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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 21, 2005

Capitol Building, Rom 102
Helena, Montana

COMMITTEE MEMBERS PRESENT

REP. JOHN PARKER, Presiding Officer
SEN. DANIEL MCGEE, Vice Presiding Officer

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, Legislative Research Analyst
VALENCIA LANE, Staff Attorney
FONG HOM, Secretary

Visitors

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

COMMITTEE ACTION

- Approved the minutes from the July 26, 2005, meeting.

CALL TO ORDER AND ROLL CALL

The meeting was called to order by the presiding officer, REP. JOHN PARKER, at 8:35 a.m. The secretary noted the roll. Sen. Laslovich was excused. A motion to approve the minutes from the July 26, 2005, meeting passed unanimously.

BACKGROUND REPORT ON CIVIL LEGAL AID - Sheri Heffelfinger, Research Analyst, Legislative Services Division (LSD)

SHERI HEFFELFINGER gave a detailed background report on civil legal aid ([EXHIBIT 1](#)). Her presentation included an historical overview, a summary of current services in Montana, a summary of the major legal needs identified in the State Bar's legal needs study, and a discussion of what policy questions the Committee needed to address. Questions from Committee members were taken during the presentation.

QUESTIONS FROM THE COMMITTEE

SEN. MCGEE asked how the National Legal Aid and Defender Association (NLADA) was funded. MS. HEFFELFINGER said she would try to get that information for the Committee.

SEN. MCGEE asked what "social impact litigation" meant. MS. HEFFELFINGER said that the term referred to lawsuits that had social impact, such as requiring reforms in housing laws, employment discrimination laws, health care and access to benefits, in other words, changes in law that impact all of society rather than one individual.

REP. EVERETT asked how many attorneys are subject to the Supreme Court's Rule 6.1. on pro bono service. MS. HEFFELFINGER said that all attorneys practicing in Montana are subject to the rule. MR. CHRIS MANOS, executive director of the State Bar, said that there were about 3,000 or more active members of the Bar.

REP. WINDHAM asked if publically-employed attorneys are excluded from the pro bono rule. MS. HEFFELFINGER said no. She also noted that rule encourages pro bono work but does not provide a penalty if an attorney does not perform 50 hours of pro bono service a year.

REP. EVERETT asked Ms. Heffelfinger about the meaning of the word "household" in the legal needs portion of her presentation and whether the data reported in the study referred only to low income households. He also asked whether people in low income households have more legal problems per year than people in high income households. MS. HEFFELFINGER said that the legal needs survey was conducted under the auspices of the state bar and taken only of moderate and low income people and that the term "household" was defined by the U.S. Census as anyone regularly living within the housing unit. She said she had some questions

herself about how the legal needs report defined terms.

SEN. SHOCKLEY asked how the legal needs study figures were arrived at. MS. HEFFELFINGER said that the data was generated from the surveys that had been filled out by voluntary participants.

PRESIDING OFFICER PARKER told the Committee that the purpose of today's meeting was to get a handle on the information, start to understand the problem, and, during the work session, identify what additional information and which speakers the Committee would like to have at its next meeting. He said the purpose today was not necessarily to focus on solutions yet.

MONTANA LEGAL SERVICES ASSOCIATION - Klaus Sitte, Executive Director

KLAUS SITTE gave a presentation on the Montana Legal Services Association (MLSA). He explained that a legal problem was, for example, a tenant getting an eviction notice from a landlord and the tenant knowing that there is something wrong with the eviction notice. He said, where can the tenant go to get legal help and what happens if the tenant does not get help? He said access to justice is about what happens when a domestic violence victim needs help and about where the person goes get somebody to represent them. MR. SITTE said that in most situations, if it is the State of Montana versus "the person", then it is a criminal matter. But, if it is two people against each other "in the matter of ____", then it is a civil matter and civil matters were what was involved in civil legal services to the poor.

SEN. MCGEE asked Mr. Sitte if he could further qualify the word "problem" as it was defined in the state bar's legal needs study. MR. SITTE said he would prefer that the people who worked on the data, Ann Gilkey and Chris Manos, Director of the State Bar, answer that question. He said that, to him, a problem is how the person surveyed identified the problem; it is a matter about which the person would have liked to ask a lawyer about, or that the person knew he or she needed some help and about which the average person would seek a lawyer if they had the financial means to do so.

ANN GILKEY, State Bar Equal Justice Coordinator, said that she was the coordinator of the legal needs study. She said that a "problem" is as is a problem in the person's perception of an issue, a civil matter, for which the person thought that they could have used some legal help or talked to an attorney. She said that the surveys were done one on one, not by phone, and that there were 850 surveys completed by volunteer surveyors. She said that the 76 survey questions took about a hour to do with each person. She said the questions asked were: have you had problems in housing, have you had employment issues, have you had consumer issues? MS. GILKEY said that they asked very specific questions and that she would be happy to sit down and walk through the survey form with whomever was interested so the Committee could get a better understanding of where the data came from and what it means instead of just having the numerical figures being thrown out.

REP. PARKER asked if she had copies of the survey available for Committee members? MS. GILKEY said that she would get the actual survey document and the supplement for the members to see.

REP. STOKER asked that if Ms. Gilkey were questioning him and he said yes that he had an employment problem and a family problem and a child problem, would that count as three different problems as part of the 201,000 problems a year determined by using the survey data? MS. GILKEY said yes. She said that the average number of problems reported by low and moderate income people was the 3.47 legal problems per year, which was reported in the study findings.

MR. SITTE continued with his presentation and told the Committee that when he started with MLSA, they had 39 lawyers. He said that that number has decreased to 14 lawyers. He explained that MLSA delivers services in five ways: through www.MontanaLawHelp.org; hotline advice and information; self-help representation or pro se projects; private attorney involvement programs; and direct representation with the 14 lawyers. Mr. Sitte passed out the Montana Legal Services Association's Maximum Income Standard for Eligible Clients 2005 figures (**EXHIBIT 2**), and talked about how a person qualifies for full legal aid. He explained that MLSA has obtained grants which have enabled MLSA to create the websites, MontanaLawHelp.org and Montanaprobono.net. He said his staff is involved in the Supreme Court Equal Justice Task Force, the State Bar Access to Justice Committee, the University of Montana Law School, and with other stakeholders involved in improving access to justice. Mr. Sitte talked about having pro se forms that clients can use without direction from an attorney and, by the end of this year, he said he hoped to have the forms on what is called a "hot docs" computer-based system where people type in names and addresses, push the button, and it produces the appropriate pleadings that go to the court. In the funding area, MLSA has been working with the Montana Justice Foundation.

Mr. Sitte said access to justice is essential to democracy and the cornerstone of our justice system. He said we expect Montana citizens to have rights and we should also expect that they have access to the justice system to enforce those rights.

ACCESS TO JUSTICE COMMITTEE - Chris Manos, Executive Director of the State Bar of Montana

CHRIS MANOS talked about the history of service by attorneys and others in providing legal aid in Montana, pro bono programs and the level of participation by members of the Bar and others, and the strengths and limitations of providing pro bono services. He also provided an analysis of needs.

He said that at the legislative level, the laws passed dealing with basic concerns like families, adoptions, divorces, parenting plans, child protection, elder law, conservator and guardianships,

landlord/tenant issues, and consumer law, are all good starting places for defining the need. MR. MANOS said that low income individuals have no access to the rights and protections provided by the legislature through state law without having access to either legal information or legal representation. He said that pro bono means without any fee. He said the Supreme Court, in 2000 or 2001, created the Equal Justice Task Force to conduct some planning. He said that the position of Equal Justice Coordinator for the State Bar was also created in 2001 to look at both planning and access to justice issues. At the State Bar level, he said, there is a strategic planning process, whereby the Bar Association's 17 trustees, representing geographic areas around the state, annually review the current State Bar's Strategic Plan.

MR. MANOS said that one of the five priorities of the Bar's strategic plan is to "work to increase access to justice for all Montanans and improve the administration of justice for all Montanans." He said that the Bar provides both direct and indirect financial contributions. He said that the State Bar financially supports the Equal Justice Task Force by sponsoring meetings, reimbursing travel, including several retreats for planning purposes and other events. In addition to providing financial support, he said that the State Bar coordinated the legal need study. He explained that the Equal Justice Coordinator position was funded by the Montana Justice Foundation and now is fully funded by the State Bar. He said that the major source of funding for civil legal aid from the Montana Justice Foundation is from interest earned on the Lawyers Trust Accounts. He said that the Supreme Court made attorney participation in the trust account program mandatory a number of years ago and that it is a primary funding source for Montana Legal Services. He said that the Interest on Lawyers Trust Accounts (IOLTA) is not available for lawyers to tap into. Under the IOLTA program, the interest is pooled and utilized for civil legal services programs.

MR. MANOS discussed Rule 6.1 and 6.5 of the Rules of Professional Conduct. He said that effective April 1, 2004, new rules of professional conduct were enacted. The 6.1 rule was revised and the 6.5 was a new rule. In the 6.1 rule, the Supreme Court added a statement that said, "Every lawyer has a professional responsibility to provide legal services to those unable to pay." Previously, it was recommended by the Bar that the language read, "A lawyer should aspire to render at least 50 hours of pro bono publico legal services per year." He said that the Court, on its own motion struck the "aspire to" and provided for the following language: "A lawyer should render at least 50 hours....". He said that the change prompted questions from Bar members about whether it was now mandatory to do 50 hours or pro bono service a year. He said the Bar's response has been, read the language and follow what it says. He said that pro bono service may include service not only to individuals, but to charitable, religious, civil, community, governmental and educational organizations. Finally, he said, the rule says, "in addition, a lawyer should voluntarily contribute financial support."

MR. MANOS explained that the 6.5 rule is new and allows attorneys and members of the Bar to provide limited representation, which includes clinics, which involves assistance but not

necessarily continued representation to a client. He said that as reported in the pro bono voluntary reporting form, in 2004, of 2,700 active members in the Bar, 1500 to 1600 members returned the form and that of the 1600 that returned the form, over 50% said they provided direct legal services without expectation of fee.

MR. MANOS said the Bar asked lawyers through a survey in November and December of 2004, online and in printed form --and received 45% response rate--about how important it was to increase access to justice and availability of legal services, 70% said it was important to them in their view of the obligations of the Bar. He said that when asked, what are the constraints that you have in doing pro bono work, 40% reported it was not having time. Almost 20% said it was restrictions imposed by government agencies or their employment rule. Mr. Manos said how agencies allow their attorneys to meet pro bono obligations, either using agency time or using their vacation, or on the attorney's own time is up to the agency. Mr. Manos said that when asked about what their biggest challenge was to their practice overall, bar members responded that the biggest challenge was their time management and beyond that, how they earn a living.

MR. MANOS then talked about the strengths and limitations of pro bono services. He said that a limitation is the fact that solo and small firms predominate in Montana. Solo practitioners are 30 to 40% of the bar's membership and they have the billable hour constraints. Mr. Manos said that if, for example, if an attorney does four free hours of pro bono representation, that's time they are not receiving payment for. Thus, the pro bono hours put a financial burden on their ability to pay bills, meet their monthly overhead and pay their staff. Mr. Manos explained that there are firms, as well, which are developing model policies because in those firms, there are billable hour constraints. He said that for example, a policy could be that if you are an associate, or a younger member of the firm in a large firm, you have obligations to do so many hours. The state bar is trying to suggest to those firms that the hours requirement be crafted so the attorney can be allowed to do pro bono hours to meet their obligations to the firm. But, in many cases, those attorneys have to do those pro bono activities on their own time or otherwise get permission from their firm to do that.

MR. MANOS said another limitation is that many attorneys want to do pro bono only in the areas in which they practice and are hesitant to give limited advice in other areas. Mr. Manos said that the legal needs are in the family, consumer, living, and employment areas. He added that other areas to examine would be strengthening coordination and collaboration, looking at the technology and making sure that the court has financial support. He said that the Bar stands ready to help but that making pro bono mandatory for Bar members is not going to be the solution because it is not only an attorney problem.

MONTANA SELF-HELP LAW PROJECT - Tara Veazey, Attorney with Montana Legal Services

TARA VEAZEY gave a history of her experience as a lawyer in the state. She said that when

she started practicing law in Eastern Montana, MontanaLawHelp, Montanaprobono.net, and video conferencing were not available. She said that it was devastating to see the lack of access out in our most rural areas of the state and it has formed the work she is doing now. Ms. Veazey talked about the statistics on the number of lawyers in the state and the number of lawyers practicing in Eastern Montana. In the Eastern Montana rural areas there is a higher concentration of poverty, with 18% of the population at or below the federal poverty line. That translates into anywhere from 18,000 to 28,000 income eligible clients for legal services. On average, these people have 3.5 problems per year. Only 16% of those issues were addressed with any level of assistance from an attorney. For many of your constituents, that means that there is no access to our court system. She said that she is not talking about equal justice, not talking about equal access, not talking about anything resembling equality or justice, but that she is talking about the basic right of being able to open the courthouse door and have your voice heard in a matter.

MS. VEAZEY said that there are national statistics showing that anywhere from 60 to 80% of family law litigants in the nation are pro se, that most pro se filers are poor, young, and female. The majority of people filing, state as a reason that they are filing pro se is because they can't afford an attorney and/or they have a relatively simple issue, but a much smaller percentage are filing because they have money for an attorney but they don't want one or they think an attorney will actually complicate and prolong their litigation.

MS. VEAZEY said that even if there is pro bono involvement to the highest extent, they will not be able to provide an attorney for every person who needs to go to court, and given those structural constraints, there are two central questions to ask. First, what can be done to get an attorney to those people who truly need an attorney and have their cases heard in court; and secondly, for most of the people who are still left without an attorney, what kind of resources and support can be able to provided to give them meaningful access to our court system.

MS. VEAZEY gave an overview about the Montana Self-Help Project. She said that the Project is working with the Commission on developing new forms for self-represented litigants to assist them in avoiding the legal problems that get them to court in the first place, providing information to help solve their issues before they become court cases, and developing self-help work stations in three rural communities: Sidney, Glasgow and Miles City. In addition to work stations, they have been conducting clinics throughout eastern Montana, as well as doing video conferencing, to make sure they get clinics out to rural regions in the state. The Project has 1.5 paralegals working. Any money that is diverted to self-help resources in Montana Legal Services is money taken away from the 14 attorneys providing representation across the state. She said that the Montana Legal Services can only provide advice and in depth pro se assistance to one side of any case. That creates equity issues that need to be considered.

MS. VEAZEY discussed what other states were doing. She said that no one in the country was

addressing the pro se issue in a sophisticated manner until 10 years ago when the first self-help center opened in Arizona and was funded by a state justice institute grant. Since then, in a recent analysis, around 11 states have developed comprehensive systems for meeting the pro se need. That included huge libraries of forms available online and in the courthouses. She said that we could be doing things to help address this issue; one, have easy-to-use forms in a variety of legal topics, have court-based self-help centers all across the state, have a self-help hotline, have more money for legal services attorneys to take the cases that do need direct representation, have more incentives for pro bono involvement, and have a triage system for determining what level of services are needed for a person in a given case, provide judicial and clerk education for dealing with pro se litigants, and finally, access to pro se appellate resources. Ms. Veazey said that the good news is that in states where they are dealing with this problem comprehensively, they are getting huge usage numbers. For example, Los Angeles has developed one of the first programs in California. They conducted pre-surveys where they asked judges what they thought the pro se issues were. In the first three weeks of opening a court-based self-help center, they had 3000 users each week of the first three weeks. The user satisfaction rates are high for these self-help centers that are being built up around the country. On average, there's a 90% satisfaction of users of the court-based self-help centers across the nation. Ms. Veazey said that they are lacking important data comparing client outcomes for pro se versus those represented by an attorney.

JIM TAYLOR, Managing Attorney for Confederated Salish and Kootenai Tribes

JIM TAYLOR said that he is involved in the clinical program at the University of Montana Law School. His presentation is his perspective on the issues of legal services needs on the Indian reservations in Montana (**EXHIBIT 3**). Mr. Taylor stated that he felt that the legal issues on the reservations were child protection cases, domestic violence, predatory lending, debt/jurisdiction issues, housing issues, and problems with elderly in terms of end of life issues, wills and tribal trust law. He also encouraged the Committee to contact the tribal governments and ask them directly what problems do they perceive in the delivery of civil legal services for low income people and get their response.

SEN. MCGEE introduced Mr. Taylor as the chairman of the Public Defender Commission and said that he is doing an excellent job and thanked him.

NANCY SWEENEY, Co-Chair of Equal Justice Task Force, Montana Supreme Court

MS. SWEENEY gave a general overview (**EXHIBIT 4**) of what the Equal Justice Task Force is and what they have done.

PUBLIC DEFENDER COMMISSION - Sheri Heffelfinger, LSD

SHERI HEFFELFINGER gave a background on the Public Defender Commission and updated the Committee on Commission activities in recent meetings.

COMMENTS ON PUBLIC DEFENDER COMMISSION - JIM TAYLOR

JIM TAYLOR said that their website was up today but there is no content on it. Their link is publicdefender.mt.gov. They will conduct interviews on the 4th and hope to hire on the 4th, and select office space at that time. They have a draft of their criminal defense guidelines but will not finalize it until a Chief Public Defender is hired.

SEN. McGEE said that he forgot to mention that Tara Veazey is also a member of the Public Defender Commission. Sen. McGee asked Mr. Taylor if they were advertising nationwide for a Chief Public Defender. MR. TAYLOR said that they were, and that they have received applications from both in state and out of state. Mr. Taylor also said that they had sent Tara Veazey to an NLADA Conference in Arizona.

REP. PARKER that the Committee appreciates the fact that they are working hard and that they are ahead of schedule. He is hopeful that this Committee will be able to hold a meeting in Butte with timing coincidental to the opening of the state office.

PUBLIC COMMENT ON SJR 6

DEBRA OMSPOT, Attorney, Billings, Montana, talked about the Family Advocacy Program, a program that puts attorneys into clinical settings to work with doctors to address legal stressors that may be affecting their patient's health. The Montana Children and Family Advocacy Program in Billings is the only program in the Rocky Mountains.

MELISSA WORTHAM, Missoula, talked about paid and public attorneys. She said that she has been through numerous attorneys, two who were paid at the beginning of her case. She said that she was assigned a public defender on her third case. She said that there is no accountability on public defenders. She was forced to go to pro se. Ms. Wortham started to discuss Montana Supreme Court Commission on Self Represented Litigants and one of the judges on the Commission. REP. PARKER said that the Committee will not entertain any criticism of individual office holders and advised Ms. Wortham that her comment would be out of order but that the Committee welcomes comments on administration of justice broadly, but won't entertain criticism of any judges. Ms. Wortham said that there should be more support for the pro se litigant.

RODNEY BROWN, Winston, said that as a former county welfare director for Lewis and Clark, Broadwater and Jefferson Counties, he had seen many people who were in extreme economic turmoil. Those extreme situations cause them an emotional paralysis. These people could not afford lawyers, they could not understand legal documents, couldn't understand the legal systems in which they were required to operate in. He said there is a need to provide legal services on a contingency basis.

GARY OLSON, Justice of Peace in Broadwater County, said that the civil actions they see are

small claims, landlord/tenant issues, collections, orders of protection, temporary restraining orders. Mr. Olson told the Committee that people in his county who come to his court do not understand the difference between civil and criminal action, that they feel that they have been wrongfully charged and they want to know how to get justice for themselves, that they have no concept of legal terminology, legal process and are full of questions. He and his clerks are not allowed to provide legal advice, and as a result, these people basically give up because it is intimidating to come into the legal climate without legal background.

MICHELE SNOWBERGER, City Judge for Belgrade, told the Committee that it is understood that the issue regarding self-represented litigants in the courts is increasing. Ms. Snowberger told the Committee that the legal system needs to do a better job in providing information about the legal process and how people can receive the equality that is guaranteed to them to be able to redress their grievances in court.

KANDI MATTHEW-JENKINS, Missoula, told the Committee that the hearings she heard this morning were very informative and valuable for the families she represents in abuse and neglect cases. Ms. Matthew-Jenkins said she would like to see some advertising about the different avenues that are available to those in need of legal services.

NEIL HAIGHT, former director of Montana Legal Services, commented that SJR 6 would not have happened ten years ago and this Committee is working on a subject that is a serious problem and deserves the attention it is getting.

ANN GILKEY, Helena, passed out letters from members of the public who were unable to attend the meeting. The letters support Mr. Brown's testimony that educated individuals who become disabled need help in working their way through the bureaucracy and rules and procedures of the Social Security Administration (**EXHIBIT 5**).

MARY CAFERRO, Working for Equality and Economic Liberation (WEEL), read a testimony from Kim Abbott, advocate and membership organizer of WEEL (**EXHIBIT 6**). Ms. Caferro distributed to the Committee a newspaper article from the Helena Independent Record entitled "Racial Tension in Highline Town is Bitter and Longstanding". Ms. Caferro also commented in her role as a Legislator. She said she noticed in a report prepared for the Committee on SJR 6 a beautiful quote "Mr. Reginald Herbert Smith, in 1919, published a book entitled "Justice and the Poor". In his landmark work, Smith proclaimed that legal aid to all regardless of financial means was essential to American democracy and a fundamental precept of justice and that ensuring access to the machinery of the law regardless of financial status was society's moral obligation." She said that as lawmakers, we have worked hard to create wonderful laws. She encouraged the Committee to work very hard to ensure that all people have access to the laws.

LaNette Diaz, Women's Opportunity and Resource Development, Inc. (WORD)

LaNETTE DIAZ, discussed her work with WORD, a non-profit organization in Missoula. Ms. Diaz said that she surveyed case managers in WORD and asked the following: what unmet legal means do you hear about while serving your client population and how does this affect the clients that you serve? They identified two strong areas of unmet needs: 1) parenting plans and divorce; and 2) end of life issues and drafting of wills.

Beth Brenneman, Attorney with the Montana Advocacy Program

BETH BRENNEMAN said that the Montana Advocacy Program is the designated protection advocacy system for people with disabilities in the State of Montana and are part of a national system throughout the country that has a protection and advocacy office in every state of the union. The Montana Advocacy Program serves people with mental illness in institutions and in the communities; people with mobility impairments; and people with sensory impairments. They monitor Montana Developmental Center, Montana State Hospital, Montana Mental Health Nursing Care Center, Kids Behavioral Health, Yellowstone Boys and Girls Ranch, and Shodair Hospital. The Montana Advocacy Program has special problems when referring cases for people with disabilities. Ms. Brenneman said that she attributes this to the fact that attorneys are not comfortable representing clients with sensory impairments, clients who are blind or deaf, clients who have developmental disabilities, and people with mental illness, therefore, making it difficult to refer clients with these disabilities.

Tammy Hinderman, Montana State Law Library

TAMMY HINDERMAN, Reference Librarian at the State Law Library, told the Committee that the Law Library has a statutory mandate to provide legal resources and services, including reference services to all residents of Montana. The funding for legal services has eroded in the past 10 years and local libraries have been closed due to funding concerns. The Law Library is now serving a higher proportion of self-represented litigants who come to them not by choice but because they cannot get into Montana Legal Services Association programs or private attorneys won't accept their case. The big limitation is that the library cannot give legal advice or representation, they can only give the limited legal information they have. Although technology can be a great tool and if it is used wisely, Ms. Hinderman cautioned the Committee against believing that technology can solve this problem on its own. They still suffer from a huge digital divide in this state and that's a divide both in access to computer resources and in user skills. Public librarians have limited knowledge in the use of computers, and people in rural areas do not have easy access to the libraries.

COMMENTS FROM JUDGE RUSSELL FAGG

JUDGE RUSSELL FAGG told the Committee that he appreciated the opportunity to appear by telephone. Judge Fagg brought his perspective to the issue of the pro se situation. He said that in Yellowstone County, they have the Family Law Project where attorneys are asked to take one pro bono case a year. They also have the Family Law Clinic and classes. They have a paralegal who has given thousands of volunteer hours to these programs and has made an

impact on helping people. But in spite of that, they still have people doing it alone and they do it alone because they cannot afford an attorney or do not meet the financial requirements of available programs.

Judge Fagg came up with four ideas to consider:

- with the support of clerk of district courts, designate one person in every clerk's office in the state as a pro se expert to assist the self-represented without "practicing" law;
- have a computer in each courthouse, in the clerk's office dedicated for pro se people, which would have the forms loaded on it;
- if every judicial district could have a volunteer like Patty Thane; and
- not to reinvent wheel, if there are funds available dedicate them to helping pro se folks instead of starting a new program

SEN. CROMLEY asked Judge Fagg if his remarks were confined to domestic relations cases. What is the use of mediation now and is there any point further down the road in looking at solutions at early mediation? JUDGE FAGG said that when attorneys are involved in the case, about 90% of the cases either get settled or go to a mediator. However, he said, many people don't have the money for attorneys or know how to contact a mediator.

REP. PARKER said that an issue arose today about a conflict of interest situation where you have one low income client who is represented by the Montana Legal Services and the other person can't be appointed a legal services attorney. REP. PARKER asked both Judge Fagg and Mr. Sitte if they thought there were some possible solutions for this kind of situation? JUDGE FAGG said that in a bonafide conflict where Legal Services cannot get involved on both sides, it could be possible for Legal Services to represent one party and then have something like a "Chinese Wall" between some other component of a pro se clinic or a pro bono program. MR. SITTE said that in situations where two sides are required, the other side is represented by private counsel. It's only in those situations such as the clinic ones that were described where someone that may have applied for the clinic, didn't have access to the opposing parties advice, but then you end up advising them in a clinic setting as opposed to advising them with direct representation in a contested court matter. We don't see the conflict situation as much as we did five or ten years ago.

SEN. McGEE asked both Judge Fagg and Mr. Sitte to speak to whether Montana Legal Services could act as a mediator in a conflict situation rather than as a representative and then the parties could get some guidance and see how the case is going to go. Could that be set up statutorily that the mediator decides the case at the sub-court level? JUDGE FAGG said that it would work as long as the decision of the mediator wasn't disputed between the parties. A mediator cannot represent either party but can only do his best to settle that case. SEN. McGEE said that if they were trying to maximize access to the legal system, one thought is to go to binding arbitration. JUDGE FAGG said that those would preclude someone from going to

court and settling the dispute via the judge and that would cause some heartburn to people. MR. SITTE said that the concept that Judge Fagg is talking about is actually something they have tried. They have someone in the office who does mediation and has done mediation long distance via video conferencing with the parties in different cities. If it becomes a contested matter, Montana Legal Services is out of that situation. But, he said, the availability of mediators in cases that are not domestic violence related may go a long way toward removing some of these cases from being court problems.

SEN. WILLIAMS said that she wanted the Committee to ask the tribes if they have dealt with these types of issues, or will they have to start from scratch? JIM TAYLOR said the Crow Tribe is working on coming up with a solution and Legal Services has been involved on some of the other reservations, but in large part, you will be creating new programs.

REP. EVERETT asked Mr. Taylor if the Indian tribal courts were funded by the federal government? MR. TAYLOR said that they were funded by the tribes. The tribal courts may apply for a grant but they do not get any general funding from the federal government for their court system.

REP. EVERETT said that if there is a tribal member who has a problem, they can go to the Indian courts and would not those courts tell them that while we can't provide you with any legal assistance, we're going to tell you where to get it? MR. TAYLOR said that there isn't any other place to get it.

SEN. PERRY asked Mr. Taylor that when he says it's 100% tribal funding, is he talking about federal funding and what is the source of the funding that constitutes tribal funding for this. MR. TAYLOR said that on the Flathead Indian Reservation a lot of their funding comes from the Kerr Dam revenues which they own. They have a large tribal forestry program that they get most of their revenues from, but it's tribal dollars generated from tribal programs.

SEN. PERRY asked Mr. Manos about whether or not in the pro bono rule that says "should" means "required". MR. MANOS said that the rule is the requirement. The rule sets out what it says. SEN. PERRY asked on what basis a government entity requires volunteer services from someone. MR. MANOS said that it is not an unusual rule for the legal profession nationwide. Most states have some rule of professional conduct that requires attorneys to do or consider pro bono activities. There is not a single state that has a mandatory pro bono program. There are some states which are adopting mandatory reporting. The reporting that we require is voluntary. SEN. PERRY said that, as a nonlawyer, would it be adequate for him to say that it appears it is a duty of an officer of the court to perform such a function? MR. MANOS said that attorneys have an obligation to clients and also an obligation as a duty of an officer to the court.

REP. WINDHAM asked Mr. Taylor to explain the difference between a tribal member enrolled

and a tribal descendant and how a tribal descendant may or may not get the same services as an enrolled member of a tribe. MR. TAYLOR said that a person who is a descendant is one who is not enrolled in the tribe but is biologically a descendant of a tribal member. Each tribe has the authority to set for themselves what their blood quantity requirements are for enrollment. It will vary from tribe to tribe. Most frequently it is a quarter blood of that particular tribe, but it can vary.

REP. WINDHAM asked Ms. Gilkey to define low and moderate income and how she arrived at what a low income individual was. MS. GILKEY, before addressing Rep. Windham's question, passed out copies of the actual Legal Needs survey (**EXHIBIT 7**), the supplements of the survey, and a brochure for volunteers who conducted the one on one interviews. Ms. Gilkey said that low income is not in the definition, but moderate income says "those just above low income." The household size, determined where they fell on the income chart and according to Mr. Sitte's chart, at 187.5% of poverty they can receive MLSA services. Ms. Gilkey used 200% of poverty for the moderate income level on the second chart. Low income is 125% of poverty up to 200% of poverty.

SEN. CROMLEY asked if Question 11 on the survey was 100% poverty level? MS. GILKEY said it is 125%.

REP. PARKER, referring to the poverty guideline threshold that was given earlier, asked Mr. Sitte if the poverty guidelines on the civil side are a product of federal law or federal regulations that his funding is contingent on? MR. SITTE said that the U.S. Department of Health and Human Services calculates the poverty level rates. They make sure that those rates are published in the Code of Federal Regulations and then the Code of Federal Regulations are adopted by the Legal Services Corporation. The LSC sends them out every March and expects the local programs that are LSC-funded to adopt them as part of their own internal eligibility determinations.

REP. PARKER asked Mr. Sitte if it was something that this Committee should look at? MR. SITTE said that in this situation they use the LSC guidelines, not only because it is regulatory for us but for many of the programs that low income clients are eligible for and they use the same standard.

SEN. WILLIAMS asked Mr. Sitte that if we were to suggest that as a state we would send more resources to Legal Services, where would you want it put? MR. SITTE said that at this point it would go toward additional pro se assistance. SEN. WILLIAMS asked Ms. Veazy to comment. MS. VEAZY said that she would not argue with Mr. Sitte's answer. There are a lot of reasons to focus resources on pro se assistance, but that is not the only answer. They do not have enough attorneys for people who really need an attorney to see justice done and they still do not have pro bono involvement. But in terms of the large number of people who are being kept

out of our court system, having comprehensive pro se resources is the most effective and efficient thing to do.

REP. EVERETT said that Mr. Sitte had mentioned that there is no longer legal services in Flathead County. He asked how they are handling their situation with low income people? MR. SITTE said that Legal Services still serves the Flathead area. There is an attorney in the Missoula Office who circuit rides to Flathead County on a regular basis. MR. MANOS said he wanted to add to the Kalispell and Flathead areas to this question. He said that the State Bar has been in contact with the local Bar to see what the best way is to try to get something addressed because the local Bar took it out of their pockets to hire the paralegal coordinator who was acting as an intake person, but she couldn't get lawyers to take the cases or provide the advice that would be helpful. There were discussions last week with some of their Bar leadership to see how this could be moved forward.

REP. EVERETT asked Mr. Manos if each city and county had their own Bar rather than just the Montana State Bar? MR. MANOS said that it actually is an array of things. For instance, in Missoula there is the Western Bar which encompasses Missoula but also some of the surrounding counties. In Bozeman, it's the Gallatin County Bar. There is no particular guidance on local bar configuration and they all do it in a different way.

REP. PARKER asked if it was fair to say that the Montana State Bar has obligatory membership for practicing in the state and the local Bar associations are voluntary and members need not join those just because they live in that region? MR. MANOS said that is correct and actually some local bars charge annual membership dues or fees. Other local bars have no membership dues required, it's just voluntary financial contributions from attorneys for various projects that they might be doing.

REP. RICE told Judge Fagg that she liked his idea of the computer pro se forms, do-it-yourself help guide in the courthouses, and asked if he could elaborate on that. JUDGE FAGG said that he wanted to pass that to Mr. Sitte, and in turn Mr. Sitte referred the question to Tara Veazey.

TARA VEAZEY said that with the Self-Help Law Project they have been setting up self-help work stations in rural locations in Montana. They have them in Miles City, Sidney and Glasgow. The idea is to have a place in the courthouse or near the courthouse where the public has access to basic legal information and basic forms.

REP. RICE asked Ms. Hinderman if someone were to come to the law library right now and ask for a form, could you give them what they needed and the instructions? MS. HINDERMAN said that in some instances, yes, and in most instances, no. They have very few forms that are mandatory or required or even approved. The Supreme Court's Commission on Self-Represented Litigants has approved forms for pro se divorces and for parenting plans. They

are approved for statewide use; however, there's nothing that requires any judge to accept them. In addition to that, they have some resources, such as the Courts of Limited Jurisdiction Bench Book, which includes sample forms found in a small claims complaint packet. We often have problems with individual judges and individual courts not accepting those forms. They also subscribe to a nationwide resource for very generic forms that people can try to adapt to Montana rules, but in order to do that, they have to be able to take a sample form that is not specific to any one state and apply the Rules of Civil Procedure to it and then apply the Uniform District Court Rules to it, and then apply the local district court rules to it, and then find out if the judge has any special requirements that are not listed in the rules and try to put all those things together in order to get a form that will actually be accepted by a particular judge, which can be a very difficult task.

SEN. SHOCKLEY said that he has rarely appeared in JP Court on any civil matter, and he did not understand how a judge can refuse a form if it meets the requirements of the Rules of Civil Procedure. MS. HINDERMAN said that she can't speak for the judges, that she can only speak from her perspective, which is that individual judges sometimes have individual requirements and that the rules are not always completely clear as to what is and is not required. SEN. SHOCKLEY asked to have one of the Courts of Limited Jurisdiction people speak to that issue. MS. SNOWBERGER said that generally speaking, Courts of Limited Jurisdiction have very little requirements for what the form is going to look like when it is filed. In her court, she will take anything that anywhere in the form says who the party is, what the case number is, and an outline of what they are asking; however, she does know that there are courts who require all pleadings to be typed, or all pleadings to be filed on 8 1/2 by 11, white paper. SEN. SHOCKLEY asked if she would have problems with sample forms provided by some legal entity, like the Supreme Court. MS. SNOWBERGER said that she knows that there are jurisdictions that do have difficulty with them. Some courts generally like to see the information come to them in a particular manner.

REP. PARKER thanked the Round Table members on behalf of the Committee and told them that they had provided an excellent starting point for looking into the issue of civil legal services for low income Montanans. He also thanked Judge Fagg for being there.

COMMITTEE WORK SESSION

REP. PARKER told the Committee that the purpose of this work session is to identify additional information needed and to prepare for the next meeting, which will take place in November. Rep. Parker wanted to know from the members, what more do we need to learn, who should the speakers be for the next session, and asked for the Committee members' comments.

REP. STOKER said that he has two areas which are of interest to him. One would be a consolidated list of all of these organizations where the public can seek some assistance, and the second would be, if there is a way of consolidating some sort of dollar list of how much

money by all if these organizations is currently going in this class of defense.

REP. PARKER reminded everyone to think about the study plan that we have adopted that's been proposed by Ms. Heffelfinger. He said that today is the information gathering phase. The next step of our study as a committee is to identify and frame the issues that we want to address. REP. WINDHAM said that she would like to contact each of the tribal councils on the reservations and ask them what problems they see in providing civil legal services to low and moderate income individuals. REP. PARKER requested staff to send a standardized letter to each of the seven tribal governments requesting their input to the Committees.

SEN. McGEE asked if SJR 6 was talking about low or low and moderate income? MS. HEFFELFINGER said that it was both, low and moderate income. (Note: Ms. Heffelfinger later corrected this to just low income.) SEN. McGEE said that the second thing that came up was predatory lending. Is there some definition in law about what that is? MS. HEFFELFINGER said that she is not sure that there is a definition in law, but she did talk with one of the interested persons who said that "predatory lending" was a problem. REP. WINDHAM said that they have had a problem with that in Lake County. Predatory lenders are individuals who seek out vulnerable individuals and charge them exorbitant interest rates on the money and ask them to pay it back immediately.

REP. STOKER said that he believed that the State of Montana has usury laws and that the highest acceptable interest rate is somewhere up at 18% or 19%, and anything above that is considered predatory lending.

REP. PARKER said that in the last Legislative Session, a law was passed that moved the State Consumer Protection agency out of the Department of Administration and into the Department of Justice. He suggested that the Committee get a half hour update from the Department of Justice on predatory lending and how that fits with the State Consumer Protection's function.

REP. EVERETT said that he was wondering how much money might be coming through other state programs to help the low income for legal cases. MS. HEFFELFINGER said she would follow up on that.

SEN. McGEE said that the Committee has had a number of different sets of numbers provided, including the percentage of Montanans below federal poverty levels. He questioned how many people were actually below poverty and would qualify for legal assistance.

MR. SITTE said that most of the figures in terms of income are those gathered by the U.S. Census Bureau, not by self-reporting. The Census Bureau extrapolates the information they receive and compare it to the other information they have demographically about Montana communities, and all of that is put into the figure to determine where we are in the poverty level.

SEN. McGEE commented that he is confused when he sees that 20% of the 900,000 people in this state are at the federal poverty level because it doesn't match up with what he sees. Sen. McGee said that according to the statistics that they were given, based upon his meeting with his accountant last week, he qualified as low income. MR. SITTE said that they are not looking at his adjusted gross income, they are looking at gross income. SEN. McGEE said that he was talking about gross income and trying to qualify the numbers provided.

REP. PARKER said that the Committee will have to evaluate the problems and look at solutions that are amenable to scarce state budget resources.

REP. STOKER wanted to comment on Mr. Sitte's 125% of federal poverty threshold. He said that in the DPHHS regular committee poverty levels are a constant discussion point to qualify for all of the federal and state programs that have been created. He wanted Sen. McGee to know that program eligibility thresholds range from a low of 100% of poverty to as high as 250% to qualify for the CHIP program. So a family with three children can qualify for CHIPs even when their income is higher than poverty level.

SEN. PERRY said that it is his understanding that the Committee's objective during the interim is to address the needs of people who couldn't otherwise take care of themselves in these legal matters. Therefore, it becomes important that the Committee look at accurate facts from the outset so that the Committee is not looking at what somebody looks like or anything else, but look strictly at the facts.

REP. PARKER asked Mr. Sitte and his staff to come to the next meeting and spend half hour to one hour on a sketch of a typical legal services client so the Committee can get a better grasp on the nuts and bolts of this situation. What's the life of a typical client, what is the situation with backlog in your office, what is the situation and complexity of a typical case.

SEN. SHOCKLEY said one topic that he would like the Committee to look at would be whether or not DNRC should limit access to their hearings requiring all persons and corporations who appear before them to have an attorney licensed to practice law. REP. PARKER said that the Committee's primary task is working with the Judiciary, Department of Correction, Department of Justice, and Public Defenders. SEN. SHOCKLEY said that he would withdraw his motion.

SEN. McGEE said that he didn't think that the taxpayer really needs to get involved with paying for the dissolution of a solemn marriage vow, or that perhaps people should know up front if they get married and then want to dissolve the marriage, the fees will be multiplied by a factor of 10 or 100 or whatever, so that there's enough money going to the legal services folks so that they have money to provide legal services. Sen. McGee said that another option may be to enlarge the number of people that are qualified to "practice" law, so if a person walks into Nancy Sweeny's office and says how do you fill out these forms, she can in fact tell them. Using the

medical community as a model, there are doctors and certified physician's assistants, registered nurses and LPNs, and there should be a look alike system on the legal side with attorneys and paralegals who are qualified to do legal work. Sen. McGee said his third thought is about the mediator concept. He said that what he envisions is something where instead of Mr. Sitte's group always being legal advocates for one side or the other, that group could in fact serve as a role of "subcourt". Somebody not just trying to mediate but deciding.

REP. PARKER said that he has some notes about that and will touch on some of those themes at the Committee's next meeting.

SEN. EVERETT asked Mr. Sitte if the MLSA ever looked at people's financial records and asset value to determine eligibility? MR. SITTE said a person with a high asset value would not be eligible. A \$3,000 asset limit and a person's house is exempt. We would look at something like a family ranch as being well beyond the ordinary house. To qualify, a person must have very low assets in addition to low income.

MS. HEFFELFINGER said that she had provided the wrong information earlier and wanted to correct the record. She said that SJR 6 only covers legal services for the low income, not moderate income.

REP. PARKER said that the Committee had a very productive day. We have framed topics for our next meeting with regard to SJR 6. Without objection, he would like to delay the other business topic until tomorrow because it is on tomorrow's agenda.

ADJOURN

REP. PARKER adjourned at 4:00 p.m.

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