

January 26, 2011

SENATE JUDICIARY
AMBIT NO. 6
DATE 1/27/11
SB 175

TO: Senate Judiciary Committee Members

Re: SB 175

On January 27, I understand you will be hearing SB 175, a bill to introduce a referendum for a constitutional amendment to the manner of selecting supreme court justices and district court judges. I oppose SB 175 for these reasons:

1. The bill would constitutionally mandate a merit selection commission of which the majority must be lay members who are not attorneys or elected officeholders. Any general understanding of "merit" implies an assessment of one's ability to properly perform judicial functions. Judicial functions of a supreme court justice and district court judge must be performed by lawyers. Article VII, Montana Constitution. §§ 3-2-102, 3-5-202, MCA. The practice of law is a specialized profession requiring graduate level schooling and testing. This bill leaves no assurance that any lawyer would be a member of the merit selection commission. Given the intent to revise the method for selecting these judicial officers, I can understand the desire for lay members on the commission but I am puzzled why those assurances do not also include lawyer members. Without such assurance, there is significant risk the selection process for a non-partisan office becomes partisan.
2. The bill requires "candidates for each open office" to be screened by this merit selection commission. These judicial offices become "open" by mid-term vacancy and at the end of a term. The desire at the end of a term for a mid-term appointee to remain in office may trigger a "retention" election but the office remains "open" for others to seek as well. As drafted, anyone desiring to run for the office, even the incumbent appointee, would be required to pursue another screening process.
3. The bill would constitutionally mandate a "judicial performance evaluation" prior to any retention election. I'm not aware of any other elected office holder subjected to a similar constitutional requirement for performance evaluation and I fail to see good reason for imposing the same here. If one believes such requirement assures quality in the administration of justice, it may indeed do the exact opposite. Given the uncertainties of any evaluation, potential conflict with the code of judicial conduct and separation of powers issues, many competent and experienced lawyers interested in holding these judicial positions will likely shy away from seeking the same.
4. As applied to district courts, the concept of "judicial performance evaluation" currently has so many uncertainties that it cannot be implemented fairly and effectively. The District Court Council (DCC) has been studying the issue for several years and, in great part due to these uncertainties, it has changed its focus over that time from performance measurement to management tools. See <http://courts.mt.gov.dcourt/measures>, *Report on Recommendations*

for the Adoption, Implementation and Integration of a Court Management Tools System for the Montana District Courts, May, 2010. The change has much to do with the demographics of our state and the status of a state-funded district court system that began in 2001. § 3-5-901, MCA.

To explain, let me first state the obvious: Montana is a rural state consisting of 56 counties. In square miles, it is the fourth largest state in this country. However, its population is less than one-third of 1 % of the nations' population. Approximately two-thirds that population reside in 8 counties (Yellowstone, Missoula, Gallatin, Flathead, Cascade, Lewis & Clark, Ravalli and Silver Bow).

There is only one supreme court operating primarily from one location. There are 56 district courts; one in each of Montana's counties. These courts are administratively structured into 22 judicial districts. § 3-5-102, MCA. Only 7 of the 22 judicial districts are "one county" districts. Nearly 80 % of Montana's geographic area is covered by a judicial district that averages less than one judge per county.

Now, the less obvious: Prior to state-wide funding, these 56 district courts operated primarily under county funding. Given the separate funding sources, scattered population and significant distances involved, the resources available and daily operations of district courts differed widely. Since 2001, the DCC has been charged with adopting policy and procedure to equitably administer a state-wide district court funding program. § 3-1-1601, MCA. That process has been cumbersome and is by no means complete.

Early on, it became apparent to the DCC that no uniform system existed for case filing data. A uniform case filing standard now exists but there is no certainty that it is yet being applied uniformly. Access to resources still widely vary and, of course, are dependent on available funding. Diversionary and legal assistance programs still exist in some districts that are not available in others. Distances and regional economic conditions impact the availability in many of the more rural districts of lawyers, mental health counseling and other professional providers. Although the goal has been to have each district judge staffed with a law clerk and administrative assistant, that goal has not yet been achieved. Travel is essential in many districts to assure access to the courts and in a lengthy 2009 workload assessment study, it was discovered that some judges can spend nearly a quarter of their available worktime traveling to and from courthouses. Montana's weather conditions can suddenly interrupt travel needs of the many participants in any judicial proceeding. The use of today's electronic communication technology is developing but yet to be fully tested in light of many constitutional guarantees.

It is all these variables/uncertainties that would make any judicial performance evaluation process suspect. Under these circumstances, constitutionally mandating a judicial performance evaluation would not be sound policy.

5. The constitutional requirement of a "judicial performance evaluation " would have the potential for external influence of the nature prohibited by § 2.4, of 2008 Montana Code of Judicial Conduct.

6. This bill involves the separation of powers issues. Article III, § 1, Montana Constitution. A "judicial performance evaluation" would of necessity involve the evaluation on how a judge administers justice. The administration of justice is a power properly belonging to the Judiciary Branch. Article II, § 16, Montana Constitution. Leaving it to a future Legislature to define the "who" and "how" of these evaluations would conflict with the Judiciary Branch's exercise of this power.

For these reasons, I request that you vote against SB 175.

Sincerely,

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