same person on 4 different occasions again raising our cost from $15 to $60.

State v. Reynolds
Another case of 4 times for the same persons raising our costs to $60.

State v. Stanko
Served 2 people 3 times each taking our costs from $30 to $90.

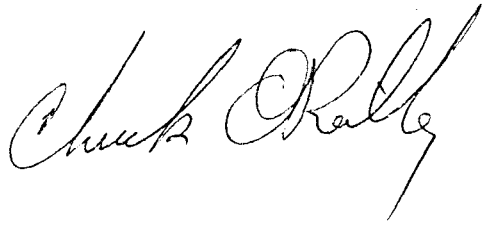
I could go on and on but I believe these cases alone show the need for the passage of SB 59. While subpoenas are 11% of the total processes we receive, the time spent in re-serving them is dramatically higher than on other one-time services.

The process for serving a subpoena involves checking and logging the paper work, actually locating and serving the person and generating a Sheriff's Return of Service and returning it to the process originator. The time involved in completing this process varies greatly depending on how difficult it is to locate and serve the person named in the process. Oftentimes we only have a name and no other identifying or location data which obviously causes a lot more need for research on our part.

My optimistic estimate for service of each subpoena is from 1 to 1 & 1/2 hours of staff time per service which represents a cost of approximately $4110.00 to $6165.00 to my department alone.

While my testimony is limited to my experiences with the Lewis & Clark County Sheriff's Office, I believe it is representative of the problem of duplicitous services of subpoenas which is occurring on a statewide basis.

I respectfully request your concurrence with a "Do pass" recommendation on this bill. Thank you.



3
1-12-95
SB 61

January 12, 1995

Testimony Supporting Senate Bill 61
Provided by the Sheriff's and Peace Officer's Association

Mr. Chairman and members of the Senate Judiciary Committee, my name is Kathy McGowan. I appear before you today on behalf of the Sheriff's and Peace Officer's Association (MSPOA). We would like to express our strong support for Senate Bill 61, and urge you to give this bill your favorable consideration.

From a local law enforcement perspective, this bill is a common sense issue.

There are two basic types of offenses: misdemeanors and felonies. The former are minor offenses: traffic violations, jaywalking, littering, and trespassing, as examples. The latter are more serious offenses such as armed robbery, assault, rape, burglary, homicide, and arson).

Our county jails and detention centers operate under the scrutiny of state and federal authorities; and that of private watchdog organizations like the American Civil Liberties Union. Jails can be filled; but not overfilled. If they are overfilled, there is a tremendous amount of liability exposure for the county generally, and the Sheriff's department in particular. If jails are over capacity, deputies are hard pressed to check the prisoners frequently enough to guarantee safety. The very real risks of assaults or suicides in the jail is being run when its resident population exceeds capacity. In addition, when a jail is overfilled, the overcrowding itself increases the risk of an incident that may well result in loss of life or in harm being done to an inmate.

We believe that we have a moral obligation to protect the inmates of our jails. Dereliction of that duty places counties and cities at tremendous legal and financial risk. When no clear cut statutory language clarifies their authority to release misdemeanants due to the jail being full, additional liability is placed upon city and county officers. This bill is protection for cities that utilize county facilities as well as for the counties themselves.

In many of our larger communities, the local jail or detention center is full much, if not most, of the time. Currently, if someone being held for a felony is being incarcerated, and a misdemeanant must be discharged in order not to exceed the facility's capacity, the local Sheriff must seek and get an order from a judge. As you know, crime is not an 8 a.m. to 5 p. m. activity, so sheriff's offices quite often find themselves calling a judge in the middle of the night and requesting an order to discharge a traffic violator in order to hold a rapist, for example. Understandably, the judges resent this kind of intrusion.

Senate Bill 61 will correct the problem by eliminating needless requirements and giving the county sheriffs the discretion they need in order to manage and administer their facilities in such a way as to protect the prisoners in their care and to limit the liability for local government and local law enforcement.

Thanks for the opportunity to testify in support of Senate Bill 61. There are other proponents here today, and any of us will be pleased to respond to any questions you may have.

friendly amendment re mandatory incarceration laws OK by committee

6.2

74
1-12-95
SB 61

Points on SB #61

Gives both police and Sheriff's departments clearcut statutory authority to do what is currently being done in many instances, but for which it is questionable in regards to the liability involved when we turn an arrested misdemeanant loose. For example it is clear in the law that a peace officer can issue citations in lieu of an arrest and that the offender can continue on his/her way with no recourse back on the officer or local government if he gets in an accident for example. But if an officer arrests a person for, say shoplifting a six pack of pop, and the jail is filled with felons such as rapists, grand larcenists, homicide suspects, etc, etc, and the officer has to release the individual (which is similar to the citation situation except no arrest was made in that case), and the individual drives off and gets in a wreck and gets injured, there is little doubt in my mind with the current "let's sue and make a million" attitude that seems to pervade our society today, that the individual will use the fact there is no statutory language in place that gave a reason for or allowed the officer to release him and thus the officers's actions indirectly caused him grievous pain, suffering, drug addiction, mental stress, post traumatic stress syndrome, the inability to work ever again in his lifetime, the loss of $23,000,000 which is what he could have been able to earn if the officer had only put him in jail instead of allowing him loose on the street to go get injured.

Admittedly I used a little dramatic license to prove a point, however I have seen suits, and have been sued myself, for reasoning not very different from my story. The point that needs to be made is that I believe SB 61 provides protection to city and county governments and their law enforcement officers where it is highly questionable whether any exists now. At the same time it helps to insure that someone arrested for jaywlking isn't taking up space needed for the burglers and other felons.

It is not the intent of this bill to sidestep mandatory confinement statutes such as domestic abuse arrests and incarcerations or the DUI laws. I am given the impression that if a statute specifically requires a given action such as mandating confinement then that statute governs when butting up against a more general statute such as SB 61. We are not opposed however, to an amendment clarifying this issue if the committee feels it is necessary.

Sheriff Chuck Reilly
Lewis & Clark County

1/12/95

DONEY, CROWLEY & SHONTZ

Ted J. Doney
Frank C. Crowley*
John M. Shontz **

Attorneys at Law

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EXHIBIT 5
1-12-95
SB 65

January 11, 1995

Senator Steve Doherty
Montana Senate
State Capitol
Helena, Montana 59620

Re: Senate Bill 65

Dear Senator Steve:

Sorry I missed you on the phone. Please consider the following regarding SB 65.

Overall, Senate Bill 65 is acceptable. However, we point out two issues that are of concern to two of our principal clients.

Two of our clients (Billings Generation, Inc. and Rosebud Energy) have attorneys licensed in other states who are principals in these energy businesses which have numerous dealings in Montana. Although they do not frequently function as counsel, from time to time, these counsel need to appear either in front of administrative agencies or before courts to speak to the highly technical aspects of PURPA and related state statutory and regulatory matters.

As developers of co-generation facilities they practice in the specialized area of PURPA (Public Utility Regulatory Policy Act), a specialty only of the utility companies and the PSC staff. Since these counsel will have long-term contacts with their businesses in Montana, we are concerned that, with the passage of SB 65, their ability to fully participate in, and actively represent, their businesses in Montana will be ended.

Questions:

1. Under the bill as drafted, these attorneys would apparently not be able to practice pro haec vice at all because they are not "retained" in particular causes. They retain our Montana firm to assist them but they themselves are not "retained" as would be required by the new language on page 1, lines 22-23. Could they ever be admitted pro haec vice since they are not retained?

2. Under the new language at page 2, lines 2-3, repeated admissions of an out of state counsel would be banned except under"special circumstances." Would their status as business principals of their Montana businesses constitute "special circumstances?" It is not at all clear.

Recommended Amendments:

Option 1:

Delete the new phrase at page 1, lines 22-23 (i.e "retained");
Delete the second full sentence at the tip of page 2
(i.e. "Absent special.....application.")

Option 2:

At page 1, lines 22, after "retained to appear" add "or who otherwise seeks to appear"

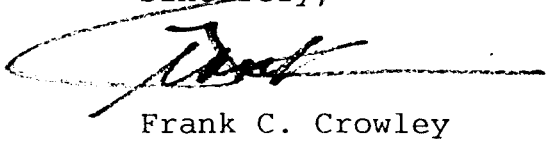
At page 2, line 3, after "application." add a new sentence:

> "Special circumstances shall be deemed to exist where such out of state counsel is also a director, officer, shareholder, or partner [alternatively, "has a direct and substantial economic interest"] in an entity which is a party to a matter before the courts of Montana."

I would greatly appreciate anything you could do to accommodate this issue. We do not oppose the bill except in this minor but critical regard. Thanks and best wishes for an excellent session.

Please call me if you need any additional information.

Sincerely,



Frank C. Crowley

At page 1, lines 22, after "retained to appear" add "or who otherwise seeks to appear"

At page 2, line 3, after "application." add a new sentence:

> "Special circumstances shall be deemed to exist where such out of state counsel is also a director, officer, shareholder, or partner, ~~(alternatively,~~ or has a direct and substantial economic interest, in an entity which is a party to a matter before the courts of Montana."

SB 65 –

1-12-95

SB 65

DATE 1-12-95

SENATE COMMITTEE ON Judiciary

BILLS BEING HEARD TODAY: SB 59, SB 60, SB 61, SB 65

< ■ > PLEASE PRINT < ■ >

Name	Representing	Bill No.	Check One: Support	Check One: Oppose
J. Michael O'Hara	Missoula County Sheriff / MSPOA	61 59	X	
Kathy McGowan	Mt. Sheriff's & Peace Officers	59 & 61	X	
Bob Gilbert	Mt. Magistrates Assn	SB 61		X
Robert Henschel	Mont. Sheriff & Peace Offic.	59 & 61	X	
Charles R Brooks	Yellowstone County	SB 61	X	
John Strandell	MSPOA / Cascade County	61 60 59	X	
Barry Micheletti	Cascade County Sheriff's Deputies Assn	61 60 59	X	
Rusty Jardee	Carter County MSPOA	61 60 59	X	
Tony Harbaugh	Custer Co Sheriff	59 60 61	X	
Ted Oldhouse	Hill Co. Sheriff's Office	61 60 59	X	
Clifford Brophy	Stillwater Co. Sheriff	60 61 59	X	
Jack Barngy	Fergus Co. Sheriff	60 61 59	X	
Chuck O'Reilly	L & C Co Sheriff	59 60 61	X	
John Connor	MT County Attys Asn. Dept of Justice	59 61		

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

DATE 1/12/95

SENATE COMMITTEE ON _____

BILLS BEING HEARD TODAY: _____

_____

< ■ > PLEASE PRINT < ■ >

Name	Representing	Bill No.	Check One: Support	Check One: Oppose
Jim CASHELL	CALLATIN COUNTY	59,61	X	
FRANK CROWLEY	Billings Generation, Inc ROSEBUD ENERGY	65	X Mock	
T. GREGORY HINDS	MISSOULA CO. MSPOA	59,61	X	
Jim DuPONT	MSPOA	59/61	X	
Gordon Morris	MHCo	59/61		

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY