

MINUTES

**MONTANA SENATE
59th LEGISLATURE - REGULAR SESSION**

COMMITTEE ON PUBLIC HEALTH, WELFARE AND SAFETY

Call to Order: By **CHAIRMAN BRENT R. CROMLEY**, on February 7, 2005
at 3:00 P.M., in Room 335 Capitol.

ROLL CALL

Members Present:

Sen. Brent R. Cromley, Chairman (D)
Sen. John Cobb (R)
Sen. John Esp (R)
Sen. Duane Grimes (R)
Sen. Lynda Moss (D)
Sen. Jerry O'Neil (R)
Sen. Trudi Schmidt (D)
Sen. Dan Weinberg (D)
Sen. Carol Williams (D)

Members Excused: None.

Members Absent: None.

Staff Present: David Niss, Legislative Branch
Rita Tenneson, Committee Secretary

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

Committee Business Summary:

Hearing & Date Posted: SJ 13, 2/1/2005; SB 322, 2/1/2005
Executive Action: SJ 13; SB 322; SB 257; SB 328; SB
273

HEARING ON SJ 13

Opening Statement by Sponsor:

SEN. JON TESTER (D), SD 15, opened the hearing on **SJ 13**, Urge Taiwan to have participation in world health organization.

Proponents: None.

Opponents: None

Informational Testimony: None.

Questions from Committee Members and Responses: None

Closing by Sponsor:

SEN. TESTER thanked the Committee and asked them to pass **SJ 13**.

EXECUTIVE ACTION ON SJ 13

Motion/Vote: **SEN. SCHMIDT** moved that **SJ 13 DO PASS**. Motion carried unanimously by voice vote.

HEARING ON SB 322

Opening Statement by Sponsor:

SEN. KIM GILLAN (D), SD 24, opened the hearing on **SB 322**, Limit duty of physician performing independent medical exam.

SEN. GILLAN said the bill addresses some complications in a 1997 Supreme Court decision regarding conditions not related to the purpose of the independent medical exam. Claimants were to discover conditions that were not related to the purpose of the independent medical exam. She handed out an amendment for discussion.

[EXHIBIT \(phs30a01\)](#)

Proponents' Testimony:

Pat Melby, Montana Medical Association, said the case referred to was *Web vs. TDDCRKS MDS*, in a 1997 supreme court case. In that case, the plaintiff asked the court to determine that a physician, who undertakes to advise a patient about her condition following an independent medical exam, has an obligation to exercise reasonable care in doing so. The physician had advised

the patient about a medical condition and had given her poor advice, and she was further injured after going back to work. The Supreme Court found that the physician doing an independent medical examination, who does advise an examinee of his or her condition following the exam, does have a duty to exercise ordinary care. The Montana Medical Association agrees that if a physician, even when there is no physician/patient relationship, provides medical advice to the examinee does create the relationship to a certain extent. The court went way beyond that and said that not only does the physician have this duty to exercise ordinary care when advising the examinee, they also have to exercise ordinary care to discover those conditions that pose an eminent danger to the examinee's physical and mental well-being and take reasonable steps to communicate to the examinee the presence of any such conditions. This places responsibility on the physician who may only be doing a range of motion test on a patient to determine if the elbow has improved enough for the examinee to go back to work, yet they have this obligation to discover other medical conditions and advise the examinee of this. **SB 352** attempts to recognize the first part of the Supreme Court's decision, that the health care provider does have a duty to exercise ordinary care in providing advice to the examinee about his or her medical condition. **SB 352** overrules the Supreme Court as to the second part that the health care provider would have a duty to discover those other medical conditions and advise the patient.

{Tape: 1; Side: A; Approx. Time Counter: 0 - 5.6}

Mark Tayler, Attorney, Montana Hospital Association, includes hospitals, critical access hospitals and long-term care facilities in Montana, told the Committee they might want to consider an effective date as of July 1, 2005. He urged do pass.

Hal Smith, Montana Trial Lawyers Association, spoke in support of the bill with the amendments proposed. He said any type of suit, for any type of medical condition, is an issue, and the opposing party has the right to request independent medical exams. This will protect doctors in a vast majority of cases.

Tom Ebbzer, Attorney, St. Vincents Health Care, Holy Rosary Health Care, Saint James Health Care, Wheatland Memorial in Harlowtown spoke in support of the bill. This was a concern of doctors over two years ago. He added the amendment clarifies these concerns.

Janie McCall, Deaconess Billings Clinic, rose in support of the bill with the amendment.

Opponents' Testimony: None.

Informational Testimony: None.

Questions from Committee Members and Responses:

SEN. O'NEIL asked about the diagnoses the health care provider didn't reasonably consider. **Mr. Melby** said the provider would only advise the examinee of diagnoses he or she actually considers might be going on with the patient.

SEN. COBB asked **Mr. Smith** for an example of the current law and how the bill changes it. **Mr. Smith** told him, in the current law if the medical exam is conducted, then the health care provider has the duty to exercise ordinary care. With the Montana Supreme Court decision, in WEB for instance, with a knee injury the doctor would consider some physical damage related to the knee. This bill says he doesn't have to discover a different medical condition the person may have. It says whatever the provider would reasonably consider related to an ordinary standard of care. They have no duty to discover other conditions.

SEN. COBB asked about the condition being the same condition but not discovered by the physician. **Mr. Smith** said they would take a look at this concern.

SEN. SCHMIDT questioned **Mr. Smith**, referring to **SEN. COBB'S** question, about the physician examining the knee, and if the physician notices something else unrelated to the knee, he isn't obligated. **Mr. Smith** told her the injured person has a treating physician who has provided diagnosis and treatment. The third party health care provider is not the treating physician. He would look at the whole constellation of what may be happening to that person and report additional findings to the treating physician.

SEN. CROMLEY asked if it made sense if, on line 14, it said, "it has no duty to discover the presence of an unrelated medical condition." **Mr. Smith** thought that looked good. **Mr. Melby** agreed.

{Tape: 1; Side: A; Approx. Time Counter: 5.6 - 14.2}

Closing by Sponsor:

SEN. GILLAN thanked the Committee for a good hearing. She gave an example of a physician contacted by an attorney, or an insurance company, to examine a patient he has never seen before. This patient has been told to go back to work and

the physician is doing a detailed examination for an injury the patient was involved in. This physician is only examining the injury from the accident, but if he notices some other medical condition of the patient's unrelated to the accident, which had not been noticed before, he will advise the patient. This goes into their record, but he will never see the patient again and this information goes to her attending physician.

EXECUTIVE ACTION ON SB 322

Motion: SEN. ESP moved that SB 322 DO PASS.

Motion: SEN. CROMLEY moved that SB 322 BE AMENDED WITH SB32201.AJM.

Discussion: He referred to page 1, line 14 following the words, "the presence of", strike "a given" and insert "an unrelated". He said this refers to the amendment handed out, paragraph 1, 2 and 3, plus the amendment he verbally read into the record.

Vote: Motion carried unanimously by voice vote.

Motion: SEN. CROMLEY moved that SB 322 BE AMENDED BY AMENDING PARAGRAPH 4 OF SB32201.AJM.

Discussion: SEN O'NEIL would prefer the amendment say "the health care provider considers pursuant to the request by the third party." He wasn't comfortable with the bill saying, "reasonably considers."

SEN. ESP suggested paragraph 4 of the amendment read, "as the health care provider has an obligation to inform the examinee of likely diagnosis that the health care provider considered relevant to the medical condition prompting the third party exam."

{Tape: 1; Side: A; Approx. Time Counter: 14.2 - 28}

SEN. CROMLEY thought SEN. ESP's phrasing put the decision on the health care provider what is relevant and he thought it should be what the health care provider reasonably considers. If there was a history of dental problems causing headaches and if they are examining for headaches, they should look at the person's teeth. SEN. ESP'S amendment could say the physician didn't consider it relevant, therefore he had no duty.

SEN. GRIMES said clarification needs to be made, but wondered if SEN. ESP'S language would conflict with the end of the paragraph

which indicates he would have looked at the entire health of the examinee.

Clarification regarding treatment of the physician went on at great length and is contained in the following tape count.

{Tape: 1; Side: B; Approx. Time Counter: 0 - 9.9}

Vote: Motion carried unanimously by voice vote.

SEN. CROMLEY asked **Mr. Niss** about the effective date. **Mr. Niss** replied without an effective date stated in the bill, it would be October 1. If the July 1 effective date is put into the bill, the language in line 21 will coordinate.

Motion: SEN. ESP moved that SB 322 DO PASS AS AMENDED.

Substitute Motion/Vote: SEN. CROMLEY made a substitute motion that SB 322 BE AMENDED BY ADDING AN EFFECTIVE DATE OF JULY 1, 2005. Substitute motion carried unanimously by voice vote.

Motion/Vote: SEN. ESP moved that SB 322 DO PASS AS AMENDED. Motion carried unanimously by voice vote.

{Tape: 1; Side: B; Approx. Time Counter: 9.9 - 17.6}

EXECUTIVE ACTION ON SB 257

Motion: SEN. GRIMES moved that SB 257 DO PASS.

Discussion: SEN. O'NEIL was against the bill as he didn't think it would improve patient care, but would increase government regulations. He thought it should be tabled.

SEN. GRIMES said there was a certificate of need (CON) process in place. He didn't think the bill added costs. He said it would make sure in some communities, with two competing institutions, that they would have to figure out how many beds are needed. It is a policy decision.

SEN. O'NEIL said that four years ago certificate of needs requirements were eliminated for hospitals in Billings. He asked someone from Billings for information as to how this had worked, regarding cost of care in Montana. **Mike Foster, Saint Vincents Health Care**, said over the past five years, in the range of price increases for St. Vincent and Deaconess, the lowest was 0% and the highest was 5%. **Mr. Olsen's** answer to **SEN. O'NEIL** was the change referred to applied to ambulatory surgery centers that

openly compete with hospitals. In the statutes, the CON was withdrawn for ambulatory surgery centers located in communities of greater than 25,000 population. Government payments are fixed payments. Hospital surgery is the same for Medicaid or Medicare. Hospital price hikes are reflective of all services and variety of payers. **SEN. O'NEIL** wanted to know if repealing the CON had kept prices low or made them higher. **Mr. Olsen** said it would have likely kept the surgical prices lower because of competition.

{Tape: 1; Side: B; Approx. Time Counter: 17.6 - 28}

{Tape: 2; Side: A; Approx. Time Counter: 0 - 2.2}

Rose Hughes, Montana Health Care, said ambulatory surgical centers are not like long-term care facilities. There was still a CON in smaller communities where the critical access hospitals are. In the larger cities, where there was a lot of competition, it was removed.

SEN. SCHMIDT said it was important that CON be consistent.

SEN. ESP offered an amendment saying, if you are going to convert two care beds to swing beds in a community, and have an agreement with another long-term care provider in the community, you wouldn't have to go through the process. He said the ii section could be omitted as it is covered in another section of the amendment.

SEN GRIMES asked for opinions from both sides on the ii amendment. **Ms. Hughes** said ii is necessary to cover the issue if there is only one facility in that community. She said the amendment provides a facility, where there is agreement, because there is a bed need or service the hospital wants to offer, or if there is no other facility in the area, it would save time and effort for those people regarding application. She said the amendment made sense to her. **Mr. Olsen** said the intent of the amendment was to keep larger facilities out of CON, as there are times the competitors can come to an agreement. It also gives existing nursing homes veto power over the local facility when restructuring services. He said they tend to resist the notion of being able to go to the competing interest and ask for permission to offer care. If they are subject to CON, it would be preferable to zero options.

{Tape: 2; Side: A; Approx. Time Counter: 2.2 - 12.7}

Motion/Vote: **SEN. ESP** moved that SB 257 BE AMENDED WITH SB027501.ajm. Motion carried unanimously by voice vote.

{Tape: 2; Side: A; Approx. Time Counter: 9.2 - 12.9}

Motion: SEN. GRIMES moved that SB 257 DO PASS AS AMENDED.

Discussion: SEN. O'NEILL did not see a need for CON and the idea of the government knowing how many beds to put into a community, where to put them, and how to label them was preposterous.

SEN. MOSS asked Ms. Dalton, Department of Public Health and Human Services, (DPHHS), to comment about the staffing available to monitor CON and if it would have any impact on the department. Ms. Dalton said in the past two years, the only CON they have done for nursing home beds are two facilities in Kalispell and St. Peters Hospital in Helena. There is a zero fiscal note as they have a 1/4 full time employee devoted to this.

{Tape: 2; Side: A; Approx. Time Counter: 2.2 - 16.4}

Motion/Vote: SEN. GRIMES moved that SB 257 DO PASS AS AMENDED. Motion failed 4-4 by roll call vote.

{Tape: 2; Side: A; Approx. Time Counter: 12.9 - 17.2}

SEN. CROMLEY said the Committee will wait 24 hours for Senator Weinberg's vote.

EXECUTIVE ACTION ON SB 328

Motion: SEN. COBB moved that SB 328 DO PASS.

Discussion: SEN. ESP resisted the motion as putting another burden on the department. He thought it would be a duplication of services and the legislature shouldn't create something else.

SEN. GRIMES noticed expenses in the bill for travel and per diem and yet there is a zero fiscal impact. SEN. CROMLEY thought SEN. SQUIRES said they could take care of this with existing staff.

Substitute Motion/Vote: SEN. ESP made a substitute motion that SB 328 BE TABLED. Substitute motion failed 3-6 by roll call vote with SEN. CROMLEY, SEN. ESP, and SEN. O'NEIL voting aye.

{Tape: 2; Side: A; Approx. Time Counter: 17.2 - 25.3}

The Motion/Vote was reversed and the SB 328 is passed and reported out of Committee with 6 aye and 3 no.

{Tape: 2; Side: A; Approx. Time Counter: 25.3 - 26.1}

EXECUTIVE ACTION ON SB 273

Motion: SEN. CROMLEY moved that SB 273 BE REMOVED FROM THE TABLE.

{Tape: 2; Side: A; Approx. Time Counter: 26.1 - 27.2}

Discussion: SEN. CROMLEY said he had been approached by several people indicating this bill is a significant project and it should have a hearing on the Senate floor.

SEN. GRIMES suggested putting the bill into a study. Considering WWAMI, the impact on the State and getting numbers on the net cost to consumers, he said this should be taken up by policy makers as opposed to turning it over to a task force.

SEN. ESP said he envisions the bill coming back next session with a fiscal note for the next ten or fifteen years saying what needs to be done to make it work, why it is important, the costs and the benefits. He didn't think an interim study would have the expertise as a task force to bring the projection numbers. SEN. CROMLEY asked if the Finance Subcommittee had the ability to turn this into a study. SEN. ESP thought Finance had different time tables, as far as committee bills, so they may have this ability. SEN. CROMLEY said this could potentially be a billion dollar benefit to the State.

SEN. GRIMES said a study could be requested at any time and there were some huge unknown costs.

SEN. COBB suggested putting some money in HB 2 for a study and see if there is any support on the floor. He thought it was difficult to put money in after it leaves a subcommittee.

{Tape: 2; Side: B; Approx. Time Counter: 0 - 12}

Motion/Vote: SEN. CROMLEY moved that SB 273 BE TAKEN FROM THE TABLE. Motion carried 7-2 by voice vote with SEN. MOSS and SEN. SCHMIDT voting no.

{Tape: 2; Side: B; Approx. Time Counter: 12 - 12.3}

Motion: SEN. CROMLEY moved that SB 273 DO PASS.

Substitute Motion/Vote: SEN. ESP made a substitute motion that SB 273 BE AMENDED BY ADDING "A WWAMI REPRESENTATIVE APPOINTED BY THE BOARD OF REGENTS ON PAGE 2, NEW SECTION F. Substitute motion carried unanimously by voice vote.

Motion: SEN. ESP moved that SB 273 DO PASS AS AMENDED.

{Tape: 2; Side: B; Approx. Time Counter: 12.3 - 13.8}

Discussion: SEN. GRIMES asked Mr. Niss about turning the bill into an interim study, and if the title be appropriate. Mr. Niss thought it was borderline. It is not a bill concerning a study. Everything in the title limits it. He added that the purpose of bill drafters, writing titles like this, is to keep your appendants out.

SEN. O'NEIL recommended that the bill be amended on line 5, sub part b page 2 to change from two members. Following sub part e, change it to one member of the Montana State University-Bozeman appointed by the Board of Regents. His reason was testimony at the hearing was that the first-year medical school in Montana is in Bozeman, and he thought they should have some voice in this.

SEN. WILLIAMS thought we could be here a long time amending the bill and not making it what we want it to be. She was concerned that it has a big fiscal note and we could be investing in more WWAMI slots. She didn't think SEN. O'NEIL trying to fix it would change the core problem of the bill and this is why it was tabled.

Motion/Vote: SEN. O'NEIL made a substitute motion that SB 273 be amended TO INCLUDE ONE MEMBER OF MONTANA STATE UNIVERSITY-BOZEMAN APPOINTED BY THE BOARD OF REGENTS. Motion carried 7-2 with SEN. CROMLEY and SEN. ESP voting No.

{Tape: 2; Side: B; Approx. Time Counter: 13.8 - 17.6}

Motion: SEN. ESP moved that SB 273 DO PASS AS AMENDED.

Discussion: SEN. ESP said the Legislature is going to spend \$6.5 billion over the biennium and the \$200,000 is going to look small compared to that. He asked the Committee to look down the road and how much that infrastructure could mean to the economy of Montana.

SEN. WEINBERG said getting doctors and keeping them here, without slavery, is an impossibility. They won't stay any more than 75% of our teachers. They go elsewhere because the wages are better, and he added it will happen with doctors, even more so. He saw it as a black financial hole.

Vote: Motion carried 6-3 by roll call vote with SEN. SCHMIDT, SEN. WEINBERG, and SEN. WILLIAMS voting no.

{Tape: 2; Side: B; Approx. Time Counter: 17.6 - 21.7}

EXECUTIVE ACTION ON SB 257

Previously the motion/vote on SB 257 failed by a 4 - 4 tie vote. The Committee was awaiting **SEN. WEINBERG'S** vote on the bill. **SEN. WEINBERG** is now present and **SEN. CROMLEY** called for another vote on **SB 257**.

Motion/Vote: **SEN. GRIMES** moved that **SB 257 DO PASS AS AMENDED**. Motion failed 4-5 by roll call vote with **SEN. COBB**, **SEN. ESP**, **SEN. GRIMES**, and **SEN. SCHMIDT** voting aye.

Motion/Vote: **SEN. CROMLEY** moved that **SB 257 BE TABLED AND THE VOTE REVERSED**. Motion carried. **SEN. COBB**, **SEN. ESP**, and **SEN. GRIMES** and **SEN. SCHMIDT** VOTING no.

{Tape: 2; Side: B; Approx. Time Counter: 21.7 - 24.7}

ADJOURNMENT

Adjournment: 4:55 P.M.

SEN. BRENT R. CROMLEY, Chairman

RITA TENNESON, Secretary

BC/rt

Additional Exhibits:

EXHIBIT ([phs30aad0.PDF](#))