



Law and Justice Interim Committee

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57th Montana Legislature

SENATE MEMBERS

AL BISHOP
STEVE DOHERTY
DUANE GRIMES
DAN HARRINGTON
JERRY O'NEIL
GERALD PEASE

HOUSE MEMBERS

TIM CALLAHAN
GILDA CLANCY
GAIL GUTSCHE
JEFF LASZLOFFY
JIM SHOCKLEY
FRANK SMITH

COMMITTEE STAFF

DAVE BOHYER, RESEARCH DIRECTOR
VALENCIA LANE, STAFF ATTORNEY
LOIS O'CONNOR, SECRETARY

October 12, 2001

MINUTES

Room 102
State Capitol
Helena, MT

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed. Committee tapes are on file in the offices of the Legislative Services Division. **Exhibits for this meeting are available upon request. Legislative Council policy requires a charge of 15 cents a page for copies of documents.**

COMMITTEE MEMBERS PRESENT

Rep. Gutsche, Chairwoman
Rep. Clancy
Rep. Callahan
Rep. Laszloffy
Rep. Smith

Sen. Bishop
Sen. Doherty
Sen. Grimes, Vice-chairman
Sen. Harrington
Sen. O'Neil
Sen. Pease

COMMITTEE MEMBERS ABSENT

Rep. Shockley

STAFF PRESENT

Dave Bohyer, Research Director
Valencia Lane, Attorney
Miko Owa, Secretary

VISITORS & AGENDA

Visitors' list (ATTACHMENT #1)
Agenda (ATTACHMENT #2)

COMMITTEE ACTION

- Adopted minutes from the August 2, 2001 meeting with one correction
- Created a Subcommittee to review alternatives to the Supreme Court's proposal for an intermediate appellate court (Sen. Doherty, Chair, Sen. Grimes, Rep. Callahan, Rep. Laszloffy)
- Adopted the proposed study plan with two amendments

CALL TO ORDER AND ROLL CALL

The meeting was called to order by Rep. Gutsche at 9:03 a.m. Roll call was taken and Rep. Jim Shockley was absent (ATTACHMENT #3).

INTRODUCTION OF STAFF

Dave Bohyer, Research Director, Legislative Services Division, introduced Miko Owa as the new Legislative Secretary for the Committee.

ADOPTION OF MINUTES

Rep. Gutsche asked if there was any discussion regarding the minutes of August 2. Rep. Smith noted one correction i.e., that he be recorded as having been present at the meeting. Sen. Grimes moved that the minutes be adopted with Rep. Smith's correction. Rep. Callahan seconded the motion. The motion passed unanimously.

BENCH REMARKS

The Honorable Karla M. Gray, Chief Justice, provided an update to the Committee on the current actions of the Court. In particular Chief Justice Gray noted that the Court is trying to aggressively decrease the backlog of cases. She continued that the Court is still working on creating a balance between issuing opinions in a timely fashion as well as maintaining the quality of their work. Finally, the Court intends to come forward to the 2003 Legislature with a proposal for the establishment of an intermediate appellate court. Justice Gray continued that they have not come up with an actual bill, but the need is obvious to them.

Justice Gray introduced **Rick Lewis**, as the new Supreme Court Administrator. Mr. Lewis then provided a background of his experience.

Sen. Grimes asked if there was a time frame from the Supreme Court on what the proposal for the intermediate appellate court might consist of. Justice Gray responded that they currently do not have a time frame, however, they are forming a subcommittee to discuss this issue.

Rep. Gutsche asked **Chris Manos, Executive Director, State Bar of Montana**, to come forward and introduce himself to the Committee. Mr. Manos introduced himself and offered the assistance of the State Bar wherever appropriate.

MATTERS OF JUSTICE

The Honorable Mike McGrath, Attorney General, reviewed the automated accounting and recording system on gaming formerly known as "dial-up". He stated that Montana is involved in litigation with LGS Systems out of Reno, NV, which the state had contracted with to design and install the system. Montana has sued LGS Systems for the return of computer equipment purchased for LGS to help design this project. Montana won its suit. LGS committed that they would return the equipment, but have since determined that they will appeal the verdict. Mr. McGrath continued that they are going to proceed with the system and are now working with other contractors.

Sen. O'Neil asked about software currently on the market that may be used for the system. Mr. McGrath responded that manufacturers were initially reluctant to talk to the state regarding software due to the litigation. Since the Nevada case was dismissed, manufacturers are now willing to talk to the state. However, the software is considerably more expensive.

Larry Fasbender, Chief of Staff, Department of Justice, spoke of public safety communication across Montana. Mr. Fasbender stated that they are looking for a unified communications system between agencies to resolve communication problems during emergencies. With new FCC restrictions, the current system will need to be replaced. Mr. Fasbender stated that the creation of a system of interoperability would roughly cost between \$100 million and \$150 million. Mr. Fasbender is not asking for this money, but would like standards to be put in place so as agencies update their current systems, there will be uniformity.

Rep. Clancy asked if this problem corresponds to (U.S.) Sen. Burn's bill. Mr. Fasbender responded that they are trying to coordinate with Sen. Burn's bill regarding enhanced 911.

Sen. Doherty asked what other cities have done to develop this type of partnership with both private and public entities. Mr. Fasbender responded that there has not been much conversation on this topic. He continued stating that the largest problem is governance as you cannot have multiple people operating on the same small (radio frequency) band. Mr. Fasbender noted that Alaska has gone to a wireless system. Sen. Doherty responded that it might be useful to see what NCSL has done, specifically referring to North Carolina. Mr. Fasbender responded that the telecommunications system that Sen. Doherty is referring to is different, but some of the problems are the same.

Sen. Grimes asked about the cost of the system. Mr. Fasbender responded that Montana will not be able to come up with the \$100 million to \$150 million at one time necessary to completely renovate the systems. He continued that what they are looking at is the amount expended in cities and counties that are currently upgrading their systems. The DOJ has no intention of going to the state general fund and asking for that money. However, they are hoping that the new federal and state funds available to combat terrorist activity will help fund a portion of the upgrade.

Sen. O'Neil asked about cellular phone communication rather than a radio system. Mr. Fasbender responded that they have looked at it from a supplemental standpoint. However, cellular systems are run by public, for-profit entities making the system more expensive.

Rep. Smith asked if the DOJ has reviewed the systems in neighboring states, like North Dakota. Mr. Fasbender responded that they have and, currently, Utah is trying to coordinate their radio system. Mr. Fasbender continued that in cooperation with other states, they are looking to establish similar standards which will create an interoperability that can go beyond the state of Montana. Rep. Smith continued to ask if the digital phones purchased within the last year will still be usable with the new system. Mr. Fasbender responded affirmatively.

Wilbur Rehmann, Project Manager, Criminal Justice Information Services Project, reported on the conference between local law enforcement, courts, and other criminal justice agencies on September 11. The conference was paid for by a grant from the Board of Crime Control. They are planning to go back to the Board to ask for additional funding for a spring conference. Mr. Rehmann also provided an update on the criminal justice computer system upgrades.

Chris Tweeten, Chief Counsel, Department of Justice, provided an update on the tobacco settlement with particular focus on the non-participating manufacturers (NPM) adjustment. Mr. Tweeten continued that legislation would require a NPM to either join the settlement or make payments to an escrow account. In the MCA, the Montana Department of Revenue is given the authority to require cigarette wholesalers to report all of their cigarette sales. Every year the tobacco companies are notified of the amount of money they have to pay for their cigarette sales. Those calculations are usually made 1-2 months prior to the date the payment is due. The NPM adjustment is utilized if the participating manufacturers have lost market share above a certain threshold to the NPM. These calculations are made based on figures from the Federal Bureau of Alcohol, Tobacco, and Firearms Enforcement. If Montana was found not to be enforcing the NPM payments, the financial burden could be quite severe, including the loss of the entire tobacco settlement for the year. Mr. Tweeten continued that this issue does put financial strains on the Department of Justice and proposed the funding for enforcement of this law to be paid for by a small portion of the tobacco settlement money.

Sen. Harrington asked about prevention programs in Montana. Mr. Tweeten responded that the settlement money was not earmarked for any particular purpose. The reason for this is that the respective constitution's of several states would not allow them to participate in the settlement if funds were earmarked for certain programs.

Rep. Laszloffy asked about non-participating manufacturers and the dollars associated with them. Mr. Tweeten stated that the termination of a market share loss is based on the aggregate sales of all participating manufacturers and the aggregate sales of NPMs. If there is a shift in market share in favor of the NPMs, then the analysis begins for the adjustment. Rep. Laszloffy asked about the money NPMs would be required to pay. Mr. Tweeten responded that there is a large amount of money that could shift between participating and non-participating manufacturers. Rep. Laszloffy then asked about the \$250 million dollar payment for the year 2000 and what the payment was for. Mr. Tweeten clarified that the \$250 million dollars was the market share shift. Rep. Laszloffy then asked what four and a half tenths of one percent of \$250 million dollars was. Mr. Bohyer responded that it was about \$1.2 million. Mr. Tweeten, responded that if all 50 states were sharing in that amount of money and doing it on a prorated basis based upon the percentage that they get of the payments, our loss would be \$1.2 million (the precise amount is \$1.125 million). Rep. Laszloffy wanted to be assured that the state would still be receiving a greater amount of funds than it would be providing to the Department. Mr.

Tweeten responded that was not the case, because the funds needed to enforce NPMs is simply assuring that we continue to receive Montana's full portion of the tobacco settlement. Rep. Laszloffy asked if there were a monetary penalty, is the penalty based on the entire tobacco settlement that we would receive. Mr. Tweeten responded that the penalty is based upon the payment that we would receive for the year in which the NPM adjustment would take place.

Sen. O'Neil asked Mr. Tweeten if it is permitted by the Constitutions of Montana and the United States for us to penalize a company which has not committed any criminal acts in order to enhance a settlement against a company that has committed criminal acts. Mr. Tweeten responded that if the payment to the escrow account by NPMs was a penalty, then there could be some constitutional problems. However, the statute states that the main reason that the escrow fund is created is to provide a guaranteed fund by which the NPMs could make payments to states and local governments in the event that the NPM was sued. The purpose is not to penalize them; the purpose is to make sure that they are able to respond in damages if the state decided to bring a lawsuit against them and succeeded.

Sen. Grimes asked if the legislature will be asked to essentially enact a penalty against manufacturers who have not originally caused any harm because of the court decision. Mr. Tweeten responded affirmatively, but the state has already enacted a statute and therefore the Department of Justice will not be asking for any additional legislation.

Rep. Smith asked what the cost would be to maintain the effort anticipated by the DOJ. Mr. Tweeten responded that he would be looking for funds in approximately the \$25,000 to \$50,000 range. Rep. Smith then asked if we will come out ahead. Mr. Tweeten responded that by enforcing NPMs, we will protect existing tobacco settlement payments. Mr. Tweeten continued that the AG will continue enforcement without funding, but this will be at the cost of other goals set forth by the legislature. Rep. Smith then asked what other states are doing. Mr. Tweeten responded that Montana's Attorney General's office is both organized differently from and quite small in comparison to other states. In other states, they have full time personnel dedicated solely to tobacco enforcement. Therefore, it is difficult for Mr. Tweeten to answer Mr. Smith's questions.

Rep. Gutsche asked how many other states have this statute. Mr. Tweeten responded that all 50 states have a similar statute. Rep. Gutsche then asked if all the states have adopted the law, how many are experiencing non-enforcement issues. Mr. Tweeten responded that we are not alone and approximately 20 states are experiencing this problem.

CORRECTIONS' CONCERNS

Bill Slaughter, Director, Department of Corrections, reviewed the structure and reorganization of the DOC (EXHIBIT #1). Mr. Slaughter continued that Montana State Prison is full at 1330 inmates. There are a total of 2200 people incarcerated throughout Montana and 60 people waiting to come into the system. The only control that the DOC has over these numbers is the length of stay in the prison system and the level of efficiency that inmates are processed through the system.

Rep. Laszloffy asked how close to capacity is the Shelby facility. Mr. Slaughter responded that

they will reach capacity in 12-15 days. Mr. Slaughter continued to add that he is trying to negotiate with the Shelby facility a sliding scale payment method.

Sen. Harrington asked about people who are in the system who are not getting credit for time served and changes that could be made to this process. Mr. Slaughter responded that the issue for the DOC was that there was never a way to calculate this. Mr. Slaughter continued that now there is a computer program in place that calculates when an inmate is eligible for release.

Rep. Clancy asked about the status of the chapel at the Montana Women's Prison (MWP). Mr. Slaughter responded that the chapel is 100% paid for and completed.

Rep. Smith asked if a public relations promotion should have been done after the incident at the juvenile corrections facility. Mr. Slaughter responded that the allegations were independently investigated and that he will stand by his employees. Rep. Smith stated that there should have been some public relations campaign regarding that as the legislators must respond to their constituents as well. Mr. Slaughter commented that he did write an article that was picked up by several papers. He also provided an interview to the *Great Falls Tribune* outlining each of the incidents. However, Mr. Slaughter stated that there may be more that the DOC can do.

Rep. Gutsche asked what will happen when the system is full. Mr. Slaughter responded that they are trying to manage the inmates within the system and infrastructure that is currently available. However, the DOC has options due to the private prison, pre-release centers, and pushing employees to do their jobs more efficiently to move people through the system.

Craig Thomas, Executive Director, Montana Board of Pardons and Parole, Mr. Thomas provided a history of the Board and reviewed actions of the Board in response to Supreme Court decisions. The Supreme Court has ruled in West v. Mahoney and Haney v. Mahoney that the Board must virtually eliminate the use of hearing examiners. Mr. Thomas continued that he is bringing these issues to the Committee so the Committee may offer guidance as to how the Board should be restructured over the next year to cope with these Supreme Court decisions.

Rep. Smith asked if telecommunications can be used for the hearings. Mr. Thomas responded negatively because Montana is not networked adequately to utilize teleconferencing. However, Mr. Thomas continued to state that they are exploring this possibility. Rep. Smith asked how much it would cost. Mr. Thomas responded that he did not know but would provide the information.

Mr. Thomas then added that the legislature did change the parole law, to allow hearing examiners to be used, but that will only affect inmates who committed their crimes on or after April 30, 2001.

PROPOSED STUDY OUTLINE & COMMITTEE WORK PLAN

Mr. Bohyer reviewed the *Proposed Study Outline and Committee Work Plan* (EXHIBIT #2) in two parts, the first being a review of HJR 39 and the second being an analysis and synthesis phase. He then reviewed the proposed work schedule for HJR 39. In reference to the March - June 2002 HJR 39 work schedule, Mr. Bohyer provided a copy of Article II, Sec. 28, Constitution, for the Committee (EXHIBIT #3). He then reviewed the monitoring, review and liaison functions

associated with the Committee. Mr. Bohyer added that Chief Justice Karla Gray has offered to provide an overview to the Committee of how the Supreme Court operates and the resources available. Justice Gray also offered the Committee an opportunity to hear an oral argument presented to the Court as well.

Rep. Laszloffy asked if it would be possible to sit in on supreme court deliberations. Mr. Bohyer responded that he did not know, but would ask Chief Justice Gray if that is possible.

Sen. Grimes asked about prioritizing subsection 5 (of HJR 39) on page 4 of the study plan. Mr. Bohyer responded that some prioritization would be good even to the extent of asking how important the topic is. Mr. Bohyer continued that whatever the Committee sees as its priorities is what staff will work on. Sen. Grimes continued to ask if the Committee should address the prioritization of items 1-4 on page 3 of the study plan. After much discussion, it was determined that items 1-4 on page 3 of the study plan are too interrelated to prioritize.

Sen. Grimes inquired as to the number of additions to the MCA that contain criminal sentences. Mr. Bohyer responded that there may be as many as 100 code sections that fall outside Titles 45 and 46.

Mr. Bohyer then reviewed additional topics that the Committee may consider. In conclusion, Mr. Bohyer stated that whatever plan is adopted by the Committee should reflect the priorities, goals, and resources of the Committee.

OTHER WORK PLAN TOPICS

Sen. O'Neil reviewed his letter dated July 28, 2001 requesting the Committee to study where legislative and judicial lines are drawn and attempt to make them more well defined. Sen. O'Neil also reviewed varying customs practiced by different clerks of court in Montana (EXHIBIT #4).

Sen. Bishop commented that the Committee cannot micro manage the court system as that will inevitably lead to problems that do not currently exist. Sen. O'Neil responded that the Committee should at least advise the judicial system to create a uniform system. In addition, Sen. O'Neil has received many complaints from his constituency regarding their right to self representation before the various courts.

Sen. Grimes disagreed with Sen. O'Neil and felt that it was not prudent for the Committee to review this issue at this time. Sen. Grimes continued to state that there was also a philosophical argument with respect to the balance of powers.

Rep. Gutsche recommended that the Committee track the following topics: dial-up gaming, the tobacco settlement, repealing 46-18-604, the district court being funded by the state, and the parole board issues.

Sen. Grimes brought forth the issue of the Supreme Court's proposal for an intermediate appellate court. Sen. Grimes would like to take a proactive approach and discuss alternative possibilities to their proposal. Sen. Grimes is asking to present a proposal outlining these alternatives to the Committee in December. He then discussed a few options that may be recommended. Sen. O'Neil concurred with Sen. Grimes and offered the possibility of the

expansion of the Supreme Court to nine members. Sen. Bishop concurred with Sen. O'Neil as that would be a more cost-effective approach. After much discussion, a subcommittee was established to review the alternatives to the Supreme Court's proposal. Rep. Gutsche appointed the following members to the subcommittee: Sen. Doherty, Chair, Sen. Grimes, Rep. Callahan, and Rep. Laszloffy.

Rep. Gutsche continued to discuss other issues that the Committee may want to address, including a visit to the Supreme Court, a tour of the state crime lab in Missoula, or a tour of a correctional facility. After much discussion, the Committee determined that they would like to attend a Supreme Court oral argument with the possibility of hearing deliberations as well. For members interested in touring the crime lab and correctional facilities, they can make their own arrangements to do so. The Committee also agreed to monitor the following topics:

- Dial-up monitoring of gaming
- Tobacco settlement
- District Court funding by the state (SB 176)
- Probation and parole
- HJR 37 (from 1999)
- 46-18-604, MCA

Mr. Bohyer then reviewed his memo regarding mental health and criminal sentencing issues. (EXHIBIT #5). He asked the Committee if they would like to review the topic further. After much discussion, the Committee concluded that they would like Bonnie Adey, State Mental Health Ombudsman and Gene Haire, Executive Director, Mental Disabilities Board of Visitors to speak before the Committee.

Sen. O'Neil offered that he would like to see the mental health ombudsman's office expanded to be a children and family ombudsman as well.

Sen. Pease commented that he will provide updates to the Committee regarding mental health issues discussed in the Children and Families Interim Committee as well as the Economic Affairs Interim Committee.

Sen. Grimes asked if the Committee should prioritize section 5 of the study plan for the next meeting. Rep. Gutsche concurred.

Mr. Bohyer presented and briefly reviewed for the Committee the Rules, Procedures, and Guidelines for Interim Committees (EXHIBIT #6).

Rep. Callahan asked Mr. Bohyer if there was any area where the Committee was not in compliance with the document presented. Mr. Bohyer responded that the Committee was currently in compliance, but that they need to be aware that all Committee work must be completed by September 15, 2002.

ADOPTION OF STUDY PLAN

Sen. Grimes moved to adopt the study plan with the following changes:

- Change to the December 2001 - March 2002 time frame. Sen. Grimes would like the first paragraph under this section on page seven to read: "Focus on Subsection (5) of HJR 39 as directed".
- Include the review of Subsection (7) of HJR 39 in the December 2001 - March 2002 time frame as well as the March - June 2002 time frame.

Rep. Smith seconded the motion. The motion passed unanimously.

ADJOURNMENT

The meeting adjourned at 4:47 p.m. The next meeting is scheduled for Thursday and Friday, December 6 and 7.