MINUTES

MONTANA SENATE
55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BRUCE D. CRIPPEN**, on February 11, 1997, at 9:00 A.M., in Senate Judiciary Room.

ROLL CALL

Members Present:

Sen. Bruce D. Crippen, Chairman (R)
Sen. Lorents Grosfield, Vice Chairman (R)
Sen. Al Bishop (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Sharon Estrada (R)
Sen. Mike Halligan (D)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Walter L. McNutt (R)

Members Excused: None

Members Absent: None

Staff Present: Valencia Lane, Legislative Services Division
Judy Keintz, Committee Secretary

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

Committee Business Summary:

Hearing(s) & Date(s) Posted: SB 303, 2/7/97
SB 266, 2/5/97
SB 289, 2/6/97
Executive Action: SB 230

HEARING ON SB 303

Sponsor: **SEN. BILL WILSON, SD 22, Great Falls**

Proponents: **Brenda Nordlund, Department of Justice**
Mark Staples, Montana Tavern Association
Tom Hopgood, Montana Beer and Wine Wholesalers
Elmer Fauth, Citizen

Opponents: **None**

Opening Statement by Sponsor:

SEN. BILL WILSON, SD 22, Great Falls, introduced SB 303. This bill allows the use of alcohol ignition air lock devices as a form of DUI prevention for those individuals who continue to drink and drive at high levels of intoxication after being convicted of DUI offenses. He referred to the handout, **EXHIBIT 1**, which explained the Guardian Interlock System.

Those convicted of a DUI offense under this proposed law, would be required to have this type of unit hooked up to their ignition system. The offender would have to blow into the unit, which measures the alcohol content in the breath. This unit would be calibrated at .03%. The legal limit is .10. It would detect the breath alcohol content and if the unit was at that threshold or above, the unit would lock the ignition and the person would not be able to start the car. People who are convicted of their second or subsequent DUI offense, or those convicted of first offense DUI where blood alcohol level is .18 or above, would be required to have this type of unit installed on their vehicle. This is an additional measure and would not eliminate any other punishments or fines which are currently in statute. The offender will pay for the installation and removal of the device. That would be $70 to $75. There would also be a $60 per month lease fee to the company that distributes the device.

SB 303 also requires the Department of Justice to indicate on the offender's drivers license record that they are only to operate a vehicle with the device installed. If the offender is found driving another vehicle, he is in violation of the law. This bill also provides a penalty for tampering or circumventing an interlock device. It requires sentencing courts to require installation of an ignition interlock device instead of revocation or suspension of a person's license to drive. Despite strictly laws and more public awareness regarding driving under the influence, some repeat DUI offenders continue to make our roads more dangerous than they ought to be. There are approximately 50 prisoners with fourth offense DUIs in our state prison. Thirty four other states have some form of interlock legislation in place.

Proponents' Testimony:

{Tape: 1; Side: a; Approx. Time Count: 9:10; Comments: .}

Brenda Nordlund, Department of Justice, rose in support of SB 303. This would add another tool in the efforts to prevent drunk driving in the state. Hard core drinking drivers seem to have high blood alcohol levels on the first offense. This bill will be directed toward the first offenders who have high blood alcohol concentration levels and also to subsequent offenders who, by their behaviors, have shown themselves to have a disregard for the law in terms of drinking and driving.

They have one technical amendment to the bill which will not change the intent of the bill. **(EXHIBIT 2)** On page 8, line 26, they would strike the language "instead of a revocation or suspension of that person's license imposed pursuant to 61-5-205." They must take a predicate action; either a suspension or a revocation, before a probationary license is issued. They would still put the suspension or revocation on their record and then issue the probationary license with the requirement indicated in the bill of an alcohol interlock advice. There is also a technical error on page 11, line 7. The reference should be to 61-8-406, the per se offense which correlates with 722.

Mark Staples, Montana Tavern Association, stated this is a DUI law which they can support. It addresses the real problems at hand, which are the repeat and high BAC offenders. He wanted to make sure the amendment did not allow for the repeat and BAC violators to continue driving anyway. This bill was intended to give the sentencing judge the option to allow the offender to have a prescribed driving privilege but it would have to be with an interlock device attached. He would not want the judge to have limited options in terms of the probationary license.

Tom Hopgood, Montana Beer and Wine Wholesalers Association, stated that the moderate, responsible and mature consumption of alcoholic beverages is one of the primary tenants of their organization and they believe this bill goes a long way to help solve the problems in this state with DUI offenders.

Elmer Fauth, Citizen, spoke in favor of the bill. He is involved with the Montana Senior Citizens Association. They endorse and support this bill.

Opponents' Testimony: None

Questions From Committee Members and Responses:

{Tape: 1; Side: a; Approx. Time Count: 9:16; Comments: .}

SEN. SUE BARTLETT expressed some concern about a DUI offender, under this law, who forces a teenage son or daughter to blow into the device for him. She asked about a device which would be both an alcohol tester and a voice recognition system.

SEN. WILSON stated there were devices which took a voice imprint. The device would only recognize the offender's voice.

Ray Burgess, who distributes these devices, explained the device as a CBPA, which is a controlled breath pulse. The person would blow into it for a second on and then a second off, two seconds on and then two seconds off, etc. The person would have to be trained to do that. It would probably take at least 10 times in the office before the individual passed the test.

SEN. WALTER MCNUTT asked how mouthwash would affect this device?

SEN. WILSON stated that mouthwash may give a false/positive reading. The individual would need to allow the unit to air out, rinse his mouth out, and try again.

SEN. MCNUTT felt the dissipation time could be approximately a half hour. This could be difficult for someone who needed to get to work.

SEN. WILSON stated that this unit was set at .03 and it could be calibrated. He does not feel this is a real problem, although it may occur on occasion.

SEN. RIC HOLDEN asked how this program would be funded?

SEN. WILSON explained the offender would pay for the unit. There may be some administrative costs by the Department of Justice.

SEN. HOLDEN asked **Mark Staples** if the **Montana Tavern Association** would support an amendment of 1% tax increase to fund this program?

Mr. Staples stated they would not.

SEN. LORENTS GROSFIELD asked the cost of the unit.

Mr. Burgess explained the replacement cost would be $500. They do not buy the unit, they rent from the company itself and dispense the units.

SEN. GROSFIELD asked where the bill stated that the offender would pay for the rent of the unit? How many devices would he be able to have?

SEN. WILSON clarified that the offender would be allowed one device only. He would be restricted to drive just one vehicle. Page 9, line 3, requires the offender to pay the reasonable cost of leasing, installing, and maintaining the device. Under current law there is nothing which guarantees that he will not drive another vehicle.

CHAIRMAN CRIPPEN was interested in the average length of use of these devices. He understood this bill to be an alternative to incarceration. The offender would be allowed a probationary license subject to using the device. He questioned if the intent of the bill would be to allow this on the fourth offense?

SEN. WILSON stated this would kick in on the first or second offense. This is not intended to circumvent any present statute, punishment, fines, etc. If you are convicted of a third DUI, your car will be taken away. This would be just one tool which may stop someone on his first or second conviction which may impede the offender from going further.

CHAIRMAN CRIPPEN asked if there were variations among the 34 states which had these interlocking devices?

SEN. WILSON stated there were a lot of variations. Each state has a varying degree of legislation in this regard. A judge in Ravalli County uses interlocks in dealing with offenders. That is not prohibited in law. This would give the judge some guidelines. The court still has discretion.

On page 8, line 23, there is language stating that in addition to other punishment "when an offender is convicted of second or subsequent offense or the offender's blood alcohol concentration at the time of arrest is 0.18% or greater, and if the court determines that approved ignition interlock devices are reasonably available. . ."

SEN. GROSFIELD asked whether this voice detected drugs?

Ms. Nordlund stated that it did not.

SEN. GROSFIELD asked if there was any data regarding drivers with ignition interlock systems switching to drugs instead?

Ms. Nordlund stated she was not aware of offenders changing their substance of choice as a result of ignition interlocks.

Closing by Sponsor:

{Tape: 1; Side: a; Approx. Time Count: 9:34; Comments: .}

SEN. WILSON stated the cost would be minimal. If we are able to stop individuals from becoming repeat DUI offenders, there will be a cost savings. This is not a cure all. It is simply an innovative approach to help the problem. It is important for a DUI offender to have a constant reminder of his problem. This is a good rehabilitation measure.

HEARING ON SB 266

Sponsor: **SEN. GERRY DEVLIN, SD 2, Terry**

Proponents: **Roger McGlenn, Director of the Independent Insurance Agents Associations of Montana**
Tom Clark, Independent Insurance Agent
Tom Grau, Century Insurance
Jerry Driscoll, Employee Benefit Management Systems
Jackie Lenmark, American Insurance Assoc. and Alliance of American Insurers
Greg Van Horssen, State Farm Insurance Co.

Opponents: **Rus Hill, Montana Trial Lawyers Association**

Opening Statement by Sponsor:

{Tape: 1; Side: a; Approx. Time Count: 9:37; Comments: .}

SEN. GERRY DEVLIN, SD 2, Terry, introduced SB 266. This bill allows for the liable party in an insurance matter to recover damages. The Supreme Court has stated that had the legislature been more clear in their determination in this area of law, they would have ruled differently on cases before them. This bill especially deals with medical bills.

Proponents' Testimony:

{Tape: 1; Side: a; Approx. Time Count: 9:39; Comments: .}

Roger McGlenn, Director of the Independent Insurance Agents Associations of Montana, commented that several Supreme Court cases have created increasing problems for insurance agents and their clients, the Montana insurance consumer.

Tom Clark, Independent Insurance Agent, stated his focus was on injuries arising from automobile accidents. Those were the circumstances which were involved in the Allstate v. Reglar and Youngblood v. American States cases which address Section 4 of this bill.

The Reglar decision, which disallowed subrogation of automobile medical payments, occurred in 1981 and did not have an immediate affect on claim settlement practices of insurers. One company began to refer the injured third parties to the medical payments coverage of their own insurance policy. When one began that practice, the remainder followed.

Insurance follows the principle of indemnity and indemnity says that an injured person should be made whole but should not be able to profit or be unjustly enriched from their injury. The end result of avoiding these duplicate payments of the same medical bills, has resulted in significant added costs to the injury claims handling process.

They had a claim wherein their insured's car was struck by another person. The driver in the car in the rear was clearly at fault. A passenger in their insured's auto was injured. The insurer for the at-fault party told the injured passenger to turn in his medical bills to his insurance company under the medical payments coverage of the policy covering the automobile that they were occupying. This left two separate claims files open on the same accident. Two different insurance companies paid staff to handle this accident.

If the third party insurer includes the injured person's medical bills in their settlement with that person, bills already paid by another insurer, the result is unjust enrichment. Ultimately the insurance consumer ends up paying more than they should.

This bill would reaffirm the tort liability principle of the one at fault has to pay by allowing subrogation of medical bills paid by an insurance policy and it affirms the principle that people shouldn't be allowed to collect more than one time for the same medical expenses.

Tom Grau, Century Insurance, stated that the Supreme Court decision did not affect the marketplace very rapidly. In 1990 some of the companies began to direct his clients to their own coverage for recovery of medical payments before they would deal with them at all. They have had clients wherein the other company has taken care of their vehicle damage and still refused to deal with the client on their medical expenses.

{Tape: 1; Side: b; Approx. Time Count: 9:45; Comments: .}

Jerry Driscoll, Employee Benefit Management Systems, offered an amendment, **EXHIBIT 3**, which gives health insurance, under 2-18-902, the same rights of subrogation as the bill. They are a health insurance trust fund. In the case of an accident, they pay the medical and would like the right to go after the faulted party to recoup their medical benefits.

Jackie Lenmark, American Insurance Association and Alliance of American Insurers, stated they support this bill. The problem of duplicate and prompt payments has been of concern to the industry. They hope this bill will acknowledge the problems which have existed with claims management.

The theory of subrogation is based on the premise that the at-fault party should pay for an injury that he or she has caused. Subrogation is the theory by which an insurer steps into the shoes of its insured to recover those payments from the at-fault party.

This bill attempts to tie together the various lines of insurance which may be available for payment on a given claim to allow the at-fault party to be determined and to provide appropriate recovery to the injured person. This bill has been drafted with another bill in the House which delineates a particular order of payment so that this entire process can proceed in an more orderly manner. They support the amendment offered by **Mr. Driscoll**.

Greg Van Hoarsen, State Farm Insurance Company, rose in support of SB 266.

Opponents' Testimony:

{Tape: 2; Side: b; Approx. Time Count: 9:51; Comments: .}

Rus Hill, Montana Trial Lawyers Association, rose in opposition to SB 266. He stated that this bill concerns coverage which the consumer has purchased. A driver hit by a drunk driver could end

up with $100,000 in medicals. This bill will give various insurance companies subrogation against the benefits that person has been paid even when that person has not come close to recovering his $100,000 in medical bills.

The problem is caused by insurance companies fighting among themselves. When the driver recovers in the above judgement, anything he recovers is reduced by whatever other insurance companies have paid.

Sections 1 and 2, are not parallel to other existing provisions in the disability or health service chapters of that code. Section 2 is, word for word, language which exists in other chapters of the insurance code. Subsection (4) is the omitted language which exists elsewhere in the insurance code. The wording "The insurers right of subrogation granted in the previous sections may not be enforced until the injured insured has been fully compensated for his injuries," is missing from this bill.

This bill gives insurance companies a subrogation right when the innocent driver has not been paid enough to cover his medical bills. If the driver had $100,000 in documented hospital bills and his insurance company has med pay coverage that it is contractually obligated to pay $10,000, after his medical insurance company pays him, his insurance company can then be paid that $10,000.

On page 1, line 21, the language regarding reasonable notice is a concern to them. In the case where an insured could not find the indigent driver who had caused an accident and therefore settled with the insurance company, his own insurance company decided they did not have to pay policy limits because the insured settled before notifying them. The Supreme Court said that if it is clear that you would have reached policy limits, the insured should not be denied the coverage they paid for. They also have a problem with the extension of the statute of limitations which is on page 1, line 30. Because this is put into the disability chapter, it is an across the board extension of the statute of limitations.

Questions From Committee Members and Responses:

{Tape: 1; Side: b; Approx. Time Count: 10:00; Comments: .}

SEN. STEVE DOHERTY, asked **Mr. Driscoll** how his amendment would protect an injured person?

Mr. Driscoll explained that if the insured has health insurance and there is an accident involved, the health insurance pays the medical bills while they pursue the car insurance coverage.

SEN. DOHERTY stated that every insurance policy he has ever seen contains a right of subrogation. He asked **Mr. Driscoll** if he was

aware of any health insurance policies which do not contain a right of subrogation.

Mr. Driscoll explained that they are a trust fund and the injured party signs a subrogation form which they use.

SEN. DOHERTY commented that he had never seen a casualty or a health insurance policy which did not include a right of subrogation.

Mr. McGlenn commented that it was his understanding that this was true prior to and sometime after the Rigler decision. Under an auto insurance policy, which included subrogation under the medical portions of the auto insurance policy, there was a Montana amendatory endorsement put on these policies to strike that subrogation because of the Rigler decision. They are primarily a property and casualty insurance company. Subrogation for medical policies are under a separate section.

SEN. DOHERTY commented that the bill deals with casualty policies. The amendments, which are in an entirely different section of law and would strike a current section of law dealing with health insurance policies. He asked **SEN. DEVLIN** if he would agree to the amendment?

SEN. DEVLIN stated he had no problem with the amendment.

SEN. HOLDEN asked **Mr. Frank Cody, Deputy Insurance Company** if he had any statistics on double payments on medical bills in Montana?

Mr. Cody stated he did not have those statistics. One of the things that they are concerned with is the instance of no companies paying where there is third-party liability. Insureds have been requested to take a second or third mortgage on their home so that they can pay their own bills before everything is resolved. There needs to be a limit of the right of subrogation against the insured until 100% of the economic damages are paid. If that was contained in this bill, they would be in favor of this bill.

CHAIRMAN CRIPPEN posed the scenario where an individual who has a passenger in the car is involved in an accident which is not his fault. The individual has $100,000 bodily injury. The insurance company of the injured driver who was not at fault has $10,000 medical coverage and pays that to the injured passenger. That is 20% of the total cost. The insurance carrier who has the medical would not then have the right of subrogation against the insurance company of the tortfeasor until after the remaining $40,000 had been paid.

Mr. Cody stated that in the case where he was involved in an accident and was at fault. The person he hit, in this case **CHAIRMAN CRIPPEN,** would have a $10,000 medical pay on his

policy. **Mr. Cody** was an uninsured motorist who was at fault. **CHAIRMAN CRIPPEN** incurred $100,000 of medical damages and had a health insurance company which paid 80% of all covered charges. At this point he has received $10,000 from his casualty insurance and then received $80,000 from his health insurer. He would have received $90,000, but had to pay out $100,000. The current bill would allow his health insurer to go back to **CHAIRMAN CRIPPEN** and ask for the $10,000 from his auto insurer to pay for claims which they paid for. He would then owe $20,000 out of his own pocket. The health insurer should not receive pay until the full $100,000 has been paid. Alternately, if **Mr. Cody** had insurance and the **CHAIRMAN** was able to collect $25,000 from him, $10,000 from the auto med pay insurer and $80,000 from the health insurance company, **CHAIRMAN CRIPPEN** would have received $115,000 on a $100,000 bill. The health insurer then ought to be able to subrogate for that $15,000.

Mr. Clark stated that the health insurer would not have a right against the auto med payments. Subrogation is a right against an at-fault third party. The automobile insurance policy of the injured person is not an at-fault third party. The alternate scenario is correct and in that the payments in excess of the total amount of medical bills should be subrogable. This bill as it is drawn does not reflect the same. He would not oppose an amendment which allowed the subrogation right to begin at the point where the individual was fully compensated for their economic loss.

SEN. DOHERTY felt that every health insurance company currently has the right of subrogation.

Mr. Hill stated that subrogation is not limited to the wrongdoer. On page 2, lines 16 through 19, there is language pertaining to subrogation clauses which are designed to prevent duplicate payments for the same element of loss under the motor vehicle liability policy or under another casualty or disability policy or health service corporation. That is contractual subrogation.

Closing by Sponsor:

{Tape: 1; Side: b; Approx. Time Count: 10:15; Comments: .}

SEN. DEVLIN stated that in the findings of Youngblood v. American States Insurance Company, the Court wrote, "Subrogation is a term of art and had the legislature intended to include subrogation in this statute, it could have easily provided the same." Evidently, the Court would not be opposed to subrogation if it had been written into legislation. He felt a person should be compensated 100%. He would like the insurance companies to go back to the responsible party to collect part of their losses.

HEARING ON SB 289

Sponsor: **SEN. DOROTHY ECK, 15, Bozeman**

Proponents: **Gene Kiser, Board of Crime Control**
Mary Ellerd, Juvenile Probation
Gloria Edwards, Victim Witness Coordinator for Gallatin County and the City of Bozeman
Deborah Bakke, Lewis and Clark Co. Victim Advocate
Mark Watson, administrator - City of Billings

Opponents: **None**

Opening Statement by Sponsor:

{Tape: 1; Side: b; Approx. Time Count: 10:17; Comments: .}

SEN. DOROTHY ECK, 15,Bozeman, introduced SB 289, which is a follow up of HB 69 regarding victim's rights. There were a number of programs mandated under that bill. The funds for the program came from the Board of Crime Control. These are federal funds which are distributed to counties who are interested in developing the program. Twenty-two counties now have programs. There is a reluctance to establish a program which may not be permanently funded. In Gallatin County, the grant they have is not sufficient to fund the program and almost 60% of the funds come from taxpayers. This bill allows a $10 surcharge for criminal convictions and will provide adequate funding for most counties to continue the program. If the city or county has a victim's witness program, they are able to keep the $10 surcharge to run the program. If not, it goes into the State Victim's Compensation Fund. The fiscal note indicates that if the funds exceeds $500,000, the $87,000 would go into the General Fund. This provides $249,000 to the counties to set up the program.

Proponents' Testimony:

{Tape: 2; Side: a; Approx. Time Count: 10:23; Comments: .}

Gene Kiser, Board of Crime Control, stated that the victim's rights' bill set out services and functions which would bring the victims to an equal level with the offenders as they proceed through the criminal justice system. He referred to a map **(EXHIBIT 4)** which showed where the services were being provided. Dawson County has a program which provides services to the surrounding six counties. A number of counties do not have this service. Some of the resistance of local jurisdictions is when the grant money runs out, how do they pay for this program? This bill provides a mechanism wherein there would be perpetual funding going toward the victim witness programs.

Mary Ellerd, Juvenile Probation, rose in support of the bill.

Gloria Edwards, Victim Witness Coordinator for Gallatin County and the City of Bozeman, explained that last year she helped 252 primary victims of violent crime. She also helped 91 secondary victims and 99 witnesses. Of those victims, 132 were victims of domestic violence, 37 were assault victims, and 20 were victims of child sexual abuse. This included a 3 month old who had been sexually assaulted and a 89 year old grandmother who had been sexually assaulted.

She referred to her handout, **EXHIBIT 5.** She provides the victims with crisis counseling, emotional support, and helps them fill out crime victim compensation forms. They go to court with people. The victims can send forms to the prison when their offender is convicted of a crime and the prison lets them know when the offender escapes or is released. The citizens of Gallatin County pay 60% of the program. She would like to see that burden placed on the offender.

Deborah Bakke, Lewis and Clark County Victim Advocate, commented that they also provide a rape crisis program. In the fourteen months it has been in operation, they have served over 160 primary and secondary victims of crimes. This bill will make the perpetrators responsible and accountable to their victims.

Mark Watson, Administrator - City of Billings, stated that they would be a proponent of the bill, but have a unique situation in Billings. The city attorney received a letter from the county attorney stating that they could no longer provide funding for the Victims Assistance Program on behalf of city residents. The state law mandates that they provide this program. The City of Billings will have a million dollar shortfall next year. They have to come up with a source of funding. They could ask for a grant. This program will take two full time mastered social workers. This bill is a step in the right direction.

Opponents' Testimony: None

Questions From Committee Members and Responses:

{Tape: 2; Side: a; Approx. Time Count: 10:32; Comments: .}

SEN. SHARON ESTRADA asked **Ms. Edwards** who paid the remaining 40% of their program?

Ms. Edwards stated they are in the fourth year of a grant. The city and county must pay for 60%.

SEN. ESTRADA stated that Billings has a YWCA and their program provides shelter, etc. for victims. She asked if Gallatin County had anything comparable?

Ms. Edwards explained they had the Battered Women's Network. The difference is that victim witness programs are specifically

designed to help people through the criminal justice system. They help every victim of a violent crime.

SEN. ESTRADA asked **SEN. ECK** if they had a YWCA?

SEN. ECK answered they had an embryo boys and girls club.

SEN. ESTRADA was concerned about the funding. She asked **Mr. Watson** if the bill were not to pass, could the YWCA expand to help this type of program?

Mr. Watson answered that there is always a possibility of contracting through a third party. However, those organizations also have financial woes. They are mandated by law to provide this program.

SEN. MIKE HALLIGAN asked if the statute also included civil law?

Ms. Edwards answered that her program is strictly criminal. They work with the Battered Women's Network and they now have a legal advocate who helps people through civil avenues. She helps people file for orders of protection, etc. HB 69 was to help victims of a criminal offense.

SEN. GROSFIELD asked **Mr. Kiser** whether the funding of this program had been adequate? He wondered if the direct allocation should be sent to the general fund instead?

Mr. Kiser stated the fiscal note was not correct in that the Crime Victim's Compensation is funded out of the General Fund. There are no special revenue accounts. There are some sections of the statute which were not deleted or changed to reflect that. Those dollars would go back into the general fund from which the Crime Victim's Compensation Program is funded. Currently they have adequate funding and it appears they will have appropriate funding into the next biennium.

CHAIRMAN CRIPPEN asked **Mr. Watson** if the county attorney said there were no funds left?

Mr. Watson explained that the city and county have worked together subsequent to the enactment of the bill by the last legislature. Workload volume from the county side has increased where it has absorbed all of the available man hours and time on the county side. The county attorney has advised them that they could no longer continue in a joint relationship. They would need to request a grant, fund it themselves or not provide the program. They are handling issues involving felonies. The misdemeanor activities is what the county can no longer handle. They would apply for a separate grant on behalf of the City of Billings to the Board of Crime Control.

Closing by Sponsor:

{Tape: 2; Side: a; Approx. Time Count: 10:42; Comments: .}

SEN. ECK stated the victim's right legislation has resulted in a good program. This bill will allow them to continue the program without the cities and counties being responsible for an unfunded mandate.

EXECUTIVE ACTION ON SB230

Amendments: sb023002.avl **(EXHIBIT 6)**

Motion: **SEN. ESTRADA MOVED TO AMEND SB 230.**

Discussion:

Susan Good, explained that the amendment redrafted the bill. The assisted suicide statute, 45-5-105, is a real peculiarity in the codes. It states that the person who purposely aids or solicits another to commit suicide and the suicide does not occur, commits the offense of aiding or soliciting suicide. There was a case of assisted suicide only if that suicide were botched and the victim survived. They would amend sections of the criminal code.

Section 1, amendment 2 strikes everything following the enacting clause. Revocation or denial of medical license for aiding suicide. Providers shall lose their license if they are (1) convicted of criminal suicide, (2) there is a contempt of court judgment for the person who is violating an injunction, (3) there is a judgment that has assessed damages against the person under section 3. This section deals with providers and cases in which they may lose their license.

Section 2, new section - Injunction against aiding in suicide. This is before the fact. An injunction can be granted and a person would have standing in order to ask for the injunction. The people who can ask for the injunction are the spouse, parent, child, sibling, or an heir of the person who is about to commit suicide, (b) the person or entity providing health care to the person who would commit suicide and (c) the county attorney for the county in which either the victim or the perpetrator resides. (2) Costs and reasonable attorneys fees would be awarded to the plaintiff.

Section 3, Action for Damages. This is after the fact. The injunction is before the fact. The people who can bring action - spouse, parent, child, sibling, or heir and the person or entity providing the care to the patient.

CHAIRMAN CRIPPEN commented that the difference between this and the original bill was that "even if the plaintiff in this case consented to or knew of the attempted suicide" was the language stricken.

Ms. Good explained that that appeared to be too problematic for the committee. The Human Rights Commission is also excluded. The rest is the same as the introduced bill.

Section 4 deals with punitive damages. This is current law with exception of the fact that the punitive damages may also be awarded pursuant to Section 3.

Section 5 is where the major changes occur. They tried to accommodate the concerns which they heard at the hearing. Section 45-5-105 needed to be amended. She was stunned to learn that if the suicide were botched and the person seeking to commit suicide lived, that would be actionable against the person who helped. If the person died, there was no action. This section says that a person who purposely aids another to commit suicide, whether or not the suicide occurs, commits the offense of aiding suicide. (2) A person aids suicide when the purpose of assisting another person to commit or attempt to commit suicide knowingly either (a) provides the physical means by which another commits or attempts to commit suicide or (b) participates in a physical act by which another person commits or attempts to commit suicide. (3) A physician, physician assistant, certified nurse, dentist, etc., subject to licensure who administers, prescribes or dispenses medications or procedures to relieve another's pain or discomfort even if the medication or procedure may hasten or increase the risk of death, does not violate this section unless the medications or procedures are knowingly administered, prescribed or dispensed to cause death. (4) Withholding or withdrawal of a life sustaining procedure does not not violate this section. Following is the penalty phase which is in statute, 10 years or $50,000 but not both.

CHAIRMAN CRIPPEN asked **Jerome Loendorf, Montana Medical Association,** if he went along with section 5 (3)?

Mr. Loendorf stated his real concern was with Section 1 (3). Subsection (3) states that if there is any judgment in a civil action rendered against the person, they would automatically lose their license. That is unfair because in civil actions you do not lose your license if the case goes against you. This gives an unfair hammer to the other side to require settlement. If you have a 90% chance of winning, you take the chance of ending your career.

Part of a physician's practice is taking care of people who are terminal and in pain. Medication is given to take care of the pain. There is a new field in pain medication. People can be made comfortable. That type of medication is routinely given to people who are terminable and in pain. You need to judge not only the type but the amount of medication to give. This depends on the size of person, how their liver functions, and their tolerance to the medication. A person would always be subject to a civil cause of action that the patient was given too much medication.

The language in Section 5 would require that the other side needed to prove that he knowingly administered and dispensed a particular medication to cause death. The argument would be that the person only needed 10 ccs and the only reason the patient was given 12 ccs was to hasten death. This only needs to be established by a civil burden of proof.

SEN. DOHERTY felt this bill addressed a very difficult and complicated subject. If under 45-5-105, they can presently charge for aiding or soliciting suicide and if the suicide works, the remedy is to charge the individual who assisted or solicited suicide with homicide. The new (3) contains wording about medications or procedures being knowingly administered and would be a problem for Hospice people. They know giving a certain amount of medication will hasten death. The medication they are giving is the only thing they can give to reduce pain. The Montana Hospice Association has sent him a letter opposing the bill. They have not seen the new language.

{Tape: 3; Side: a; Approx. Time Count: 11:20; Comments: .}

Current wrongful death actions are limited to the spouse, parent, child but not the siblings in most actions. There are no costs or attorneys fees. A guardian or trustee would have standing.

Motion: **SEN. GROSFIELD MOVED SB 230 BE AMENDED.**

Discussion:

SEN. GROSFIELD would insert Section 3, putting a period after suicide at the bottom of page 1, bottom line. He would also include section 4 as presented.

SEN. HALLIGAN asked if this bill would help because physicians would now be more concerned about end of life treatment? He has been involved in two hotly contested guardianships where all the siblings agree except for one. This person could cause the parent a tremendous amount of pain in the last few months. Adding civil action would really open this up.

Vote: The **MOTION FAILED.**

Discussion:

Ms. Lane explained that her understanding was that there is concern about amending 37-1-316, which is the existing statute in Title 37, licensing laws. Section 37-1-316 is unprofessional conduct which currently provides conduct that does not meet the generally accepted standards of practice. A certified copy of the malpractice judgment against a licensee . . . is conclusive evidence of but is not needed to prove conduct that does not meet generally accepted standards. She would make the existing language (a) and add (b) which says, "Conviction of the person under 45-5-102, evading suicide, is conclusive evidence but is

not needed to prove conduct that does not meet generally accepted standards." This would necessitate amending the amendment to take out new Section 1 of the amendments which provides for automatic revocation of license.

CHAIRMAN CRIPPEN questioned why automatic revocation would be inconsistent?

Ms. Lane answered that new Section 1 of the bill and the amendments, provided for automatic revocation upon conviction and would not provide due process procedures on the license revocation. The whole point of amending 37-1-316 would be to provide due process procedures for license revocation. Automatic revocation versus a due process hearing on revocation are inconsistent.

SEN. AL BISHOP stated it wasn't the Committee's responsibility to write a bill for someone who has brought in a bill which is as flawed as this one.

Motion: **SEN. BISHOP MOVED SB 230 AS AMENDED BE TABLED.**

SEN. ESTRADA agreed. This bill needs to be totally rewritten.

Vote: The **MOTION CARRIED** on oral vote.

ADJOURNMENT

Adjournment: The meeting adjourned at 12:08 p.m.

SEN. BRUCE D. CRIPPEN, Chairman

JUDY KEINTZ, Secretary

BDC/JJK