



**Law and Justice Interim Committee**  
**60th Montana Legislature**

**SENATE MEMBERS**

LARRY JENT  
CAROL JUNEAU  
JESSE LASLOVICH  
DANIEL MCGEE  
GARY PERRY  
JIM SHOCKLEY

**HOUSE MEMBERS**

SHANNON AUGARE  
BOB EBINGER  
EDWARD HILBERT  
KRAYTON KERNS  
DEBORAH KOTTEL  
RON STOKER

**COMMITTEE STAFF**

SHERI HEFFELFINGER, Lead Staff  
VALENCIA LANE, Staff Attorney  
DAWN FIELD, Secretary

# MINUTES

## Subcommittee on Medical Detainee Costs

August 28, 2008

Room 137, 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.**

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### **SUBCOMMITTEE MEMBERS PRESENT**

SEN. JESSE LASLOVICH, Chair  
SEN. JIM SHOCKLEY  
REP. ROBERT EBINGER  
REP. EDWARD HILBERT  
REP. RON STOKER

### **STAFF PRESENT**

SHERI HEFFELFINGER, Lead Staff  
VALENCIA LANE, Staff Attorney  
DAWN FIELD, Secretary

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

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

## **COMMITTEE ACTION**

The Subcommittee on Medical Detainee Costs voted to not approve **LC1111** for recommendation to the full Law and Justice Interim Committee.

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

- 00:00:01 SEN. LASLOVICH called the meeting to order at 10:07 a.m. He asked the meeting attendees to join the Subcommittee members at the table in order to have a roundtable discussion. He announced that SEN. SHOCKLEY would be serving on the Subcommittee in place of SEN. MCGEE.
- 00:02:16 SEN. LASLOVICH asked that a representative of the stakeholder group explain the bill draft they put out for review prior to the meeting.
- 00:03:04 **Mark Taylor, Montana Hospital Association (MHA)**, said the hospitals wanted to reach out to those in opposition to the previous draft (LC7776 - EXHIBIT #1). He said that a meeting was held on Monday, August 22, and the bill draft LC1111 (EXHIBIT #2) was the result of the discussion. He said that the bill draft contained concepts that both sides could agree on and contained a statutory appropriation as a funding mechanism. Mr. Taylor reviewed the provisions of the proposed bill draft.
- 00:08:22 **Jim Smith, Montana Sheriff's and Peace Officers Association (MSPOA)**, said Mr. Taylor's summary was accurate, but that his opinion is that it is still unclear as to who will pay when a person is arrested. He compared the situation to that of a forest fire, saying that it is a completely unpredictable and unexpected event, and is very difficult for counties to anticipate or budget for. For this reason, Mr. Smith said, it should be approached from a "societal cost" point of view and statutorily funded.
- 00:10:22 **Alec Hanson, League of Cities and Towns**, said it has been clearly established in law that counties are responsible for medical costs of people who are arrested for violation of state laws and could result in double taxation of city residents if they were also required to pay. He said small cities in particular would have a very difficult time complying with the bill as originally drafted, which is why the League supports the revised bill draft.
- 00:12:09 **Sheryl Wood, Montana Association of Counties (MACo)**, said that she did not receive the bill until this morning and that MACo was not involved in the workgroup. She said that MACo has significant reservations regarding the revised bill draft and that it was in need of much more discussion and work. She suggested that there could be unintended consequences as currently drafted. She discussed several concerns, which included problems in computing a statutory appropriation and conflicts in existing statutory language.
- 00:13:55 REP. HILBERT asked if the proposed consensus bill included a time line for length of time under which medical expenses would be covered and how comprehensive the coverage would be. **Bob Olsen, MHA**, said that current law requires that counties pay for medical expenses only so long as the person is an

inmate. He said that the proposed bill draft would cover the time span in which an individual is in custody but is not yet an inmate.

- 00:15:53 SEN. SHOCKLEY said because of stakeholder opposition to the original bill draft proposal offered by the Law and Justice Interim Committee (LJIC), the Committee gave the stakeholders an opportunity to work it out between themselves about whether the counties or the hospitals would pay. He said it appeared to him that they decided that neither would pay and that the cost would be handed off to the state. Mr. Taylor responded that the issue could be considered a societal cost and that is why the the working group recommended using a state appropriation to pay for medical detainee costs.
- 00:18:33 Ms. Wood recalled that the LJIC instructed hospitals to gather data regarding medical detainee costs but that the Health Insurance Portability and Accountability Act (HIPAA) had hindered the gathering of data. She noted that at the January meeting, there had been discussion of developing a forensic unit in hospitals and that she would like to return to that concept because, in her opinion, a forensic unit would allow everyone to do their jobs.
- 00:21:49 SEN. LASLOVICH said that he had requested statistics at an earlier LJIC meeting and that the LJIC had received some information from hospitals. He said while he does not doubt that there is a problem, he does have concerns about creating a statutory appropriation to deal with it. He said there needs to be a data collection system in order to ensure accountability.
- 00:23:03 Mr. Taylor said that other funding mechanisms could be discussed. Regarding statistical data, Mr. Taylor said that historically, hospitals have not compiled data for medical detainees. He said that some hospitals are gathering data in response to the LJIC's request and noted that the idea of a forensic unit had not been discussed since January. He said his association is interested in real solutions and is willing to work to achieve that goal.
- 00:25:55 **Mike Foster, St. Vincent, Sisters of Charity , St James, Butte, and Holy Rosary, Miles City,** said he had presented data at the LJIC's last full committee meeting and noted that there have been twenty-seven instances in the last year in which law enforcement brought a injured person to an emergency room. He agreed that hospitals have not been identifying these costs but are doing so now, and that enough hard data is now available to formulate a statewide estimate. He said that Kay Wagner, Director of Patient Access, St. Vincent Hopsital, was present and could answer questions about the process.
- 00:28:21 Mr. Olsen said that the medical services industry often find themselves in a clash with the criminal justice system and that the medical detainee issue is a direct result of that clash. Under the MHA hypothesis, the cases discussed so far would be subject to current law and the counties would be obligated to pay. The counties disagree with that position, which is the crux of this issue. Mr. Olsen also discussed the complication of federal law prohibiting the release of private medical information, except to the payor of interest. He said that on one hand, counties say they are not responsible, yet they are also saying they are being

denied access to information on medical detainees. Mr. Olsen said that only when a county takes responsibility for a medical detainees can a hospital provide medical information to a county. Regarding forensic units, Mr. Olsen said a hospital is not a jail and the concept would not work in smaller hospitals. He said if counties continue to dispute their responsibility, current statutes must be amended in order to deal with this issue.

00:32:08 SEN. SHOCKLEY said the issue is not when a person is charged with a crime, but when a person is apprehended. **Tom Ebzery, St. Vincent Health Care**, said the issue first arose when hospitals began seeing injured persons who had been apprehended by law enforcement officers but not arrested, or had been "unarrested" when brought to the hospital, in order for the county to avoid payment responsibility. He discussed a 2003 change in statutory language in which the term "medical detainee" was created to distinguish between someone apprehended but not yet arrested and who had been injured as the result of the interaction with law enforcement officers. Mr. Ebzery said the term was meant to more clearly establish responsibility, but that the counties are still managing to muddy the waters.

00:38:57 SEN. SHOCKLEY said it is clear to him that if a person is shot and not able to freely leave the scene, the person is considered arrested or apprehended. He said his understanding of the issue is that if the person is apprehended, the county pays. If not, the hospital pays. Mr. Ebzery said in the Yellowstone County incident, the hospital got stuck with the bill. He said the issue boils down to hospitals not being able to collect from counties because the individual had not been arrested, so did not fit the statutory definition of "inmate". He said that the 2003 change in statutory language was meant to clarify the definition.

00:42:24 SEN. LASLOVICH asked how a person can be "unarrested". **Pam Bucy, Montana Association of Police Association and Montana Police Protective Association**, said there is no simple or clear definition and suggested that each case be analyzed on the facts of that case. She said her opinion is that in the Yellowstone County case, had the case gone to court, the individual would have been found to be under arrest. Ms. Bucy said that because county attorneys are paid by the state to enforce state laws, it would not be inappropriate to ask for a state appropriation to help pay the costs. She discussed several additional points, including that she doesn't think a person can be "unarrested", but that departments are making conscious choices to not arrest certain individuals, such as mentally ill people, because of the possible costs. She also said that creating a new legal status, such as forensic units, will not fix this problem, and agreed that the costs are exorbitant and that not all situations can be anticipated and planned for, which makes it difficult to clarify in statute.

00:51:03 SEN. LASLOVICH said that the original situation dealt with an injured person being unarrested when brought to a hospital for treatment, but that the proposed bill draft is much broader than that. Ms. Bucy said it is a very complicated issue and that an injury may not always be the direct fault of a law enforcement officer but may occur in the course of an officer doing his job.

- 00:53:24 Mr. Taylor said the MHA is trying to deal only with the time from which the person comes into contact with law enforcement officers to the time the person meets the statutory definition of inmate under 7-32-2245, MCA, excluding preexisting conditions.
- 00:54:59 **Bill Kennedy, Yellowstone County Commissioner**, said the issue of preexisting conditions is not as clear as it may appear and discussed a lawsuit in which Yellowstone County was forced to pay for open heart surgery for an inmate. He said he would not support broadening the statutory definition and referenced articles provided to the LJIC from the Billings Gazette relating to this issue. He agreed that the definition is not clear, but said that broadening the definition would only make matters worse. Mr. Kennedy agreed this is a huge uncompensated expense and suggested that a possible funding source could be a state appropriation, using either a per capita fee or a permissive levy. He asked that the LJIC not proceed with the proposed bill draft but that if it did so, to look only at how to fund hospitals for uncompensated costs.
- 01:01:53 **Jim Cashell, Sheriff, Gallatin County, Montana Sheriffs and Peace Officers Association (MSPOA)**, said that he has dealt extensively with this issue. He agreed with SEN. SHOCKLEY that the moment a person is shot by law enforcement, that person is under arrest and referenced the Montana Supreme Court ruling in *City of Great Falls vs. Cascade County* in which the Court ruled that Cascade County was responsible for the medical costs of an inmate. Sheriff Cashell agreed there is disagreement regarding the term "inmate". He said that his policy is that an injured person will not be jailed until medical clearance is received, but noted that there are exceptions, such as when a drunk driver refuses medical treatment at an accident scene or individuals with preexisting conditions. He discussed two examples in which preexisting conditions created great expense for Gallatin County, one being an elderly man jailed on homicide charges that cost the County \$140,000 in nursing home charges, and another several inmates with severe dental problems.
- Regarding the difficulty of collecting payment from injured individuals, Sheriff Cashell provided the example of Social Security administrators who, in order to avoid having to pay Medicaid or Medicare benefits while a person is incarcerated, offer a bounty to the County if it reports people who have been arrested and are in the jail longer than 30 days. He said the third-party collections process must be made easier.
- Sheriff Cashell said that Montana law does have a statute that provides for the unarrest of a person and that the statute is used in hospitals. He said that while most people injured while interacting with law enforcement should probably be paying the bill themselves, in the case of an individual being shot by law enforcement officers, his position is that the Supreme Court ruling dictates how the costs are taken care of. He discouraged the LJIC from changing the definition of inmate, saying it would only complicate the matter further.
- 01:08:29 **Kevin Gillan, Yellowstone County Deputy County Attorney**, discussed details from the Yellowstone County incident in which a man was shot by law

enforcement officers and was taken by ambulance directly to St. Vincent Hospital. Mr. Gillan said, in his opinion, the individual was not under arrest, so could not have been unarrested. He said he is not aware of any instance in which a person has been unarrested in order to avoid county liability. He said the individual was not placed under arrest because the critical nature of his injuries prevented communication, not because Yellowstone County was trying to avoid liability or responsibility. Mr. Gillan said the idea of arresting the individual was not considered until he was released from the hospital..

- 01:12:58 Mr. Gillan said there should be a distinction between the legal definition of inmate and being in custody, versus being a detainee. He said they are two different concepts and cannot be melded together for purposes of attaching liability. He agreed that this issue is not going to go away, would likely get worse, and that something does need to be done.
- 01:15:06 SEN. LASLOVICH said Mr. Gillan's statement contradicts other testimony. He asked if the injured individual is not to be considered under arrest, what is the person's legal position. Mr. Gillan said the person may be arrested but not in custody, due to a medical emergency, for example.
- 01:17:36 SEN. LASLOVICH asked Sheriff Cashell if the same incident happened in Gallatin County, would the individual be considered to be under arrest. Sheriff Cashell said yes.
- 01:17:54 **Mark Muir, Chief of Police, Missoula**, said if the incident has occurred in Missoula, the individual would have been considered under arrest. He said the distinction between arrest and custody is a valid point and provided an example of an intoxicated driver driving on the interstate who killed two others and was severely injured himself. He said there would be no question that the intoxicated driver would not be arrested until he was out of intensive care because it would not have been physically possible to arrest him. Chief Muir said his officers deal with these types of situations on a regular basis. He agreed that the unarrest statute is used in Montana but that it specifically dictates that it can be used only when probable cause does not exist. Mr. Ebzery said, for clarification, his discussion of the use of unarrest referred to an incident in Rosebud County.
- 01:21:26 REP. HILBERT asked who would have to pay if a person was injured while being pursued by law enforcement officers. Mr. Taylor said the goal is to have the individual pay, but that because the injury resulted from interaction with law enforcement, the county would likely end up having to pay if the individual can't.
- 01:26:17 REP. STOKER said in recent conversations he had with two judges, the judges were of the opinion that custody begins the moment a person interfaces with law enforcement officers and that as employers of those officers a county or state government is responsible for any costs incurred as a result of that interface.
- 01:32:11 Mr. Gillan and Chief Muir disagreed with REP. STOKER's position. Chief Muir discussed the *Scott v. Harris* United States Supreme Court case involving law enforcement pursuit. He said the Court ruled that law enforcement pursuit of an

individual doesn't necessarily infer liability or place the person in a custodial situation and that injuries that occur as a result of pursuit are not the liability of law enforcement.

- 01:33:54 **Jon Petak, Stillwater County Attorney**, said that if the individual in the Yellowstone County incident had not been shot or if he had dropped his weapon, he most definitely would have been placed under arrest. He said that as county attorney, he frequently deals with the issue of whether or not someone is in custody. He cautioned that changing the legal definition of inmate would open a Pandora's Box, saying that each scenario has to be looked at individually. He said an attempt to define it further would result in even more lawsuits, especially between counties and hospitals, two groups that need to be able to work together. Mr. Petak said he was relieved to hear that a state appropriation was a possibility but that data will be needed in order to determine the amount needed. He agreed that neither counties nor hospitals have the resources to deal with this issue.
- 01:39:29 **Jay Hansen, Sheriff, Beaverhead County**, agreed that changing the definition of medical detainee would only confuse the issue more. He said the real problem is not who pays, but how the bill is paid. He said that Beaverhead County is the largest county in the state, has only five officers, and has paid out over \$10,000 for medical costs.
- 01:40:37 **Carl Seilstad, Fergus County Commissioner and MACo President**, said that many good points were made in the discussion but that the issue remains a very confusing one. He said he has discussed this issue with the judges and law enforcement agencies he works with and said they are of the opinion that there is a very big difference between a detainee and being in custody.
- 01:42:37 **Maureen Davy, Stillwater County Commissioner**, stated that on behalf of Stillwater County, she opposed the bill draft proposal.
- 01:43:29 **Cynthia Johnson, Pondera County Commissioner**, agreed that there is a significant problem but said she did not support the bill draft proposal.
- 01:44:39 **Jim Reno, Yellowstone County Commissioner**, discussed anecdotal information provided to him by his wife, who is an emergency room nurse. He said this issue is a problem for large and small counties alike.
- 01:45:25 Chief Muir said that for the record, the City of Missoula would support legislation that would name the state as the responsible entity. He said counties cannot afford this, hospitals can't afford this, and that a system similar to that of the public defender system may be a good model to use as a state-appropriated program. He said Missoula County would oppose any legislation that would impose further burdens upon counties.
- 01:48:12 Ms. Wood, MACo, said the proposed bill draft would present constitutional challenges and would be litigated. She said rising health care costs are also an issue that must be dealt with. She suggested that an overall resolution is needed

that would solve everyone's problems, rather than shifting the burden to taxpayers. She asked for more time to work on a better solution.

01:50:43 Mr. Taylor suggested that stakeholders continue work on language in order to clarify the gray areas and present the bill again at the September meeting. He said a state funding mechanism is in the best interest of the state and is good public policy.

01:52:19 **BREAK**

### **Subcommittee Work Session**

01:57:56 SEN. LASLOVICH said that the Subcommittee must report its recommendations to the full Law and Justice Interim Committee and asked if a motion would be made to move a bill forward for final action at the Committee's September meeting.

01:59:06 REP. STOKER **moved** that the bill continue forward and that the bill should also include data from MHA on hospital costs in order to determine an amount needed for a state appropriation.

02:00:59 SEN. SHOCKLEY did not support the motion. He said the agreement was to have the parties work it out together but that their solution to have the state pay was a poor one. He said it has been suggested to him that creating an insurance pool could be a potential solution.

02:02:49 SEN. LASLOVICH said he was frustrated by the lack of agreement among the stakeholders and that little has been accomplished in the past eight months. He also opposed the motion because of the lack of consensus among the stakeholders and predicted that the issue will appear in the 2009 Legislature, regardless of whether or not a committee bill is approved.

02:07:44 REP. EBINGER strongly agreed with SEN. LASLOVICH's comments. He said he doubted an adequate solution could be found before the September meeting and suggested that work continue for a future bill.

02:08:45 REP. HILBERT asked that the stakeholders continue working on the issue if the motion fails.

02:09:59 SEN. LASLOVICH said while he questions whether a solution can be found, by not approving the motion, an incentive is created for continued work. He said that if a suitable solution is found, the LJIC could adopt it as a committee bill at its final meeting.

02:10:34 REP. STOKER closed on his motion, saying that he would like the issue to be on the September meeting agenda. He agreed that the proposal is not perfect but would like the full Committee to have the opportunity to discuss the issue. SEN. LASLOVICH said the issue would be on the September meeting agenda, regardless of whether the bill draft was approved as a Committee bill or not.

02:14:09      The **motion failed** on a 2-3 voice vote, with REP. STOKER and REP. HILBERT voting yes and SEN. SHOCKLEY, REP. EBINGER, and SEN. LASLOVICH voting no.

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