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Law and Justice Interim Committee

59th Montana Legislature

SENATE MEMBERS

DANIEL MCGEE--Vice Chair
BRENT CROMLEY
JESSE LASLOVICH
GARY PERRY
JIM SHOCKLEY
CAROL WILLIAMS

HOUSE MEMBERS

JOHN PARKER--Chair
GEORGE EVERETT
DIANE RICE
RON STOKER
BILL WILSON
JEANNE WINDHAM

COMMITTEE STAFF

SHERI HEFFELFINGER, Lead Staff
VALENCIA LANE, Staff Attorney
FONG HOM, 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 the document.**

September 22, 2005

Capitol Building, Room 102
Helena, Montana

COMMITTEE MEMBERS PRESENT

REP. JOHN PARKER, Chair
SEN. DANIEL MCGEE, Vice Chair

SEN. BRENT CROMLEY
SEN. GARY PERRY
SEN. JIM SHOCKLEY
SEN. CAROL WILLIAMS

REP. GEORGE EVERETT
REP. DIANE RICE
REP. RON STOKER
REP. BILL WILSON
REP. JEANNE WINDHAM

COMMITTEE MEMBERS EXCUSED

SEN. JESSE LASLOVICH

STAFF PRESENT

SHERI HEFFELFINGER, Research Analyst
VALENCIA LANE, Staff Attorney
FONG HOM, Secretary

Visitors

Visitors' list, [Attachment #1](#).

CALL TO ORDER AND ROLL CALL

REP. PARKER called the meeting to order at 8:38 a.m. The Secretary took note of the roll. SEN. JESSE LASLOVICH was excused.

BACKGROUND REPORT ON COUNTY ATTORNEY SERVICES - Sheri Heffelfinger, LSD

SHERI HEFFELFINGER presented a summary of a background report on the SJR 40 Study of County Attorney Services (**EXHIBIT 8**). Ms. Heffelfinger said that the issues being raised were salaries, funding, work load and performance of county attorneys with salaries being the most talked about issue. Ms. Heffelfinger went over the services that are available in the Attorney General's Office that support the county attorneys.

REP. EVERETT asked if the state would have to pay 50% of the salaries of the 32 Montana counties that have full time county attorneys? MS. HEFFELFINGER said that the state pays 50% of the salary no matter what.

MS. HEFFELFINGER discussed the research questions in her report and said that under the study plan, the SJR 40 white paper is due in March of next year. She said that the purpose of today's meeting is to set the course on where the Committee wants to go with the study.

MIKE McGRATH, Montana Attorney General, said that he was pleased that the Legislature decided to look at the county attorney system and that it was an important task. Mr. McGrath gave his testimony to the Committee (**EXHIBIT 9**). He thanked the Committee for its interest and said that the state needs to develop a system of prosecution that matches the resources to the communities that need them to insure the equitable distribution of justice in the state.

JOHN CONNOR, Chief Criminal Counsel in Attorney General's Office, said that he didn't have any written remarks but would like to tell the Committee what he does. He said he occupies a statutory position that is in Title 44 called "training coordinator" that the Legislature created in the 70s. He said that the training coordinator position and the special prosecutor position has evolved into the Prosecution Services Bureau (PSB) to provide training to county attorneys twice a year and to be available to assist county attorneys with criminal law related issues.

QUESTIONS FROM THE COMMITTEE

REP. STOKER asked if it was possible to get more information about PSB staff, office locations, and the numbers of cases that the PSB has handled over the last year or two. MR. CONNOR said that he could provide the location of the offices, but that caseload figures should come Kathleen Jenks, who is the supervisor of that unit.

REP. WINDHAM asked Mr. McGrath if it was his recommendation to separate the criminal prosecutions from the civil workload. MR. McGRATH said that there are a number of ways to

look at that, such as severing the civil responsibilities and considering them county responsibilities, with the exception of child abuse and neglect cases which are technically considered civil.

REP. WINDHAM asked where she would go to get the disposition per felony defendant from Lake County. MR. McGRATH said that the most accurate way to get that information was to go to the Clerk of the District Court. He said that the problem with obtaining information about the number of cases is that there is no uniform reporting system yet.

SEN. PERRY asked Mr. McGrath about the incident in Gallatin County between the county attorney and the police chief in Belgrade and whether he could outline the responsibility of the county attorney and the jurisdiction over municipal systems. MR. McGRATH said that the county attorney has no jurisdiction or supervisory authority over a police chief of a municipality in the county.

SEN. PERRY said that the state provides a full time county attorney based on population and the number of deputies are based on the taxable valuation of a county. It makes sense to look at that and see if we can make it logical. MR. McGRATH said that if you read the statutes cold, it does not appear to be logical, but there is another statute that allows the counties to hire as many deputy county attorneys as they deem sufficient.

REP. EVERETT asked Mr. McGrath to explain his supervisory duties over county attorneys in all matters. MR. McGRATH said that they legally have supervisory powers over county attorneys, but county attorneys are elected officials subject to the electorate in terms of technical supervision and that makes it a very difficult situation.

SEN. McGEE asked if Mr. McGrath wanted to see this Committee revise the supervisory relationship. MR. McGRATH said that if the Committee doesn't make any other changes, then the Committee shouldn't change that either. He said that one of the things that is of concern is that any standards or requirements for people becoming prosecutors should contain mandatory training. SEN. McGEE asked if Mr. McGrath thought that this Committee should entertain the notion of looking at the roles of city attorneys specifically with regard to their duties of carrying out prosecution of state laws. MR. McGRATH said that that was an excellent question but he didn't think so. He said that city attorney jurisdiction is fairly limited and limited to misdemeanor prosecutions. He said that mandating city attorneys to attend training would be an excellent idea.

SEN. CROMLEY asked Mr. McGrath if there is any involvement of his office in the civil side of the county attorney's business. MR. McGRATH said that they actually do a lot of work with the counties on the civil side by issuing opinions on issues of law relating to civil questions.

REP. RICE said that she appreciates Mr. McGrath's comment that we need to put resources where the need is, and with such declining populations in Eastern Montana and rapid growth in Western Montana, is that enough? MR. McGRATH said that to a limited degree, yes. About a decade ago, the Attorney General's Office had asked the Legislature to pass a statute allowing for county consolidation of offices.

SEN. WILLIAMS asked Mr. McGrath if he could give the Committee a couple of examples of what was meant by how disjointed the system was and that information on the workload was hard to obtain. Does Mr. McGrath think that the Committee should be looking into this issue? MR. McGRATH said that what he meant by disjointed was that there is a huge disparity in workload between counties.

REP. STOKER asked if there was such a thing as an operating procedures manual for county attorneys that standardizes what their job is and their relationship to the Attorney General's Office. MR. McGRATH said that there is. Mr. Connor has developed over the years a number of standards, but in terms of an actual procedures manual, no.

HAROLD BLATTIE, Executive Director of Montana Association of Counties, said that the civil work on the part of a county is an ever increasing workload. He said that there is a huge workload related to land use and subdivision decisions. He said human relations is also a difficult area of law and that MACo has a full time employee who is responsible for providing human relations guidance and advice to the county. He also said that both people work with the county attorneys.

MR. BLATTIE provided information to the Committee on taxable value (**EXHIBIT 10**). This was in response to a question posed earlier on taxable value in the county and what the possible correlation is to taxable value and the workload in a particular county. He said that there wasn't any correlation that he was aware of, although taxable value is an indicator of an ability to pay. In a county that has a greater ability to pay, that county will probably be more inclined to have more staff available either directly or through contract for both criminal and civil matters.

REP. PARKER said that he would like to see if the Committee would want additional data in the white paper on workload issues as Attorney General Mike McGrath had suggested. Mr. Blattie, on behalf of MACo, offered to give the Committee some figures as well as gather needed information for the Committee. Rep. Parker said that at this time, the Committee did not know what kind of figures are needed but that the Committee will let him know and that his offer getting information for the Committee is appreciated.

FRED VAN VALKENBURG, President of Montana County Attorney Association and Missoula County Attorney, distributed to the Committee a packet (**EXHIBIT 11**) which included his testimony on county attorneys' workload and a document which showed the results

of a survey the Association began after they reviewed the staff report prepared by Ms. Heffelfinger.

QUESTIONS FROM THE COMMITTEE

REP. PARKER asked Mr. Van Valkenburg what other kinds of facts and figures should the Committee be building in the white paper. MR. VAN VALKENBURG said that the Committee first needs to make a decision as to what kind of data is needed and how it will be uniformly reported for comparison purposes. REP. PARKER asked how helpful it would be to have uniform filing standards. MR. VAN VALKENBURG said that he did not know if they would cover everything but that it would improve the data collection.

REP. PARKER told the Committee that before Public Comment, there will be a brief update on SJR 37. He commented on the memo that went out from Sen. Schmidt and himself regarding the coordination between the Law and Justice Committee and the Children and Families Committee on SJR 37. Sen. Schmidt has agreed to accept two additional liaisons from our committee. Rep. Parker appointed Sen. Williams because she is the author of SJR 37, and Sen. McGee because he is the Vice Chair and serves on the oversight committee for DPHHS. Rep. Parker said that the two senators will coordinate with Sen. Schmidt on which meetings would be appropriate for them to attend and they will report back on whether there is anything that this Committee should be looking at with respect to the Judiciary during the Interim. Rep. Parker thanked both Sen. Williams and Sen. McGee for agreeing to do that.

UPDATE ON SJR 37 - Susan Fox, Research Analyst for CFHHS Interim Committee

SUSAN FOX thanked Rep. Rice and Rep. Stoker for attending the Children and Families' meeting. Ms. Fox told the Committee that the next meeting will be October 20. The entire day will be spent on SJR 37 and Child Protective Services with a panel discussion on Intake, Placement, Courts, Permanency and Safety. Ms. Fox said that she intends to look into the complaint policy at the Department, look at court assessment programs through the Supreme Court dealing specifically with court related issues, and treatment courts.

QUESTIONS FROM THE COMMITTEE

SEN. MCGEE asked how many Children and Families Committee meetings are scheduled to deal with the SJR 37 issue. MS. FOX said that the CFHHS Committee will deal with that issue at every meeting and has scheduled five additional meetings, most of which will be two-day meetings, at which a good portion of the meeting time will be spent on this issue.

SEN. SHOCKLEY asked that if the committee envisioned having witnesses, he wanted to "screen" or "prepare" them and he would like to know when he should be ready to do this. MS. FOX said that she had a list of everyone who came and testified at the last meeting and she was going to address them specifically and let them know how the next meeting was going to be structured, if they were interested in testifying on the panel presentation, if they had questions as

to what might be the more appropriate one, but leave it in terms of public comment and testimony, not specifically be witnesses.

PUBLIC COMMENT ON SJR 40

BOB ZENKER, Silver Star, County Attorney for Madison County, said he provided for the Committee a different perspective on some of the comments made by Attorney General Mike McGrath. He said he would suggest that the incidents which the Attorney General referred to are real but isolated. He also asked the Committee to consider some things with regard to the questions that have been put before them. One would be logistics, particularly in rural Montana counties where the Judicial Districts have more than one county. He said that if you have a district attorney system, how do you ferret out the work, who goes where, do you have a circuit district attorney and who does the work? Costs, resources and the logistics of splitting the system of where you have two offices providing the same kinds of services should be considered.

QUESTIONS FROM THE COMMITTEE

SEN. SHOCKLEY asked if in less populated counties, is there enough civil work to keep a county attorney who doesn't do any criminal work actively employed? MR. ZENKER said that generally the history of those kinds of counties are that you have a part time county attorney who is engaged in private practice and is also a public servant. If you change that system, he said that he expects that if you cannot keep a civil practitioner employed as a county official full time, then the counties will contract out.

COMMITTEE WORK SESSION ON SJR 40

Ms. Heffelfinger passed out extracts of statutes (**EXHIBIT 12**) that has been talked about.

REP. PARKER wanted to add items to the white paper and treat that as staff instruction. First of all, Attorney General McGrath documented the need for more workload information and caseload information and MACo has agreed to assist in gathering that. There is a request that initially came from Ravalli County Attorney, Mr. George Corn, about more budget data from each county about the number of deputy county attorneys, paralegals and secretaries in each office. Finally, more detail about the duties and complexity and scope of the workload undertaken in each county attorney's office. Rep. Parker requested from the Association two or three paragraphs of text that puts it in context in a typical urban county, how much time is spent on criminal prosecution, how much is spent on civil, how much is Youth in Need of Care in an anecdotal way to help us understand what a typical day of a county attorney has. This document will not only be used by this Committee but will be presented to the entire Legislature in the next session.

REP. WINDHAM said that having data on the number of cases pending and the number of cases filed would have more meaning.

SEN. MCGEE said a glossary of terms would be helpful and asked Ms. Heffelfinger to put out a draft glossary and hand it out to the County Attorneys Association and the Attorney General's Office and say this is the beginning of our glossary of terms, please add to it and please correct what is flawed in it.

REP. PARKER said that as it stands now, there is no time scheduled between now and March to review SJR 40. He would like to build some additional time into that and continue this discussion with the county attorneys around the state to structure the study before it is presented in final form. If we want a glossary of terms, we would want input from the county attorneys and other interested parties to make sure that there's some consensus of what that means.

SEN. MCGEE said he wondered if it might not make more sense to have the County Attorneys Association, the Attorney General's Office, and perhaps MACo who know what topics need to be addressed to provide input on what should be done by the Committee. MR. VAN VALKENBURG said that makes sense and he would start with the statutory appropriation in regards to salary. He said he'd like to find out where the Committee is on that, and then draft a bill and present it to Ms. Heffelfinger to pass around for comment.

REP. PARKER said there is consensus around the table that that is an issue that we want to address. He asked the Committee if we want to have that topic analyzed in the white paper or do we want to take Mr. Van Valkenburg up on his offer to flush that out for us. SEN. PERRY said that that might be premature and we might want to save that for later but keep it on the list. REP. PARKER said that the Committee could flag that as a policy option and take the list of bullet points that Mr. Van Valkenburg presented earlier and use that as a starting point for harvesting policy options. In addition to that, if there are individual legislators here or other people in the audience who would like to email additional ideas to Ms. Heffelfinger, the Committee could start putting together a list of policy options and make that a topic in January.

REP. EVERETT said that he is not hearing a lot of support for the district attorney system.

REP. PARKER said that we need to make sure we are addressing some of the policy concerns of more uniform training.

REP. STOKER said that he would like to get input from the county attorneys. Attorney General McGrath said that if no change came from the study, the Committee shouldn't change the supervisory requirements. Mr. McGrath suggested mandatory county and city attorney training. Rep. Stoker said that he would be interested in hearing a response from one of the county attorneys.

MR. VAN VALKENBURG said that the MCAA has not discussed the specific issue of mandatory training. His guess is the County Attorneys Association would be supportive of mandatory

training. As far as city attorneys are concerned, all attorneys are required by the State Bar to perform or satisfy 15 hours of Continuing Legal Education credits every year, so there is a mandatory training element there.

REP. WINDHAM asked John Connor if the two training sessions that he does add up to the 15 CLE credits that any lawyer needs for the year. MR. CONNOR said that they generally exceed the 15 CLE credits. From his standpoint, mandatory training would be fine. He said the state actually gets very good turnout from the county attorneys at the training programs, particularly in the summer. REP. WINDHAM asked how many hours are these training sessions and whether that was sufficient time for a county attorney to become current on all the changing laws. MR. CONNOR said that the number of hours depends upon the nature of the program and that he did not presume to think that his training is what keeps county attorneys up to speed. It is a supplement to what they learn on their own and what they learn on the job.

SEN. WILLIAMS asked Mr. Van Valkenburg if he had a plan for video conferencing as a vehicle for some of these trainings. MR. VAN VALKENBURG said that one of his campaign promises when he was running for office was to put on a video conference this year. They are going to try this in early winter. It is expensive so we need to make sure that we do it well and use our dollars wisely.

SEN. McGEE asked to what degree Mr. Connor thought it would be appropriate for the Legislature to mandate training and what kind of training would be appropriate. MR. CONNOR said that he would have to give that some thought and get back to him. He said he agreed with Mr. Van Valkenburg that there might be some cracks in the system but that it's not broken. He said you can train someone for a long time but you can't teach good judgment. If you don't have good judgment, then it is the voters responsibility to vote them out. SEN. McGEE asked if Mr. Connor wouldn't like to see the state try to replicate what was done in the public defender act with all the requirements for training and education on the prosecutorial side. MR. CONNOR said that he thought that would be going too far.

REP. PARKER said that we have already agreed that in this white paper, we would like to have a laundry list of policy options. He said that he would like Ms. Heffelfinger to distill from today's meeting bullet points on what policy concerns have been identified by the Attorney General and the county attorneys. He said that there have been issues of recruitment and retention, not only of deputy county attorneys, but of county attorneys, as well as problems in some limited areas of service delivery. He invited any member of the audience to submit additional ideas through email that would help foster discussion between now and the next meeting.

SEN. PERRY said that he would like to bring the Committee back to Sheri Heffelfinger's background report as a guide. Members of the Committee can review the guide and get questions answered. He said our duty is this, Montanans are getting one heck of a bang for

their buck with the current system. There are some great questions in the background report and he would want to hear from the Chairman what the Committee's plan is for answering those questions so we can arrive at a good decision point.

REP. PARKER said that the Committee can work through these research questions that Ms. Heffelfinger has laid out, and from the concerns that the County Attorneys Association and the Attorney General has brought before us today as a bulleted list, match it up with a list of policy proposals, and break those research questions into more manageable ones. He has requested some text from the county attorneys to frame their perspective of how much time is personnel and contractual matters for county government, how much time is homicide cases, rapes, meth labs, and so on. Rep. Parker said that he felt that if we have those two lists from Ms. Heffelfinger, we are basically working through these research questions in a way that builds from testimony rather than building from the questions.

REP. WINDHAM said that it seems like a long time between now and January. She said that she would like to continue this discussion and have input so that at the January 19 meeting we don't say, now where are we. She agreed with Sen. Perry in that she doesn't know what the answer is yet about whether the state should stick with the county attorney and forget the district attorney format. She said we need some information and that there is a lot to consider before we come to a conclusion.

REP. PARKER asked if members wanted to modify the work plan. He said that the study plan contemplates about 35% of our time on indigent civil issues and 25% of time on this study. Would it be worth changing the study plan and doing an hour and a half round table and have a deputy county attorney that handles primarily civil work on hand at our November meeting? MS. HEFFELFINGER said that she could take the information and the discussion and put together a basic issues option checklist in which the round table focus could be on discussing the pros and cons of each issue and to identify options.

REP. PARKER said that he will work with Ms. Heffelfinger and schedule a group of speakers and invite MACo and the County Attorneys Association to take part in the next meeting.

SEN. MCGEE asked if this Committee wanted to look at the district attorney system. Sen. McGee referred to page 18 of the report which asked if Montana should consider a district attorney system. He said that he would like more information on what a district attorney system looks like.

SEN. PERRY said that we came out of the last interim committee with a spectacular public defender system, we laid everything on the table, and once we had all the facts before us, then we brainstormed and designed a custom system for Montana. He said that that is what he wants to do.

REP. WINDHAM said that when Attorney General McGrath was testifying, he did make a comment that he recommended separating the criminal prosecutions from the civil work load and that he believed that the district attorney should also be an elected official. She agreed with Sen. Perry in that she wanted to see everything on the table so that she knows what her choices are.

REP. PARKER said that this interim the Committee is looking at indigent legal issues on the civil side and how we handle prosecution of criminal cases as well as county attorney civil legal work, how do we manage these legal resources across a broad geographic area, and how do we as Legislators, try to make sure that there is quality services throughout different regions. The Committee should continue deciding what the policy challenges are and get a companion list of possible policy solutions, have an idea of a district attorney system, and have a half hour presentation at our next meeting to define what the concept would mean in a state like Montana.

SEN. SHOCKLEY said that sounded reasonable and that whoever is delegated to do this, that person should be directed to talk to the County Attorneys Association and the Attorney General to get their point of view on issues like geography and politics.

OTHER BUSINESS

REP. PARKER asked Valencia Lane, Legal Counsel, if there were any agency rule review issues to consider. VALENCIA LANE said that there were none. She said that at the first meeting, how the Committee wanted to handle rule review issues was not discussed. She said she would continue doing what she did during the last interim and that is to give a written summary of every rule by the Department of Justice and the Department of Corrections that she reviews.

SEN. SHOCKLEY said that most of us know that we have a very pressing problem with the 246 people who are supposed to be in the state prison but are still taking up space in county jails. He said that the Department of Corrections is thinking about moving people out of state, the women to Minnesota and the men to Texas and Arizona. He thinks that the Chairman should make liaison with DOC and see if there is something that we should be aware of.

REP. PARKER said that he would make a phone call and request a written response that could be distributed to all the members prior to the next meeting.

SHERI HEFFELFINGER wanted to respond to the question from yesterday about gross income versus federal adjusted gross income. She passed out a copy of a statute in Title 15 (**EXHIBIT 13**). Sen. Perry asked what was decided with regard to the Public Defender Act? Ms. Heffelfinger said that the Public Defender Act defines indigence as 133% of federal poverty based on household income and that household income was defined in the statute which was just passed out. She said that the federal government does not define whether the poverty

guidelines should be based on gross income or household income and that that is left to the states. She also said that the policy decision for the Public Defender Act was to follow the state's statutory definition of gross household income.

REP. PARKER asked Ms. Heffelfinger if she felt that the scope of what the Committee was asking in each of these two studies was going beyond what she was able to do during this interim. MS. HEFFELFINGER said that she was comfortable with it. SEN. McGEE asked if Ms. Heffelfinger was going to get information on district attorney system models and what states she might look at. MS. HEFFELFINGER said that she was going to look at Idaho, Wyoming, Colorado, Utah, North and South Dakota. She did request information from the National Conference of State Legislators but they didn't have a comprehensive list. She said that if the Committee was going to go after caseload data, budget information, and number of deputies in each county, that that information was going to have to come from the County Attorneys Association and MACo.

MR. ZENKER said that he wanted to add one more resource to that list and that Pam Bucy could likely access the National District Attorneys Association, which might be the most likely resource for the most comprehensive information in regard to data about other states. MS. HEFFELFINGER said that she will be looking to the Chair to help determine how the Committee would like to use that data. She said that what is important when collecting data is to know what you are going to use it for.

ADJOURN

The meeting was adjourned at 2:50 p.m.

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