



## Newsletter

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### Applicants Sought for Uniform State Laws Commissioner

The Montana Legislative Council is seeking applicants interested in serving on the National Conference of Commissioners on Uniform State Laws, also known as the Uniform Law Commission. Commission members research, draft, and promote enactment of uniform state laws in areas where uniformity is desirable and practical.

The Legislative Council is responsible for appointing a new member and is accepting applications. The successful applicant must be a member of the Montana State Bar, will serve a four-year term, and is eligible to be reimbursed for expenses incurred for attending ULC annual meetings. The Legislative Council will select the new member at its Nov. 16 meeting. Individuals interested in applying should send a letter of interest and resume by Nov. 2 to the Montana Legislative Council, c/o Todd Everts, PO Box 201706, Helena, MT 59620. For more information, contact Todd Everts at (406) 444-4023 or [teverts@mt.gov](mailto:teverts@mt.gov).

### Audit Committee Meeting to Be Held on Nov. 4-5

The Legislative Audit Committee will meet in early November to review recent audits of state programs and services. The meeting will begin at 1 p.m. on Nov. 4 in Room 172 of the Capitol in Helena and will resume at 8 a.m. on Nov. 5 in the same location. The Legislative Audit Division provides independent and objective evaluations of the stewardship, performance, and cost of government policies, programs, and operations. The division is responsible for conducting financial, performance, and information system audits of state agencies and their programs, including the university system.

For more information on the committee's activities and upcoming meeting, visit the committee's website or contact Tori Hunthausen, Legislative Auditor.

To report improper acts committed by state agencies, departments, or their employees, call the Legislative Audit Division fraud hotline at 800-222-4446 or 406-444-4446 in Helena.

Committee Website: [www.leg.mt.gov/audit](http://www.leg.mt.gov/audit)

Committee Staff: [thunthausen@mt.gov](mailto:thunthausen@mt.gov) or 406-444-3122

## September Presentations Set the Stage for CFHHS Studies

The Children, Families, Health, and Human Services Interim Committee began work on three assigned studies in September with presentations on guardianship laws for people who are unable to make decisions about their care or finances, the children's mental health system, and the expansion of adult mental health services.

Members also reviewed and adopted a revised interim work plan and a revised study plan for the Senate Joint Resolution 22 study of guardianship laws and services. The committee decided in June to expand the SJR 22 study to include topics related to Alzheimer's disease and other forms of dementia.

### SJR 22 — Study of Guardianship Laws and Services

Committee members began work on the SJR 22 study by hearing from attorneys and a district court judge about the laws and court proceedings that come into play when guardianships are sought for people no longer able to make decisions for themselves.

Helena District Court Judge Mike Menahan provided statistics showing that the state's district courts handled 1,124 guardianship cases in 2014. According to Judge Menahan, most guardianship cases are filed by family members, physicians, the state's Adult Protective Services Bureau, or others who believe that a third party should be appointed by the court to handle some or all of the affairs of an incapacitated person.

Judge Menahan also said that district court judges make sure that procedural steps are followed when determining whether a person needs a guardian and deciding who should serve as guardian. He noted that guardians are required to file an annual accounting with the court but that judges are not necessarily trained to know whether guardians are properly fulfilling their fiduciary responsibilities.

Douglas Day, regional deputy public defender in Lewistown, said his office represents people who are the subject of guardianship proceedings and do not have the financial ability to hire their own attorneys. He said the Lewiston office handled 178 such cases in fiscal year 2014 and 189 cases in FY 2015. He also said that it's hard to know whether guardians are properly carrying out their duties after appointment.

Jon McCarty, a Great Falls attorney, said he encourages clients to plan in advance how their property, finances, and medical care should be handled if they become incapacitated. When people have wills, living wills, and powers of attorney in place, they reduce the chances that a guardian will need to be appointed, because they will have already expressed their wishes.

All of the panelists noted that the state's laws do not specify the type of training guardians should receive, describe the standards guardians should meet, or expressly contain penalties for guardians who fail to carry out their responsibilities properly.

Kelly Williams, administrator for the state's Senior and Long Term Care Division, and Valerie Bashor, attorney with the Department of Public Health and Human Services, discussed the state's involvement in guardianship proceedings. They said that although DPHHS employees are sometimes appointed as guardians, the agency first tries to find family members, friends, or other people who can serve as guardians.

Williams and Bashor also said that the state lacks standardized education and training for Montana citizens on how to pursue a guardianship and for attorneys and the courts on guardianship procedures. The laws also do not set standardized reporting processes for guardians, they said.

### HB 422 — Study of Children's Mental Health Outcomes

Committee members began their House Bill 422 study of children's mental health outcomes by learning more about Montana's system of mental health services for children. Zoe Barnard, chief of the Children's Mental Health Bureau, and Jo Thompson of the DPHHS Human Resources Division discussed the number of children receiving publicly funded mental health services and the services covered by Medicaid, Healthy Montana Kids (formerly known as the Children's Health Insurance Plan), and general fund dollars.

HB 422 requires the committee to review evidence-based outcomes for mental health services and performance-based pay for children's mental health providers in order to develop legislation for a pilot project.

Two children's mental health providers — Jani McCall, representing the Legacy Provider Group, and Jeff Folsom of A.W.A.R.E. Inc. — encouraged committee members to view children's mental health within the larger public health context. McCall noted that a study done 10 years ago showed that the children using the most expensive mental health services came from families with mental health, domestic violence, or substance abuse problems and that these children exhibited a wide range of problem behaviors. Folsom encouraged the committee to choose two or three goals for mental health services and to measure how well the services accomplish those goals. He said the goals could be as specific as reducing youth suicide, improving high school graduation rates, reducing contacts with the criminal justice system, or pursuing other priorities identified by the committee.

The committee will be seeking additional ideas for pilot project legislation at its November meeting in Billings.

## SB 418 — Monitoring of Legislative Mental Health Investments

Senate Bill 418 directed the committee to monitor the implementation of nearly \$19 million in new mental health appropriations approved by the Legislature in 2015.

Glenda Oldenburg, administrator for the DPHHS Addictive and Mental Disorders Division, outlined the activities the department has taken to date to make much of the new money available to community mental health providers. These activities include:

- awarding nearly all of the money that was appropriated for jail diversion and crisis intervention grants to counties. Sixteen counties proposed projects that will provide services in 29 counties, and all of the proposals were funded, totaling about \$1.8 million. Nine counties applied for the grants for the first time.
- drafting rules for spending the new state funding for short-term voluntary treatment for people who are facing an involuntary commitment proceeding. The Legislature appropriated \$1 million for such diversion in the next biennium. The rules propose daily payment rates of \$875 for treatment provided in hospital psychiatric units and \$575 for treatment in crisis stabilization facilities.
- exploring ways to establish transitional mental health group homes in communities for people who are at the Montana State Hospital because they have been convicted of crimes but have been found to be mentally ill at the time the crime was committed. Many of these individuals are eligible for parole but have not been released because they can't make arrangements for a community placement. Oldenburg also said that the State Hospital is opening an additional eight-bed group home on the Warm Springs campus to move some of the criminally committed patients out of the more secure hospital setting to prepare them for eventual release to a community.

Oldenburg also discussed some of the data the department will collect to measure whether the new mental health services are helping people to recover from their mental illnesses and reducing pressure on law enforcement agencies and the State Hospital.

## Medicaid Expansion Review

As required by law, the committee reviewed the application that DPHHS planned to submit in September to the federal Centers for Medicare and Medicaid to carry out the expansion of the Medicaid program as authorized by Senate Bill 405. That bill expanded Medicaid coverage to all Montana adults ages 19 to 64 who have income at or below 138 percent of the federal poverty level.

Several elements of SB 405 are not allowed under federal

Medicaid law and regulations, so the state must ask the federal government to waive those federal requirements.

State Medicaid Director Mary Dalton told the committee that the federal government would hold a 30-day public comment period on the waiver application after submission. She said that DPHHS has asked that the waiver be approved by Nov. 1 so the state can start enrolling people in Medicaid at the same time that the health insurance exchange is open for people to sign up for insurance policies for 2016. The Medicaid benefits would be available to the new Medicaid enrollees on Jan. 1, 2016.

## MDC Closure

Legislative staff updated the committee on developments during this past summer involving the Montana Developmental Center, which is slated to close by July 1, 2017, under legislation passed by the 2015 Legislature. Senate Bill 411 required that the Boulder facility be closed and that most clients be moved into community services by the end of 2016. The bill also established a transition planning committee to help DPHHS plan for the closure.

Staff reported that during the summer the transition planning committee:

- approved a motion recommending that the MDC buildings and campus be repurposed rather than closed;
- established a subcommittee to work on a new rate structure for community providers who accept MDC clients;
- learned that staff turnover has created difficulty in filling shifts, prompting the state to offer retention bonuses of \$500 to staff who work more than 1,040 hours a year and to pay double overtime to union workers who fill direct care shifts;
- heard that the administration believes a state-run entity will be part of the solution to closing MDC; and
- was told that DPHHS has been offering to pay some community providers additional funds to accept certain MDC clients. The state hopes to move 13 to 15 people from the facility this fall so it can close one of the MDC cottages and redistribute staff to the remaining buildings. In return for the higher funding, the providers would have to agree to accept the clients for at least 12 months.

## Next Meeting

The committee will meet on Nov. 19-20 in Billings at a time and location to be determined. For more information on the committee's activities and upcoming meeting, visit the committee's website or contact Sue O'Connell, committee staff.

Committee Website: [www.leg.mt.gov/cfhhs](http://www.leg.mt.gov/cfhhs)

Committee Staff: [soconnell@mt.gov](mailto:soconnell@mt.gov) or 406-444-3597

## Commission on Sentencing Elects Officers and Gives Directions for Future Meetings

A commission established under Senate Bill 224 (2015) to conduct an empirical study of Montana's criminal justice system met for the first time on Sept. 2. The commission elected Sen. Cynthia Wolken (D-Missoula) as its presiding officer and Sen. Kristin Hansen (R-Havre) as vice presiding officer.

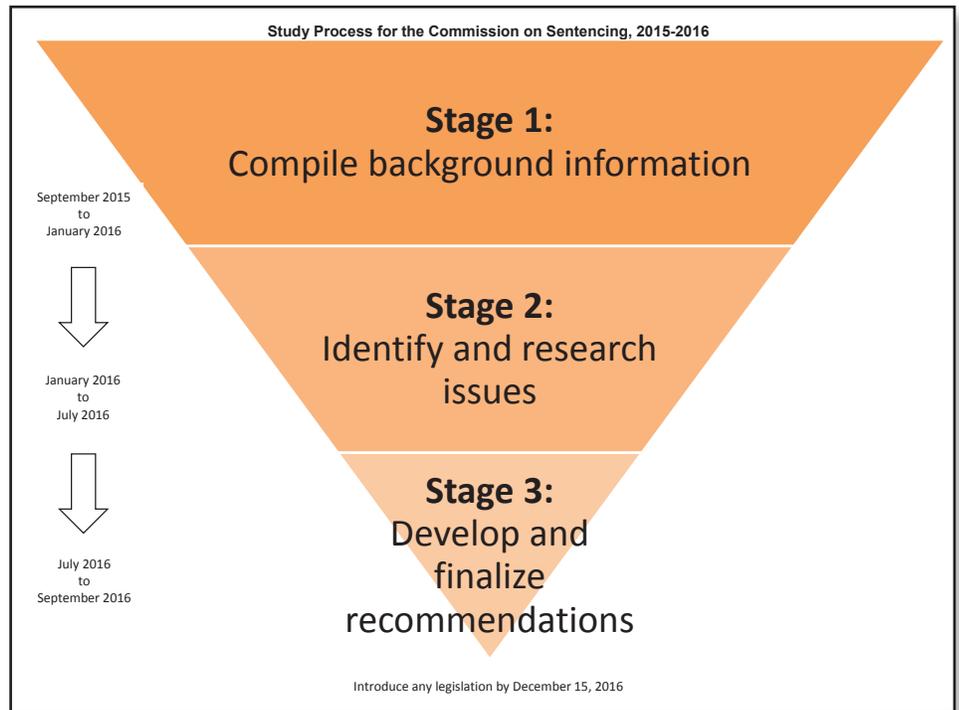
Commission members were introduced to Council of State Governments Justice Center staff who will be working with the commission throughout the next year and learned more about the technical assistance that team will provide. The commissioners also heard background information related to the study and took comments from the public.

During a wide-ranging work session, the commissioners expressed interest in studying specific areas of the criminal justice system or problems they perceived with the system. That discussion helped the commissioners identify several topics on which they expect to receive background information at future meetings. Those topics include:

- recidivism, including how it is measured and recent research on policies that can reduce it;
- swift and certain sanctions for probation and parole violations;
- risk and needs assessments, their use in the criminal justice system, and Montana's models;
- substance use/abuse and treatment courts;
- bills enacted in 2015 that relate to Montana's parole process;
- experiences of policymakers in other states who have conducted similar criminal justice system reviews;
- the relationships among state, local, and federal jurisdictions;
- pretrial release programs and efforts by local entities to reduce jail populations composed of individuals who have not yet received a trial;
- mental health issues in the corrections population; and
- sentencing structures and disparate sentencing related to race, ethnicity, gender, or geography.

## Study Process

After learning more about the above topics and in conjunction with data work by the CSG Justice Center, the commissioners will begin to narrow their focus and, if warranted, begin to develop recommendations to the next Legislature for policy changes.



The diagram provided illustrates the commission's three-stage study process. The study starts broadly, with commissioners learning more about the criminal justice system, sharing their expertise on various parts of the system, and establishing a common base of knowledge from which they can proceed. The commission will then narrow its focus by identifying policy topics that require further analysis or problems that it might want to address through policy or budget recommendations. During the final stage of the study, the commission will consider and adopt recommendations, including requesting legislation for the 2017 session, if needed.

## Next Meeting

The commission will meet again on Nov. 17-18 in Helena. For more information on the commission's activities and upcoming meeting, visit the commission's website or contact Rachel Weiss, commission staff.

Commission Website: [www.leg.mt.gov/cos](http://www.leg.mt.gov/cos)

Commission Staff: [rweiss@mt.gov](mailto:rweiss@mt.gov) or 406-444-5367

## Education and Local Government Committee Dives In

The Education and Local Government Interim Committee met on Sept. 24-25 and dove into its examination of K-12 and higher education matters as well as the Senate Joint Resolution 20 study of county road historic rights-of-way on state trust land and the Senate Joint Resolution 21 study of local fire and emergency services.

The committee also shares five members and staff with the School Funding Interim Commission established by Senate Bill 128, which met on Sept. 23. Commission members and staff shared information about the commission's meeting and anticipated interim work.

The ELG also received presentations on:

- the Senate Joint Resolution 26 study of youth concussion laws;
- the Office of Public Instruction's activities, including negotiated rulemaking, statewide assessments, and data collection and analysis;
- the federal Elementary and Secondary Education Act reauthorization; and
- the Montana university system's Research Initiative, financial literacy efforts, and course placement protocol.

The committee also received reports and hosted panel discussions with state and local officials and members of the public who work daily with the issues articulated in the county road rights-of-way and local fire and emergency services study resolutions (SJR 20 and SJR 21).

Look for more details about the committee's Sept. 24-25 meeting and future study activities in the November newsletter.

### Next Meeting

The committee will meet on Dec. 7-8 in Helena at a time and location to be determined. For more information on the committee's activities and upcoming meeting, visit the committee's website or contact Leanne Kurtz, committee staff.

Committee Website: [www.leg.mt.gov/elgic](http://www.leg.mt.gov/elgic)

Committee Staff: [lekurtz@mt.gov](mailto:lekurtz@mt.gov) or 406-444-3593

## Energy and Telecommunications Committee Focuses on Net Metering and Colstrip Units

The Energy and Telecommunications Interim Committee on Sept. 11 got its first look at an analysis of net metering costs and benefits and discussed the potential closure of coal-fired generating units in Colstrip.

### Net Metering

To kick off the net metering study outlined in Senate Joint Resolution 12, the committee in June sent Montana's regulated utilities, rural electric cooperatives, and the renewable energy industry a set of specific data requests. At the Sept. 11 meeting, the committee agreed to ask the Montana Public Service Commission, the Montana Consumer Counsel, and the Montana Department of Environmental Quality to review the information provided as a result of those requests. The committee is asking these agencies to identify follow-up questions or additional data requests that will help clarify the information and ensure that the assumptions, perspectives, sources, and methodologies used by stakeholders in responding to the questions are transparent.

The committee wants to determine whether the current net metering policy and the underlying rate design used by regulated and cooperative utilities lead to any overcompensation or undercompensation of net metered customers. While rate design is clearly the job of the PSC, the ETIC wants to ensure that Montana's net metering policy does not result in a misallocation of costs and benefits.

### Colstrip Units

The committee also spent time discussing matters related to Colstrip Units 1 and 2.

During its 2015 session, the Washington Legislature considered bills that would allow electrical companies to petition the Washington Public Utility and Transportation Commission for approval to acquire and decommission one or more coal-fired generating units, like the Colstrip Units 1 and 2. The bills also would secure ratepayer funds for environmental remediation. Although the bills did not pass, the WPUTC is assessing the economic risks of continued operation of certain coal-fired generating units included in Washington utility rates and is investigating the costs of closing Colstrip Units 1 and 2.

The committee agreed by a 6-2 vote to send comments to the WPUTC. The comments, posted on the ETIC website, discuss the potential decommissioning and remediation costs of closing the Colstrip units as well as the tax implications and other economic impacts to Rosebud County.

The Washington Legislature is also taking steps to discuss the closure of Colstrip Units 1 and 2. The Washington Senate Energy Committee is considering whether to hold a meeting in Spokane in late October on the potential closure. The Senate committee has indicated that it intends to invite a variety of public officials and legislators from Montana to attend the meeting. The ETIC selected Sen. Duane Ankney (R-Colstrip) and Sen. Cliff Larsen (D-Missoula) to attend the meeting. The Environmental Quality Council selected Sen. Jim Keane (D-Butte) and Sen. Rick Ripley (R-Wolf Creek).

## Next Meeting

The committee's next meeting is on Jan. 15 at a time and location to be determined. For more information on the committee's activities and upcoming meeting, visit the committee's website or contact Sonja Nowakowski, committee staff.

Committee Website: [www.leg.mt.gov/etic](http://www.leg.mt.gov/etic)

Committee Staff: [snowakowski@mt.gov](mailto:snowakowski@mt.gov) or 406-444-3078

## 111d Subcommittee Hears Initial Reactions to Federal Clean Power Plan

At its Sept. 10 meeting, the 111d Subcommittee heard initial reactions to the final federal Clean Power Plan from the Department of Environmental Quality, the Montana Public Service Commission, and the Montana Consumer Counsel. The agencies indicated that a more detailed analysis will be available in January. The subcommittee also asked Montana Attorney General Tim Fox to provide the subcommittee with an update in the coming months on his response to the federal plan.

The subcommittee plans to work closely with a variety of Montana state agencies to examine how the state should respond to the federal plan, which requires states to reduce carbon dioxide emissions in the power sector by about 32 percent below 2005 levels by 2030. The federal Clean Power Plan is also known as the 111d Rule.

The subcommittee's members are Sen. Duane Ankney (R-Colstrip), Sen. Robyn Driscoll (D-Billings), Sen. Jim Keane (D-Butte), Sen. Cary Smith (R-Billings), Rep. Keith Regier (R-Kalispell), Rep. Tom Steenberg (D-Missoula), Rep. Janet Ellis (D-Helena), and public member Scott Aspenlieder.

The subcommittee elected Sen. Keane as presiding officer and Rep. Regier as vice presiding officer.

The final 111d Rule was issued on Aug. 3, after the draft rule was changed significantly. The DEQ is responsible for developing Montana's plan to implement the rule. The state has until Sept. 6, 2016, to submit a final plan, or an initial plan with a request for an extension.

## Next Meeting

The subcommittee's next meeting is on Jan. 14 at a time and location to be determined. For more information on

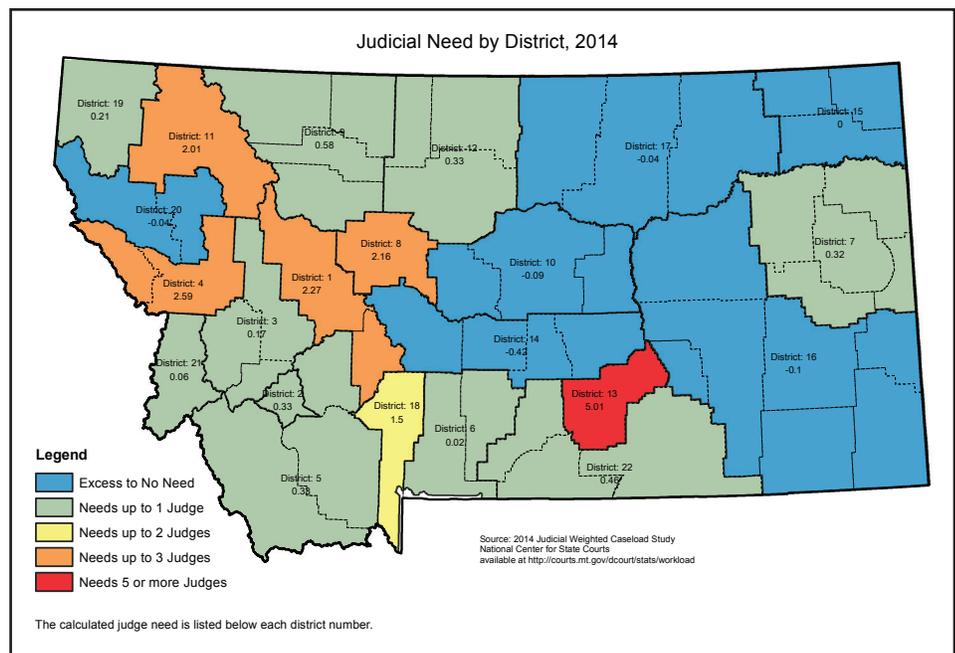
the subcommittee's activities and upcoming meeting, visit the subcommittee's website or contact Sonja Nowakowski, subcommittee staff.

Subcommittee Website: <http://leg.mt.gov/css/Committees/Interim/2015-2016/EQC/111d-Subcom/default.asp>

Subcommittee Staff: [snowakowski@mt.gov](mailto:snowakowski@mt.gov) or 406-444-3078

## Judicial Redistricting Commission Elects Presiding Officer, Discusses Next Steps

At its Sept. 3 organizational meeting, the Judicial Redistricting Commission elected Judge Gregory Todd as its presiding officer. The commissioners learned about existing caseload and judicial workload data, which indicate that Montana's judicial districts need an additional 17.63 full-time judges to accommodate existing caseloads. The map provided depicts the judicial need for each district.



Commissioners also learned about constitutional and statutory provisions that govern district courts and judges. In addition, the commission discussed courtroom space, local funding considerations, and resources that can help mitigate judges' workloads, such as treatment courts and mediation.

The commission requested additional information on several topics, including:

- the number of civil cases filed in the 1st Judicial District (Lewis and Clark County and Broadwater County) that have the State of Montana as a defendant or plaintiff;
- laws that give certain case types priority over other cases;

- the number of district court cases being presided over by a judge not from the district in which the case was filed (i.e., a substitute judge from outside the district) and the miles traveled by those judges to preside over the cases; and
- the use of drug treatment courts, including the effectiveness of the courts and impacts to judges' workloads.

### Next Meeting

The commission agreed that it would not meet again until updated judicial workload statistics are available, which is anticipated to be in late January or early February 2016. For more information on the commission's activities, visit the commission's website or contact Rachel Weiss, commission staff.

Commission Website: [www.leg.mt.gov/jrc](http://www.leg.mt.gov/jrc)

Commission Staff: [rweiss@mt.gov](mailto:rweiss@mt.gov) or 406-444-5367

## Legislative Finance Committee Receives Updates and Discusses Work Plan

The Legislative Finance Committee met on Sept. 24-25 in Helena. Topics discussed included:

- the fiscal year end 2015 budget, the state general fund ending fund balance, and the actual FY 2015 general fund revenues and expenditures for all funds;
- budget policy choices for the 2019 biennium;
- a new format for future budget status reports;
- state government self-insured health care pools;
- Medicaid monitoring under Senate Bill 405; and
- the committee's work plan.

Additional details will be provided in the November issue.

For more information on the committee's activities, visit the committee's website or contact Amy Carlson, committee staff.

Committee Website: [www.leg.mt.gov/lfc](http://www.leg.mt.gov/lfc)

Committee Staff: Legislative Fiscal Analyst Amy Carlson, [acarlson@mt.gov](mailto:acarlson@mt.gov) or 406-444-2988; Diane McDuffie, committee secretary, [dimcduffie@mt.gov](mailto:dimcduffie@mt.gov) or 406-444-2063

## Task Force on State Public Defender Operations Elects Officers and Revises its Work Plan

The Task Force on State Public Defender Operations held its organizational meeting on Sept. 17 at the Capitol. Task force members were briefed on the constitutional and statutory requirements and limitations applicable to the Office of State Public Defender, the history of indigent defense in the United

States and Montana, and the varying perspectives about indigent defense. The task force also reviewed, discussed, and revised the proposed study plan for conducting the House Bill 627 study of the public defender office's operations.

Revisions to the proposed study plan included prescribing guidelines for staff research on other states' indigent defense systems and revising future meeting dates.

The task force:

- directed staff to (1) identify other states' public defender offices that have about 34,000 new cases assigned annually and are not being sued for violating constitutional requirements for providing indigent defense and (2) identify at least one state with at least one of the following characteristics as part of its public defender system: (a) an oversight commission; (b) a business manager or director who is not also a public defender; (c) separate units for civil and criminal cases; (d) a separate unit for handling child abuse and neglect case; and (e) extensive use of guardians ad litem and Court Appointed Special Advocates.
- voted to allow proxies from excused members when the proxy is in writing and is delegated to another task force member;
- tentatively adopted the Rules, Guidelines, and Procedures for Interim Committees (established by the Legislative Council) as the task force's operating rules;
- elected Rep. Kimberly Dudik (D-Missoula) as presiding officer;
- elected Rep. Randy Brodehl (R-Kalispell) as vice presiding officer; and
- set a meeting calendar for the interim.

### Next Meeting

The task force will meet Dec. 10 at a time and location to be determined. For more information about task force activities and its upcoming meeting, visit the task force's website or contact Dave Bohyer, task force staff.

Task Force Website: [www.leg.mt.gov/tfspdo](http://www.leg.mt.gov/tfspdo)

Task Force Staff: [dbohyer@mt.gov](mailto:dbohyer@mt.gov) or 406-444-3592

## Revenue and Transportation Committee Holds September Meeting

The Revenue and Transportation Interim Committee is scheduled to meet on Sept. 24-25, which is after the deadline for submitting an article about the meeting for this issue of *The Interim*. At this time, the agenda for the meeting includes consideration of a revised work plan, a 2015 fiscal year end report, agency updates from the departments of Revenue and Trans-

portation and the Montana Tax Appeal Board, and background information for some of the committee's chosen study topics.

The study topics on the agenda are:

- the Highway State Special Revenue Account;
- the elderly homeowner and renter income tax credit;
- the adequacy of local government revenue-generating capacity;
- the treatment of intangible property for centrally assessed property valuation;
- property taxable value neutrality;
- nonprofit reporting of community benefits;
- tax liens and deeds; and
- the taxation of international corporations doing business in Montana.

The November issue of *The Interim* will include a detailed discussion of the committee's September meeting.

For more information on the committee's activities, visit the committee's website or contact Megan Moore, committee staff.

Committee Website: [www.leg.mt.gov/rtic](http://www.leg.mt.gov/rtic)

Committee Staff: [memoore@mt.gov](mailto:memoore@mt.gov) or 406-444-4496

## School Funding Commission Holds Initial Meeting

The School Funding Interim Commission met for the first time on Sept. 23 at the Capitol. All 16 commissioners attended, 12 legislators and 4 public members. The commission elected Sen. Tom Facey (D-Missoula) as presiding officer and Sen. Elsie Arntzen (R-Billings) as vice presiding officer. The commission began by inviting input on its study of the state's school funding formula from the Office of Public Instruction and the Board of Public Education, representatives of the education community, and the public.

Following a work session intended to inform commissioners about the basics of Montana school funding, the commission discussed its work plan and decided to meet again for three days in January and focus its attention on four areas of concern:

- recruitment and retention of qualified teachers, administrators, and staff;
- school facilities;
- special education; and
- school district structure and boundaries.

Look for more details on the commission's initial meeting in the November newsletter.

## Next Meeting

The commission will meet again on Jan. 11-13 at the Capitol in Helena. For more information on the commission's activities and upcoming meeting, visit the commission's website or contact Pad McCracken, commission staff.

Commission Website: [www.leg.mt.gov/sfc](http://www.leg.mt.gov/sfc)

Commission Staff: [padmccracken@mt.gov](mailto:padmccracken@mt.gov) or 406 444 3595

## State-Tribal Relations Committee to Look at Tax Agreements and Indian Child Welfare Act

The State-Tribal Relations Interim Committee in October will take up the first two pieces of its interim work plan: state-tribal tax agreements and state implementation of the Indian Child Welfare Act.

To avoid double taxation and legal controversy over the taxation of gas, tobacco, and alcohol sales on reservations, the state has entered into agreements with several tribes to collect the taxes and remit a portion to the tribes based on their enrollment populations. In the morning on Oct. 21, the first day of the committee's meeting, representatives of the tribes, the governor's office, and the departments of Transportation and Revenue will discuss the history of these agreements and current negotiations. Agreements related to the taxation of natural resources will also be discussed.

In the afternoon on Oct. 21, the committee will learn about the ICWA and the state's implementation of the act. Congress passed the ICWA in 1978 to address concerns about the breakup of Indian families due to the high rate of placing Indian children in non-Indian foster care and adoptive homes. Representatives from the U.S. Bureau of Indian Affairs and the state Department of Public Health and Human Services as well as an ICWA attorney from the Confederated Salish and Kootenai Tribes are among the expected speakers.

The committee will also learn about existing regulations to protect cultural patrimony and sacred objects and sites as well as about the calculation of labor statistics on Montana's reservations, American Indian youth suicide prevention efforts, the Native American Collateral Support Program, and the implementation and funding of language immersion programs in certain Montana schools.

The second day's agenda has yet to be set. A full agenda and meeting materials will be posted on the committee's website about two weeks before the meeting.

## Next Meeting

The committee will meet on Oct. 21-22 in Room 137 of the Capitol in Helena. For more information on the committee's activities and upcoming meeting, visit the committee's website or contact Hope Stockwell, committee staff.

Committee Website: [www.leg.mt.gov/tribal](http://www.leg.mt.gov/tribal)

Committee Staff: [hstockwell@mt.gov](mailto:hstockwell@mt.gov) or 406-444-9280

## Water Policy Committee Ponders Water Claims from North Dakota Tribe

At its Sept. 2-3 meeting in Helena, the Water Policy Interim Committee zeroed in on its study of legal processes for water rights and requested an update regarding unresolved water claims made on behalf of a North Dakota tribe.

The committee added specific details to its study on the future of Montana's Water Court and planned for future discussions on:

- the accuracy of final water rights decrees issued by the Water Court;
- the appeals process for Department of Natural Resources and Conservation decisions on permitting or changing water rights;
- the enforceability and timing of final Water Court decrees; and
- district court administration of Water Court decrees.

The committee will resume the study on the future of the Water Court in January.

The committee also heard how the DNRC and the Water Court are working to process about 800 individual water rights claims on scattered tribal allotments of land in north-eastern Montana. The U.S. government made the claims on behalf of individuals who are or were members of the Turtle Mountain Band of Chippewa Indians. The Turtle Mountain Band is headquartered in Belcourt, N.D. The claims are for irrigation, stock, and other domestic uses of water.

The Reserved Water Rights Compact Commission did not negotiate a compact that included these claims. The DNRC and the Water Court will report to the committee in January on how they plan to adjudicate these reserved rights.

In other business, the committee:

- discussed a federal Environmental Protection Agency rule that defines water subject to federal jurisdiction under the Clean Water Act. A federal judge in North Dakota ordered that the rule cannot apply in Montana and 12 other states until a legal challenge is resolved.

- considered, but did not approve, a letter of support for congressional reauthorization of the federal Land and Water Conservation Fund;
- heard about possible options for the Department of Environmental Quality when it is implementing future wastewater ammonia standards; and
- discussed the effects of a 2014 district court ruling on exempt water wells. The ruling means that certain new subdivisions may need individual permits for any domestic groundwater wells. Testimony to the committee indicated that the ruling — and the department's subsequent interpretation of it — may not be fully evident until certain areas of the state run out of buildable lots.

## Next Meeting

The committee will meet again on Jan. 11-12 at a time and place to be determined. For more information on the committee's activities and upcoming meeting, visit the committee's website or contact Jason Mohr, committee staff.

Committee Website: [www.leg.mt.gov/water](http://www.leg.mt.gov/water)

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## The Back Page

### Online Privacy: Who Cares?

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They are posted on many websites. They are often just a tiny link at the bottom of a web page, or they may be in an annoying pop-up box that interrupts when you are trying to purchase that book in time for a birthday, access an article for your paper due tomorrow, or reserve a hotel room before the special rate expires. Click “agree” and you may continue — don’t agree and you can’t. Reading them will take precious time you don’t have. You think, “Seriously?” But, because you want to function in the everyday online world, you don’t read them, you click “agree,” and you go on with your life.

Online terms and conditions and privacy policies seem to be everywhere. However, it seems that the vast majority of us either do not read them or misunderstand them when we do. Joseph Turow, who studies digital marketing and privacy issues at the University of Pennsylvania’s Annenberg School for Communication, told the Pew Research Center that “many people don’t actually read privacy policies; they simply look at the label. And the intuitive understanding — the cultural understanding — of the label is that when something says ‘privacy policy,’ it protects your privacy.”<sup>1</sup> But the truth is that the existence of a policy doesn’t mean your privacy is protected. In fact, in the United States, there is no generally applicable law for online privacy protection. Several laws apply only to certain types of information collected by certain organizations for certain purposes. Furthermore, many of these laws authorize federal agencies to develop guidelines and standards for a system of self-regulation. In other words, compliance is voluntary.

Privacy policies are intended to inform online customers about what personal information is collected, secured, and

shared. But one study found that only 14 percent of those surveyed said they read privacy policies often.<sup>2</sup> An analysis of the same study concluded that most consumers either don’t care about their privacy or proceed with a false sense of security.<sup>3</sup>

### Big Data, Big Business

So, just how much is our online behavior being tracked? A *Wall Street Journal* investigation conducted in 2010 into 50 of the most popular websites used by Americans identified more than 100 “middlemen” between Internet users and advertisers. Imagine this ratio on a global scale. These middlemen — online tracking companies, data brokers, and advertising networks — plant tracking files on your computer each time you visit a website within the company’s ecosystem of websites. Granted, the tracking files — usually called “cookies,” “beacons,” or “pixels” — provide conveniences that help you navigate a website, but they are also used to collect data about your online behavior and correlate this data with other websites you visit. If you subscribe to a free service or make a purchase, you also may be agreeing to allow tracking software to mine other files on your computer, including your e-mails.<sup>4</sup>

This tracking software is voluminous and is not classified as “spyware” or “malware” because we agree to allow ourselves to be tracked in exchange for the benefits offered by the website. The *Wall Street Journal’s* 2010 investigation found that the websites studied installed an average of 64 pieces of tracking technology each onto an individual computer and that this was usually done without warning. The investigation also found that many of the tracking tools mined the computer

<sup>1</sup> Aaron Smith, “Half of Online Americans Don’t Know What a Privacy Policy Is,” Pew Research Center, Dec. 4, 2014. Available at <http://www.pewresearch.org/fact-tank/2014/12/04/half-of-americans-dont-know-what-a-privacy-policy-is/>.

<sup>2</sup> Chris Jay Hoofnagle and Jennifer M. Urban, “Alan Westin’s Privacy Homo Economicus,” 49 *Wake Forest L. Rev.* 261 (2014), p. 308. Available at: <http://scholarship.law.berkeley.edu/facpubs/2395>.

<sup>3</sup> Hoofnagle and Urban, “Alan Westin’s Privacy Homo Economicus,” pp. 304-306.

<sup>4</sup> Julia Angwin, “The Web’s New Gold Mine: Your Secrets,” *Wall Street Journal*, July 30, 2010. Available at <http://www.wsj.com/articles/SB10001424052748703940904575395073512989404>.

for personal information in real time to instantly access location, income information, shopping interests, and even medical conditions. Furthermore, some tracking tools were found to have surreptitiously re-spawned even after the cookies or beacons were deleted.<sup>5</sup>

Online tracking tools are becoming so powerful that data brokers are capable of building a detailed personal profile correlated to your IP address (a unique identifier assigned to every computer that accesses the Internet). You may be profiled by age, location, gender, health, income, marital status, political or religious interests, whether you have children, or whether you own a home.<sup>6</sup>

Cellphones and mobile applications present another level of data mining opportunities for “big data” companies. By downloading a free app, you may be agreeing to allow the company to read your text messages, automatically reprogram or update the app, or track your exact location. Social media websites are also a gold mine for big data companies.

Your online personal information, aggregated and correlated to your personal IP address from all of these online sources, is valuable and sold on exchanges resembling stock markets to companies who want to specifically target customers like you. The transactions take only seconds, so in less than a minute you may see an ad offering you a certain health product, program, or service.<sup>7</sup>

Government agencies, too, may use this information. In 2011, a U.S. district court in a case involving WikiLeaks associates ruled that the federal government can collect personal information about you from Internet providers and data brokers without a warrant (i.e., without cause or oversight).<sup>8</sup>

A blogger for the information technology website InfoWorld noted that “many of us share data promiscuously on Facebook, Twitter, Google Plus, and other social sites, only dimly aware our personal information is also being collected by both marketers and the government. There’s an entire industry devoted to mining that data, matching it to real-life activities, and using it to decide whether you’re likely to vote Democrat or Republican, if you’re in the market for a car, if you’re pregnant, and whether you’re a good candidate for credit or a bad insurance risk.”<sup>9</sup>

<sup>5,6,7</sup> Angwin, “The Web’s New Gold Mine.”

<sup>8</sup> Graeme McMillan, “Court Rules Government Can Get Your Online Personal Data Without Warrant,” *Time*, Nov. 11, 2011. Available at <http://techland.time.com/2011/11/11/court-rules-government-can-get-your-online-personal-data-without-warrant/>.

<sup>9</sup> Dan Tynan, “Our Internet Privacy Is at Risk -- But Not Dead (Yet),” InfoWorld, April 22, 2013. Available at <http://www.infoworld.com/article/2614138/internet-privacy/our-internet-privacy-is-at-risk---but-not-dead-yet.html>.

<sup>10</sup> Bob Sullivan, “Why Should I Care About Digital Privacy?,” Technology and Science, MSNBC.com, March 10, 2011.

<sup>11</sup> Sarah Kessler, “Online Behavior Tracking: 7 Worst Case Scenarios,” Mashable.com, November 3, 2010, quoting Christopher Soghoian, a privacy advocate who studies data security and privacy as a Ph.D. candidate at Indiana University.

## Does It Matter?

Okay. So what? The world is still turning, right? Why care if marketing companies know the books you read, the movies you like, that you booked a plane to visit your sister in Kansas or researched points of interest for your drive to California? You can still choose to ignore the ads. And if you aren’t breaking the law, why worry if the government is watching. No actual harm done. Right?

Privacy advocates argue that there is plenty of potential harm. Your personal information, including your e-mail address, phone number, physical address, birthday, passwords, and security questions, could be hacked by bad actors seeking to steal your identity for financial or other gain. Social media posts could be used to discriminate against you when you apply for a job, educational opportunity, or bank loan. You could also become a victim of mistaken identification by law enforcement because your online profile was hacked. And once your information is collected and sold, you can’t take it back or correct it.

One privacy consultant, Alessandro Acquisti, said: “Giving away privacy has been compared to giving a company a blank check. You don’t know how they’re going to fill it in, or what’s going to happen when it comes back to you.” Despite this warning, says another privacy advocate, “consumers continue to think that no harm will come to them, and they continue to embrace the illusion that they can control who gets their personal information and how it is used.”<sup>10</sup>

According to privacy advocate Christopher Soghoian: “Consumers treat the search engine box like their psychiatrist, their rabbi, their priest, their doctor. People type the most intimate things into search engines and other websites primarily because they think they’re anonymous. They type in things on WebMD that sometimes they wouldn’t even ask their own doctors. ... And in fact, we are not anonymous, these sites are tracking us.”<sup>11</sup>

John Simpson, a privacy advocate with the nonprofit advocacy group Consumer Watchdog, explains: “If the data is there, it is potentially something that could be obtained by government law enforcement authorities without you knowing about it. It could potentially be subpoenaed in civil trials.

The issue is that people don't realize the tracks that they leave when they do these routine things."<sup>12</sup>

Given these warnings, we are tempted to join online security expert Bruce Schneier in declaring that privacy is dead and accept that this is just the way things are:

Welcome to a world where Google knows ... more about your interests than your spouse does. ... [and] where your cellphone company knows exactly where you are all the time. Welcome to the end of private conversations, because increasingly your conversations are conducted by email, text, or social networking sites. And welcome to a world where all of this, and everything else that you do or is done on a computer, is saved, correlated, studied, passed around from company to company without your knowledge or consent; and where the government accesses it at will without a warrant. Welcome to an Internet without privacy, and we've ended up here with hardly a fight.<sup>13</sup>

### Is Online Privacy Really Dead?

On the other hand, some say we should not buy into a "sky-is-falling" mentality or accept that online privacy is dead. They point to:

- federal and state legislative initiatives, such as the federal Consumer Privacy Bill of Rights,<sup>14</sup> "do-not-track" proposals,<sup>15</sup> and an array of state legislation related to online activities, such as requiring (not just encouraging) websites to post privacy policies, barring online booksellers and libraries from disclosing readers' orders or browsing information, requiring certain security measures for personal information held by Internet service providers, regulating online marketing of certain products directed to minors, and requiring employers to give notice before monitoring e-mail or using social media posts to judge an employee's potential work performance;<sup>16</sup>

- innovative new technologies and programs that could allow people to use encryption, store their information in a "data vault" that requires data collectors to get explicit permission to access it, or set up their own online portal for organizing and protecting the personal information they give to utility companies, government agencies, and businesses;<sup>17</sup>
- self-regulation initiatives by responsible companies and market-driven innovations that could lead to better privacy protection and more control for consumers without intrusive government regulation;<sup>18</sup> and
- educational and consumer awareness programs that help consumers be more discriminating and take better care of their online privacy.<sup>19</sup>

### Do You Care?

Online privacy in this "big data" world is a hotly debated topic among policymakers, private industry, civil rights advocates, watchdog organizations, legal experts, educational institutions, and consumer advocates. And it is not only a national debate — it is global. Still, the biggest question is, do you care? Every day, you are likely providing some type of personal information to "big data companies", whether through your cellphone apps, Facebook posts, web surfing, debit or credit card purchases, or online payments to health care providers, insurance companies, or other financial institutions. This information may be bought and sold almost instantaneously or used by government agencies. We are all enjoying the great benefits of these powerful tools. But it is incumbent on each of us to also understand the risks.

**Note:** The State Administration and Veterans' Affairs Interim Committee is examining personal information ownership and privacy laws under House Joint Resolution 21. For more information, visit the committee's website at [www.leg.mt.gov/sava](http://www.leg.mt.gov/sava).

<sup>12</sup> Kessler, "Online Behavior Tracking."

<sup>13</sup> Dan Tynan, "Our Internet Privacy Is at Risk — But Not Dead (Yet)," InfoWorld, April 22, 2013. Available at <http://www.infoworld.com/article/2614138/internet-privacy/our-internet-privacy-is-at-risk---but-not-dead--yet-.html>.

<sup>14</sup> Available at <https://www.whitehouse.gov/sites/default/files/omb/legislative/letters/cpbr-act-of-2015-discussion-draft.pdf>.

<sup>15</sup> More information is available at <http://donottrack.us/>.

<sup>16</sup> National Conference of State Legislatures, "State Laws Related to Internet Privacy," Feb. 24, 2015. Available at <http://www.ncsl.org/research/telecommunications-and-information-technology/state-laws-related-to-internet-privacy.aspx>.

<sup>17</sup> Larry Greenemeier, "3 Projects Prove Privacy Is Not Dead," *Scientific American*, July 22, 2014. Available at <http://www.scientificamerican.com/article/3-projects-prove-privacy-is-not-dead/>.

<sup>18</sup> Jim Adler, "When Self-Regulation Works, Your Privacy Is in Good Hands," TRUSTe Blog, July 27, 2012. Available at <http://www.truste.com/blog/2012/07/27/when-self-regulation-works-your-privacy-is-in-good-hands/>.

<sup>19</sup> See information on consumer protection educational efforts by the Federal Trade Commission at <http://www.consumer.ftc.gov/topics/privacy-identity>.