



# Law, Justice, and Indian Affairs Interim Committee

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## 56th Montana Legislature

### SENATE MEMBERS

LORENTS GROSFIELD, PRESIDING OFFICER  
SUE BARTLETT  
JOHN BOHLINGER  
DUANE GRIMES  
MIKE HALLIGAN  
LINDA J. NELSON

### HOUSE MEMBERS

CAROL C. JUNEAU, VICE PRESIDING OFFICER  
GAIL GUTSCHE  
GARY MATTHEWS  
DANIEL W. "DAN" MCGEE  
JIM SHOCKLEY  
JAY STOVALL

### COMMITTEE STAFF

LEANNE KURTZ, RESEARCH ANALYST  
VALENCIA LANE, STAFF ATTORNEY  
JOHN MACMASTER, STAFF ATTORNEY  
LOIS O'CONNOR, SECRETARY

## MINUTES

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

Third Meeting of Interim  
Supreme Court Chambers/Justice Building  
December 10, 1999

### COMMITTEE MEMBERS PRESENT

Sen. Lorents Grosfield, Presiding Officer  
Rep. Carol C. Juneau, Vice Presiding Officer  
Sen. Sue Bartlett  
Sen. John Bohlinger  
Sen. Mike Halligan  
Sen. Linda J. Nelson  
Rep. Gail Gutsche  
Rep. Gary Matthews  
Rep. Daniel W. "Dan" McGee  
Rep. Jim Shockley

### COMMITTEE MEMBERS EXCUSED

Sen. Duane Grimes  
Rep. Jay Stovall

### STAFF PRESENT

Leanne Kurtz, Research Analyst  
Susan Fox, Research Analyst  
Valencia Lane, Attorney  
Lois O'Connor, Secretary

### VISITORS

Visitors' list (ATTACHMENT #1)

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

The meeting was called to order by Sen. Grosfield, Chair, at 8:30 a.m. Roll call was noted; Senator Grimes and Representative Stovall were excused. (ATTACHMENT #2)

## **THE LEGISLATIVE AND JUDICIAL BRANCHES**

**Greg Petesch, Director, Legislative Services Division Legal Services Office**, provided a Separation of Powers Overview. (EXHIBIT #1) The following is a synopsis of his testimony:

- Under the auspices of Senate Bill No. 11, the Committee has an historic opportunity to begin a forum of dialog between the Legislature and the Judiciary;
- By their very nature, the functions of each Branch of government causes tension;
- The most disturbing provisions of separation of powers to the Legislature are when the Courts review legislation to determine constitutionality and the delegation of authority to the Executive Branch;
- In many instances, the Legislature allows Executive Branch agencies to adopt administrative rules that, when properly adopted, have the force and effect of law;
- It is when the Legislature does not provide sufficient guidelines that Executive Branch agencies are able to act outside of the context of the law that legislation is declared invalid;
- In order for legislation to be upheld by the Court, the state must show a compelling state interest, and the Legislature does not have built into its system ways to create the empirical data needed by the Court to evaluate compelling state interest.

Rep. Shockley asked if the biggest threat to separation of powers was when the Supreme Court directly interferes with the legislative process, such as the Caucus Case. Mr. Petesch said that direct interference by the Supreme Court would have an impact on legislative functions but the Legislature chose not to receive ultimate resolutions on issues from it. There are constitutional provisions that indicate that caucuses were not intended to be included in the open meeting provisions, but District Courts have been unreceptive to legislative immunity provisions.

Sen. Bartlett asked if the Supreme Court's argument regarding House Bill No. 260 was limited to the approach used by the Legislature in that it was an effort to evade a provision of the Constitution. Mr. Petesch said yes, and since a factual record of HB 260 does not exist, the Court must examine HB 260 on its face--Does HB 260, as written, violate the Constitution? Sen. Bartlett said that privacy issues were an increasing concern to policymakers in relation to the amount of information that is collected by various entities. She asked how the privacy provisions within the Constitution would play out in Montana. Mr. Petesch said that Montana has the strongest privacy statement in the nation, and the government's ability to collect data concerning its citizens is more limited. As a result, Montana would be precluded from adopting certain types of legislation that would be acceptable in other jurisdictions and it will be difficult for Montana to comply with federal directives. He said that Montana also has a constitutional right-to-

know provision--data collected by the government concerning its citizens has to be made available to the public unless the public's right to know infringes on a person's right to privacy. He foresaw a great deal of litigation in the area of whether a person's expectation of privacy was reasonable and whether personal choices diminish the reasonableness of that expectation.

Sen. Bohlinger asked if it would be helpful to ask the Supreme Court to provide the Legislature with advisory opinions on the constitutionality of proposed legislation and if it would be helpful to have annual sessions. Mr. Petesch was unsure whether the Court would issue an advisory opinion on proposed legislation because the Court requires an actual case or controversy to come before it. He added that annual sessions would allow the Legislature to react more quickly to Supreme Court decisions. With the liaison function of the Committee, it could review statutes that are being struck down to determine how it wants to respond to those decisions.

Sen. Grosfield asked how, as legislators, would they know if proposed legislation strikes a balance between a person's right to privacy and the public's right to know. Mr. Petesch said that a presumption of validity of legislation exists and the burden of showing that the legislation is unconstitutional is on the party who challenges it. He said because legislative attorneys look forward and have no precedence to look back on, it is more difficult to predict the outcome of a piece of legislation if it is challenged. He added that it is easy to draft a bill, that facially, passes constitutional muster. However, it is very difficult to foresee how each piece of legislation will work when applied to the real world and the Legislature must weigh the risk of constitutionality when requesting legislation. Sen. Grosfield asked if the Supreme Court gives the Legislature sufficient guidance as to how the problems can be fixed when it declares legislation unconstitutional. Mr. Petesch said that for the most part, the Supreme Court identifies why the legislation is struck down and provides options for addressing the flaw.

Sen. Bartlett said that when the Supreme Court makes a constitutionality ruling, it relays options that can be used to address the statutory defect. She suggested a formalized structure whereby any constitutionality option that arises during the interim would be an appropriate discussion topics for the Committee. Sen. Grosfield asked that the Committee ponder Sen. Bartlett's suggestion and relay their ideas to Committee staff as a followup.

### **THE SUPREME COURT**

**The Honorable Jean Turnage, Chief Justice, Montana Supreme Court**, provided written comments that included suggested changes to Senate Bill No. 443, introduced in the 1999 Session by Sen. Halligan, which would have created an intermediate court of appeals. (EXHIBIT #2) Chief Justice

Turnage requested that with the Supreme Court's increasing case load, the lengthier times that cases remain pending on appeal, and to preserve Montanans' right of access to the Courts, that the Committee request draft legislation, based on SB 443 with the suggested amendments, to be introduced in the 2001 Legislature.

Sen. Grosfield asked if the Court was suggesting that only certain types of cases go to the intermediate court of appeals. Chief Justice Turnage said that distribution of cases, such as marital estates, appeal applications by prison inmates, and writs of habeas corpus would be assigned to the appeals court, relieving the Supreme Court from some of its burden. However, if the cases contain significant constitutional issues or issues of statewide importance, the Supreme Court would take the cases from the appeals court.

Rep. Shockley asked if the Supreme Court's burden would be lessened if more justices were added. Chief Justice Turnage said no, because the problem lies with the flow of work. He said that the Court will hear approximately 735 cases in 1999, it meets twice a week as a full panel, and it classifies cases on importance. As a result, citizens are denied due process because of the delay and it adds an increased cost to the state.

**Christine Wethern, Staff Attorney, Supreme Court**, provided a copy of the Internal Operating Rules of the Montana Supreme Court. (EXHIBIT #3)

Sen. Halligan asked how often original jurisdiction was invoked (when a case goes directly to the Supreme Court without first being heard in District Court) and whether original jurisdiction cases bog down the Court. Ms. Wethern said that on every Tuesday's agenda, there are three or four original jurisdiction cases, whether they be repeat cases or new cases. Orders in these cases take judicial time to write but not as much time as a final opinion.

Sen. Grosfield commented that original jurisdiction cases represent 25% of the Court's caseload. Ms. Wethern said that many original jurisdiction cases do not take much time and many of them are habeas corpus petitions from the prison. In some cases, the petitions do not have much merit but they do deserve consideration. She added that the Justices' concerns are cases that, perhaps, do not have great interest to a large number of people but has much interest to the parties involved, such as divorce cases, because there is no other way for them to appeal a District Court's decision. If the Supreme Court were to deny their appeals, the people would be left with the District Court's opinion. Sen. Grosfield asked how long

the law clerks stayed with the Court. Ms. Wethern said that Montana has a turn-over rate of approximately one-half of the law clerks every year.

### **CLERK OF THE SUPREME COURT**

**Ed Smith, Clerk of the Supreme Court**, provided an example of a self-represented case that is handled by the Supreme Court and a copy of the Supreme Court Clerk's Office Annual Statistics for 1998. (EXHIBITS #4 and #5 respectively) The following is additional testimony by Mr. Smith:

- Because all Supreme Court business goes through his office, he was very aware of the increase in the Supreme Court's caseload and there is a need for an intermediate appellate court.
- People are using the Court systems to a greater degree across the country and 25% of the Court's cases in 1999 will be self-represented cases.
- The Court has seen a 26% increase in cases since 1989.
- The Court established appellate mediation whereby cases involving domestic relations, money judgments, and workers' compensation matters are first sent to mediation.
- Out of the mediation cases, 25% settle and mediation has reduced the Court's workload by 10%.
- In 1999, there was a 25% increase in Pro Se litigant filings.
- Fifty percent of the 144 Pro Se filings are criminals representing themselves.

In conclusion, Mr. Smith said that because of his membership in the National Conference of Appellate Court Clerks, he was able to secure a new computer program from Florida for the Montana Supreme Court. To date, the Court has no database. The program is currently being installed and he estimates that it will save Montana taxpayers \$200,000 because the program is already written.

Rep. Juneau requested information on the Court's legal definitions and terms.

Sen. Grosfield asked of the 144 original proceedings, how many would go to the intermediate appellate court if one were established; and if the litigant was dissatisfied with that ruling, can the litigant still be heard by the Supreme Court. . Mr. Smith said that the intermediate appellate court would handle the majority of the 144 original proceedings cases unless they involve major constitutional issues and a certain percentage of the litigants would appeal the lower court's decision. However, upon the filing of the litigant's petition, the Supreme Court has the option of turning them down. He added that the problem is that the Supreme Court has become a dumping ground for everything. Currently, the Court hears approximately 45 cases a year in oral argument and it would like to hear more. However, given its large workload, they are handing down approximately 350 written opinions a year. He said that the difference between current cases and those of 10 years ago is that current cases are much more complicated and the fear is that if the Court delays handing down rulings, there will future difficulties. Sen. Grosfield asked how Montana's Supreme Court workload compares to the workload of other states. Mr. Smith said that a

1998 study conducted by Roger Hansen from the National Center for State Courts analyzed how Montana's Supreme Court stood in comparison to three or four other states. The study found that Justices in other states hand down approximately 20 opinions a year while Montana's Justices hand down between 50 to 55 opinions per year per Justice. He suggested that the Committee receive a presentation from Jean Whittinghill who was the Montana staff person for the study.

Rep. Shockley asked if additional District Court Judges would alleviate the burden on the District Court level thereby alleviating the Supreme Court appeals. Mr. Smith said that there are many areas of the state that need additional District Court Judges but it will not control the number of appeals that are brought before the Supreme Court.

Referring to the Committee's questions regarding statistics, Mr. Smith said that the Clerk of the Supreme Court's Office as well as the Office of the Court Administrator need to know what statistics the Legislature, the Courts, and other entities want them to keep track of because, currently, statistics are not available. He added that there has been no duplication of Supreme Court files and records made since 1938 and the Judiciary will ask the Legislature for a funding source for the duplication.

#### **OFFICE OF THE COURT ADMINISTRATOR**

**Pat Chenovick, Supreme Court Administrator**, provided the 1999 fiscal note for the proposed appellate court (SB 443); a copy of the 1998 Annual Report of the Montana Judiciary, which provides an overview of the functions of the Office of the Court Administrator; and a copy of 3-5-901, MCA, which provides information on state funding for District Courts. (EXHIBITS #6, #7, and #8 respectively)

#### **Data Systems Demonstrations**

**Dana Corson and Judy DeJarlias, Department of Justice (DOJ)**, provided automated demonstrations of the Montana Judicial Case Management System (MJCMS) and the Limited Jurisdiction Case Management System (LJCMS) within the Supreme Court.

**Please Note:** Copies of the following were provided: Montana Judicial Case Management System: Manager's Manual; MJCMS REPORTS: District Clerk of Courts Convention; and Limited Jurisdiction Case Management System (LJCMS) Training Guide, V.4. Because of the volume and length of these documents, copying would require a significant amount of staff time and would be very costly. Therefore, Committee staff has established a check-out file within the permanent LJIAC file for Committee and public member perusal. These documents will not be entered into the record as exhibits.

Sen. Grosfield asked if District Court Judges continue to be concerned about their caseloads. Mr. Chenovick said that there are approximately 33,000 filings annually in the District Court, from simple cases to complex cases. Based on an analysis of how many cases per judge and how many miles a judge may have to travel in a particular district, the three additional judges provided by the 1999 Legislature will be sufficient for a few years. However, some of the cases filed in the Courts are much more complex and future Legislatures may have to review the addition of more judges as the population of Montana increases.

Sen. Halligan asked if the Montana Board of Crime Control (MBCC) receives any data from the MJCMS when it publishes its annual report on statistics. Mr. Corson said that the MBCC may review the Department's Annual Report, but currently there is no repository for information.

Rep. Juneau asked if criminal charges were determined by arrest and who makes the determination as to the type of crime. Mr. Chenovick said that a person, at the time of arrest, may be charged with several crimes by the police officer, but the type of charge is determined by the County Attorneys at the time of prosecution. Rep. Juneau asked if the arrest history was lost. **Wilbur Rehman, Manager, Criminal Justice Information Services Project**, said that arrest information is maintained in the Criminal History Record Repository within the DOJ. The DOJ maintains arrest records and fingerprint cards and the District Courts receive the actual charge documents which is different than the arrest record.

Sen. Halligan asked if the MJCMS tracked criminals by demographic information from the time that they enter the criminal justice system. Mr. Corson said that demographic information is not included in the MJCMS, that it could be tailored to be a repository for demographic information, and that it does keep track of crimes against females, minorities, hate crimes, and crimes against the elderly, for example.

Rep. McGee asked if the MJCMS's sentence disposition category dovetailed with the Department of Correction's Adult Corrections Information System (ACIS) and is the DOJ kept informed as to what happens to an offender once the offender is sentenced to the Department of Corrections (DOC), for example, did the offender go to the Boot Camp or a prerelease center. Mr. Rehman said that currently, the DOJ does not receive sentence disposition information. The information remains with the DOC until the offender is no longer under state supervision. Rep. McGee asked whether there has been dialogue between the Departments and the Courts to establish an integrated system so that the Legislature can receive composite information regarding all of the information necessary to make informed decisions. Mr. Rehman said that the Montana Criminal Justice Information Project is currently being established that would integrate all information maintained by the Departments of Justice and Corrections and the Courts.

Rep. Juneau asked whether all information about a person is eliminated from the system if the person is found not guilty in District Court. Mr. Corson said that the information is kept but the person can petition the Court to have the case sealed.

Sen. Bartlett said that the Sentencing Commission wrote a letter to the Chief Justice of the Supreme Court requesting that the Courts adopt a standard sentencing order for use in all Judicial Districts throughout the state, but the Supreme Court preferred not to do this. She asked why. Mr. Chenovick said that historically, the Supreme Court has not delved into the administrative processes of the Courts but it is open to the standardization of sentencing forms. He suggested that another letter be written.

Rep. McGee said that standardized sentencing orders could be used for many different things, such as presentence investigations (PSIs) for example. Currently, legislators feel that they cannot receive the information that they feel they need to make good and informed decisions.

**Art Pembroke, Administrator, Justice Information Systems Division, DOJ**, provided an overview of Montana Department of Justice: "A New Century of Opportunities" that included the current status of several of the Department's criminal justice projects. (EXHIBIT #9)

Rep. McGee asked if the DOJ's message switch center would be the central information repository for all information from the DOJ, the DOC, and the Courts and was there ongoing system coordination between the agencies. Mr. Pembroke said that the message switch does not physically store information but allows the routing of information requests between computer systems to appropriate repositories. He added that the Montana Criminal Justice Information Systems Project (MCJISP) currently identifies certain types of information that is collected by the Courts, the DOC, and the DOJ. Business function-specific data is collected and housed in each individual agency to avoid duplication of data but the information can be shared across state agencies.

Sen. Bartlett asked what use did the Justice Information Systems Division have with the information located in the Criminal History Records System (CHRS). Mr. Rehman said the CHRS is a composite of all the criminal history of an offender, from arrest to disposition. It is located within the DOJ by statute and is used primarily by the law enforcement community. In addition, under federal certification for access to national repositories, there must be a single point of contact for criminal information that other states can access. The contact point has always fallen within the DOJ and all law enforcement agencies have the capacity to enter information into the system. Sen. Bartlett requested a list of the types of information that is found within the CHRS.

Rep. Juneau asked if the CHRS kept information on juveniles. Mr. Rehman said no because the DOJ keeps information that is outlined in statute only.

Mr. Rehman provided a copy of a memorandum of understanding between the Governor, the Attorney General, and Chief Justice Turnage that would assist the MCJIS in improving the effectiveness and efficiency of information services available to state and local justice and law enforcement agencies; a list the members of the MCJIS Advisory Group that assists the three agencies in their integration efforts; and a copy of the MCJIS Advisory Group's mission statement. (EXHIBITS #10, #11, and #12 respectively)

Mr. Corson provided two examples of information that can be retrieved through the MCJIS: a case summary report and an offense report. (EXHIBITS #13 and #14 respectively) He also provided a MCJIS: Data Collection Process Chart. (EXHIBIT #15)

Sen. Grosfield asked about local level cooperation in terms of using the MCJIS. Mr. Chenovick said that the MCJIS software has been installed in all District Courts across the state, all Clerks of the District Court and their staff have been provided training, and there has been varying degrees of compliance regarding the information that is entered into the system.

Sen. Bartlett asked for what purpose was the MCJIS developed. Mr. Chenovick said that MCJIS was developed in 1990 to move the Courts from a paper system for keeping records to an automated system.

Referring to the Limited Jurisdiction Case Management System (LJCMS), Rep. Shockley said that the Courts have recently been allowed to deposit fines and fees into interest-bearing accounts. He asked if this information was kept in the LJCMS database. Ms. DeJarlias said no that the Courts have separate savings or money market accounts and they keep their own check book. The only fines or fees seen in the system is the amount that is charged for the offense committed.

Sen. Bartlett asked if there were local courts that were not using the LJCMS. Mr. Rehman said that 90 of the 114 local courts use the LJCMS while the remaining courts use the system that they had in place at the time of the Supreme Court order.

#### **SJR 14 SENTENCING STUDY UPDATE**

**Susan Fox, Research Analyst, Legislative Services Division**, provided an update of what steps agencies are taking to integrate data and a flow chart of the Adult Corrections Systems. (EXHIBIT #16) She said the following:

- The Department of Correction's ProFiles System is closer to integrating with the Criminal Justice Information System (CJIS) than the Courts are.
- She suggested a demonstration of the CJIS and a presentation from the Board of Crime Control regarding what types of data it collects.
- Other than the data that resides at the District Court level, juvenile data resides in the Juvenile Probation Information System which is incorporated into the CAPS system at the Department of Public Health and Human Services.
- The Correctional Standards and Oversight Committee introduced legislation in the 1999 Session to allow certain juvenile records to be maintained because most Youth Court records are supposed to be expunged. Many people wished to have juvenile records included in an ideal system because they suspect that many of the juveniles proceed into the adult corrections system.
- The juvenile system is even more complicated to understand because it is perceived as a criminal system while, in actuality, it is a civil system.
- Ms. Fox will prepare a background report on general definitions specifically for Montana's criminal justice arena and who within the state has responsibility for collecting information. The Department of Justice has closely defined types of information that it is suppose to collect while the Department of Corrections and the Court have little to no statutes regarding their information technology.
- A study was conducted that discussed correctional data elements and 207 variables were found. Information requested by the Committee are among the variables. Ms. Fox requested that the Committee define what types of information it wanted the different agencies to collect, what purpose is the data for, how hard is it to collect, and who is going to collect it.
- The quality of the data is only as good as the quality of the input.

The Committee requested the following:

- A demonstration of the juvenile information system.
- A laundry list of data elements that the DOJ, the DOC, and the Courts feel that they need for data gathering purposes.
- A Committee questionnaire to establish the types of data elements that each member is interested in.
- That the Board of Crime Control supply its data elements, what its sources are, and who enters the data.
- Information from other states that have established intermediate appellate courts to see if they are working.
- Information from other states that do not have intermediate appellate courts and why.
- Information on how much time the Supreme Court and its staff spends on Pro Se cases and why many cases continue to appeal over and over.
- An overview of federal legislation that limited the number of Habeas Corpus appeals at the February meeting.

Sen. Bartlett said that the Sentencing Commission reviewed a guideline system for sentencing. One of the benefits of the guideline system is that much clearer information is received that helps to evaluate sentences. She requested that the Committee not lose sight of the evaluative functions of data and that data elements are essential but reporting capabilities of a system are just as significant.

Rep. McGee said that the major function of the Committee should be to oversee the data elements and the gathering and dispensation of those elements because data is critical for any decisions that the Legislature makes.

Ms. Fox will provide the Committee with data elements that it will use for the crime seriousness ranking. She will also request that participants in the system, such as Judges, County Attorneys, and law enforcement, talk to the Committee about the purposes that they see in sentencing. She will also keep the Committee abreast on the many court-issue studies currently being conducted and provide interested Committee members with the Supreme Court's decision of Jeanine Pease Pretty On Top as Chairman of the Districting and Apportionment Commission.

Rep. Juneau provided an update on the progress of House Bill No. 528. A subcommittee of the Board of Regents and the Board of Public Education will hold a meeting January 24, 2000, to plan policies for implementation of the legislation.

There being no further business, the meeting adjourned at 3:30 p.m.

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