

**Council Senate Members**

GREGORY BARKUS  
VICKI COCCHIARELLA  
MIKE COONEY  
KELLY GEBHARDT  
DAN HARRINGTON  
COREY STAPLETON



**Council House Members**

BOB BERGREN--Chair  
DENNIS HIMMELBERGER--Vice  
DEBBY BARRETT  
MARGARETT CAMPBELL  
DAVE MCALPIN  
SCOTT SALES

## Montana Legislative Council

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# MINUTES

January 29, 2008

Room 102, State Capitol  
Helena, Montana

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 the document.**

Please note: These minutes provide abbreviated information about committee discussion, public testimony, action taken, and other activities. The minutes are accompanied by an audio recording. For each action listed, the minutes indicate the approximate amount of time in hours, minutes, and seconds that has elapsed since the start of the meeting. This time may be used to locate the activity on the audio recording.

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To view the minutes, locate the meeting date and click on minutes. To hear the audio recording, click on the Real Player icon. Note: You must have Real Player to listen to the audio recording.

### **COMMITTEE MEMBERS PRESENT**

REP. BOB BERGREN, Chair  
REP. DENNIS HIMMELBERGER, Vice Chair  
SEN. GREGORY BARKUS  
SEN. VICKI COCCHIARELLA  
SEN. MIKE COONEY  
SEN. KELLY GEBHARDT  
SEN. DAN HARRINGTON  
REP. DEBBY BARRETT  
REP. MARGARETT CAMPBELL  
REP. DAVE MCALPIN  
REP. SCOTT SALES

### **COMMITTEE MEMBERS EXCUSED**

SEN. COREY STAPLETON

### **STAFF PRESENT**

Susan Byorth Fox, Executive Director, Legislative Services Division (LSD)

Greg Petesch, Director, Legal Services, LSD  
Karen Berger, Financial Services Manager, Financial & Human Resources Office, LSD  
Steve Eller, Computer Systems Manager, Office of Legislative Information Technology,  
LSD  
Dawn Field, Legislative Secretary, LSD

### **AGENDA & VISITORS' LIST**

Agenda, Attachment #1.  
Visitors' list, Attachment #2.

### **COMMITTEE ACTION**

The Legislative Council:

- approved the November 27, 2007, meeting minutes, as corrected;
- approved staff working to improve the administrative rules process;
- approved caucus and training dates for the 2009 legislature;
- approved planning of additional training for legislators;
- approved December 15, 2008, as the date for rules and committee chair training;
- approved the expenditure of IT Reserve Account funds for the vote system upgrade and for RFP team expenditures;
- approved allowing Ms. Fox to send proposed changes for interim committees rules to all interim committee chairs for their input; and
- approved moving forward on a proposal to work with the University of Montana and the United States State Department on a legislator mentoring program.

### **CALL TO ORDER AND ROLL CALL**

00:00:01 REP. BERGREN called the meeting to order. The Secretary took roll, SEN. STAPLETON was excused, all other members were present. Regarding the November 27, 2007, meeting minutes, REP. HIMMELBERGER said he was not listed as being present at the subcommittee meeting held previous to the full Council meeting. He asked that the meeting minutes be corrected to reflect his presence. The Council members agreed to the change and the minutes, as corrected, were approved on a unanimous voice vote.

### **DELEGATION OF AUTHORITY TO ADOPT ADMINISTRATIVE RULES**

00:02:01 **Greg Petesch, Director, Legal Services. LSD**, discussed a January 14, 2008, legal memo which addressed the delegation of authority to agencies to adopt rules (EXHIBIT #1), saying that the Montana Supreme Court set the standard with its 1960 decision in Bacus v. Lake. Mr. Petesch went on to discuss the basis for the Court's decision, several specific examples in which adopted rules have been challenged, and the current process used for dealing with proposed administrative rules by the appropriate interim committee.

00:13:02 SEN. COONEY said at one point in time, there was an Administrative Code Committee (ACC) that dealt with administrative rule review and asked what the rationale was for doing away with that committee. Mr. Petesch said the ACC was put in place for review of rules at same time the Montana Administrative Procedure Act (MAPA). He said that eventually the process became very cumbersome and time consuming and the authority and responsibility was given

to interim committees in attempt to combine the policy oversight and knowledge function with the administrative rule review function.

- 00:18:53 SEN. COCCHIARELLA and SEN. HARRINGTON both agreed the current method is more efficient and effective.
- 00:20:43 REP. BARRETT asked if there is a time limit for an agency to propose rules for a bill that has been passed. Mr. Petesch said no but that there is a six-month limit between when a proposed rule is first published and the time it has to be adopted. REP. BARRETT asked if an agency has proposed rules for the same law more than once. Mr. Petesch said yes, and that the usual reason is that the agency may discover inefficiencies in the law, may want feedback for clarification, or may discover gaps that rules don't address. REP. BARRETT asked if, when a bill is passed with an immediate effective date, and the agency proposes rules years later, is the bill still effective immediately? Mr. Petesch said yes.
- 00:25:08 REP. MCALPIN asked if the adoption of administrative rules take into account revenue impacts. Mr. Petesch said yes, in some cases explicitly and some impliedly. He said fees charged by agencies, for example, would be a good example. REP. MCALPIN asked if every proposed administrative rule contains a statement regarding potential revenue impact. Mr. Petesch said not all proposed administrative rules need this information but that for the rules that do, an economic impact statement may be requested.
- 00:27:09 REP. HIMMELBERGER said that rule making authority appears to vary considerably between agencies. Mr. Petesch said yes. REP. HIMMELBERGER asked if Mr. Petesch thought the administrative rule making authority should be made more uniform. Mr. Petesch said extremely broad delegations of authority are suspect and should be reviewed, but that these instances are rare. There are also instances in which fairly broad authority is acceptable, such as in emerging areas in which there is little to base guidelines on. Mr. Petesch predicted this issue would be debated in the upcoming session in several areas of emerging issues, such as climate change. He said that any broad authority granted should be considered on a case-by-case basis.
- 00:30:38 REP. BARRETT said the current process creates an "after the fact" look at rules. She said the onus is on legislators to instruct agencies on how to propose and approve rules. REP. BARRETT proposed that all bills contain an administrative rules check-off box with four options for administrative rules. She said this would help legislators, in the drafting process, to better understand their legislation.
- 00:32:50 SEN. COONEY agreed with REP. BARRETT's point but said it is also up to the legislators to do their homework regarding proposed rules. He said bill sponsors automatically receive copies of proposed administrative rules and that any legislator can sign up to receive notice of proposed administrative rules. He said one option would be to combine the current process with the suggestion made by REP. BARRETT.

- 00:33:49 REP. BARRETT said using a check box on a bill could potentially allow agencies to work with the legislators on potential problems during the legislative session, instead of after the session is over.
- 00:34:34 SEN. COCCHIARELLA said it was her opinion that such concerns need to be handled in the drafting process. She asked Mr. Petesch to comment. Mr. Petesch said grants or restrictions need be part of the law itself and specific restrictions may be written in to guide an agency on what it may or may not do under that law. Educating legislators on the complexities of drafting new statute and codification instructions would also help decrease the confusion and problems regarding administrative rules. Also, bill sponsors have been included in the process through the rules notice process in order to allow the sponsor the ability to take the matter to the committee with jurisdiction.
- 00:38:42 SEN. COCCHIARELLA said agencies are not doing a good job of sending out sponsor notices for proposed rules.
- 00:39:00 REP. BARRETT said the rules process happens when legislators are at home and that it is difficult for legislators to make it to Helena for every meeting and rules hearing. The use of a rules check box during drafting and throughout the process would streamline the process and allow a legislator more control over his or her bill. REP. BERGREN said that education is important, particularly for interim committees because of the amount of authority they have over the rules process.
- 00:40:40 SEN. COONEY said individual legislators can do a better job of utilizing current tools to stay abreast of the proposed administrative rules, such as subscribing to the administrative rules register.
- 00:42:06 REP. HIMMELBERGER asked Mr. Petesch to report back to the Council on the differences in rule making authority between departments. He said the Council should review each and consider options for making the process more uniform.
- 00:43:06 SEN. COCCHIARELLA said she would like to notify the executive branch that agencies are not doing an adequate job of sending out rules notices to bill sponsors.
- 00:43:36 REP. HIMMELBERGER asked Mr. Petesch to comment on what the best way to proceed would be. Mr. Petesch said the most expeditious and least burdensome approach would be to break the 775 statutes in need of review down by agency and assign them to the appropriate interim committee for review. It would be up to the interim committee to determine if the statute contains the adequate guidelines and standards to govern the adoption of rules. He said it may require formation of additional subcommittee and additional staff to do this.
- 00:45:21 Ms. Fox cautioned against additional subcommittees and said it does seem that an attempt is made, when drafting bills, to consider existing authority and to work with it in the bill. She asked if legal staff could consider rules more closely when reviewing bill drafts and when assisting interim committees with rule review. Mr.

Petesch said sponsor notification requirements are currently being examined. He cautioned that when staff reviews rules, it puts staff in a difficult position of advising agencies and can result in staff questioning the validity of the laws enacted by the legislators, which is not appropriate.

- 00:49:19 REP. BERGREN asked if there is time remaining in this interim to complete a review, as suggested by Mr. Petesch; and to come up with options for interim committees to consider.
- 00:50:29 REP. BARRETT said interim committees are after the fact and that she would rather have the issue dealt with while legislators are in session and actively working on the bill.
- 00:51:42 REP. HIMMELBERGER agreed and said there are actually two issues at hand: REP. BARRETT's suggestion of using a check-off box and determining if existing rule making authority needs to be tightened up.
- 00:52:32 SEN. COCCHIARELLA suggested combining REP. BARRETT's and Ms. Fox's suggestions into one proposal to have a check box on all bills, from the drafting process forward, indicating what rule making authority is required. This would allow legislators to know up front if rule making authority will be an issue with their bill. She **moved** that staff bring forward a proposal for tracking rulemaking authority in draft legislation and a method to provide that information to the bill sponsor, in order that they be more aware of the rule making issue. REP. HIMMELBERGER asked if the proposal would also look at existing rule making authority. SEN. COCCHIARELLA said the task of examining this issue is a monumental one and that as each bill is drafted, if now rule making authority is considered throughout the legislative process, it will address both REP. BARRETT's and REP. HIMMELBERGER's concerns. The **motion passed** on a unanimous voice vote.
- 00:58:32 SEN. GEBHARDT said he has had concerns regarding the rule making process for quite some time and that legislative intent and proposed rules are often very different. One of best solutions would be to make bills tighter, which would eliminate the need for rules. It is more a matter of educating legislators and writing bills that are specific enough to decrease or eliminate the need for rule making.
- 00:59:53 SEN. BARKUS agreed with SEN. GEBHARDT. He said while the issue of existing legislation is addressed in SEN. COCCHIARELLA's motion, it would improve the situation but would be very dependent on staff to do so.
- 01:00:48 REP. CAMPBELL asked the Council to consider sending out Mr. Petesch's memo to all legislators and said it is very clearly written and would help everyone better understand this issue.
- 01:01:34 SEN. GEBHARDT agreed that the proposal would be fix for future legislation. SEN. COONEY said that not all administrative rules should not be characterized

as a problem. He agreed that the process could be improved but said rules are a necessary part of the process.

#### **TVMT UPDATE**

- 01:03:27 **Stephen Maly, Executive Director, Helena Civic Television (HCTV),** discussed the background and current and planned activities of HCTV (EXHIBIT #2). Mr. Maly said the Council's discussion regarding administrative rules is a good example of how TVMT connects the legislative process to Montana citizens and pointed out that through the broadcasting of interim committee meetings, the administrative rule making authority process is very visible to the public. He said progress has been slower than he would like but that the network is growing and said the goal is to connect no fewer than 30 Montana communities prior to the 2009 legislative session. He discussed the potential for confusion regarding PBS and TVMT funding and said he hoped to avoid any confusion or collision of budgets.
- 01:13:34 Mr. Maly said he is working with the Legislative Information Officer (LIO) to make sure that TVMT programming and broadcast information is listed on the legislative website. He discussed past use of satellite broadcasting of signals and said it may not be sustainable when high definition broadcasting becomes a reality. He said future broadcasting needs would be focused on building the network in a terrestrial fashion. He said the growth of TVMT acts as an economic development engine because it drives demand for the service and the push for a statewide delivery system. Mr. Maly's final discussion point regarded obtaining cheaper circuits, possibly through the Department of Administration, than are currently being leased.
- 01:16:54 REP. CAMPBELL asked if NEMONT would have to invest in infrastructure in order to obtain TVMT. Mr. Maly said yes. REP. CAMPBELL said the area between Chinook and Culbertson remains unserved and asked Mr. Maly if he knew of plans to begin broadcasting in that area. Mr. Maly said he did not know of any discussions regarding that area. REP. CAMPBELL said it is important that legislators and other officials work to rectify this situation because many of the citizens in this area and other unserved areas of the state often feel disenfranchised because of the lack of connection to the rest of the state.
- 01:21:47 REP. HIMMELBERGER said signal consistency has sometimes been a problem. Mr. Maly said technical challenges have created problems from time to time. He said he has been assured by Bresnan that, in the future, the signal will be available consistently.
- 01:26:00 REP. MCALPIN asked for estimation of what percent of the state's population will be served if the goal of connecting the 30 communities becomes a reality. Mr. Maly said 85% of the state's population would be served.
- 01:28:26 SEN. COONEY thanked Mr. Maly for his update and for his work. He also thanked all of the companies working with Mr. Maly to open the legislative process to the citizens of Montana.

## **PUBLIC COMMENT**

01:31:50 **Corey Swanson, Attorney, representing Bresnan Communications**, provided information regarding technical difficulties, saying that between late November and early January, there were problems with some of the fiber optic cables. Looking forward, Mr. Swanson said decisions will have to be made soon on how to reach the largest number of people possible in the most economical manner, the cost and quality of video, and how much coverage of legislative proceedings will be broadcast between sessions. Mr. Swanson said additional information requests could be directed to Sean O'Donnell.

01:38:04 **Geoffrey Feiss, General Manager, Montana Telecommunications Association**, said he would like to commend Mr. Maly's tireless efforts to bring legislative proceedings to Montana citizens. He agreed that Montana presents challenges because of the large distances between communities but said the telecommunications industry is committed to help.

## **BREAK**

## **STRATEGIC PLANNING DISCUSSIONS**

### **Media Access to Legislative Proceedings**

01:54:20 President of the Senate, SEN. COONEY, said he was surprised by some of the reporting regarding the discussions that have taken place and reports that the Legislative Council and legislature were attempting to limit the media's access to the legislative process. He said he could speak only for the Senate but wanted it to be very clear that there is not and has never been any interest in limiting any of the media's access to the legislative process. He said from a personal vantage point, he has seen the media pool grow over three terms in office and while he encourages the growth, there are certain physical limitations to accommodating the growing needs of the media and said the congestion has occasionally conflicted with the flow of Senate business. He encouraged the media to work with the Senate on specific suggestions on how to accommodate the needs of the media while maintaining the decorum and atmosphere necessary for the Senate to conduct its business.

01:59:25 As Speaker of the House, REP. SALES said he echoed SEN. COONEY comments. He said the interest in this subject is not about limiting press but about improving the process, while maintaining the dignity and decorum of the Legislature. He said that he fears that with all of the added scrutiny, fewer people may be willing to serve. He said he is not interested in curtailing access, but in making the process better and that involvement by the media is necessary to make this happen. REP. BERGREN agreed that the Council and legislators want to work amicably with the media on this issue.

- **Legal Issues Discussion**

02:02:05 Mr. Petesch presented a January 3, 2008, legal memorandum prepared for the Legislative Council (EXHIBIT #3). Mr. Petesch discussed the requirements of the Montana Constitution with regard to open caucuses, several related lawsuits

dealing with the public's right to know, as well as a historical review of the events that lead up to the February 1995 lawsuit demanding open access.

02:11:12 SEN. COONEY said some of the interest in this issue may be related to term limits because many of the members of the Legislature are newer legislators who have served only since the caucuses were opened and may not be aware of the history. He said the legal memo makes the Supreme Court's opinion on this issue very clear.

02:12:56 SEN. HARRINGTON recalled that even before the decision was handed down, there was a great deal of support from the House Democrats for opening up caucuses.

- **Panel Discussion**

02:14:05 **Greg MacDonald, President, Montana Broadcasters Association, Bonner**, thanked the Council for the invitation to discuss this important subject. He said his Board of Directors has already met with SEN. COONEY and plan to meet again, to work on some of the concerns expressed by both parties. He said while the MBA is committed to maintaining open access to all government, it does not want to interfere with legislators' ability to do their jobs either. He said his association could provide technical assistance, if needed, and stands ready to work cooperatively with the Council to resolve the issues of concern.

02:16:49 **Ian Marquand, Chairman, Freedom of Information Hotline, Montana Television Network, Society of Professional Journalists - Montana Chapter, Missoula**, said he has covered legislative proceedings since 1985. He presented a historical review of the numbers of broadcast reporters, amount of equipment, and space used by the media. He said in 1985, only two television stations had permanent space in the Capitol and that each had only one camera. On days with more significant happenings, there may have been two additional cameras from other stations. Additionally, full time radio coverage was provided during legislative sessions. In 2007, Mr. Marquand said that on a very busy day, there were as many as five cameras operating, but essentially the number of cameras and equipment has not grown much over the years. Mr. Marquand concurred with Mr. MacDonald that the size of equipment has gotten smaller and that less equipment is needed.

Mr. Marquand shared several tips he said he has learned over the years as a broadcast journalist: (1) be in place and set up ahead of time in order to decrease the amount of disruption to legislative proceedings, (2) always show courtesy and respect and it will be returned in kind, and (3) have a good knowledge of the layout of the rooms, in order to set up or take down without creating a distraction. Mr. Marquand said that because journalists sometimes have to cover more than one event at a time, there has been times when their presence has been conspicuous. He said in the interest of trying to be less conspicuous, the Society of Professional Journalists and the Freedom of Information Hotline are willing to provide training for broadcast and print reporters, and particularly for reporters new to the Capital building and legislative proceedings. Mr. Marquand said he is also willing to contact the Associated

Press and ask that they address this issue at its annual meeting and that he would also be willing to organize a training session for media prior to the 2009 legislative session.

Mr. Marquand discussed the House and Senate Chambers, saying that the issue of space is more of a concern in the Senate than in the House. Since the renovation, media has been placed on the left hand side of both chambers. On busy days, there have been times when the Senators seated on the left side of the Senate Chamber have been inconvenienced by the presence of the media. He suggested having House and Senate staff work with television media to identify four designated camera positions in both the House and Senate Chambers and work jointly to develop ground rules. Mr. Marquand also suggested that the Special Visitor Gallery in the Senate be used for overflow media on days where coverage is especially heavy, such as on opening day.

02:23:15 **John Barrows, Executive Director, Montana Newspaper Association (MNA), Helena**, provided written copies of his statement, including comments from Dan Testa, who served as the MNA intern in the 2007 legislative session (EXHIBIT #4). Mr. Barrows discussed his opinions and comments on the issue of access openness in legislative proceedings, as well of those of Mr. Testa.

02:30:16 **John Doran, Editor, Helena Independent Record, Lee Enterprises**, said he appreciated the opportunity to discuss the issue and is willing to work proactively to develop solutions. He said it was reassuring to hear from SEN. COONEY and REP. SALES that access is not issue but rather, determining how best to have that access. He said the media has proven its willingness to fight for full access and that any limits would be a setback. Mr. Doran said print media also uses cameras and video equipment and that he would welcome training or guidelines to minimize disruptions or inconveniences. Mr. Doran said he would also support an accreditation process for the media as a way to monitor who is covering the legislature and as an avenue of dealing with journalists who don't work within guidelines.

### **Council Questions/Discussion**

02:35:08 SEN. COONEY thanked the panelists for their comments and said he appreciated their willingness work with the Council. He reiterated that the interest in this issue is due to physical challenges and not an interest in limiting access. He said he is particularly interested in the perspective of electronic media because of the coverage available through TMVT. He asked if there are ways that the television media could use TVMT footage as a part of its coverage.

02:37:09 Mr. Marquand said TVMT is a good tool but is not well suited to a television reporter's needs. He said it may be helpful for media outside of Helena who cannot send a person to Helena but that because TVMT is funded and operated by the State, journalists prefer to use independent coverage and are reluctant to take what they view as "government feed". SEN. COONEY said he was not suggesting that TVMT coverage replace independent coverage, but rather as a supplement to coverage.

- 02:38:49 Mr. MacDonald said there are ways to use TVMT coverage as a supplement and cited the example of the public television station in Bozeman that uses TVMT coverage in a weekly news segment. Mr. MacDonald said he supports and encourages expansion of TVMT and suggested that expansion efforts include input from the media, so that TVMT footage could be utilized more effectively.
- 02:40:13 SEN. COONEY asked if installing additional connections in the Senate Visitors Gallery would help. Mr. Marquand said it would and also suggested allowing media access to the right side of the House and Senate floors, as they were allowed to do before the renovation. He said wireless technology would allow this to be done easily and would spread the cameras throughout the chambers with little inconvenience to legislators. He said he liked the space and angle of the Senate Visitor Gallery and would use it when available, but that the House Gallery is very difficult to work in and is not an option, in his opinion.
- 02:44:40 SEN. BARKUS thanked the panelists for the discussion regarding the congestion on the left side of the Senate floor and said he was glad to hear recognition that there is a problem. SEN. BARKUS said he has conversed with former Speaker of the House, John Mercer, who maintains the Legislature has been severely hampered by the inability to caucus in private. He asked Mr. Marquand to comment on what his opinion is of the level of the caucus work since he has been covering them. Mr. Marquand said his experience in covering caucuses is fairly limited. In 1984, House Democrats allowed the press into pre-session caucuses and in the 1985 session, the Capitol press corps made a determined effort to enter all four caucuses and were allowed in only by the House Democrats. He discussed several of the caucuses he has covered since being opened and said his view is that this is a settled issue. He said he also believes there has not been issues with open caucuses until one stand alone incident late in the 2007 session. Mr. Marquand said the Court set the bar high in establishing that caucuses are considered a public body, that open caucuses work well, and are in the best interest of the public.
- 02:50:01 Mr. Doran said there also needs to be a way to distinguish the integrity level of journalists doing their job from party operatives who also take video coverage of caucuses.
- 02:50:27 REP. MCALPIN said it was an interesting but puzzling idea to distinguish between the ordinary public and the press corps, which may or may not be credentialed. He asked the other panelists to give their views on a credentialing process. REP. BERGREN said currently, credentialing is done through the Department of Administration (DOA). Mr. Barrows, MNA, said credentialing media and reporters is fraught with danger because First Amendment Rights of individuals, and not a newspaper or television station. He said credentialing for the purpose of convenience or identification is acceptable but not if the process has the ability to influence who is approved or denied, based upon the content of coverage.
- 02:52:26 Mr. Marquand said media credentialing would not be necessary for attending caucuses because the court decision made no distinction made between the

media and the public. He said the same standard applies to committee meetings also, and that the only time credentialing would be necessary is to gain access to the House or Senate floor, which is a privilege and should remain so.

02:53:13 REP. MCALPIN asked Mr. Marquand if he is opposed to credentialing. Mr. Marquand said he is not opposed and reiterated that in practice, it is only necessary to gain access to the House or Senate floor, or in other spaces in which the general public may not have access.

02:54:14 REP. SALES said he has observed a growing attitude that the legislative branch is inferior to that of the judicial or executive branch. He said that is of great concern to him because all three branches are to be considered equal. He asked the panelists if they foresee an instance in which the media would sue the judicial branch or executive branch to obtain access to private deliberations, as the media did with the legislative branch. He asked for the responses to include reasons why or why not. Mr. Marquand said he did not agree that the legislature has become an inferior branch. He said by its nature, the legislature is a decision making body, which makes public involvement incredibly important. He pointed out that portions of the executive branch are subject to open meeting laws and that agencies have been sued for open access. Mr. Marquand said he would not comment on the Supreme Court, but did say that judicial proceedings in Montana are considered open court and subject to public observation.

02:57:28 REP. BARRETT asked Mr. Barrows asked how many university students served as interns in the last session. Mr. Barrows said his association sponsors one full-time student intern. REP. BARRETT asked if the intern is given total freedom to cover the issues of their choice. Mr. Barrows said the intern has a great deal of freedom but does get some guidance from a college advisor. He said the intern often receives requests from an association newspaper for coverage of a certain issue. Mr. MacDonald said the MBA has had two full-time interns at the last session.

## **BREAK**

### **Public Comment**

03:12:18 **John Kuglin, attorney and representing the Associated Press (AP)**, said the AP organized the litigation that resulted in the 1998 decision that opened caucuses. Mr. Kuglin said the Montana Legislature has made great strides in opening up the process to the public and recounted past practices of votes taken behind closed doors and other methods of dealing with issues out of the public's view. Mr. Kuglin said Montana's Constitution has strongest open government provisions in the entire nation and discussed several points from Mr. Petesch's memo (EXHIBIT #3) and Montana's constitutional mandates for open government. He said the 1972 Constitutional Convention delegates were very concerned about the issue of open meetings and the public's right to know and participate, specifically within the legislative branch. Mr. Kuglin discussed the relevant articles of the Constitution pertaining to this issue. Mr. Kuglin also discussed the basis of the 1995 lawsuit, as viewed by the media.

03:20:41 **Casey Kyler-West, News Director, KTVH Beartooth NBC, Helena**, thanked the Council for the opportunity to collaborate and work together to improve the

relationship. Ms. Kyler-West said she concurs with the testimony of her colleagues, particularly regarding the discussion about the cramped space of the Senate. She said all media has experienced issues with audio boxes and a limited number of plug-ins, which has created congestion. She said if the boxes and plug-ins were spread throughout a room, it would help ease the problem. Ms. Kyler-West said one of the reasons there have been problems is because most of the reporters assigned to cover legislative sessions are new and there are few that return from session to session. She said although most reporters try very hard to be inconspicuous, because they cover multiple stories in a single day, it is sometimes difficult for them to enter and exit a hearing room without causing a disturbance. She said training, such as a media day in advance of the session, would familiarize the media with the facilities and would help minimize the disruptions.

03:24:21 **Rita Blouke, League of Women Voters of Montana**, said she was confused and not sure which issue was being discussed - technical access or restriction of media access. She said the League believes in informed and active participation by the public at all levels of government and that the situation has improved vastly from the days of closed caucuses. She said she hopes that there will be no limits placed on access.

03:27:24 **William Marcus, Director, Broadcast Media Center, University of Montana, Montana Public Radio, and Montana Public Television**, said he welcomes the opportunity to underscore the importance of access and that he also appreciated the constitutional review provided by Mr. Petesch. He said Montana PBS produced a documentary about the 1972 Constitutional Convention and read a quote from the documentary from delegate Arlene Ryker. Mr. Marcus said Montana Public Radio has maintained an office in the Capitol for many years and said access is essential for the reporter's job, not just for legislative proceedings, but for executive branch and other meetings as well. Mr. Marcus said the technical concerns can be worked out and agreed that while TVMT is a great service, it is important to maintain an independent source of information.

Mr. Marcus relayed a message from Peggy Kuhr, Dean of the School of Journalism, University of Montana, journalism school, saying that Dean Kuhr said Montana has a great tradition of open and accessible government and that the School of Journalism is very interested in the discussions taking place regarding media access. Ms. Kuhr said U of M faculty members frequently discuss access issues and that journalism students experience first-hand the importance of open government during legislative sessions. Mr. Marcus explained that the coverage provided by journalism students give citizens information that may not be otherwise available and that the process relies on complete and open access.

03:32:26 **Bob Campbell, Missoula**, said as a delegate to the 1972 Constitutional Convention, he authored section 10 dealing with the right to privacy and that there is no question in his mind that caucuses must be kept open. Mr. Campbell said would serve as an informational witness, if needed.

- 03:33:48 **Mike Meloy, Attorney, Helena**, said he was asked by REP. SALES to address the question of why the legislative branch is treated differently than the executive or judicial branches. Mr. Meloy said he has worked on issues related to access to government for many years, including serving as chief legal counsel to the legislative body from 1970 - 1974, and was assigned to monitor the 1972 Constitutional Convention on behalf of the legislature, so he is very familiar with this issue. Mr. Meloy said convention delegates were highly suspicious of legislature, primarily because of the closed nature of past legislative proceedings. Conversely, the delegates also thought the legislative branch was the most important branch of government and in order to make sure that their ideas of openness applied to this most important body, they adopted Article V, section 10, to ensure open access to government. The right to know provision addressed public bodies, including the executive branch, and the question of whether the governor or director of an agency is a public body was resolved by several Supreme Court decisions that established that if public business is being considered, the public has a right to observe. Regarding the judicial branch, Mr. Meloy said the question of whether the Supreme Court is a public body, as defined by the 1972 Constitution, has not been addressed by the Supreme Court, but that there is no question that the legislature must be open. Mr. Meloy emphasized that the Constitution delegates did not think the legislative branch was a lesser body, but that in fact, was the most important body to public observation and participation, which is why the special requirements in Article V, section 10, were written.
- 03:39:04 REP. BERGREN said that the Council requested Mr. Petesch to prepare the legal memo, not because there was an interest in closing caucuses but because few of the current Council members were as knowledgeable of the issue as they would like. He said the memo was for informational purposes only, not to restrict or close access to caucuses.
- 03:40:17 SEN. GEBHARDT said it appears that pre-session caucuses must remain open. Regarding caucuses held during a session, he said it is his opinion that legislators could use the time more productively for other work and that there have been instances of caucuses being used for a grandstanding opportunity.
- 03:41:37 SEN. BARKUS asked Mr. Petesch for legal guidance on what constitutes a public meeting, particularly if there is a specific number of people gathered that constitutes an open meeting. Mr. Petesch said there is no clear answer to the question. He said a convening of a body that will discuss policy in a public location will likely be subject to the open meeting law. However, the open meetings law doesn't necessarily mesh with public bodies being open. He said the public meeting law is vested in terms of notice and convening of a quorum, for example. He said for instance, if three senators get together to discuss an issue, there is no quorum but such a group may have to allow someone to observe the meeting, if requested.
- 03:43:48 SEN. BARKUS said it is important for the panelists and public to know that this issue came up in a Council Strategic Planning work group discussion of regarding decorum. The Council and staff thought it was important to discuss

the issue because of concern that the decorum of the institution is being degraded by certain actions of the media, such as posting footage on You-Tube.

03:46:07 REP. BERGREN thanked the panelists and those who provided public comment. He said the Council is charged with the efficient management of the legislature and looks forward to working with the media on this issue.

#### **LUNCH BREAK UNTIL 1:00 P.M.**

#### **STRATEGIC PLANNING DISCUSSIONS**

##### **Subcommittee Reports**

- 04:58:59 SEN. COCCHIARELLA, Rules Subcommittee Chair, reported that the Subcommittee carefully studied current rules and said that the Subcommittee identified four rules issues for consideration by the full Council:
- Fiscal note issues, such as timing and amended bills without new fiscal note. She said the Subcommittee recommends that the proposed legislation from the 2007 regarding fiscal notes be reconsidered and that Jon Moe, Fiscal Analyst, Legislative Fiscal Division, will assist.
  - Budget issues -- many legislators do not have a clear understanding of how the budget bill works and there is a need for more understanding, knowledge of, and involvement in the budgeting process. Issues such as time limits and how to get more involvement were discussed, as they are relative to rules.
  - Is there a need for a Legislative Administration Committee -- it was eliminated in a recent revision of House rules, however the Senate side heard bills in the 2005 session. There are some that feel there is a need for that committee or a similar type committee to be re-established because there is a lack of experience and knowledge due to term limits. Additionally, there is a need for clarification regarding leadership duties. Several options were discussed but no decisions were made and input from the Council is needed.
  - Should limits and guidelines for use of laptops and other electronic technology, such as text messaging, in committee meetings be established. Discussion of whether this should be at the discretion of committee chairs was discussed. This is an emerging issue with legal ramifications.
- 05:10:41 REP. HIMMELBERGER said Mr. Petesch has recommended that a protocol be written for committee chairs to use regarding placement of media and the authority to control decorum in committee hearings, and that Mr. Petesch recommended that there be a specific list of items that the chair would be allowed to regulate, including cell phones and lap top computers. SEN COCCHIARELLA said Senate rules already allow committee chairs authority over cell phones but wanted to address the issue of text messaging and use of lap tops.
- 05:12:34 SEN. COONEY said there was a discussion on this issue early in the 2007 session. He said it is good to consider it but that there has to be reasonable way deal with this issue. He said it is such a broad area and will be very difficult to

control. He said he understands the concerns but isn't sure how such guidelines would be enforced.

- 05:16:05 REP. BARRETT referenced an instance in which she observed a participant in a committee hearing text messaging another person in his agency and being instructed, via text message, to ask certain questions at the hearing. She said she thinks this is unethical and should be allowed only at the discretion of the chair. She said that there needs to be ethical guidelines because of the unfair advantage that can occur through the use of this type of communication.
- 05:17:14 REP. CAMPBELL commented that she has found it very useful to be able to use text messaging for the purposes of alerting legislators to committee hearings and communicating with people without disrupting a meeting. REP. BERGREN said there are two issues to consider - a way to quietly and quickly communicate and the possibility of influencing the outcome of a hearing without publically participating. He said it will be a struggle to incorporate technological advances and suggested that other states be contacted to see how they are addressing these issues.
- 05:19:49 REP. BARRETT asked about the court decisions made during the Martz administration regarding state emails being public information. Mr. Petesch said the Martz administration had emails subpoenaed and the court determined that the such emails are public if done on state computers, on state time, by state personnel. He explained that legislators do not fall under this ruling because the need to conduct private business while fulfilling legislative duties is allowed for. In the event a legislator computer was subpoenaed, anything of a private nature would be redacted. Mr. Petesch said he advises his staff to consider email a phone call that can be printed in a newspaper and to use it accordingly.
- 05:25:09 REP. MCALPIN asked that a comparison memo with other states be prepared. Mr. Petesch said that could be done but reminded the Council that Montana's constitutional right to look at documents is limited only by privacy provisions and that there are no exceptions to that. This is quite different from other states' requirements, so a memo may not prove to be a useful tool.
- 05:26:30 SEN. COONEY said he does not have a problem with this issue but would like to make certain that any policy or process is enforceable and legal, before adopting it. He said there is enough concern to warrant further investigation.
- 05:27:43 REP. BARRETT suggested beginning with technology ethics and guidelines for proper use of equipment. REP. BERGREN said it would be an agenda item at the next Council meeting.
- 05:28:40 SEN. COCCHIARELLA asked Mr. Petesch what the next step for the Rules Subcommittee should be. Mr. Petesch said in addition to items by SEN. COCCHIARELLA, there are several other agreed upon changes to the rules and that he will have the proposed changes available soon for consideration by the full Council.

05:31:10 REP. BERGREN asked Ms. Fox to discuss the issue of electronic records management. Ms. Fox said the Secretary of State has established a work group to deal with this issue because it affects all state agencies. Other states' policies and protocols will be examined and the work done by the work group will be a good resource to the Council. She said that the State Administration and Veterans' Affairs Interim Committee and the Legislative Finance Committee are also looking at these issues and may come forward with proposals.

#### **Caucus and Training Schedule for Fall 2008**

05:35:15 Ms. Fox discussed two different sets of dates for caucus and legislator training (EXHIBIT #5). Ms. Fox said she has also discussed offering a budget training session with fiscal staff.

05:39:52 The Council discussed the pros and cons of the two proposed schedules. Ms. Fox said there is much to be done in preparation of a session, such as hiring and training of House and Senate staff, and getting all of the computer systems in place and operational.

05:46:07 REP. BARRETT asked that the schedule will be sent out to all candidates, asking them to "save the date" so that they know how to plan their time. SEN. COONEY agreed with that suggestion. Ms. Fox said traditionally, information has been mailed out immediately after elections, but that the information could be sent to all candidates before the election.

05:49:39 After additional discussion, REP. MCALPIN **moved** to adopt the proposed schedule in which caucuses and training would begin on Wednesday, November 19, 2008. The **motion passed** on a unanimous voice vote.

05:50:36 Ms. Fox asked for discussion on expanding legislator training to include training for all legislators, including the budget.

05:51:13 SEN. COONEY said he supported additional training for incumbent legislators and **moved** to approve Ms. Fox moving ahead with planning the additional training. The **motion passed** on a unanimous voice vote.

05:52:16 REP. SALES **moved** to have rules training and committee chair training on Dec. 15. The **motion passed** on a unanimous voice vote.

05:53:44 Ms. Fox asked the Council to approve a legislative calendar and presented two options for consideration - Version 1 (tan - EXHIBIT #6) and Version 2 (gray - EXHIBIT #7). SEN. COONEY asked if staff could continue work on the schedule to have some of the earlier Saturdays off and to adjust transmittal dates. REP. SALES agreed that the Saturdays early in the session are not as productive as later in the session and that he would like to have days available later in the session. Ms. Fox said that would be done and that offering training on the first few Saturdays, as suggested by REP. BARRETT, could be incorporated also. REP. BERGREN recommended that no action be taken at this time and that it be taken up again at the next Council meeting.

## **INFORMATION TECHNOLOGY UPDATES**

- 06:03:44 Steve Eller presented a Montana Legislature Information Technology Update (EXHIBIT #8), which included information on:
- replacement of the chamber vote systems in the House and Senate and the status of the Request For Proposal;
  - improved audio minutes (including an example of pre-audio minutes and an example of the new format - EXHIBITS #9 and #10, and a copy of House and Senate rules regarding records of minutes - EXHIBIT #11); and
  - electronic notification for legislator pilot program (EXHIBITS #12, #13, #14, and #15).
- 06:21:19 Regarding the possibility eliminating the requirement for committee chairs to sign off on committee minutes, SEN. GEBHARDT said he did not support this and that there needs to be some type of official sign off by the committee chair.
- 06:22:24 SEN. COCCHIARELLA said she feels uncomfortable signing off on the abbreviated minutes because many times, she does not receive the minutes until a week later and did not have a clear recollection of all of the hearings. She said she would prefer having a daily sign off sheet for any executive action taken at a particular hearing. SEN. GEBHARDT said there could be a standard form that would have room for a few notes and a record of the bills heard and executive action. REP. BARRETT said the committee journal would accomplish the objectives discussed by SEN. GEBHARDT and SEN. COCCHIARELLA. SEN. COCCHIARELLA asked Mr. Eller if having that type of sign off sheet would create more work or simplify the process. Mr. Eller said it could be easily done.
- 06:28:46 **Karen Berger, Financial Manager, LSD**, discussed the Legislative Branch IT Reserve Account, which will be used to fund the vote system update (EXHIBIT #16). Ms. Berger said the process cannot move forward unless the Council approves the expenditure for the RFP and related costs. SEN. COONEY **moved** to approve the expenditure of reserve funds in the form of a contract with the successful vendor, up to the cash balance of the reserve account (option 1 on EXHIBIT #16). The **motion passed** on a unanimous voice vote.
- 06:32:23 SEN. COONEY **moved** to allow the expenditures to cover the RFP review team. The **motion passed** on a unanimous voice vote.

## **POLICY CONSIDERATIONS FOR LEGISLATIVE COUNCIL**

### **Legislator Compensation/Interim Committee**

- 06:33:28 Ms. Fox reviewed a report she prepared for the Council on legislator compensation and reimbursement (EXHIBIT #17). She said if there are still concerns after studying her report, the topic could be revisited at a later time.
- 06:36:00 SEN. GEBHARDT said the SAVA Committee has also discussed this and decided not to take action until the Legislative Council addressed the issue. Ms. Fox said the concerns brought up in the SAVA meeting dealt with the issue of the \$12 reimbursement for a non-receipted facility, such as family or friends and the difficulty of finding hotels that will offer the state rate.

- 06:38:48 SEN. COCCHIARELLA added that any workers' compensation claimant who travels is paid at the state rate, so this impacts them too. SEN. GEBHARDT said this affects local governments as well.
- 06:39:35 Ms. Fox said LSD staff is struggling with some of the interim committee issues and would like guidance from the Legislative Council. She discussed a January 24, 2008, memo outlining the concerns regarding providing resources for interim committees (EXHIBIT #18), a copy of Program 21 - Interim Committees and Activities (EXHIBIT #19) and an inventory of interim committees and subcommittees (EXHIBIT #20). Ms. Fox said interim committees have shown an increased desire for out-of-town meetings and for creating subcommittees, which has stretched staff resources and committee budgets. She discussed several proposed rules changes (pages 3-5 in EXHIBIT #18) that would address these problems and said with the Council's approval, she would forward them to all interim committee chairs for their input. Ms. Fox said she would provide additional information on election of interim committee officers (page 5, EXHIBIT #18) at another meeting. REP. BERGREN agreed that would be in the best interest of time.
- 06:49:06 SEN. BARKUS said, regarding travel expenses of interim committees, that committees must work within their means and that it is important to operate in a fiscally responsible manner. SEN. COONEY agreed, but said he also supports the idea of conducting committee meetings around the state. He said this was not anticipated in the budgeting process and perhaps should be a consideration when working on the next budget, but in the meantime, interim committees need to operate within their budgets.
- 06:51:18 REP. HIMMELBERGER said that conducting meetings out of the Capitol actually excludes public participation because out-of-towns cannot be video or audio streamed.
- 06:51:59 SEN. COCCHIARELLA said Ms. Fox's memo said gives committees flexibility in planning its work load and budgeting accordingly. She said her fear regarding out-of-town meetings is that it can be used for political gain and that such meetings should be approved only if the purpose can be justified and is for a valid reason.
- 06:53:55 REP. BARRETT said that teleconferencing technology could be used for remote meetings and would allow communities to participate and present its concerns or requests. SEN. COCCHIARELLA **moved** to allow Ms. Fox to provide the information to the interim committee chairs for their input, with the final decision left to the Legislative Council. The **motion passed** on a unanimous voice vote.

#### **LEGISLATIVE SERVICES DIVISION REPORTS AND UPDATES**

- 06:56:19 Ms. Fox said that Dr. Otto Kester, University of Montana, Missoula, would like to address the Council. **Dr. Otto Kester, Director of Grant Writing and Project Development, U of M**, said he has met with Senator Carol Williams about a proposal from the U. S. State Department to work with legislators and staff from other countries. He said the purpose is to teach these people more about the

democratic process and to give them a hands-on experience to take back to their own country for application, and that the State Department is proposing that state legislatures and their staffs be willing to invite interns to spend a four to six month period in the state attached to a particular part of the state or local government. The University of Montana is very interested in helping with this effort and is requesting an agreement from the legislature to host interns. Staff and legislators who mentor the interns would then travel to the country and serve as a consultant to that country for a brief period of time. Dr. Kester discussed other aspects of the exchange program, including funding and stipends available for participants.

- 07:03:45 SEN. COONEY said Dr. Kester's request was not on the agenda so no action could be taken. He asked what is the time frame for a decision. REP. BERGREN said it could be discussed but agreed that a vote can not be taken.
- 07:05:04 REP. MCALPIN said he would be in support of participating in such a program. He referenced Mike Mansfield and other Montanans who exhibited great diplomatic skills.
- 07:05:29 Dr. Kester said the State Department deadline for proposals is February 20, 2009, and that final decisions will be made by April. He said with the Council's permission, he would like to submit a proposal with a statement that the idea has been presented to the Legislative Council and that it is under consideration and a definite answer would be made in April.
- 07:07:59 REP. HIMMELBERGER asked Ms. Fox what impact this would have on the LSD staff if they were to participate in such a program. Ms. Fox said permanent staff could probably absorb one position but if interns were to be placed in leadership offices, it would have to be leadership's decision. She said there are concerns about the length and duration of the internships. Dr. Kester said the participants would be screened carefully, would be fluent in English, and would have significant political experience in their own country, which should help in the training process.
- 07:11:04 SEN. COCCHIARELLA said the idea is intriguing and would be a wonderful opportunity but the reality is that it would greatly impact the workload. She **moved** that Ms. Fox work with Sen. Williams and Dr. Kester on a more specific proposal to be presented at the next meeting. She asked if perhaps the proposal could include additional staff to assist with the internship program. Dr. Kester said it may be possible to include a request for additional staff or funding in the proposal.
- 07:13:10 REP. SALES said the program sounds very worthwhile but that his duties as Speaker are very demanding and that he didn't think it would be possible to fit in another obligation. The **motion passed** on a 7-4 voice vote, with SEN. BARKUS, REP. BARRETT, REP. SALES, and REP. HIMMELBERGER voting no.

## **REPORTS AND UPDATES**

- 07:16:24 Ms. Fox announced that the RFP for the Mental Health Study was awarded to DMA Health Strategies and that information had been provided to Council members in their meeting packet (EXHIBIT #21).
- 07:17:31 Ms. Fox reported that she participated in a three-day **Federal Emergency Management Agency (FEMA)** training on continuity of government, in the event of a disaster. She also said that the Administrative Manual has been amended recently and that there are already changes proposed for the next version.
- 07:18:57 Several Council members reported they would not be able to attend the next meeting, scheduled for April 1. After a brief discussion, REP. BERGREN said the meeting date would remain on April 1, 2008.

#### **PUBLIC COMMENT**

There was no public comment.

#### **ADJOURNMENT**

- 07:19:35 SEN. COONEY moved to adjourn the Legislative Council meeting at 3:25 p.m. The next Legislative Council meeting is scheduled for April 1, 2008, in Helena.

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