

**MINUTES**

**MONTANA SENATE  
55th LEGISLATURE - REGULAR SESSION**

**COMMITTEE ON JUDICIARY**

**Call to Order:** By **CHAIRMAN BRUCE D. CRIPPEN**, on February 13, 1997, at 8:00 a.m, in Senate Judiciary Room, Room 325.

**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 318, 2/10/97  
SB 314, 2/10/97  
SR 16, 2/10/97  
Executive Action: SB 289, SB 278, SB 266

**EXECUTIVE ACTION ON SB 289**

**Amendments:** sb028901.avl - EXHIBIT 1

**Motion:** SEN. LORENTS GROSFIELD MOVED TO AMEND SB 289.

**Discussion:** SEN. GROSFIELD This amendment would move the money from the Crime Victim's Compensation Assistance Account to the General Fund. Their money comes from the General Fund. If the money does not go to the counties under (a) it would then go to the State General Fund.

Vote: The MOTION CARRIED UNANIMOUSLY.

Motion: SEN. RIC HOLDEN MOVED SB 289 DO PASS AS AMENDED.

Discussion: SEN. HOLDEN commented that the grant money to fund the Crime Victim's Compensation Assistance Program is running out and this bill would charge the offender \$10 to cover the program.

Motion: The MOTION CARRIED UNANIMOUSLY.

EXECUTIVE ACTION ON SB 278

Amendments: sb027801.av1 - EXHIBIT 2

Motion: SEN. LORENTS GROSFIELD MOVED TO AMEND SB 278.

Discussion:

SEN. GROSFIELD stated there was concern about the definition of "in the area". This clarifies the language by using "immediate vicinity" instead of area. Amendment 4 states that the manager of the establishment must post easily readable signs which inform that minors may not be in the immediate vicinity of a gambling activity. In reference to amusement games, he would change the language to read, "Amusement games may not be placed in such a manner that they are interspersed with live card game tables or gambling devices."

There is a definition of immediate vicinity as used in the amendments. Immediate vicinity means sufficiently close enough to play, control, or participate in the play or control of gambling activity or device. Easily readable signs is plural. If there are one to three machines it is not necessary to have more than one sign. The editors will not allow using the words "sign or signs."

SEN. SHARON ESTRADA asked what the "immediate vicinity" would mean - on the machines, in the building?

SEN. GROSFIELD stated that was defined in amendment 7. This would mean sufficiently close enough to play, control, or participate in the play or control of a gambling activity or device.

Vote: The MOTION CARRIED UNANIMOUSLY.

Motion: SEN. GROSFIELD MOVED SB 278 DO PASS AS AMENDED.

Discussion:

SEN. WALTER MCNUTT was concerned about the ma and pa establishments under this bill.

**SEN. GROSFIELD** stated the amendment would take care of that situation. This does not say that a person cannot walk past the machines. There needs to be a sign indicating that the activity is there and children are not allowed in the vicinity.

**CHAIRMAN CRIPPEN** stated that he had a letter from the Montana Lottery in which they proposed an amendment which would state, "For the purposes of this section gambling device does not include any machine or electronic device used in conjunction with the state lottery as defined in this section." They are concerned that grocery and convenience stores will have underaged children at the counter.

**SEN. STEVE DOHERTY** commented that Section 7 stated "close enough to play or control or participate in the play." The underaged children are loitering and they are close enough to play.

**SEN. GROSFIELD** did not feel that waiting in line meant loitering. He asked if a lottery device is a gambling device for purposes of Title 23, Chapter 5?

**Janice Jessup, Montana State Lottery**, stated they would like to see this confined to Title 23, Chapter 5, which would exclude the lottery. She suggested a codification instruction.

**CHAIRMAN CRIPPEN** asked if the amendment would then say that minors could play the lottery?

**Ms. Lane** explained that a codification instruction would not be appropriate with this bill. This bill amends a particular statute of existing law. Codification instructions are used when there is a new section of law which is to apply or not apply in certain areas. Section 23-5-158 states that minors cannot participate in gambling activities. By saying a new subsection does not apply to play lottery, the implication is that minors could play the lottery.

**CHAIRMAN CRIPPEN** felt amendment 7 took care of the problem.

**Vote:** The MOTION CARRIED. **SEN. HOLDEN, SEN. AL BISHOP, and SEN. ESTRADA** voted no.

#### EXECUTIVE ACTION ON SB 266

**Amendments:** sb026601.agp - EXHIBIT 3

**Discussion:** **Ms. Lane** explained the amendment was presented by **Jerry Driscoll**. This would make a similar amendment in the Title 2, Chapter 18, part 9, which is the state tort claims sections of the law to the amendment made in the insurance code.

**Motion:** **SEN. MIKE HALLIGAN MOVED SB 266 BE AMENDED.**

Discussion:

SEN. HOLDEN commented that **Jacqueline Lenmark's** amendment would include **Mr. Driscoll's** amendment plus other considerations. He asked **Ms. Lenmark** to explain.

**Ms. Lenmark** stated that the amendments she had prepared were in the alternative. One represented the trial lawyers' position, one represented the bill as it was currently drafted and one represented a compromise position which has been discussed. **Mr. Driscoll's** amendment was not included. There are subrogation statutes which mirror each other in three different places in current law.

SEN. HOLDEN asked which amendment was the compromise?

CHAIRMAN CRIPPEN commented that (4) of the second amendment would include no right of subrogation until the injured insured would be fully compensated for the economic damages arising out of his injuries.

**Ms. Lenmark** explained this would be only economic damages. This would not include pain and suffering, attorney fees, or costs. This would only be actual damages which would include medical expenses, property damage, and future medical expenses.

**Mr. Hill** stated they could not accept a compromise that goes into new sections of statute that the original bill didn't cover. The amendments regarding economic damages went beyond the original bill and reduce the threshold. He understood the insurance department would be comfortable with the economic damages language in one section of the bill, but not going into other sections of the code.

SB 266 is two different bills. Section 4 is the bill which the independent agents want. They have no objection to Section 3. The first two sections give a right of subrogation against an insured. The fourth section is not limited to subrogating against tortfeasors.

CHAIRMAN CRIPPEN commented that the amendment starting Page 2, line 2 would leave the question open on subrogation.

**Ms. Lenmark** stated that was to correct the bill as it was originally drafted.

Amendments: EXHIBIT 4

Substitute Motion: SEN. HOLDEN MOVED TO AMEND SB 266.

Discussion:

SEN. HOLDEN felt that this bill needed to pull in the Insurance Commissioner.

**CHAIRMAN CRIPPEN** objected to amendments which were not put into proper form by the staff attorney.

Motion: SEN. HALLIGAN WITHDREW HIS MOTION.

*{Tape: 1; Side: b; Approx. Time Count: 8:45}*

Amendments: sbo26601.avl and sb026602.avl-EXHIBIT 5 & EXHIBIT 6

Discussion:

**SEN. DOHERTY** explained he had two amendments in the alternative. One dealt with being fully compensated for the insured's injuries which was consistent with the current statute - right of subrogation granted for disability. Amendment sb026601.avl mirrors current law for health insurance policies.

**CHAIRMAN CRIPPEN** stated one amendment dealt with expenses and the other with injuries.

**SEN. DOHERTY** stated he did not have a problem giving the money to the casualty insurance companies if the insured is fully compensated for his injuries. If the committee did not like the current law, he prepared the back up amendment sb026602.avl which would fully compensate for the insured's expenses. In attempting to fix the right of subrogation, we do not want to make the person who was injured the one to suffer the consequences. If the insurance companies want to fight among themselves, that's fine. However, he does not want the insured in the middle of that.

**Ms. Lenmark** stated they do not support the full recovery. They would support the expenses or economic damages language. They would prefer the economic damages language.

**CHAIRMAN CRIPPEN** stated that would not be as inclusive as expensive. Insured's injuries would be the fullest umbrella. The next would be expenses. He asked to have the amendments put in proper form.

Motion: SEN. HOLDEN WITHDREW HIS MOTION.

HEARING ON SB 318

*{Tape: 1; Side: b; Approx. Time Count: 9:04}*

Sponsor: SEN. TOM BECK, SD 28, Deer Lodge

Proponents: Keith Colbo, Montana Independent Bankers  
Page Dringman, Montana Chamber Liability Coalition  
Frank Stock, Polson Banker  
George Bennett, Montana Bankers' Association  
Steve Turkiewicz, Montana Auto Dealers'  
Association

Opponents:       David Paoli  
                  Erik Thueson, Lawyer  
                  Russell Hill, Montana Trial Lawyers

Opening Statement by Sponsor:

SEN. TOM BECK, SD 28, Deer Lodge, introduced SB 318. It is essential that contracts be in writing.

Proponents' Testimony:

*{Tape: 1; Side: b; Approx. Time Count: 9:07}*

Keith Colbo, Montana Independent Bankers, stated it is important that when a transaction is put in writing it can be relied on and would not be overturned. He referred to a handout (**EXHIBIT 7**). People must be able to rely on a written contract as being final and complete. Equitable estoppel can be used, but the supporting evidence must be in writing. Written contract terms should not change because of oral representations of prior negotiations.

Page Dringman, Montana Chamber Liability Coalition, rose in support of SB 318. Written contracts provide benefits and assurances. The statute being amended is called the parole evidence statute. This provides that when a written agreement is intended as the full and final agreement between the parties, there are restrictions on any oral evidence.

The parole evidence rule allows oral evidence in certain circumstances. If someone alleges that there was a mistake in understanding in the formation of the contract or if someone was fraudulently induced to enter into the contract, oral evidence would be admitted to explain the circumstances. Oral evidence of an agreement which was prior to the time the written agreement was entered into or oral evidence of an agreement which was contemporaneous with the written agreement is not permitted if there is a written agreement between the parties to the contract.

The courts have interpreted an additional exception to the parole evidence rule which is called equitable estoppel. This is a doctrine which prevents a person from asserting their own rights against another if the first person has relied on certain comments, conduct, or even silence to their detriment. The defense of equitable estoppel is being used to bring in evidence of verbal agreement which was entered into prior to the written agreement or at the same time of the written agreement. This is strictly prohibited by the parole evidence rule.

The amendment would prohibit the equitable estoppel defense being raised as a basis for introducing oral evidence when there is a written agreement. If in the course of a contract, the parties to the contract determine there needs to be some modification, they can modify their contract in writing and this can be used in

an equitable estoppel defense. This amendment prevents the convenient memory lapse.

**Frank Stock, Polson Banker**, spoke about escrows. The bank does not have any ownership in escrows. Their purpose is to receive the payments from the purchasers, compute the interest, keep the books, and disperse the payments. When the contract is paid, they release the deed to the seller.

An example of an escrow was presented to the committee, **EXHIBIT 8**. Mr. Markin is the owner of the note for \$188,000. Whiteman is the signor. George is 90 years old. Within a year or two George and his wife will be in rest home. He is dependent upon this note as written.

He referred to another escrow, **EXHIBIT 9**. This is a contract for deed. Gerrity is the seller who is retirement age. This is a significant part of his retirement. He needs this contract as written.

He handed out another document, **EXHIBIT 10**. There are 510 escrows in their bank which amount to \$22,263,462. These are all deals between private people. They need to know they can depend on the courts to enforce their written contracts.

**George Bennett, Montana Bankers' Association**, spoke in favor of this bill. Last session there was a bill which was perceived as being favorable only to financial institutions and unfavorable to farmers and ranchers. This applies to everyone relying on a written contract. There is a fine line between constructive fraud and equitable estoppel. If a party to a contract can show fraud, they can go behind the written contract. We have a situation where a party can't prove fraud but still wants to show an oral modification. They should have had the modification in writing or they ought to be equitably estopped.

**Steve Turkiewicz, Montana Auto Dealers' Association**, spoke in favor of SB 318.

**Opponents' Testimony:**

*{Tape: 2; Side: a; Approx. Time Count: 9:24}*

**David Paoli** rose in opposition to SB 318. There are cases wherein equitable estoppel is not favored and will be sustained only upon clear and convincing evidence. In another Montana Supreme Court case it was stated that equitable estoppel is founded in equity and good conscience and its object is to prevent a party from taking unconscionable advantage of its own wrong while asserting a strict legal right.

Equitable estoppel is a term used where a party is denied the right to prove an otherwise important fact because of something another party has done or admitted to do. He counted the cases

where equitable estoppel would have impacted bankers, car salesmen, and insurance companies. They are few, so he does not know why this bill is needed.

Equitable estoppel is a defense. The amendment is fatally flawed onto itself. It talks about how no oral evidence of a claimed defense of equitable estoppel offered for the purpose of varying or modifying an agreement, the terms of which have been reduced to writing, is admissible in evidence.

Subsection (2) states that this section does not exclude the extrinsic type of evidence to prove or establish illegality or fraud.

Equitable estoppel and fraud are one and the same. This says you can bring in extrinsic evidence to prove fraud and the additional language being added says that you can't bring in oral or extrinsic evidence to prove equitable estoppel.

State ex. rel. Farm Credit Bank of Spokane v. Third Judicial District is the case which prompted this bill. This is the Graveley case. The Graveleys attempted to expand their ranch operation to provide for their three sons to ranch with them. They needed a loan for expansion. The Farm Credit Bank entered into written agreements but a loan officer stated to the Graveleys that the land they were purchasing provided the security for the loan and their homestead would not be at risk. There was a foreclosure and the home place was at risk. The Graveleys went into court to repeat what was told to them. That is the use of the doctrine of equitable estoppel which would be eliminated under this bill. In the Graveley case the Montana Supreme Court stated that equitable estoppel and fraud are one and the same. Fraud is not easy to prove. The amended statute is fatally flawed for that reason.

*{Tape: 2; Side: a; Approx. Time Count: 9:35}*

In the situation where a loan officer tells the attorney that he did lie to the consumer, that will not be allowed as evidence in court. He brought a piece of art which summed up his argument. The sculpture was called the Montana contract.

**Erik Thueson, Lawyer,** stated he wrote a letter to Governor Racicot and he wrote back saying, "Don't worry, Erik. I recognize I have a duty to protect Montana as a special place." One of the special things about Montana is the handshake. Equitable estoppel is the handshake rule. If you do away with equitable estoppel you do away with the handshake. Ranchers and farmers work on the handshake and after the handshake the contract is signed. He can't even read or try to understand some of the contracts involved in a business transaction. Farmers and ranchers can't hire lawyers at all times to read the fine print for them.



**Russell Hill, Montana Trial Lawyers**, commented that this bill illustrates the situation of a bullet hitting the bulls eye, but you have to be careful where the bullet goes and what the collateral damage is. This applies to our insurance companies, attorneys, financial advisers and car dealers. Nothing in law prevents oral representations from being made. This bill bars your attempt to enforce a legitimate oral argument. On line page 1, line 21 and 22, the bill says that no matter if there are witnesses or if the loan officer admits to the agreement, evidence cannot be introduced in court.

**Questions From Committee Members and Responses:**

*{Tape: 2; Side: a; Approx. Time Count: 9:46}*

**SEN. DOHERTY** asked **Ms. Dringman** if there had been any attempt to go to the Bar Association to deal with this issue in the years it has been coming before the legislature? This would allow the people who practice on a daily basis to say that this particular rule of evidence doesn't work and should be fixed.

**Ms. Dringman** stated she was not aware of anything like this being done. This is not a rule of evidence. It is an equitable doctrine.

**SEN. DOHERTY** stated that **Mr. Paoli** made the comment that if the new language in (3) were adopted, it would directly conflict with (2). Subsection (2) states you would have the defense and (3) says it is not admissible. He asked for an instance where this would apply.

**Ms. Dringman** felt there was a difference. Subsection (2) refers to fraud. There are nine elements of fraud and six elements of equitable estoppel. Fraud requires an intentional misrepresentation. Equitable estoppel could be negligent misrepresentation. Even with (3) added, fraud could be raised. Equitable estoppel is raised where the elements of fraud cannot be met.

**Mr. Paoli** stated this issue was directly addressed in the Graveley case. The Graveleys were objected to by their use of equitable estoppel. They contended that section 28-2-905 set forth the parole evidence rule that the Montana Supreme Court should consider the defense of equitable estoppel analogous to the exception for evidence of fraud which is made in 28-2-905(2). In that case, the Montana Supreme Court set out the requirements to prove fraud and the requirements to prove equitable estoppel. They said that for these reasons, "We conclude that the Graveleys' testimony about the representation made to them by Valeria Wareheim that in the event of default the FCB would accept deeds to their secured property in lieu of foreclosure, is admissible in support of the Graveleys defense of equitable estoppel and that based on the evidence offered in support of

that defense the motion for summary judgment should have been denied." The Montana Supreme Court said they are the same.

**SEN. DOHERTY** asked how many Supreme Court cases, in the last five to ten years, would have raised this issue? He does not know of anyone in the habit of suing banks.

**Mr. Paoli** stated that the bankers admitted it was not a problem. In the 25 most recent cases he looked at, equitable estoppel was mentioned in statute of limitations cases most of the time. Other than the Graveley case, there was no other financial institution case in which equitable estoppel was raised.

**SEN. HOLDEN** asked **Mr. Murdo** if the loan officer indicated he was making a false representation, how would that be handled?

**Mr. Murdo** stated if there was a false misrepresentation made to the customer, the parole evidence rule of exception for fraud would allow that kind of testimony.

**SEN. REINY JABS** questioned if the mistake was unintentional, how would that be handled?

**Mr. Murdo** answered if something was unintentionally stated, this defense would say that it had to be in writing to get it into evidence. If it is material to the contract, it needs to be in writing.

**CHAIRMAN CRIPPEN**, referring to the sculptor, asked **Mr. Paoli** if he were buying the bronze, would he expect anything else to verify that the bronze was an original?

**Mr. Paoli** answered that if he were in the business of buying and selling art and he were savvy, he would probably ask for certificate of authenticity. And if that turned out to be false, he would like to be able to prove the falsity.

**CHAIRMAN CRIPPEN** commented that if there was no fraud he would be out of luck.

**Mr. Paoli** stated he had no problem with contracts being in writing. **Ms. Dringman** spoke about the distinction between fraud and equitable estoppel. If the loan officer admitted that he made a mistake, that evidence would not be allowed.

**CHAIRMAN CRIPPEN** felt that if he relied on an individual telling him that he was purchasing an original, he would really rather have that in writing.

**Mr. Paoli** stated he had no problem with contracts being in writing. If people make representations to you that are false, you should have the opportunity to go into a courtroom and say what you were told. People should be able to go into the office of the president of a bank and tell him what the loan officer

told him and not have that bank officer have the knowledge that if it is not in the document, he is out of luck.

Closing by Sponsor:

*{Tape: 2; Side: a; Approx. Time Count: 10:02}*

SEN. BECK explained that he is also a rancher and is familiar with the Graveley case. When Mr. Graveley bought the property, he bought it with the responsibility of making the payments. He did not have enough cash up front to mortgage that piece of property. The final written contract included his home property as security for that piece of land. That was the binding agreement. When the foreclosure started, he couldn't believe what he had done. Now he was losing the whole ranch. People have got to be able to rely on that written contract. He sells his cattle on a handshake, then they prepare a written contract.

HEARING ON SB 314

*{Tape: 2; Side: A; Approx. Time Count: 10:02}*

Sponsor: SEN. CRIPPEN, SD 10, Billings

Proponents: Page Dringman, Burlington Northern Railroad  
John Alke, Montana Defense Trial Lawyers, and  
Montana Dakota Utilities Company  
Russ Ritter, Washington Corporations, and  
Morrison-Knudson  
John Fitzpatrick, Pegasus Gold Corporation

Opponents: Erik Thueson, Attorney  
Don Judge, AFL-CIO  
Fran Marceau, United Transportation Union and  
Brotherhood of Locomotive Engineers  
Russell Hill, Montana Trial Lawyers Association  
Ted Lang, Northern States Resource Council

Opening Statement by Sponsor:

SEN. BISHOP took over as Chairman of the Judiciary Committee.

SEN. CRIPPEN, SD 10, Billings, introduced SB 314. They had a bill last session that they put in writing, however, there are people on the judiciary who can't understand what they have read. In 1995 the legislature revised section 25-2-122 of the venue statutes to provide a limited number of forums in which an out-of-state corporation could be sued in tort. The rationalization was to recognize that non-resident corporations, which do business in Montana, greatly contribute to Montana's economy and should be treated in a fashion similar to resident corporations. Burlington Northern Railroad has train tracks throughout the western part of the United States.

A plaintiff who was injured in Nebraska and lived in Texas was allowed to file a lawsuit in Montana and also pick the district court which he or she felt was the one that would be most sympathetic and then file the lawsuit there. Last session we amended the law to provide that there were four possible venues for suits against out-of-state corporations. They were: (1) where the plaintiff resides, (2) where the tort occurred, (3) where the resident agent was located, or (4) the First Judicial District, Lewis and Clark County. Since that time a number of cases have gone before district courts dealing with the issue of venue. There have been a variety of opinions. In Great Falls, the district court interpreted the law as set forth in SB 63 and upheld that decision. In Yellowstone County, the District Court Judge held that there were two choices of venue. They could take the choices set out by the legislature or go back to the regular venue section where it states that if none of the defendants reside in the state, the proper place of trial is any county the plaintiff designates in the complaint. That language was not stricken in SB 63. The plaintiffs argued that sections 118 and 122 merely offered alternative venues. This was completely contrary to what the majority of the Legislature intended at that time.

In addition, they also argued that the law passed in 1995 was unconstitutional because it treats those injured by a non-resident individual differently than those injured by a non-resident corporation. The Legislature made a change in 1995 to address the fairness issue by treating non-resident corporations more similarly to resident corporations. SB 314 deals with both section 25-2-118 and 222. On page 1, lines 13 and 14, it clarifies that if none of the defendants reside in the state, the proper place of trial for a contract action would be provided in the section of law dealing with contracts and the proper place of trial for a tort action would be provided in 25-2-122(2) or (3). The amendments start on line 20 and explain the proper place of trial for a tort action which are the same four places of venue. On page 2, (3) explains the proper place for trial when the defendant is a resident of a state other than Montana. This is the county in which the tort was committed, the county in which the plaintiff resides or the first judicial district. This has nothing to do with FELA. They can still file under the federal forum if they choose. This explains the intent of the legislature whereby they provide a list of where a plaintiff can sue a non-resident corporation.

**Proponents' Testimony:**

*{Tape: 2; Side: b; Approx. Time Count: 10:15}*

**Page Dringman, Burlington Northern Railroad**, commented that the venue bill in 1995 sought to change a long standing rule that non-resident corporations could be sued in any county in the state. There were three reasons for the bill.

First, the legislature wanted to treat non-resident corporations in a similar fashion to resident corporations.

Secondly, the legislature wanted to curb the practice of forum shopping which allows you to take your case to a venue you perceive as most favorable for your cause. BN had 29 cases in '93 and '94 which had nothing to do with the state of Montana. The accident didn't happen here and the plaintiff didn't reside here. They were filed in Cascade or Yellowstone County. There were 91 cases filed by Montana residents. Seventy-nine of them were filed in Cascade or Yellowstone County. Sixty-eight had nothing to do with Cascade or Yellowstone County.

The third reason for limiting venue was the burden on certain judicial districts with regard to crowded dockets and the financial impact on state and local taxpayers. The average cost was \$7,000 per trial. The '95 amendment has been challenged by plaintiffs in Great Falls, Butte and Billings. They challenged 118 which stated "unless otherwise provided in this part" and then specified general venue rules. The '95 Legislature otherwise provided by specifying venues for actions against out-of-state corporations. The allegation was made that 118 and 122 merely offered alternative choices of venue. A court in Billings and a couple courts in Butte refused to move cases. Great Falls didn't buy that argument and stated the intent of the 95 Legislature was clear. The plaintiff in the Great Falls also alleged that the statute was unconstitutional because of the disparity for those people injured by non-resident individuals. Great Falls held that it was constitutional. These cases have been consolidated and appealed to the Montana Supreme Court and the court has not ruled on the cases at this time. The issues appealed to the Supreme Court were non-constitutional issues. If the Supreme Court upholds the constitutionality of 25-2-122 as written in 95, they may not decide the issue of statutory construction because it is not before them. This amendment eliminates the all county rule so that venue is neutral whether you are suing a non-resident individual or a non-resident corporation. This is a fairness issue.

**John Alke, Montana Defense Trial Lawyers, and Montana Dakota Utilities Company,** stated that this bill addresses every out-of-state corporation. In the utility rate making business, a federal law was passed which gave intervenors in a very select class of utility rate cases a right to demand compensation for appearing before the Montana Public Service Commission. Montana Dakota Utilities had such a rate case which applied only to the customers in eastern Montana. The rate proceeding was conducted by the PSC in eastern Montana. The intervenor made a claim for compensation under the federal law. That lawsuit was filed in Missoula County. Montana Dakota Utility had to defend that lawsuit in Missoula County where the plaintiff's lawyer lived. The practice of forum shopping brings discredit to the judicial system and the state of Montana.

**Russ Ritter, Washington Corporations, and Morrison-Knudson,** stated that Washington Construction Company, which operated in Montana and California, recently merged with Morrison-Knudson and its headquarters are now in Boise, Idaho. They have five contracts in Montana.

**John Fitzpatrick, Pegasus Gold Corporation,** stated they have four operating subsidiaries in Montana. Two are Montana corporations and two are out-of-state corporations. They have been victimized by forum shopping. Forum shopping gives credence to the saying, "When you have got a case to try, it is far better to know the judge than to know the law."

**Opponents' Testimony:**

*{Tape: 2; Side: b; Approx. Time Count: 10:30}*

**Erik Thueson, Attorney,** stated that he represents railroad workers. This bill is here because of bad lawyering. We have attorneys from other states bringing their clients from other states and filing railroad suits in our state courts. They seem to think that gives them an advantage over Burlington Northern. They don't try the cases here. Montana lawyers try cases in Montana for Montanans but the out-of-state lawyers don't. This is the weapon that the railroad has used to convince a lot of people that the venue laws need to be changed.

The good things about the judicial system and the rights that Montanans have is the baby. The problem bad lawyering creates is that the baby is in fear of being drained out with the bath water. If this bill is passed and the last bill is left intact, the baby has gone down the drain.

Bad lawyering can be fixed without hurting Montanans. If we are trying to provide fairness to out-of-state corporations, why are we passing a venue bill which says that when an individual Montanan has to file a lawsuit against an individual, non-corporation, out-of-stater, that their venue rights will be restricted as well? Right now if a drunk driver from out-of-state causes an accident, you can sue them in any county. This bill takes away that right. Corporations and non-corporation out-of-staters could be given a residence. The fair grounds would be that the place of residence for someone who does not have a residence in this state is where they are doing business or where they are paying property taxes.

The United States Supreme Court says you can classify venue laws according to residency. He presented a handout, **EXHIBIT 11**. If we are going to give this benefit to out-of-state corporations, there should be something in return. The United States Supreme Court has decided that an out-of-state railroad can be taxed on its intra-state profits. BN has closed our branch lines and caused an economic impact on our citizens. They have increased their shipping rates. That impacts Montana citizens. The

railroad, as an out-of-state corporation, is not subject to the Montana laws conducting settlement procedures in good faith. If they subjected themselves voluntarily to our unfair settlement practices, the courts wouldn't have to be used. The issue is fairness. Corporations who come into Montana and say they need special legislation, should also recognize their obligations.

**Don Judge, AFL-CIO,** stated that a couple of years ago a not so funny thing happened on the way to the forum. There was good reason for the law prior to 1995. Governor Racicot, in defending the law, said that subjecting a foreign corporation to a suit in the county in which it does business promotes the legitimate state policy to make its courts accessible to injured persons and to hold accountable a corporation which avails itself of the privilege of doing business in the state.

He also said in a brief filed before the U.S. Supreme Court that the state is not able to give its citizens the same assurance of effective redress for injuries committed by foreign corporations as it can in the case of domestic corporations. Foreign corporations simply do business here. Our mining companies do business here until the profits and minerals are gone and then leave Montana and also leave us to deal with the results of their leaving Montana. The proponents are saying, "Fix the law because people are filing lawsuits against us." Why are people filing lawsuits against them? Because they have committed some wrong against Montanans. We have pipelines being built across Montana today by out-of-state pipeline companies. How would this affect a multi-landowner lawsuit which crosses multi-county jurisdictions who would like to file a joint lawsuit against a pipeline company for faulty construction? In eastern Montana we have had to rebuild a great length of pipeline because of faulty construction. If there were to be a lawsuit from the property owners, would they each have to individually file a lawsuit in each of their counties? Are they prohibited from filing a joint lawsuit? What about the people from Ekalaka to Eureka who want to have access to a judicial system which is close to their home? If you live on the eastern boundaries of Lincoln County you will want to use the judicial system and the attorneys who preside in Flathead County instead of driving all the way back to Libby to file a lawsuit against some out-of-state or out-of-country corporation who came into Montana to do business for you. The proponents of this legislation are concerned that the Supreme Court of the State of Montana is going to defend Montanans against out-of-state corporations and out-of-state individuals. He is proud of the Supreme Court for sending a signal that this might happen. They are going to say that the legislature erred in favor of multi-national, out-of-state corporations and now may error in favor of out-of-state individuals. The responsible way of allowing Montanans access to the courts, their attorneys, and expertise legal advice is to let Montanans choose when dealing with people who are coming to our state to do business in our state and taking profits from our state but do not reside in our state.

**Fran Marceau, United Transportation Union and Brotherhood of Locomotive Engineers**, presented his written testimony in opposition to SB 314, **EXHIBIT 12**.

**Russell Hill, Montana Trial Lawyers Association**, stated that the opponents to the 95 legislation made precisely the arguments about unconstitutionality and inconsistency which were made in the courts. The case is on appeal. Forum shopping is the person in Augusta who would rather go to the court in Great Falls or Choteau in the wintertime than come down to Helena.

**Ted Lang, Northern States Resource Council**, stated this bill is forum shopping in and of itself and has put out-of-state corporations at a distinct advantage over Montanans.

Additional handout - **EXHIBIT 13** - Craig Gilchrist, Brotherhood of Locomotive Engineers.

**Questions From Committee Members and Responses:**

*{Tape: 3; Side: a; Approx. Time Count: 10:53}*

**SEN. DOHERTY** commented that every session we have a BN venue bill. Rather than come back each session for the BN venue bill, wouldn't it be a good idea to get the bar association, the defense bar and the plaintiffs bar to study this. Lawyers are the only ones who deal with venue and understand venue. They could come up with a venue bill which would end all venue bills.

**Ms. Dringman** stated she did not feel it was a good idea for the bar association to come up with a venue rule. Venue has been set by the legislature. This is not a judicial function.

**SEN. DOHERTY** commented that the courts have been pretty active at it. There is a conflict between the different district courts. Concerning the cases in Billings and Butte where **SEN. CRIPPEN** feels the courts have erred, did they involve railroad cases or other defendants?

**Ms. Dringman** stated they involved railroad cases.

**SEN. CRIPPEN** commented that he would not prefer having the bar association do his work for him. He thought they had a good venue bill a few years ago. He obviously underestimated the ingenuity of the Montana Trial Lawyers Association.

**SEN. DOHERTY** explained that given the issue is in front of the Montana Supreme Court at this time, why not let the court take care of it?

**SEN. CRIPPEN** stated that the question answers itself. The Supreme Court ought not to be involved in it. The legislative intent was clearly stated. This bill will state the legislative intent even more clearly. The legislature is charged with the



responsibility to make the laws. It is the responsibility of the courts to interpret them.

**SEN. HOLDEN** asked **Mr. Alke** if there could be a retroactivity clause placed into the bill to clarify the situations which have arisen since 95?

**Mr. Alke** stated that was a "nasty" one. With respect to the case at the Montana Supreme Court, because the case has already been argued, a retroactive provision would not affect the outcome of that decision unless the decision was after the bill was passed by both chambers and signed by the Governor. A retroactivity provision would affect the cases out there. **Mr. Judge** has created a straw man by stating that someone who lives on the east side of Lincoln County won't be able to go to Flathead to file a suit. If in fact it was an in state defendant, he can't do that anyway. If the tort is committed in Lincoln County by a Lincoln County resident, he can't go to Flathead County to file his suit. The only case in which that would apply deals with an out-of-state resident.

Closing by Sponsor:

*{Tape: 3; Side: a; Approx. Time Count: 11:07}*

**SEN. CRIPPEN** stated the reason for this bill is not bad lawyering, it is because of bad judging. The opponents spoke of bad corporations and hid behind the veil of "Montana for Montanans" and that we should not even consider the rights of these big out-of-state corporations who come in and destroy our state and oppress our citizens. That is not the case at all. Those corporations act as responsible citizens. We tax them. They are entitled to the protection of the laws and rights we have under the Constitution. They are entitled to be treated equitably and fairly. This bill was not initiated by the Burlington Northern. He initiated it because he was appalled and dismayed when he found out that the judge in Yellowstone County clearly ignored the intent of this legislative body when they passed SB 63.

HEARING ON SR 16

Sponsor: SEN. DOHERTY, SD 24, Great Falls

Proponents: GOVERNOR MARC RACICOT  
Pat Chenovak, Administrator of the Supreme Court  
Sue Weingartner, Executive Director of the Montana  
Defense Trial Lawyers  
Russell Hill, Montana Trial Lawyers Association

Opponents: None

Opening Statement by Sponsor:

{Tape: 3; Side: a; Approx. Time Count: 11:14}

SEN. DOHERTY, SD 24, Great Falls, stated this is a unique and honorable responsibility of this committee. When the Governor nominates individuals for judicial replacements, it is our responsibility to examine those individuals and concur, confirm and consent. He brings to the committee the nomination of Judge Kenneth Neil to the Eighth Judicial District, Cascade County. He thinks it would be the most honorable job in the world to sit in judgment on us, our neighbors and friends. This takes a special temperament. They are asked to split families apart and send people to their death. Judge Neil has that unfathomable judicial temperament. He has practiced law in Great Falls for 29 years before he was nominated by Governor Racicot. He served in the United States Army and is a graduate of the University of Montana for both his bachelor and law degrees. He served as a law clerk for the Montana Supreme Court and also as a deputy county attorney in Big Horn County. He also suffered the slings and arrows of working for legislative council. One of the hallmarks of his practice was the establishment of the pro bono legal clinic in Cascade County. His civic activities include the Gift of Life Foundation, the Great Falls Dodgers, and the Grizzly Athletic Association. It appears that he is a former chairman of the Montana State Republican Party, a former national committeeman, and Chairman of the President Ford Campaign Committee in 1976. These minor digressions from the straight and narrow should not dismiss us from considering and acting favorably upon Judge Neil's confirmation. The Governor did a remarkable job in making this appointment and he heartedly recommend it to this committee.

Proponents' Testimony:

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

GOVERNOR MARC RACICOT, commented that it was his great pleasure and privilege to be a part of the process which ultimately resulted in a recommendation before this committee and, hopefully, before the Senate to confirm the nomination of Ken Neil as a District Judge for the Eighth Judicial District. He has had a friendship with Ken Neil for a substantial period of time. He has had the privilege of being able to observe him in a variety of different circumstances in the practice of law and in the life of the community which he shares with many others in Great Falls, Montana. It is without qualification or condition that he heartedly and strongly recommends this recommendation. Ken Neil is exceptionally well qualified by virtue of his training, experience and character.

Pat Chenovak, Administrator of the Supreme Court, stated that Chief Justice Jean Turnage wanted the record to reflect his support of the confirmation of Judge Neil. He believes that he

will be a great addition to the bench. **Mr. Chairman's** comments to the court will be taken back in hopes that they will try to get things right in the future.

**Sue Weingartner, Executive Director of the Montana Defense Trial Lawyers,** stated their support of Judge Neil. It is a proud day for all of Montana when someone the caliber of Judge Neil is willing to serve in our judiciary.

**Russell Hill, Montana Trial Lawyers Association,** stated their support of Judge Neil. One member commented to him that in this session they feel very lucky when the odds are 50/50 and Judge Neil will be fair. The odds are 50/50.

**Opponents' Testimony:** None

**Questions From Committee Members and Responses:**

*{Tape: 3; Side: a; Approx. Time Count: 11:23}*

**CHAIRMAN CRIPPEN** asked Judge Neil to make a statement.

Judge Neil thanked **SEN. DOHERTY** and **GOVERNOR RACICOT** for their kindness and stated that he hopes to satisfy the confidence which has been shown. He introduced his wife, Sharon. He grew up three blocks from the Capitol and was sworn in as a lawyer in this room. He is grateful there were no opponents. He ran into Tom Schneider, a boyhood friend, and begged him not to come in and tell any stories about their childhood. He has been acting as district judge for three months. He has seen a lot of procedures which district judges see in that period of time. They have a heavy caseload. There are about 1200 cases per judge annually. His colleagues, Judge McKittrick and Judge Johnson and himself meet twice a month and are working out procedures to expedite the calendar.

**CHAIRMAN CRIPPEN** asked for a succinct explanation for the rule against perpetuities.

**SEN. HOLDEN** commented that his constituents were very upset with the Supreme Court last year regarding a ruling concerning a weapon stolen from someone used in a fatal killing of another. The blame was placed on the original owner of the weapon. He asked Judge Neil what his thoughts were on that ruling.

Judge Neil stated that when one is in the position of District Judge it is difficult to comment or criticize the Supreme Court. He had a little difficulty understanding the decision.

**SEN. BISHOP** asked Judge Neil how he would figure an augmented estate?

**CHAIRMAN CRIPPEN** stated that **SEN. BISHOP** was as much in the dark on that issue as the rest of the committee.

**SEN. HALLIGAN** stated that a lot of the lay people feel that attorneys and judges do not police themselves enough and that judges are not hard enough on lawyers to make sure they are complying with the rules of practice and ethics. He asked for his philosophy and the standards he would expect from the attorneys practicing in front of him.

**Judge Neil** stated that 99.9% of those who practice law expect high standards of each other and conform to high standards. He does not have any patience with unethical behavior. He has a strong belief in the civility of lawyers in how they deal with each other. He had a motion to compel before him the other day and it was the first time he reprimanded an attorney because of the conduct that he had during the course of the deposition. This hurts the whole concept of our judicial system.

**SEN. SUE BARTLETT** stated she always takes these opportunities to encourage the Governor and the Judicial Nominating Commission to actively work to recruit and appoint women for the judiciary. She has never had any objection to the men who were appointed to the judiciary. What would he do as a district judge to encourage the women of the bar to prepare themselves to assume a judicial post when an opportunity arises at some point in their lives?

**Judge Neil** felt there was a climate in Cascade County which would encourage that. Judge Marge Johnson, who is a woman, sits with Judge McKittrick and himself. There are three or four women on the county attorney's staff. They do not pay any attention to gender. Judge Johnson is setting a good example in her own right.

**SEN. BARTLETT** stated that sentencing of adult offenders can be used to achieve several purposes. She asked what purposes he would like to achieve through criminal sentences?

**Judge Neil** answered that would depend on the crime and how long the individual had been in the system. He puts a high priority on protecting society in terms of violent offenses. They try to emphasize rehabilitation. There is a lot of discussion about more prison cells or more community based programs. While he would not send a signal out that a first time, non-violent offender might not go to prison in my court, it is fairly typical that they get a deferred sentence and a probation status. If they violate probation or commit another offense, there may be a suspended sentence and then more intensive supervision. The people who are sent to prison, particularly in the non-violent category, are people who have been in the system for quite a while. In many cases the problems are drugs and alcohol. The intensive supervision program is a good one, but one probation officer can only handle twelve people. His first concern is the protection of society. He would like to have more options for people who do not get out of the drug, alcohol and crime cycle.

**SEN. ESTRADA** commented that she serves on the Sentencing Commission. She asked **Judge Neil** if he has an opportunity to review the Sentencing Guidelines.

**Judge Neil** stated that he is not in favor of Sentencing Guidelines. He feels that the judges are the professionals. They have the person and the record before them. He believes in broad discretion on behalf of judges. Guidelines may inhibit county attorneys and defense lawyers in their plea bargaining approach. He doesn't see a soft-on-crime policy by district judges.

**SEN. ESTRADA** stated the Sentencing Commission is recommending voluntary guidelines. She asked if he would be receptive to that idea.

**Judge Neil** said he would be receptive to voluntary guidelines.

**CHAIRMAN CRIPPEN** asked why he applied to be a district judge?

**Judge Neil** stated that being a judge was always in the back of his mind. He felt he had the experience down in the pit and that he could be helpful to people. He thought it would be fun to be a Supreme Court Justice someday. The district court is where the action is. Many of the things he deals with on the bench are practical problems.

Closing by Sponsor:

*{Tape: 3; Side: b; Approx. Time Count: 11:45}*

**SEN. DOHERTY** stated that the reason **Judge Neil** is here is that Judge Gough passed away last year. Judge Gough was universally liked, respected and valued in Cascade County. The Governor is to be commended for his nomination of **Judge Neil**.


EXECUTIVE ACTION ON SR 16

MOTION/VOTE: **SEN. DOHERTY** MOVED SR 16 DO PASS. THE MOTION CARRIED UNANIMOUSLY.

ADJOURNMENT

**Adjournment:** The meeting adjourned at 11:50 a.m.

  
SEN. BRUCE D. CRIPPEN, Chairman

  
JUDY KEINTZ, Secretary

BDC/JJK