MINUTES

MONTANA SENATE
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **ACTING CHAIRMAN MIKE HALLIGAN**, on March 10, 1995, at 9:00 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 Keintz, Committee Secretary

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

Committee Business Summary:

Hearing: HB 74, HB 355, HB 551
Executive Action: HB 157, HB 355

HEARING ON HB 355

Opening Statement by Sponsor:

REPRESENTATIVE BILL REHBEIN, House District 100, Sidney, presented HB 355. This bill deals with stolen property. If someone has stolen property and it is still in his possession, then law enforcement can go after him. Current law tended to say that a person could steal property, hide it for five years and then be free from prosecution. They do not believe that is the way the law was intended.

Proponents' Testimony:

Gary Reier, Assistant County Attorney, Richland County, stated the reason for the proposal for HB 355 is because of a Montana Supreme Court decision. In this case an individual had stolen some property and had it at his farm. Because the property had been stolen more than five years from the date, the Supreme Court said the statute of limitation had expired. That is bad law because it encourages a person to hide property and if hidden long enough, they get to keep the property. The theft statute uses terms such as "conceal or use property" which is a continuing act. The Supreme Court stated the legislature should designate that the statute of limitations continues under those circumstances. The reason for the proposal is if a person steals property and continues to hold possession of that stolen property, the statute of limitations stays in effect until the time that the investigating officers discover the stolen property. After it is discovered, there is a year to prosecute.

Marty Lambert, Chief Deputy County Attorney for Gallatin County, stated the **Montana County Attorneys Association** supports the bill which remedies an inequitable situation which now exists in the law.

Opponents' Testimony: None

Informational Testimony: None

Questions From Committee Members and Responses: None

Closing by Sponsor:

REPRESENTATIVE REHBEIN offered no further remarks on closing.

EXECUTIVE ACTION ON HB 355

Motion/Vote: **SENATOR REINY JABS MOVED HB 355 BE CONCURRED IN.** The motion **CARRIED UNANIMOUSLY** on oral vote.

HEARING ON HB 74

Opening Statement by Sponsor:

REPRESENTATIVE DON HOLLAND, House District 7, portions of Rosebud, Yellowstone and all of Treasure County, introduced HB 74. He sponsored HB 74 on behalf of the Rosebud County Commissioners. The heart of the bill was in Paragraph 2, Section 1, of the code, stating, "in civil actions, the court shall notify the jurors that they may impose economic sanctions if they determine the case to be frivolous or brought for purposes of harassment." On several occasions, there have been cases brought before the district court that were frivolous and

upon request, jurors were empaneled at the cost of the county and the taxpayers. The requestor is entitled to the jury trial; however, he said that many times the action was either frivolous or brought for the purpose of harassment. He said the amendments added in the House were excellent and made the bill even stronger.

Proponents' Testimony:

Beverly Gibson represented the Montana Association of Counties. The organization had passed a unanimous resolution at their September annual meeting in requesting the drafting of this legislation. In district court cases, the counties are reimbursed, to some degree, for criminal costs. In civil cases there is no reimbursement. When a case is brought to court and the jury determines that it has been brought frivolously, the jury has the opportunity to award jury costs to the party who brought the case.

REPRESENTATIVE DEBORAH KOTTEL, House District 45, Great Falls, stated she is a member of the House Judiciary Committee. She proposed the amendments to HB 74. They proposed amendments in concept and voted on the conceptual amendment without seeing the language of the amendment. She asked the Committee to consider on page 1, line 7, after the word "case" to add the words "or defense". Also, on page 1, line 23, following the word "case" to add the words "or defense". Throughout the entire discussion in House Judiciary they agreed when someone uses the court system for frivolous purposes, that person should pay the price of the use of the court system. They discussed the fact that it is either the plaintiff's or the defendant's right to ask for a jury trial. Out of fairness, they decided that parties who bring frivolous actions or raise frivolous affirmative defenses should go before the jury and if the jury finds that to be true, the cost of having the jury could then be imposed on the party. Unfortunately, because it was a conceptual amendment, the language only read "case" which seems to put the entire burden only on plaintiffs and none of the burden on defendants. Equity demands that the jury look at either party who brings frivolous actions or raises frivolous defenses such as affirmative defenses.

Jerry Criner, Lincoln County Commissioner, spoke in support of HB 74. This bill would help save several hundred dollars in district court costs.

Jackie Lenmark, American Insurance Association, Farmers Insurance Group, stated their support of HB 74.

Opponents' Testimony:

Jim Molloy, Montana Trial Lawyers Association, spoke in opposition to the bill. He presented written testimony from **Russell Hill, MTLA, EXHIBIT 1.** The legislation is not needed.

What they hear in support of this bill is that there are several occasions in which frivolous claims have been brought. This is the kind of legislation which emerges from myths about what happened and not reality. If the reality exists, it should be supported by specific cases and the instances associated with the costs that that litigation brought. The mechanisms for addressing frivolous claims already exist in our court system. Under the Rules of Procedure, there are prejudgment motions which permit a court to say as a matter of law that a claim or a defense is without merit. We also have Rule 11 sanctions which permit a court not only to penalize a party but also that party's attorney who brings or advances in court a claim which is frivolous and without merit. Regardless of that, this bill as drafted, is not sound. It affects only plaintiffs. That creates serious constitutional problems. The proposed amendment would address that; however, even with the amendment the legislation is not sound. A jury is there to rule on facts and the law as instructed to them by the court. A jury does not get an entire picture of a claim or a defense. Things happen in pretrial proceedings and motions at court which affect how a case ultimately gets to the jury. How can a jury decide whether a claim or a defense is frivolous? Is it necessary to bring in all that happened in pretrial proceedings. Can a party admit and bring into evidence settlement negotiations to prove a claim is not frivolous? This would include evidence that would prove that serious negotiations took place in trying to resolve the case and perhaps offers of money and payment were made. This creates a whole set of procedural questions. This bill says a judge shall inform the jury. What kind of instructions does the jury get? Would the jury have to impanel itself again after they have ruled on the merits of the case? This is a punitive damage provision which creates the necessity for the punitive damages types of due process considerations. Do we then begin bringing in evidence of financial position of the parties as to what the appropriate amount of economic sanctions should be? The sponsors talked about the costs of jury impanelment fees. The bill itself talks about economic sanctions. As drafted, the jury could award a million dollars against a party for a frivolous claim or a defense. There are times when defending a claim, for tactical reasons, you do not give up a defense because you want to have things to discuss even though it may be a weaker part of your case. For example, in an admitted liability automobile case where liability is clear, you may not give away the issue of liability if you think the plaintiff is exaggerating their claims. You may want to give the jury the right to say they do not think the defendant is at fault. In a case like this, a defendant could be hit with sanctions for not admitting liability and as a plaintiff's attorney, he would attempt to have a jury award sanctions against someone who didn't admit liability in a clear liability case. It would be a frivolous defense. For sound and good tactical reasons, the defense attorney may want to keep liability in the case. On appeal, would the jury's determination of sanctions be reviewed as a court's determination or a jury's determination. This bill would not be effective for

its intended purpose. It is designed to deter people from bringing frivolous claims. It is not worried about those who advance frivolous defenses. This will not reduce the cost to counties. It will create satellite litigation which will tie up the court. Juries will be sitting longer because they will be considering more issues. There will be more issues on appeal. There are more responsible ways to address the cost of our court system.

Informational Testimony: None

Questions From Committee Members and Responses:

SENATOR RIC HOLDEN asked **REPRESENTATIVE HOLLAND** his view of the MTLA amendment.

REPRESENTATIVE HOLLAND stated he had no problem with the amendment presented by **REPRESENTATIVE KOTTEL**. He also stated that MACO and the county commissioners would not have any problem with it either.

SENATOR LINDA NELSON asked if "frivolous" was defined somewhere?

REPRESENTATIVE HOLLAND stated it was not defined in the bill. He stated that he assumed it would be defined by the judge and the jury.

SENATOR MIKE HALLIGAN stated that he did not recall whether the Rules of Ethics or the Commission on Practice have defined "frivolous".
SENATOR STEVE DOHERTY stated the people from MACO talked about the costs of the county. Economic sanctions means something different than costs of the county. Who would be made whole?

REPRESENTATIVE HOLLAND stated this amendment was made by the House Judicial Committee. The original language actually defined jury fees. Economic sanctions were not further defined in the bill.

SENATOR DOHERTY commented the intent of the bill was whoever was responsible for the frivolous case would pay the jury fees.

REPRESENTATIVE HOLLAND stated that was the original intent of the bill.

SENATOR DOHERTY commented that if jury fees were awarded that would go directly to the county because they pay jury fees. Economic sanctions can be much larger. If a jury awards economic sanctions, the question is do all the economic sanctions go to the party who had a valid claim or do all the economic sanctions go to the county? He asked Jackie Lenmark how this would work? Would a jury render a decision and then have a separate hearing

after the decision on whether the claim or defense was frivolous? This would involve putting on new evidence and a new discussion somewhat similar to the punitive damages second step which must be taken.

Ms. Lenmark stated she should have discussed their feelings about the bill in a little more depth. She has not seen the proposed amendment. The bill is not clearly drafted at this point and raises that exact question. She was not present for the decisions which led to the amendment in the House Judiciary. The bill will either need to clarified or there will need to be some rulemaking in the Rules of Civil Procedure about how this could be handled. It could go on the verdict form. The bill also does not address who gets the money.

SENATOR DOHERTY stated that since we have Rule 11, the judge has to make the first cut as a matter of law that the particular claim or defense has some grounding in reality or some legitimate argument for an extension of current law. How would this bill change the power and authority of the judge to make a legal determination that the claim or defense could actually get to the jury, but then ask the jury to make a new interpretation on something that the judge has already made a call on.

Ms. Lenmark answered that the judge doesn't make that decision unless requested to do so. While Rule 11 is available, it is not used very often. Sometimes cases get to jury without the judge having made that determination. One of the unclear portions of the bill is how that issue will be presented to the jury. Without further delineation, the jury is going to talk about it as they are deliberating on the verdict and come up with their own decision. This raises the question of jury instructions.

SENATOR DOHERTY stated that assuming someone is going to ask for a jury instruction on whether the claim or defense is frivolous, the judge will make the call whether to give the jury instruction. At that point the judge makes a legal determination that there is at least sufficient evidence to raise that as an issue. Would this be a matter of law, which the reviewing court would give no deference, or would this be a matter of fact, if decided one way or the other that the court should give some deference to it?

Ms. Lenmark answered that in the first instance, we are reviewing a matter of law. The judge has made a decision. We also may be looking at the factual basis which was presented to the judge for his decision. Until the Supreme Court tells us what the standard of review is, I don't think we know.

SENATOR HALLIGAN stated if the issue of this bill is to reimburse counties for jury costs, this bill actually applies much broader in that it applies economic sanctions to parties which may not include reimbursing the county for jury costs. He stated the committee would want to look at the language which was proposed

by **REPRESENTATIVE KOTTEL** as well as making sure that the bill deals with the specific problem of reimbursing counties for the costs of juries.

Closing by Sponsor:

REPRESENTATIVE HOLLAND stated that having to defend the action of the House Judiciary Committee was difficult because it was not what he originally proposed. He felt that it did strengthen the bill; however, he has no objection to this committee fine tuning the bill in any manner which they see fit to make it more understandable by the system. He has no objection to the amendment which **REPRESENTATIVE KOTTEL** proposed. His main concern is that the bill is acceptable and understandable and still performs the original intent of the counties. In the testimony in House Judiciary, a county commissioner made remarks to specifics as mentioned by the opponent. As far as the taxpayer and the county government is concerned, this is good legislation. By the committees efforts, it could be even better.

EXECUTIVE ACTION ON HB 157

Discussion: **Valencia Lane** explained the two amendments. The first one was proposed by **SENATOR SUE BARTLETT** which has to do with closing the hearing at which the person would petition to be taken off lifetime registration, **EXHIBIT 2.** The other set of amendments, **EXHIBIT 3,** are technical amendments **Ms. Lane** suggested the committee adopt because HB 214 has almost identical language. Since HB 157 deals with sexual offenders only, in several places it refers only to sexual offender. The other bill is both sexual offenders and violent offenders. That bill simply refers to the offender. If both bills pass, the section would be codified referring only to sexual offenders in several places, although it is intended to apply to both sexual and violent offenders. To take care of that potential conflict she recommended that the committee adopt this set of amendments to strike the word sexual before offender in several places in § 46-23-506, MCA.

SENATOR BARTLETT commented that she questioned whether the hearing when an offender is petitioning to be removed from lifetime registration should be a closed hearing. She is offering the amendment for committee discussion. If a offender is petitioning to be removed from the lifetime registration requirement and that hearing is a public hearing, regardless of what the judge decides, the offender has broadcast the fact that he or she is on lifetime registration. Even if they are removed from that requirement, it is somewhat meaningless since the press would more than likely be covering that hearing.

SENATOR LARRY BAER stated he had a problem with the word "must". In light of the open meeting law, a judge should be able to determine whether the right of the public to know would exceed

the individual's right of privacy. A judge would be a good person to determine that factor. He suggested the word "must" be replaced with "may" thereby leaving it up to the judge's discretion.

SENATOR BARTLETT stated that would improve the amendment.

HEARING ON HB 551

Opening Statement by Sponsor:

REPRESENTATIVE WILLIAM BOHARSKI, House District 79, Kalispell, presented HB 551. The House Judiciary Committee had a bill before them regarding DNA records testing for sexual offenses. The fiscal note stated that the cost of the original bill was almost identical to the cost of this bill. The Committee decided that because there were so few sexual offender cases and it would involve such a large amount of capital and initial costs into this DNA testing facility, that this might as well be expanded to include other violent crimes. As with most bills, he was somewhat concerned about the rulemaking authority but the members of the House and the Judiciary Committee felt comfortable that records would be necessary. On page 2, they added most of the language on lines 11 and 12 to add the violent crimes. As the bill originally came in, it dealt only with sex crimes. A question which came up was, who would have access and who would want to use these records. Initially, the language on page 3, section 4, stated the information on DNA records can be released for purposes other than someone who is being charged with a sex crime. They would be collecting records of people who were convicted of sex crimes only. However, it would be legitimate to access that information for all other crimes. The most contentious issue with this bill was with the expungement of DNA records. They changed the wording because there was a lot of concern about being convicted in a lower court of a crime and if that conviction was overturned, would it be reasonable for someone to keep your DNA records on file? They decided if the offense is reversed, the record would be expunged. According to the attorney general's office, it would take about two legislative terms before they would know how well this system is working. The report to the legislature is scheduled for the 56th Legislature rather than the 55th Legislature. In the House they discussed having the State of Montana enter into an arrangement with another state to save some of the setup costs for this.

Proponents' Testimony:

Bill Unger, Department of Justice, spoke in support of this bill. He is also the Director of the State Crime Lab in Missoula. In 1993 the Montana Board of Crime Control identified 179 rapes in Montana. Of the 179 reported to law enforcement, the Montana State Crime Lab received 67. The primary reason the rest of the cases were not submitted to the crime lab is a recommendation by the crime lab that they not be submitted. If there is no known

suspect, they recommend law enforcement retain any evidence they have until a suspect is found. Only then can they help law enforcement determine if that person can be eliminated as a suspect. This bill would allow them to establish a database and compare sex offenders with that database. Sex offenders have a high propensity to reoffend. In 1994, they received 112 rape cases. They anticipate there were probably over 200 cases which were not submitted to the crime lab. Currently 43 states have DNA capabilities. There have been three DNA cases in the state which have been upheld by the Supreme Court. It would take approximately a year and a half to establish a DNA lab. The standards they would follow are very strict and have been adopted by the American Society of Crime Lab Directors.

Dave Ohler, Department of Corrections and Human Services, stated their support of HB 551. This committee heard HB 157 which dealt with lifetime registration and sentencing of sex offenders. The Department believes that HB 551 is another peg in the sex offender legislation. Testimony during HB 157 concerned sex offenders who are amenable to treatment and who are placed in the community need to have some guidelines and boundaries. The DNA record is another boundary. The sex offender realizes that his DNA is on record with the forensic lab and, hopefully, that will give him more pause before committing another sexual offense.

Marty Lambert, Montana County Attorneys Association, spoke on behalf of the Gallatin County Attorney who was the Chairman of the Subcommittee on Sexual Offenders of the Governor's Advisory Committee on Corrections. This will clear people who are suspected of crimes, but are innocent. Sex offenders will be known when they come to town and they will be suspected where there is no readily identifiable person to suspect. This type of database could clear innocent people as well as leading to the proper prosecution and conviction of those who might be guilty of sexual offenses. If he has a case which is a serious case, he will use another crime lab when necessary. Sometimes these labs are very expensive. The money could be better spent having the crime lab in Montana.

John Strandell, Undersheriff of Cascade County, stated he served as a member of the Governor's Advisory Council on Corrections and Criminal Justice and also served on the Subcommittee for Sex Offenders. He also represents the **Montana Sheriffs and Peace Officers Association** who also endorse this bill. HB 551 is an excellent bill which would be a tremendous tool and asset for law enforcement within the state in the investigation of violent crime. DNA offers the potential to make positive identification of perpetrator's blood, semen, hair, or tissue samples found at crime scenes. Many sex offenses are repeat offenses. This legislation would provide a deterrent to convicted sex offenders knowing that there is a DNA record on file and their chances of being caught are increased. It would also effectively combat transient and mobile sex offenders who move freely within our state committing crimes from town to town. Many states currently

have laws which allows for DNA sampling of convicted sex and violent offenders. DNA samples would be analyzed and stored in the lab at the Forensic Science Division in Missoula and only criminal justice agencies would have access to the confidential information. The fiscal note would be money well spent in order to combat the rising cases of sex and violent offenses in our state committed against both adults and children.

Opponents' Testimony:

Scott Crichton, ACLU, presented his written testimony, **EXHIBIT 4.** We are not talking about being able to use DNA testing in the court. We are talking about giving the state the authority to develop a data bank on its citizens who have been convicted of sex or violent crimes. This bill states that the state now has reasonable cause to suspect in any future prosecutions because of past convictions.

Informational Testimony: None

Questions From Committee Members and Responses:

SENATOR HALLIGAN asked if the lab in Wyoming would perform the same analysis as the lab in Colorado in a DNA test of saliva, as opposed to blood or other body fluids. Are there standards in the profession now that make sure that they are analyzing the same bands of genetic material?

Julie Long, Montana Crime Lab, commented the standards are very stringent guidelines. They have the same concerns as **Mr. Crichton** detailed. She, as a scientist, will not embark on a new procedure without proper validation, education, or experience. It is to their advantage to use the same methodology which Idaho, Wyoming, and Oregon labs use. The scientific community is standardizing so that results can be compared.

SENATOR HALLIGAN asked if there is 100% statistical probability that the DNA test will show that the same person was involved in cases in Wyoming, Montana, and Idaho? Is it that accurate?

Ms. Long stated the statistical argument is large at this point. Each person's DNA is different from the person next to them with the exception of identical twins. The DNA analysis which they do forensically, does not analyze the entire DNA molecule. No one has coded the entire DNA molecule. It is like a string of three billion beads in row. In forensic analysis, you are only looking at 150 to 200 of those beads. Those particular sections of the DNA does not code for anything like eye or hair color, personality. They are non-coding regions which do not identify personality or physical traits about that particular person which is why they are chosen for forensic analysis. Since the entire DNA molecule is not analyzed, there would not be a 100% inclusion. Depending on how common your particular DNA pattern in that small portion is in your population, is what is compared.

Part of the year and a half set up time is to establish a population database.

SENATOR HALLIGAN stated that if they are trying to set up Montana's statistical database, they would have to get fluid samples from ordinary citizens who have not been part of the criminal justice system.

Ms. Long stated that is how a population database is set up. They would ask for volunteers. It takes a minimum of 100 individuals to set up a good database population.

SENATOR HOLDEN asked if the people of Montana could rely on the lab's DNA testing capabilities now.

Ms. Long stated they do not have the capability or education at the present time. Any cases relative to DNA testing must be sent to a private lab.

SENATOR HOLDEN asked for further information on the fiscal note.

Mr. Unger stated a large part of the funds involved in the fiscal note would be remodeling at the State Crime Lab in Missoula. Currently the crime lab rents approximately 9,100 square feet from St. Patrick's Hospital. There is currently 5,000 square feet available. That space is available for expansion. It is an all or none situation because of the security required. The lab is completely filled at this time. If a DNA program is implemented, it would take two contamination free rooms. They are paying $5.85 a square foot including utilities, which is a giveaway. The average cost in Missoula is anywhere from $8.50 to $15.50 a square foot. Renting the additional 5,000 square foot would handle the growth they are projecting for the next 15 to 20 years. In consideration of sharing DNA testing with another state, the amount of work they would have would require those states to hire two scientists, which is what is requested in the fiscal note. The materials would cost the same. The only savings would be about $50,000.

SENATOR HOLDEN asked **REPRESENTATIVE BOHARSKI** if the House had any concerns about the fiscal note.

REPRESENTATIVE BOHARSKI stated that they were concerned about spending approximately $400,000 setting up the DNA testing program since there were so few sex crimes alone. Using this for violent crime would make it more appropriate. One of the last sections in the bill states that if money is not specifically line itemed by HB 2, this program would not come into operation.

SENATOR BARTLETT asked **REPRESENTATIVE BOHARSKI** the status of their budget request.

REPRESENTATIVE BOHARSKI stated he did not have that information.

SENATOR BARTLETT, referring to the all or nothing proposal for additional space at St. Patrick's, asked if the crime lab would use the remaining space not needed by the DNA program?

Mr. Unger answered they are expecting growth in Montana which would indicate growth in the crime lab. Currently, in the drug chemistry area their turnaround time has changed from two weeks to six weeks. There has been a huge increase in drug cases in the last five years. They are completely flooded with latent fingerprint examinations. They would only be using the 1500 square feet at this time because they would need funds for remodeling the remaining 3500.

Closing by Sponsor:

REPRESENTATIVE BOHARSKI stated that **Mr. Crichton** brought up some points which would concern us. In order to collect this information, the person must be convicted of any of the sexual or violent crimes listed in the bill. Some of the concern is whether or not this information will be allowed in court. This information will be used more frequently as time goes on. One of the advantages of DNA testing is that not only can it help in prosecution, it can also help in clear exoneration of an individual.

SENATOR BRUCE CRIPPEN took over as chairman of the hearing.

EXECUTIVE ACTION ON HB 157

Motion: **SENATOR HALLIGAN MOVED TO AMEND HB 157.**

Discussion: **SENATOR HALLIGAN** commented the technical amendment is not a problem.

SENATOR HOLDEN questioned if the word "sexual" was stricken in the amendment, where would the bill reference "sexual offender"?

Ms. Lane commented that at the bottom of page 6 the bill is amending § 46-23-506. HB 214 also amends the same section and also contains (2) which is identical to (2) on page 7 of HB 157. Both bills refer to "any time after 10 years since the date of the sexual offender's last conviction of a sexual offense" and "the offenders last conviction of a sexual or violent offense".

SENATOR LORENTS GROSFIELD posed the question if HB 214 failed and this bill passed with the amendment, would there still be a problem?

Ms. Lane stated if this was the only bill to pass, the subsection would read "At any time after 10 years since the date of the sexual offender's last conviction of a sexual offense, the offender may petition . . . the offender has the duty to register . . . the offender was convicted." There would be no problem.

Vote: The motion **CARRIED UNANIMOUSLY** on oral vote.

Motion: **SENATOR BAER MOVED TO FURTHER AMEND HB 157, EXHIBIT 5.**

Discussion: **SENATOR HOLDEN** commented that last week they passed HB 69, the crime victim's bill. That bill contained language wherein the victims of crime would know what would happen to the offender. This would be accomplished by opening the forum so that the victims could attend public hearings. He believed this amendment would give the judge the discretion of deciding whether or not the victims should attend. There is a possibility that the victim would not participate. He objected to the amendment.

CHAIRMAN CRIPPEN stated this amendment only stated the hearing may be closed to the general public. He believed the victim would still have the opportunity to be involved.

SENATOR HALLIGAN commented the crime victim's legislation would supersede this bill. If there is specific language in that bill allowing victims to be part of the process, they would not be considered the general public and would be allowed to attend the hearings.

CHAIRMAN CRIPPEN stated there might be a request by the victim that in fact the hearing be closed to the general public. An example would be the woman who testified at the hearing who did not know how her husband was killed or any of the circumstances about his murder. She may want the knowledge but that does not mean the general public should hear about it at that point in time.

SENATOR HOLDEN stated that he still felt a judge would be allowed the discrepancy on whether or not a certain situation will occur. They would be interjecting another political philosophy into the scheme of this bill.

SENATOR BAER commented there is a constitutional and statutory duty under open meeting law whereby any government body which comes together is required to have the meeting open to the public unless the governing person of that body, in this case the judge, makes the decision that the right of the public to know exceeds the right of an individual's person privacy. In this case, the victim would be a part of the process and would be allowed regardless of the public's right to know. If the public's right to know was decided to be insufficient in the balancing test, it would not deny the victim the right to be at the meeting.

SENATOR GROSFIELD commented that everyone on the committee agrees that the language "may be closed to the public" should not apply to the victim.

CHAIRMAN CRIPPEN stated they would take this as a conceptual amendment and have **Ms. Lane** word the amendment in proper form.

He stated that **SENATOR BAER's** motion would provide that the hearing may be closed to the public but that does not mean the victim.

SENATOR DOHERTY asked whether, in a closed judicial hearing, the victim's families would be subject to the same confidentiality provisions which everyone else in the courtroom would be subject to.

CHAIRMAN CRIPPEN stated that once the judge admonishes those within the hearing, as he or she would do, that would apply to everyone in the hearing room. The victim would fall under the same admonishment by the judge.

SENATOR HALLIGAN stated the existing victim's rights legislation allows a defendant to request that a hearing, all or part, be closed. Notwithstanding closure of a proceeding to the public, the judge shall permit a victim of the offense to be present unless the judge determines that exclusion of the victim is necessary to protect either the party's right to a fair trial or the safety of the victim. That applies to pretrial proceedings. This would not be a pretrial proceeding. He suggested making the language consistent with HB 69.

Vote: The motion to amend **CARRIED UNANIMOUSLY** on oral vote.

Motion/Vote: **SENATOR HOLDEN MOVED HB 157 AS AMENDED BE CONCURRED IN.** The motion **CARRIED UNANIMOUSLY** on oral vote.

ADJOURNMENT

Adjournment: The meeting adjourned at 11:20 a.m.

SENATOR BRUCE D. CRIPPEN, Chairman

JUDY J. KEINTZ, Secretary

BC/jjk

MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE

ROLL CALL DATE 3-10-95

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	✓		

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SENATE STANDING COMMITTEE REPORT

March 10, 1995

MR. PRESIDENT:
We, your committee on Judiciary having had under consideration HB 157 (third reading copy -- blue), respectfully report that HB 157 be amended as follows and as so amended be concurred in.

Signed: _____
Senator Bruce Crippen, Chair

That such amendments read:

1. Page 7, line 2.
Following: "of the"
Strike: "sexual"

2. Page 7, line 3.
Following: "the"
Strike: "sexual"

3. Page 7, line 5.
Following: "relieving the"
Strike: "sexual"

4. Page 7, line 10.
Following: "WHICH THE"
Strike: "SEXUAL"

5. Page 7, line 13.
Following: "the"
Strike: "sexual"

6. Page 7, line 16.
Insert: "(3) The offender may move that all or part of the proceedings in a hearing under subsection (2) be closed to the public, or the judge may take action on the judge's own motion. Notwithstanding closure of the proceeding to the public, the judge shall permit a victim of the offense to be present unless the judge determines that exclusion of the victim is necessary to protect the offender's right of privacy or the safety of the victim. If the victim is present, the judge, at the victim's request, shall permit the presence of an individual to provide support to the victim unless the judge determines that exclusion of the individual is necessary to protect the offender's right to privacy."

-END-

_____ Amd. Coord.
_____ Sec. of Senate
_____ Senator Carrying Bill

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SENATE STANDING COMMITTEE REPORT

March 10, 1995

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration HB 355 (third reading copy -- blue), respectfully report that HB 355 be concurred in.

Signed: _____
Senator Bruce Crippen, Chair

Amd. Coord. _____
Sec. of Senate

_____
Senator Carrying Bill

561113SC.SPV

Montana Trial Lawyers Association

Russell B. Hill, Executive Director
#1 N. Last Chance Gulch
Helena, Montana 59601
Tel: (406) 443-3124
Fax: (406) 443-7850

March 10, 1995

Sen. Bruce Crippen, Chair
Senate Judiciary Committee
Room 325, State Capitol
Helena, MT 59620

RE: House Bill 74

Mr. Chair, Members of the Committee:

Thank you for this opportunity to express MTLA's opposition to House Bill 74, which allows juries in civil actions to assess economic sanctions against plaintiffs--but not defendants--for frivolous or harassing litigation.

MTLA opposes HB 74 because:

- The jury, which predominantly determines issues of fact, will rarely be familiar with the ***entire*** "case" in a civil proceeding, which often consists of legal as well as factual issues. Without a comprehensive perspective on the "case," juries will frequently be unable to determine whether that "case" was genuinely frivolous or brought for purposes of harassment.

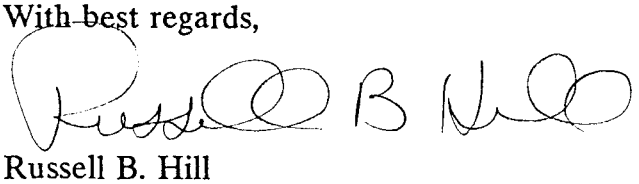
- The bill creates but fails to address numerous procedural problems. For instance, the bill doesn't specify at what stage of the proceedings a jury will determine sanctions. Similarly, appeal courts generally give great deference to the factual determinations of juries; but HB 74 ignores the basis for appeals (if any) of jury sanctions based on legal as well as factual determinations. Similarly, the bill ignores the relationship of jury sanctions with jury instructions (i.e., how does a judge evaluate jury-instruction requests?); and the admissibility of evidence (i.e., prior settlement negotiations as evidence of frivolous/harassing proceedings).

- Even if the Legislature authorizes juries to assess economic sanctions

against litigants for frivolous or harassing litigation, it must do so *for both sides*, for defendants as well as plaintiffs. Constitutional principles of due process, equal protection, and access to justice prohibit sanctioning only one party for behavior common to both parties.

Thank you again for this opportunity to express MTLA's opposition to HB 74. Please contact me if I can provide additional information or assistance.

With best regards,



Russell B. Hill
Executive Director

Amendments to House Bill No. 74
Third Reading Copy (blue)

Requested by Montana Trial Lawyers Association
For the Senate Judiciary Committee

Prepared by Russell B. Hill
March 10, 1995

1. Page 1, line 7.
Following: "CASE"
Insert: "OR DEFENSE"

2. Page 1, line 23.
Following: "CASE"
Insert: "OR DEFENSE"

Amendments to House Bill No. 157
Third Reading Copy (blue)

Requested by Senator Bartlett
For the Committee on Judiciary

Prepared by Valencia Lane
March 9, 1995

1. Page 7, line 12.
Following: "~~victims.~~"
Insert: "The hearing ~~must~~ may be closed to the public."

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 3/10/95
BILL NO. HB157

Amendments to House Bill No. 157
Third Reading Copy (blue)

For the Committee on Judiciary

Prepared by Valencia Lane
March 9, 1995

NOTE: This is a technical amendment needed if both HB157 and HB214 pass - to avoid a conflict in (2) of 46-23-501
Valencia

1. Page 7, line 2.
Following: "of the"
Strike: "sexual"

2. Page 7, line 3.
Following: "the"
Strike: "sexual"

3. Page 7, line 5.
Following: "relieving the"
Strike: "sexual"

4. Page 7, line 10.
Following: "WHICH THE"
Strike: "SEXUAL"

5. Page 7, line 13.
Following: "the"
Strike: "sexual"

ACLU OF MONTANA
AMERICAN CIVIL LIBERTIES UNION
P.O. BOX 3012 • BILLINGS, MONTANA 59103 • (406) 248-1086 • FAX (406) 248-7763

March 10, 1995

Mr. Chairman, members of the Committee:

For the record, my name is Scott Crichton, Executive Director of the American Civil Liberties Union of Montana, and I rise in opposition to HB 551.

The use of DNA testing has been in the news of late. The Larry Moore prosecution in Gallatin county was the first time DNA evidence was admitted in a criminal case in Montana. The Sex Offender Sub-Committee of the Governor's Advisory Council on Corrections and Criminal Justice Policy made news in late July of 1994 when they began discussing the concept of establishing a DNA bank for sex offenders.

The O.J. Simpson trial has also brought the use of this technology into the fore as the merits and risks associated with evidentiary hearings are being debated by the best criminal defense money can buy. And there have been a handful of cases nationwide where DNA matching has exonerated individuals who have been incarcerated and falsely convicted.

Originally, when this was HB 191, it was restricted to DNA testing and resulting data bank one one class of criminals, sex offenders. This bill expands the category to include violent offenders. Nobody is standing up for this unsavory minority. And only ACLU is standing up for the rights of these individuals.

I remind you that prisoners, whether convicted or waiting for trial, remain protected by the Constitution and while incarcerated should suffer restrictions of those constitutional rights which are necessary concommitants of incarceration.

Among those rights are 1) the right to counsel and other legal assistance; 2)the right to be free from unnecessary censorship of written material; 3) the right to express and practice political, personal and religious beliefs; 4) the right of personal property; 5) the right to vote; 6) the right to procedural due process; 7) the right to be free from unreasonable searches and seizures.

These are an easy first target, and no amount of testimony from me or others is likely to convince a legislative majority not to take this first precident setting step in crime control. So instead, I ask you to be fully cognizant of what are the implications of this first venture into a brave new world. When you pass this bill out of committee, you will be giving your blessing to an unprescidented measure. You are empowering the government, in this instance the State of Montana, to begin extracting genetic blue prints of a

small (and necessarily unsavory) portion of the population. You are for the first time empowering the state to keep a genetic data bank on these citizens. For now, at least, we are assured that the information will be maintained for the sole use of crime control.

With all the distrust that some seem to have of the federal government, it seems odd that everyone seems so trusting about the limits and intentions of state government. If government and law enforcement are always good willed, professional and self controlled, "we have nothing to fear but fear itself". But were that always the case with government, our founders would not have bothered spelling out a Bill of Rights with specific enumerated boundaries.

This bill is unstopable, I know. So I raise these few points in hopes that you will see fit to amend it to insure some protections against unprofessionalism or the potentialities of abuse.

I spell out in more detail the ACLU's position regarding Standards for Admissibility of DNA tests in written testimony. Currently, in order for DNA evidence to be admissible in a criminal prosecution, the extraction of DNA from a non-consenting individual must comport with Fourth Amendment Standards. To justify the involuntary extraction of DNA in the furtherance of a criminal investigation, a search warrant must be issued based upon reasonable cause.

A defendant must be given an adequate oppoprtunity to litigate the reliability or validity of the DNA testing process used in her or his case. In the case of O.J. Simpson, there is no doubt he has adequate counsel and appropriate defense experts. I think an average or indigent defendant, might have real barriers to having a level playing field in accessing this forensic evidence and/or engaing in independent testing.

But for now I'd like to focus on the need for Procedural Safeguards. One prominent scientist has argued that there is more quality assurance required to diagnose strep throat than to put a person on death row. At a minimum, 1) all laboratories doing forensic DNA analysis should be required to be liscenced; 2) laboratory personnel should be accredited; and 3) rigorous proficiency testing guidelines should be followed, including separate, independent analyses of each test result and blind external proficiency testing of laboratories on a quarterly basis, with strict standards for disqualifications of laboratories producing mistaken results.

Finally, the DNA contains a substantial amount of personal information not necessarily pertinent to the government's law enforcement goals and which information should not be maintained by the government. Government respect for individual privacy and autonomy is being diminished to a point inconsistent with the aim of a free and open society. For these reasons, the ACLU opposes the creation of data banks for the purposes of identifying and investigating individuals as suspects in future criminal cases.

EXHIBIT 4
DATE 3-10-95
HB 551

There use of forensic evidence in criminal cases raises serious civil liberties concerns, many of which are intensified by the prosecution's use of DNA analysis and identification. The concepts of fundamental fairness embedded in the Due Process Clauses of the federal and state constitutions obligate prosecutors to build their cases with valid and reliable evidence. DNA identification testimony may present significant due process problems if: 1) it is presented to juries with the infallible aura of science; 2) laboratories that conduct forensic testing, including DNAS testing, are not regulated and test results are not reliable or valid; 3)given the difficulty of litigating the complexities of this issue and that the defendanty is likely to have fewer resources than the government, it is difficult for lay finders of fact to understand the scientific processes leading to the conclusory testimony presented to them; or 4) its claims are so ambitious that the tetsimony often threatens to subvert the standrad of proof beyond a reasonable doubt required by due process in a criminal trial.

Accordingly, before DNA identification testimony is admitted, the prosecution must prove 1) that the general p[rinciples underlying the forensic uase of the tets are accepted as accurate by a consensus of the scientific community; 2) that the actual procedures used in the individual case comported with those general principles, and in particular that the laboratories involved in the testing were sufficiently regulated to ensure the reliablity and validity of test results; and 3) that the probability derived from the DNA evidence used to identify the defendant was calculated through the use of appropriate statistical principles of population genetics and adequately developed data bases. Until this showing can be made, DNA testimony should not be admitted in criminal cases.

DATE 3/10/95

SENATE COMMITTEE ON Judiciary

BILLS BEING HEARD TODAY: HB 74 HB 355 HB 551

< ■ > PLEASE PRINT < ■ >

Name	Representing	Bill No.	Check One: Support	Oppose
Marty Lambert	Mt. City Attys Asso	355	X	
Marty Lambert	Gallatin County	551	X	
Jim Molloy	MTLA / SELF	74		X
Bill Unger	Dept. of Justice	551	X	
JIM STREETER	DEPT OF JUSTICE	551	X	
Julie Lane	Dept of Justice	551	X	
John Strandell	Cascade County	551	X	
Scott Crichton	ACLU	551		X
Gary Ryder	Mt City Mfg			
Beverly Gibson	MACo	74	X	
Jerry Driver	Lincoln Co	74	X	
Dan Kemmis	NWPS	74		
Jacqueline Lenmark	Am. Ins. Ass'n	H 74	as amd X	
Todd Shahahan	Farmers Ins. Group	H 74	as amd X	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

REGISTER.F10

DATE _____

SENATE COMMITTEE ON _____

BILLS BEING HEARD TODAY: _____

_____

< ■ > PLEASE PRINT < ■ >

Check One

Name	Representing	Bill No.	Support	Oppose
Anne Kalafat				
Katherine Lippel				
Mary E. Chord				

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

REGISTER.F10

DATE _____

SENATE COMMITTEE ON _____

BILLS BEING HEARD TODAY: _____

_____

< ■ > PLEASE PRINT < ■ >

Name	Representing	Bill No.	Check One: Support	Oppose
Jo Lindert	Germany		✓	✓
Margarita Maria Cano	Colombia		✓	✓

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REGISTER.F10