



## Law and Justice Interim Committee

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### 60th Montana Legislature

#### SENATE MEMBERS

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

#### HOUSE MEMBERS

SHANNON AUGARE  
BOB EBINGER  
KRAYTON KERNS  
DEBORAH KOTTEL  
TOM MCGILLVRAY  
RON STOKER

#### COMMITTEE STAFF

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

# MINUTES

November 8 & 9, 2007

Orphan Girl Conference Room, Copper King Inn  
Butte, 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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#### **COMMITTEE MEMBERS PRESENT**

SEN. DANIEL MCGEE, Chair  
SEN. LARRY JENT  
SEN. CAROL JUNEAU  
SEN. JIM SHOCKLEY

REP. BOB EBINGER  
REP. KRAYTON KERNS  
REP. RON STOKER

#### **MEMBERS ABSENT/EXCUSED**

SEN. JESSE LASLOVICH  
SEN. GARY PERRY  
REP. SHANNON AUGARE  
REP. DEBORAH KOTTEL  
REP. TOM MCGILLVRAY

#### **STAFF PRESENT**

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

**PLEASE NOTE:** From 9 a.m. until approximately 1 p.m., on November 8, 2007, Law and

Justice Committee members had the choice of taking a tour of either institutional programs (Montana State Prison and the Forensic Unit of the Montana State Hospital) or community services programs (Prerelease center, Connections Corrections, and the Montana Chemical Dependency Center (MCDC)). Staff participated in the community services programs tour.

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

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

### **COMMITTEE ACTION**

The Law and Justice Interim Committee:

- approved the July 13, 2007 minutes, as written; and
- approved the HJR 50 draft survey.

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

SEN. MCGEE called the Law and Justice Committee to order at 3:40 p.m. The secretary took roll, SEN. JUNEAU, SEN. SHOCKLEY, REP. EBINGER, REP. KERNS, and REP. STOKER were present; SEN. JENT, SEN. LASLOVICH, SEN. PERRY, REP. AUGARE, REP. KOTTEL, AND REP. MCGILLVRAY absent or excused.

### **SJR 24 - DIVERSION ALTERNATIVES, NONVIOLENT DRUG OFFENDERS**

**Sheri Heffelfinger, Research Analyst, Legislative Services Division, (LSD)**, Ms. Heffelfinger presented a staff report, "*DRUG OFFENDER SENTENCING DATA ANALYSIS - FY 2003-2007*" (EXHIBIT #1). Ms. Heffelfinger's presentation included an examination of drug offender sentencing data over the last four years.

SEN. JUNEAU asked if the data was broken down by male and female. Ms. Heffelfinger said it was not but she could get the data from the Department of Corrections (DOC). SEN. MCGEE asked that the data be broken down by Judicial District also.

**Daniel Abrahamson, Director of Legal Affairs, Drug Policy Alliance**, (present via speaker phone) asked if the data included people on probation or parole and if the data included those who had been re-incarcerated for violations. Ms. Heffelfinger said the data covered initial sentences only.

### **Current Law Sentencing Alternatives for Drug Offenses**

**Diana Koch, Chief Legal Counsel, DOC**, discussed a PowerPoint presentation, "*SENTENCING ALTERNATIVES FOR DRUG OFFENDERS*" (EXHIBIT #2). Discussion points included:

- sentences in general, under 46-18-202, MCA;
- deferred and suspended sentences; **TAPE 1 - SIDE B**
- DOC commitments and determining factors;
- DOC placements in programs and facilities;
- conditions for suspended or deferred sentences; and
- 45-9-202, MCA, - alternative sentencing authority for drug offenders: judge authority,

Regarding 45-9-202, MCA, SEN. SHOCKLEY asked if it is up to the judge to determine if the offender is satisfactorily meeting requirements for maintaining employment or attending school.

Ms. Koch said that the probation officer is allowed to make that determination in some cases also.

TAPE 2 - SIDE A

SEN. SHOCKLEY said Montana is the only state that allows the judge to commit individuals to the DOC and said he thinks that is one of the reasons Montana's prison population is so high. He asked if that authority should be taken away from DOC. Ms. Koch said that the high populations may have been influenced by that at one time but that DOC has taken proactive measures to assess incoming offenders and to send as many offenders as possible to community placements. She said Pam Bunke, (Administrator, Adult Community Corrections Division, DOC) could further address this issue if needed.

REP. STOKER said that the prison population level maxed out a few years ago and that in his opinion, without this option, the judges and DOC may have a more difficult problem of where to place prisoners. Ms. Koch said he was correct and that the DOC commit option was DOC's salvation because the worst offenders could be sent to prison and others could be diverted.

SEN. SHOCKLEY said Montana is one of few states that still use boot camp and that, in his opinion, it isn't cost effective. He said the persons who drop out really run up the costs, which is not considered by DOC. Ms. Koch said she was not the correct person to address the topic.

REP. STOKER asked what percentage of boot camp inductees fail. Ms. Koch said she did not know but would find out.

SEN. JUNEAU said, in looking at the SJR 24 bill text and in considering the data and listening to the presentations, the problem does not seem to be as severe and critical as outlined in the bill. Ms. Koch agreed that the situation is not the crisis situation it was at the time the resolution was passed. SEN. JUNEAU asked about the 38% increase requested for the DOC budget and asked if that amount is still needed. Ms. Koch said she does not work with budget issues and could not answer that question.

SEN. MCGEE said in the late 1990s, a DOC commit automatically went through an intake process at MSP, which inflated numbers. He asked if that process is still being used for DOC commits. Ms. Koch said the numbers were inflated on paper only and that the person didn't have to physically go to prison. She said changes have been made in the intake process. SEN. MCGEE asked Gary Hamel, Administrator, Health, Planning and Information Services Division, DOC, to address this issue in his presentation on Friday.

SEN. MCGEE said the 2007 Legislature was told by the creator of the Meth Project that meth treatment takes from 15-18 months. He asked why the meth treatment programs designed by DOC were much shorter than that. Ms. Koch said offenders gets nine months of in-house treatment, and six months of aftercare as an inmate in a prerelease center, for a total of 15 months; and that the suspended sentence begins after the 15 months are completed.

### **Drug Policy Reform Goals and Objectives**

**Daniel Abrahamson, Director of Legal Affairs, Drug Policy Alliance**, addressed the Committee via speaker phone from California on Proposition 36, enacted in California in 2000. Mr. Abrahamson covered the following discussion topics and data:

- prior to passage of Proposition 36, 46% of drug offenders were incarcerated solely for drug offenses;

- between 1994 and 1999, California built 21 new prisons and only one new university;
- it became obvious that imprisoning nonviolent drug offenders without treatment was a failed and expensive policy; and
- California, like Montana, had diversion programs, but few offenders had access to these programs.

Mr. Abrahamson discussed the philosophy behind Proposition 36:

- it was meant to reduce overcrowding of jails and prisons;
- covered all drug offenders, regardless of their history; and
- was modeled on an similar Arizona law.

Mr. Abrahamson discussed the goals of Proposition 36:

- to increase access to treatment;
- to save money on incarceration costs;
- to reduce recidivism related to drug addiction;
- to enhance public safety by reducing drug-related crime;
- to reduce prison population and keep nonviolent offenders out of prison;
- to improve quality of life for those participating in treatment; and
- to expand community-based treatment capacity and quality and diversity of treatment.

Mr. Abrahamson discussed key elements of law in Proposition 36:

- to provide and allow treatment instead of jail for nonviolent offenders;
- to offer broad treatment options in the community that includes vocational and educational opportunities, as well as other auxiliary services in order to help the offender integrate and reenter society;
- to offer diverse treatment options;
- to provide aftercare services for six months;
- to establish uniform eligibility requirements to ensure quality treatment; and
- to provide that an evaluation is done annually and that a series of criteria and a summary of findings is presented to the Legislature.

Mr. Abrahamson noted that:

- over half of the people in California's treatment programs suffer from methamphetamine addiction but this group's recovery rate is the same or better than success rates of other addictions;
- the University of California, Los Angeles, (UCLA) determined that Proposition 36 saves taxpayers approximately \$250 to \$400 for every dollar invested in the program, which has allowed a treatment capacity increase; **TAPE 2 - SIDE B**
- the number of people incarcerated has dropped by over 35% in the first five years and that the number of incarcerated women dropped by 46%;
- completion rates meet or exceed completion rates for other diversion programs or voluntary programs;
- employment rates are very good for those who complete treatment; and
- there has been a significant drop in drug use for those in the program.

Mr. Abrahamson discussed Montana data and noted that like California, there is an enormous need for drug treatment, not only for non-violent drug offenders, but also for offenders who commit drug-related crimes, which account for a majority of property crimes. He suggested that Montana look more closely at its property crime rate to see how drug crimes are related.

Mr. Abrahamson concluded his remarks by saying that California is on a very different scale than Montana but even so, the underlying problems are similar, as are the solutions. Quality treatment seems to be what works the best and the full scope of the problem must be considered.

SEN. MCGEE asked what happened to the crime rate in the categories of drug possession, drug plus nonviolent offenses, and drug plus violent offenses, after the passage of Proposition 36. Mr. Abrahamson said he did not have specific percentages and would provide that information to the Committee but could say that there were not increases.

SEN. MCGEE asked if Mr. Abrahamson's report would be available in written or electronic format. Mr. Abrahamson said it is available in written or electronic format and that he would provide the information to Ms. Heffelfinger, and would email a summary of the data and other information to the Committee members.

In response to a question from SEN. MCGEE regarding the treatment success rate, Mr. Abrahamson said the statewide methamphetamine completion rate mirrors those of other drugs, which is roughly 34%. He said the rates vary between counties and range from 25% to 50%.

SEN. SHOCKLEY said many experts say that meth addiction is very difficult to overcome and yet California's success rate is good. Mr. Abrahamson said meth addiction is very treatable but requires a longer treatment period than other drugs.

#### **Public Comment**

**Patti Jacques, Helena**, said she would like to see records for first time drug offender sentencing broken down by Judicial District and by county. She predicted that some judges are more likely to sentence an offender to DOC rather than diverting them to another program. She said that there should be consistency and that standard treatment is important and that the same options should be available statewide.

**Anita Roessman, Montana Advocacy Project (MAP)**, thanked LJIC for the tour she attended in the morning and said that she had learned a great deal about the therapeutic community model. She said she had not appreciated fully that Community, Counseling, and Correctional Services, Inc. (CCCS) was a Montana-grown business and is a success story for the State. She said Mike Thatcher is to be commended for his energy and enthusiasm. Ms. Roessman said she hopes to see more treatment options become available, particularly in mental health and noted that in a therapeutic community model, people learn about their illnesses and how to live with them.

**Tom Daubert, Helena**, commented that California has proven that better outcomes can be achieved with less money when treatment is the priority. Regarding a drug offender diversion program in Montana, Mr. Daubert said it isn't known at this time what the cost savings would be because data is not available. Mr. Daubert said he would like to know:

- how many offenders fail while on probation or parole because of a drug violation;
- sentencing data broken down by judicial districts and counties, as well for race and age;
- what the actual cost is to taxpayers;
- what the average length of sentence is;
- more information about a typical nonviolent crime that is drug related;
- what criteria DOC uses to decide how to handle someone who is committed to it;

- what percentage of offenders who are not sent to prison are receiving treatment;
- a breakdown of the different types of drugs involved, with meth data in particular; so effective treatment plans can be developed; and
- a rundown of misdemeanor data.

**TAPE 3 - SIDE A**

**Scott Crichton, Executive Director, American Civil Liberties Union (ACLU)**, commended the committee and Ms. Heffelfinger for their work on this issue. Mr. Crichton discussed the University of Montana Department of Sociology study on prerelease centers and who is in them. The study indicates that a huge percentage of the offenders have mental health issues, co-occurring disorders, and drug issues, and that a very large number were not diagnosed with any issues until they got into prerelease. It would be a mistake to study only what is happening in prisons because jails are the feeder system to the prison system. Mr. Crichton said that Mona Sumner, who works in the Rimrock Center in Billings, Montana, is an admirable advocate for treatment programs and he described the services being provided in Yellowstone County through the Rimrock Center. He said the program has a compelling success rate. He discussed recent developments that may put the program in jeopardy and said it didn't make sense that a program that stopped people from entering the system would not be allowed to continue. Mr. Crichton said it is essential that there be analysis of what is happening in the county jails and that there be some consistent statistical analysis of who is in there and for what reason.

**Ms. Jacques** said she managed the grant for the Rimrock Center and that the problem is that the grant was federally funded and funds were cut. She agreed that it was a great program but that problems with transportation could not be overcome. She suggested having Ms. Sumner address the Committee.

SEN. MCGEE asked, regarding funding for the Rimrock Center program, if part of problem is that it is harder to find statistics regarding recovery success rates than it is to get statistics for criminal offenses. Ms. Jacques said the program criteria was to show success rate and that it did that. She said a factor was that every jail had a different system to track inmates, that none of them interacted with each other, and none of them offered treatment. Ms. Jacques said Ms. Sumner kept very good records and documentation.

SEN. MCGEE said the Committee would stand in recess until 8:00 a.m., November 9, 2007.

**NOVEMBER 9, 2007 TAPE 4 - SIDE A**

SEN. MCGEE called the committee back to order at 8:05 a.m. SEN. JENT joined the meeting.

**UPDATE ON DEPARTMENT OF CORRECTIONS FISCAL ISSUES & RELATED ACTIVITIES**

**Pat Gervais, Fiscal Analyst, Legislative Fiscal Division (LFD)**, discussed Performance Measurement for agencies on selected goals and initiatives that were agreed upon through discussion and negotiations with agency staff. Ms. Gervais said the purpose is to allow the Legislature to receive information related to agency progress and to assist the Legislature to identify where assistance to the agency may be necessary, and where changes may be needed, and in preparing for issues that may come before the legislature. Ms. Gervais explained the goals for DOC, DOJ, and the Montana Board of Crime Control (MBCC) (EXHIBIT #3).

Ms. Gervais presented a finance report that had been presented to the Legislative Finance Committee on September 25, 2007, regarding the status of the 2007 biennium supplemental appropriation to the DOC. Ms. Gervais said that the DOC reverted \$3.5 million back to the general fund and that the prison population is expected to be less than estimated. She said LFD will continue to monitor the situation and report back to the LJIC (EXHIBIT #4).

#### **Department of Corrections Response to Fiscal Briefing**

**Mike Ferriter, Director, DOC**, thanked the LJIC members and staff for touring DOC programs on the previous day and said a better understanding is gained by seeing programs in action.

Director Ferriter said the briefing presented by Ms. Gervais (EXHIBIT #4) indicates that inmate numbers are down, which is good, but said he is reluctant to agree at this point in time that DOC may not need the full amount of the supplemental appropriation because it is still very early in the fiscal year. He said it is more than good luck, that programs are successfully diverting offenders, and that key programs such as START and PASSAGES serve as a safety net for offenders before going back to prison. He discussed several DOC programs that are having positive impacts and several new programs that DOC is working on, such as opening prerelease centers in northwest Montana and on the Salish-Kootenai Reservation, moving and expanding the work dormitory at MSP from 80 beds to 179, an update on the Request for Proposal (RFP) process for a sex offender facility, scheduled to be operational by April of 2009, and that many of the new probation and parole FTEs allocated by the 2007 Legislature have been hired.

Director Ferriter said he hopes to report back to the LJIC in the future that the prison population is continuing to decrease. He said Mr. Hamel will further discuss the prison population and that the information is very positive. He mentioned an article in the Great Falls Tribune about an additional offenders coming into the system.

SEN. JUNEAU, regarding the decline of prison numbers, asked if the newly-created Public Defender Office (OPD) has had an impact. Director Ferriter said yes, the OPD has been a factor. SEN. JUNEAU agreed but said she gets many calls from constituents, after having been arrested, asking her what to do. She said she tells them to sell whatever they can and hire the best attorney they can afford, so she is glad to see that people can get a better defense, even if they can't afford an attorney. This will divert people from prison and reduce prison population. Director Ferriter said there is now a cultural specialist in the Great Falls probation and parole review who works with Native American offenders who may be struggling with the system. He explained how the Revocation Center and the Assessment Centers, are all intended to be a catching point before sending an offender back to prison.

SEN. JUNEAU asked, of the 154 person reduction in the inmate population, how many are Native American. Director Ferriter said he would assume it was across the board but he did not know.

SEN. MCGEE asked how many probation and parole officers are currently on staff and what the case load is per officer. **TAPE 4 - SIDE B** Director Ferriter said the case load averages about 90 and that their many duties keep them very busy. He said he needs a new officer to keep up with caseload about every month. SEN. MCGEE asked if probation and parole facilities are adequate. Director Ferriter said facilities are crowded and it is a struggle but measures have been taken to ease the situation, such as offering alternative work hours.

SEN. MCGEE asked, regarding intake processes for DOC, if offenders still go through an intake process at MSP. Director Ferriter said that the process has been changed and that an offender goes first to the Assessment Center for several months to determine the best placement for that offender.

**Gary Hamel, Administrator, Health Planning and Information Services, DOC**, said DOC statistics staff has completed its first population projection report for the 2009 biennium. In summary, Mr. Hamel noted that the secure prison population is projected to grow at a slower pace than the community corrections population. He distributed copies of the population projections (EXHIBIT #5) and reviewed the results for the Committee. He noted that DOC has worked diligently to make its projections more accurate and explained several of the changes made. Mr. Hamel reported that in January of 2008, the population committee will reconvene to talk about future changes that may be needed to stay proactive. Mr. Hamel also distributed a circle graph and bar graph illustrating the distribution of adult average daily population - July through September, 2007 (EXHIBIT #6).

SEN. JENT, referring to EXHIBIT #6, asked Mr. Hamel if the intensive supervised probation population (ISP) of 2.6%, in the 80-20 split (80% in community placements and 20% in secure placement), is considered secure or non secure. Mr. Hamel said the IPS program is considered a community program and is included in the 81.1% of the calculation. SEN. JENT said he likes the idea of sentencing people to ISP because of the degree of control over the offender. He asked if there are plans to expand this program. Mr. Hamel said he did not know but did say that DOC is continually looking at programs like ISP and other alternatives to find the most optimal diversion for offenders. Director Ferriter said that ISP programs are available in certain areas only and that there are no plans at this time to expand the programs because management of these offenders requires a great deal of staff.

SEN. JUNEAU asked, regarding EXHIBIT #6, about youth corrections data and if the similar decreases have been found in the youth population. She asked if he could provide numbers on male and female youth. Mr. Hamel said youthful offenders are not included in the population projections at this time. He said most offenders are in the adult system and that DOC is trying to hone its projection methods before addressing the issue of youth corrections. Director Ferriter said the Youth Services Division's goal is to maintain or reduce the number of admissions into youth correctional facilities. He said the Pine Hills population has remained static for years and that Riverside Facility for Girls stays close to capacity. He said that juvenile parole averages about 208 and stays fairly steady.

**TAPE 5 - SIDE A**

SEN. JUNEAU said reduction goals for youth corrections must be set also. Director Ferriter said Steve Gibson (Administrator, Youth Services, DOC) is very committed to youth corrections issues. He said as with adult offenders, mental health issues are problematic in the youth population.

REP. STOKER asked Director Ferriter to describe the intensive supervised probation ratio to probation and parole caseload. Director Ferriter said the intensive supervision probation caseload has 30 cases per officer, as opposed to over 80 cases for other probation and parole officers. He explained that ISP offenders are under electronic supervision and have very closely monitored schedules, and that there are approximately 300 offenders in ISP.

**Deb Matteucci, Behavioral Health Program Facilitator, liaison for DOC and Department of Health and Human Services (DPHHS)**, reviewed the background and legislative history of the Secure Treatment and Examination Program (STEP). She said only one of three STEP components made it through the 2007 session, and that is the component to renovate facilities on the Warm Springs Campus. She reported that committees have been appointed to look at the buildings and an architectural firm has been selected. Ms. Matteucci said the need for a STEP program is still there and estimated that approximately one-third of the MSH population would be eligible for the program. She said the census at MSH has been incredibly high and that these patients pose significant challenges to the MSH, as well as to the prison system. These types of offenders have very acute treatment needs and, if they are in the prison setting, are often vulnerable.

## **HJR 26 - METAL HEALTH & CRIMINAL JUSTICE**

### **Review of Issues Identified at October Meeting**

Ms. Heffelfinger distributed copies of her report "*HJR 26 - MENTAL HEALTH AND CRIMINAL JUSTICE: PROBLEMS AND NEEDS SUMMARY*", (EXHIBIT #7), and said her report is a review of the issues identified at the October 1, 2007, meeting. Ms. Heffelfinger's discussion was a summary of each of the five intercept levels, both by panel and by topic. She the report would provide the base for decisions during the options phase of the committee's studies.

### **Constitutional and Legal Issues Regarding Mental Health Treatment for Persons in Custody in Criminal Justice System**

**David Niss, Staff Attorney, LSD**, said he would be providing new documents for today's presentation and would be referencing others provided at the October 1, 2007, meeting. He asked that the members have the following documents from the October meeting (in binder) available during his discussion:

- September 14, 2007, legal memo which considered state and federal constitutional provisions upon which is based the constitutional right to mental health treatment for incarcerated persons (EXHIBIT #4 - 10/01/2007);
- *United States of America v. State of Montana* settlement agreement (EXHIBIT #5 - 10/01/2007); and
- the Final Report to the Court in case of *Montana v. Walker* (EXHIBIT #6 - 10/01/2007).

Mr. Niss said he would be referring to and reading extensively from the Montana Supreme Court decision on the Walker case and pointed out that copies of the opinion were in this day's meeting materials (EXHIBIT #8) and would also present his recommendations, as requested by the Chair. Mr. Niss said he has given great consideration to his recommendations and that each one was carefully thought out.

Regarding his Sept. 14, legal memo, Mr. Niss asked the Committee to look at pages 3 and 4. He pointed out the six main components of a constitutional mental healthcare system for incarcerated persons. He said the components were derived from case law, and originated within one Federal District Court; and said that there has been much written concerning those six criteria. Courts have generally concluded that these six criteria are the baseline for a minimally constitutional system. Mr Niss went on to say that:

- The courts have also held at both the trial and appellate level that the six criteria also apply to county and municipal jails. There is no difference between the source of those rights, nor is there any difference in the extent of those rights, based upon the resources of the jurisdiction. He said the question is whether the incarceration systems in Montana

comply with those minimal constitutional requirements brought forth under the Eighth Amendment of the United States Constitution.

- Additionally, the Montana Supreme Court has ruled that Montana affords a higher degree of protection for those in jail or prison and diagnosed with a mental illness.

Mr. Niss said a current District Court case in Park County has raised this issue and may be a determining factor of what is acceptable under Montana's Constitution.

Mr. Niss noted two issues that should have been included in his Sept. 14 memo: (1) What difference does funding make to a court applying minimal Constitutional standards to a prison mental health system; and (2) How do those minimal rights apply to a person in a probation and parole system.

Mr. Niss discussed the funding issue and cited several court decisions relating to funding. **TAPE 5 - SIDE B** He said the attitude of the federal courts make it clear that a facility's lack of financial resources cannot affect a person's right to mental health treatment, once incarcerated, under the Eighth Amendment.

Mr. Niss said, in researching *Watson v. Montana*, he discovered an error in footnote 13 (fifth line) in his Sept. 14, legal memo (page 7, EXHIBIT #4, 10/01/2007) and said that the footnote should be changed from, "refused to dismiss" to "dismissed".

Mr. Niss discussed the stipulated agreement in *United States of America v. State of Montana* (EXHIBIT #5 - 10/01/2007). He said this document is what settled the lawsuit brought by the United States Department of Justice against Montana under the Civil Rights of Institutionalized Persons Act (CRISPA). Mr. Niss explained that CRISPA was a Congressional enactment and gave the United States Attorney General and federal District Courts jurisdiction over claims brought by the United States against states or municipalities for violations of the civil rights of incarcerated individuals in state and local government penal systems. Montana was sued by the United States government over state prisons conditions that came to light in the 1991 prison riot at MSP and civil actions were brought against Montana officials, also a result of the prison riot. Mr. Niss said both cases were settled.

SEN. MCGEE said he found it frustrating that there is no date on the document and asked when the agreement was finalized. Mr. Niss said he thought the agreement was reached in the fall of 1993 or 1994 and agreed that the date of completion is not clear.

Mr. Niss said the State had quite a lot to do to meet minimal constitutional requirements and discussed segregation and inmates and suicide prevention. Mr. Niss explained that a monitoring committee was established, which visited the prisons and made reports to the courts. The degree and manner of compliance by the State with the terms of the settlements was eventually deemed satisfactory and the cases were dismissed, with the exception of the American with Disabilities claim, which is still pending.

Mr. Niss discussed the Supreme Court ruling in *Walker v. Montana* (EXHIBIT #8 - 11/08/2007 meeting materials). He reviewed Mr. Walker's history of incarceration in both Colorado and Montana. Mr. Niss said as a result of the Supreme Court opinion, the DOC revised its policies and said that the situation has improved. The monitoring committee was ordered to report to Judge Neal.

Mr. Niss noted that a member of the monitoring committee was present at the committee meeting - Mr. Donald Harr, of Billings. Mr. Niss reviewed the committee's findings as presented to Judge Neal: *Final Report to the Court* (EXHIBIT #6 - 10/1/2007). Mr. Niss said the concerns identified on page 20 of the Final Report address prison conditions that the prison could do little to address or change. Mr. Niss said it is that list upon which he based his recommendations and noted that Judge Neill, in his closing comments, there is much in the Final Report which should be addressed by DOC and considered by appropriate legislative committees. Mr. Niss said the Law and Justice Interim Committee is the appropriate legislative committee.

SEN. MCGEE asked Director Ferriter if he is aware of the Walker case and of the recommendations made. Director Ferriter said he is aware of the case but that he was not the Director at the time it occurred. SEN. MCGEE asked Mr. Niss and Director Ferriter if they would recommend that a subcommittee be created to formulate recommendations to bring back to the full Committee. Ms. Heffelfinger said a subcommittee could be formed and it is a question of how many meetings would be needed. SEN. MCGEE said he would prefer a "working group", rather than a subcommittee. Ms. Heffelfinger said a working group is considered a public meeting and would require public notice and staff support. SEN. MCGEE said he would make a decision by the end of the day.

Mr. Niss distributed a copy of the jail standards currently in place for mental health standards (EXHIBIT #9) and said at this point, they are complied with on a voluntary basis. The standards were written by the Sheriffs' and Peace Officers Association, which asked its members to implement the standards. If compared to the six minimal requirements listed in his Sept. 14, Legal memo, it is apparent that the Sheriffs' and Peace Officers standards do not meet Eight Amendment standards. Mr. Niss said he has discussed the standards at length with the President of the Association and that the President said the standards were written so that all jails could comply.

Mr. Niss said the question still remains regarding what the situation is in county and municipal jails. He said there is not a lot of information but cited one resource -- the Montana Advocacy Program survey, published in September, 2000 (EXHIBIT #10). Mr. Niss said he used some of the survey conclusions as the basis of some of his recommendations.

Mr. Niss also briefly referenced the newly-filed case in Park County - *Greenwood V. Park County* (EXHIBIT #11), and explained the premise of the case. He said it is clear to him that counsel for Mr. Greenwood has read and understands the Walker decision. **TAPE 6 - SIDE A** Mr. Niss discussed several particular issues in the case.

Mr Niss presented three recommendations for consideration by LJIC:

- take testimony as to the standards and operation of the mental health treatment program at MSP; that testimony focus on what DOC did to respond to the Walker case, and that the Committee write legislation to establish a procedure to reduce the possibility of misdiagnosis of mental illness at MSP;
- use the monitoring committee's Final Report to the Court (EXHIBIT #6 - 10/1/2007) as the basis for legislative changes; and
- establish a minimal reporting system for city and county correctional facilities to find out what they are doing in regards the mental health treatment programs.

Mr. Niss said he would not recommend legislation to create a mental health standard for county and municipal jails, as some states have done, because they are not state-funded.

SEN. MCGEE thanked Mr. Niss for his detailed presentation and said the work was valuable to the Committee.

### **Department of Corrections Response to Mental Health Legal Issues**

**Diana Koch, Chief Legal Counsel, DOC**, distributed a memo regarding constitutional standards for mental health treatment in prisons and detention centers (EXHIBIT #12). Ms. Koch said the Walker case was not about mental health treatment in the prison, it was about how the prison chose to handle an unruly inmate. She discussed findings of fact, conclusions of law and order from the District Court case (*State of Montana v. Walker*):

- After 14 days of testimony from doctors and many others, Judge Neill ruled that the testimony was credible but could not find that Mr. Walker suffered from a mental disease.
- Judge Neill found that the BMPs were appropriate ways to deal with an unruly inmate.
- Judge Neill's findings also dealt with the issue of medication and revealed that Mr. Walker exhibited aggressive behavior, whether or not he was on medication. Expert testimony was given that he suffered from Attention Deficient Disorder.
- The holding of the Court said it found that if BMPs exacerbates an inmate's mental illness, then it violates the Eighth Amendment of the Constitution.

Ms. Koch challenged the Committee to find any specific statement in the Supreme Court opinion that Mr. Walker was mentally ill.

Ms. Koch covered several other discussion points:

- As a result of the Walker case, that BMPs were revamped and DOC worked with Dr. Mark Harr of Billings to develop the changes. Ms. Koch predicted that if Mr. Walker was an inmate at MSP today, he would function well under the revamped BMPs.
- The Quigg case is an indication of how the Montana Supreme Court views the Walker case because it declined to apply the rulings of the Walker case to the Quigg case. It ruled that the Walker case is limited to its facts and that DOC had not violated Eighth Amendment standards in the Quigg case.
- The Law and Justice Committee can draw only a very limited amount of information from the Walker case. It can be concluded that MSP was using BMPs that the Supreme Court took exception to, and the BMPs were changed. The Final Report said it would be very nice if MSP has more resources to with which to treat mentally ill offenders, but did not address it further. The LJIC may want to consider requesting additional funding for DOC for mental health professionals in the prison, as DOC did in the 2007 legislative session.

#### **TAPE 6 - SIDE B**

- Regarding the lawsuit against DOC for violations of Eighth Amendments, rights are not violated simply because of staff shortages. Only when a prison official knows of a serious risk to an inmate's mental health, and deliberately disregards it, would DOC be in violation of the Eighth Amendment Standards.
- The class action suits after the 1991 prison riots are ancient history and were resolved in 1995, except for the American with Disabilities Act issues. The Prison Litigation Reform Act in 1996 would not allow those suits to be tried today.
- The Walker case was decided in April 29, 2003, and with two full sessions having passed, there is nothing left for the Committee to address.

SEN. SHOCKLEY asked if Judge Neill made the final judgment. Ms. Koch said yes, and noted that the case was dismissed after the revised BMPs were submitted and after the reports to the Court said DOC was not violating inmates' constitutional rights. SEN. MCGEE asked for copies of the judgment to be provided to Committee members.

### **HJR 50 - INVOLUNTARY CIVIL COMMITMENT PROCESS & COSTS PANEL**

SEN. MCGEE asked the panelists to present their perspectives on the issue of involuntary civil commitment and to provide comments on the HJR 50 draft survey (EXHIBIT #13).

**Bill Kennedy, Yellowstone County Commissioner, & Chair, Health and Human Services Committee for Montana Association of Counties (MACo)**, said HJR 50 was turned into a study bill in the 2007 session at the request of MACo. Mr. Kennedy discussed that a MACo survey was done several years ago on the number of commitments per county and the amount spent. A piece of the survey ended up including criminal commitment data, which is a very different issue than that of involuntary commitment. Mr. Kennedy said his remarks today would be strictly about civil commitments.

Mr. Kennedy said the civil commitment issue has come before the last three legislatures. Counties are involved because they are statutorily required to pay for the evaluation process for the commitment. Mr. Kennedy said that MACo wants to know:

- the number of involuntary commitments for each county.;
- the dollar amount spent per county per calendar year;
- the amount of time taken by each county for the evaluation process;
- an average number of days for an evaluation process, if there is one;
- the facilities used;
- the cost per day of the facility; and
- how to deal with transport issues.

Mr. Kennedy said it is difficult for counties to plan their budgets because it has no way to estimate involuntary commitment costs. Many counties struggle with the impact of high commitment costs. Mr. Kennedy noted that one county had such an enormous bill, it had to lay off the county road crew for two months in order to have the funds to pay the bill. County budgets are very tight and counties don't want the mental health providers to absorb the costs either. Counties are going to need resources to help pay these costs and the HJR 50 survey should give good information that will help determine what those resources may be needed.

**Joan Daly, MS, LCPC, Director, Billings Clinic**, said the Billings Clinic is the major provider for mental health evaluations during the commitment process for the eastern half of Montana. She said it is a very cumbersome process. Ms. Daly discussed several issues of concern to the Billings Clinic:

- a mechanism to find out how many of the people being committed have insurance or are uninsured -- the cost billed out for an insured versus an uninsured person differs;
- length of stay -- there is too great a degree of variability between counties;
- inconsistency of the process -- the hospitals and counties don't always agree on what should be done.

Ms. Daly said providers want to be a party to the process and to provide good service to communities and that Yellowstone County does a lot of courtesy commitments for other

counties, which have been very effective. Ms. Daly said she dedicates a great deal of staff time to the commitment process and said from the Clinic's point of view, she would like:

- the commitment process to be streamlined and consistent from county to county;
- education for mental health issues, particularly for County Attorneys;
- a determination of liability when the person is discharged from the hospital's care, and
- funding.

Ms. Daly said the Clinic does not randomly commit people and that co-occurring disorders, such as alcoholism, can make it difficult to properly diagnose an individual. The doctors take the commitment process very seriously. SEN. MCGEE asked if the County Attorneys may be concerned with trying to avoid incurring costs. Ms. Daly said yes.

**Merle Raph, Toole County Attorney, also representing Montana County Attorney's Association (MCAA)**, discussed the commit process from the point of when the county becomes involved by filing a petition for involuntary commitment. He said persons from his area are usually placed in Benefis Hospital in Great Falls and that the hospital has been very accommodating. If a bed is not available there, then the County has to hold the person until a bed is found. The person is held in the least restrictive means possible, so they are not held in a jail cell. A conference room is used frequently, which is a very labor intensive process because the person has to be constantly monitored until transferred to a facility for evaluation.

Mr. Raph, regarding the outcome of *In the matter of the Mental Health of K.G.B.*, described the process and steps that must be followed before a person can be taken to a facility, and agreed that the process needs to be streamlined. He said once the person arrives at the facility, a psychiatric exam is done. Frequently, the person has been stabilized by this point and wants to return to the community for treatment, but most small communities do not have the resources to do this. Another complicating factor is scheduling difficulties. The work load of doctors, judges, law enforcement officers, and defense counsels make it very difficult to set a time when everyone can get together to deal with the commitment.

Mr. Raph said County Attorneys would be very willing to get training to help them deal more effectively with the commitment process but said that County Attorneys have to dovetail the findings by the psychiatrist into the factual findings of the petition for involuntary commitment.

TAPE 7 - SIDE A

Mr. Raph said transportation is an issue and that it would be helpful if more local resources were available because that would lessen the likelihood of a person having to be committed, as well as decrease the demands placed on law enforcement. He said the only issue not on the survey was that of the abuse of testing potential. Ms. Heffelfinger said that could be added to the survey.

**Brett Linneweber, Park County Attorney, MCAA Board Member, and Park County Commissioners Representative**, described his previous week's activities as a county attorney. Events included dealing with a 1 a.m. phone call requesting an order for an involuntary commitment for a woman exhibiting signs of mental illness. Law enforcement officers brought her to the police station and a mental health professional was available to evaluate the woman. The professional recommended that the person needed further evaluation because of the behaviors exhibited. Another case dealt with an intoxicated person and eventually, it was determined that there were no mental health issues involved.

Mr. Linneweber said liability issues are a huge problem for jails and problems are often related to mental health issues. The potential impact to counties is an issue that must be addressed.

Mr. Linneweber discussed the Greenwood case and said the Committee should not be concerned. He said Mr. Greenwood is a repeat convicted felon and to date, was not diagnosed with any mental health problems. It is alleged that Mr. Greenwood violated his probation conditions and the judge requested a bench warrant. County officials were under a valid court order to arrest Mr. Greenwood and did so. His attorney requested an evaluation, and he was evaluated multiple times. Mr. Linneweber said that he has to rely on what the mental health professionals recommend and is concerned about reports that county attorneys are disregarding the advice of the mental health professionals. He said he has never denied an involuntary commitment request. Mr. Linneweber said he is working with MACo and he does not think the Greenwood case will result in a crisis for counties but there is not a guarantee that it won't become a huge case and detrimental to counties.

Mr. Linneweber said he is a member of the local mental health council and is very concerned about the constraints on the system. He repeated his invitation to the Committee to use MCAA as a resource in its work.

**Ed Amburg, Director, Montana State Hospital**, provided data on MSH (#14) and said that the report lists per diem costs for fiscal year 2008. He explained how the per diem is determined and what the rate for each unit in the hospital is. Mr. Amburg also discussed:

- MSH recidivism data for fiscal year 2007;
- number of admissions by count and the different types of admissions;
- data on length of stay, mean and median commitment lengths, and emergency detention information;
- MSH admission trends in fiscal year 2007; and
- admissions by day of week and time of day.

Mr. Amburg agreed there are many challenges to providing local services and said the commitment law is very complex. He said that he did not believe that MSH was being "dumped on" because only the most difficult cases come there. He said that many of the people who end up going through the commitment process would likely be willing to enter an evaluation voluntarily, if that option was available.

Mr. Amburg offered suggestions for possible solutions to some of the problems:

- revise the involuntary commit law to include the interests and needs of the people served;
- more services in communities that are more welcoming and less intimidating to use;
- consideration of community and state needs;
- a physical exam of the individual, because a physical illness or condition is frequently the root of the problem; **TAPE 7 - SIDE B**
- more involvement of medical professionals;
- increased bed capacity;
- changes in the process to allow for expedited initial hearings in local facilities;
- more involvement of county governments, local law enforcement and local hospitals; and
- recruitment of mental health professionals in local and state agencies.

**Kurt Krueger, District Court Judge, 2nd Judicial District, Butte-Silver Bow**, said one reason there are so many commitments from Butte-Silver Bow is the proximity of MSH. He said many of those discharged from MSH have no family or community ties, so they stay in Butte. Judge Krueger reviewed the commitment process and said he can conclude the process in a short period of time because of the short distance to the MSH. He said he can see the perspective from that of communities who do not have facilities close by. He related an anecdotal incident involving a mentally ill individual in a rural county, in which the person, because of unusual circumstances, was transported from White Sulphur to Warm Springs, from Warm Springs to Butte, and back to Warm Springs in the course of getting an evaluation completed. He said Silver Bow County ended up paying the commitment costs, rather than the county that the person was from, due to a petition from that county's County Attorney. Judge Krueger said this example illustrates that small and rural counties don't have the services or resources to deal properly with this issue, and sometimes transfer the burden to other communities.

**Merry Hutton, Community Services, St. Patrick Hospital, Missoula**, said she would discuss the involuntary commitment costs to the Missoula community. She reported that St. Patrick Hospital has a high rate of uninsured patients and served over 500 uninsured patients in 2006, at a cost to the hospital of over \$750,000 for mental health issues alone. She explained that in Missoula, a mental health professional frequently does an assessment in the Emergency Room at the hospital and that last year, there were seven direct commitments to MSH from the ER that did not ever pass through the hospital's Mental Health Unit. Ms. Hutton said 35 patients were seen that voluntarily committed themselves for treatment.

Ms. Hutton said St. Patrick would like to partner with law enforcement and other providers in the community because this is a community problem. St. Patrick's provides one FTE mental health professional in the community, which puts the capacity of professionals that can do evaluations at four professionals. This is in addition to the charity cases. Ms. Hutton said her biggest recommendation would be to fund mental health professionals assigned to courts. This would greatly enhance the process.

Ms. Hutton asked the Committee to carefully consider additional funding for the Missoula Mental Health Court, and to also consider a similar mental health court for civil proceedings.

**Linda Bradford, RN, Director, Neurobehavioral Medicine, St. Patrick Hospital, Missoula, & Montana Mental Health Association Board Member**, said she was in agreement with much of what had been discussed at the meeting and stressed that the hospital's mission is to serve and support the mentally ill and that it will continue to do so. Many of the patients treated at St. Patrick are from outlying communities and no one is turned away. Voluntary commitments are preferable to involuntary, because the patient is engaged and motivated to work with staff to recover. Transportation is a problem for St. Patrick because there is no means to transport patients to and from MSH, for example. Patients are kept at the hospital, which takes up bed space and increases the hospital's costs. Ms. Bradford's closing statement addressed the fact that the cost for caring for the mentally ill is not at all accurate, because the data does not include the enormous amount of charity care provided mainly by hospitals.

Ms. Hutton reported that year-to-date (YTD) 2007, the combined Missoula, Ravalli, and Saunders Counties, were billed by the hospital for more than \$140,031. The hospital received \$77,190.

SEN. MCGEE asked that the panelists give him any input they have regarding the HJR 50 survey.

**John Honsky, RN, Missoula**, said he conducted an independent research project under Gonzaga University's Nursing Department and with the cooperation of the Fourth District Court (Mineral and Missoula Counties). He said the 2005 court records were opened up to him for use in his study. He said it is a prescriptive study of all involuntary commitment petitions for 2005 in the Fourth Judicial District. It is intended to be a prescriptive study and not an inferential study.

Mr. Honsky discussed the results from his study:

- there was a high percentage of co-occurring disorders with physical diseases;
- 90% of the case load came from other counties, 10% of those came from out-of-state; and
- the average length of stay in an evaluation setting was 8.2 days.

Mr. Honsky suggested setting up a standardized system to collect data and encouraging states to follow this population. He said the Supreme Court collects data every year from the District Courts and reported that from 2004-2005, there was an 11% increase in involuntary commitments and a 7% decrease in 2006. He said his research indicates that one out of every 90 Montanans will be involved with the involuntary commit process on a yearly basis.

**TAPE 8 - SIDE A**

SEN. MCGEE asked Mr. Honsky to provide copies of his research when available. Mr. Honsky said he would do so.

Ms. Daly said the precommitment processes in statute include children but there is not a facility to commit them to. She said the Billings Clinic frequently has children in its acute facility who should be committed to an institution but they don't qualify under Medicaid and that this is a huge gap in the system.

Ms. Daly said that the Billings Clinic provides about \$4 million of charity care for mentally health and asked that the survey be sent to hospitals so that their costs can be included in addition to the county costs.

Mr. Kennedy said this issue came to forefront through discussion of how counties paying for precommitment costs and explained that precommitment costs are the costs for the period of time from which the County Attorney files the paperwork until the person is committed to MSH. Another issue is that voluntary commitments are no longer paid for by counties or the State, which has caused problems. He said the system is not uniform across the State and places the burden on the larger cities with mental health professionals and services. Additionally, establishing statewide standards for quality and consistency of services and care should be considered. Mr. Kennedy concluded his remarks by saying that community resources, such as crisis centers and mental health centers, are very important and would have an impact at the State Hospital.

SEN. MCGEE asked Judge Krueger what the likelihood is of a person, who should have been involuntarily committed but for whatever reason is not, ending up in the criminal justice system. Judge Krueger said he did not have statistics but estimated that it would be a fairly significant number, but said also that there is an equally significant number that don't. He said the

Committee's work in this study is to study involuntary commitment but said the issue of voluntary commitment should be studied also. SEN. MCGEE said he is concerned that people don't get the help they need at the involuntary commitment stage will end up in the criminal justice system.

### **Public Comment**

**Kathy McGowan, Community Mental Health Centers (CMHC), Sheriff's and Peace Officers Association, and MCAA**, emphasized that the number one issue, heard over and over, is the need for resources and said it is frustrating for everyone involved because people care and want to do the right thing, but their hands are tied due to the lack of resources. Ms. McGowan said in the last legislative session, all three of the groups she represents requested community resources and that little can change without them.

Regarding charity care, Ms. McGowan said the Community Mental Health Centers contribute large amounts of charity care. The uninsured population is very large and growing, not to mention the group of people not getting served less or not at all.

Ms. McGowan commented on county jails, saying that none of the groups she represents wants to have inmates in their jails who are not being properly cared for. Again, resources are what is needed. However, when counties have tried to pass public safety levies to improve the situation, they have failed. Ms. McGowan said the Sheriffs and Peace Officer Association provides a lot of training but it still comes down to the lack of resources.

Ms. McGowan said she has anecdotal information from other states. She reported that she recently returned from a national conference for CMHCs and heard a moving presentation about the aftermath of the Virginia Tech shooting situation. The presenters's message was to not let these type of mentally ill people fall through the cracks because of the potential for a horrific event, such as occurred at Virginia Tech. Ms. McGowan expressed her concern over the many groups, councils, boards, committees, etc., studying this issue and said she is confused over who is doing what and who is in charge. She said a better approach would be to have a cohesive group all working toward the same purpose and goals.

**Laurie Lamson, Administrator, Business and Financial Services Division, DPHHS**, said one of the responsibilities of the Division is to do the billing and collection for state institutions and residents that are served there. She said she appreciates the Committee's work and consideration of all of the factors affecting this situation.

**Ms. Jacques** suggested the following:

- having a "gold standard" of care for people with mental illness in every jail and detention center;
- get County Attorneys on board through more education and to implement mental health diversion programs from county jails;
- creating a followup coordinator in order to monitor people to make sure they staying on medications, for instance;
- a requirement that all jails provide and perform, within five days, an assessment and evaluation on the determination of mental illness and that the person must be moved to a different facility if treatment can't be provided;
- automated medical records, starting at the local jail level on up to state detention and correctional facilities;

- Crisis Intervention Team (CIT) training for all law enforcement officers and correctional staff;

Ms. Jacques agreed that mentally ill people fall through the cracks and end up in the criminal justice system. She reviewed details and events regarding her son who suffered from mental illness. She said her son was a good student and athlete, but, due to the effect of mental illness in his life, will be labeled a felon for the rest of his life.

**Kathy Day, Policy Director, ACLU, Montana,** urged the Committee to gather data on county jails, as suggested by Mr. Niss, to find out what is going on. She said she routinely receives complaints about county jails and that more needs to be known about the problems.

**Anita Roessman, Montana Advocacy Program (MAP),** said she would provide comment on the HJR 50 survey in writing. She commented that the Committee has heard over and over again that the greatest need is community services. She said she learned in the tour on the previous day's meeting that most offenders are not diagnosed with mental illness until they are in the system and not until they are preparing for probation and parole.

TAPE 8 - SIDE B

**Dr. Donald Harr, Psychiatrist, Billings,** commended the legislators on the level of work going on regarding mental health issues and said much has been accomplished, even though much remains to be done. He said he helped reformulate the civil commitment statute in 1975 and that he remains interested in the issue. Dr. Harr said good changes have been made to improve the statute, which is important for the treatment of the patient and safety of the community. He said that most individuals with mental illness are not dangerous but end up in the criminal justice system as a result of the mental illness. A first and necessary step is to divert these people into appropriate treatment before it becomes necessary to imprison them.

Dr. Harr discussed the issues concerning county attorney involvement in the involuntary commitment process and suggested that the Committee encourage the Attorney General to monitor the county attorneys to see that they follow the statute, and to work to create a more consistent process.

Dr. Harr said his 2004 evaluation of the prison system is available to the Committee, if needed, and noted that the mental issue was somewhat incidental to the main purpose of the monitoring. He said his report was not a condemnation of prison staff but a statement on the fact that it was understaffed.

### **Roundtable Discussion with the State Public Defender Commission**

#### **Update on Performance Goals**

Ms. Gervais referred members to her report from the Legislative Finance Committee regarding performance and outcome measures (EXHIBIT #3), as presented earlier in the meeting. She said page 4 of EXHIBIT #3 addresses the program, goals, and outcome measures for OPD.

**Harry Freebourn, Administrative Director, Office of State Public Defender,** discussed in detail each of the three goals and outcome measures agreed upon after meeting with legislative staff several weeks ago (page 4, EXHIBIT #3).

SEN. MCGEE asked when outcome measure data would be available. Mr. Freebourn said the first round of information would be available in late November and would be more narrative than numbers but that with time, specific numbers would be available.

## **Statutory Report, Update on Activities -- Commission and Staff**

**Jim Taylor, OPD Commission Chair**, introduced members of the Commission -- Vic Miller, Wendy Holton, Jennifer Hensley, Mike Sherwood, Steve Nardi, Dan Donovan, Tara Veazey; and staff -- Randi Hood, Dr. Laura Wendlandt, Sandra Law, and Bonnie Martello.

**Randi Hood, Chief State Public Defender**, updated the Committee on some of the policies and procedures adopted by the Commission over the past year. Ms. Hood directed the Committee to the *Montana Public Defender Commission - Fiscal Year 2007 Report* (EXHIBIT #15) and discussed two of seven new policies:

- Policy 105 - Determination of Indigence -- Ms. Hood said the purpose of the policy is to determine who is or is not eligible for public defender services. She said the Legislature provided provisions in the statute to contest denial of public defender services and that eligibility requirements have been challenged frequently. **TAPE 9 SIDE A**
- Policy 110 - Client Grievance Procedure - Ms. Hood said it is was important to have policy and procedure in place to deal with dissatisfied clients, which has always been a factor in public defender work. This policy sets out a procedure for a client to follow to resolve a problem. Ms. Hood briefly explained the steps for filing a complaint.

Ms. Hood discussed a staffing report, also in EXHIBIT #15, describing how public defender services are being provided across the state. She reported that there are 192.5 FTE, of which over 90 are attorneys. Ms. Hood said she is very pleased with the qualifications of attorneys providing public defender services.

Ms. Hood related case load and case count information (EXHIBIT #15 - last section in report). She said that currently there are about 30,000 cases, most of which are open. She said the case management system was very recently rolled out and that staff is undergoing training on how to use the system. She said she would provide more accurate caseloads and costs at the next meeting, after the new system is fully in place and operational.

SEN. MCGEE asked if contract attorneys are used. Ms. Hood said approximately 200 private practice attorney are used and provide services in all 11 regions.

Ms. Hood said OPD has a full-time training officer who conducts trainings statewide and noted that some of the trainings have been opened to the public. She provided details on training sessions.

**Chairman Taylor** said there are detailed standards for every type of case and that they are closely followed. He said the most significant change made in the last year has been in case load. The standard was rewritten and currently recommends that a felony attorney should not have more than 50 active files going at one time. He said that the Commission is developing a flexible model that depends upon current case load and type of case. He said there will be hard data available soon to indicate where resources need to set up.

**Dr. Laura Wendlandt, Psychiatrist**, said she is very pleased that the 26-page protocol booklet has been completed (back of EXHIBIT #16). Dr. Wendlandt provided a general overview of the protocols using a PowerPoint presentation, *Mental Health Expert - OPD Protocol Governing Referral and Examination*, (EXHIBIT #17).

SEN. MCGEE asked how the mental health definitions were formulated. Dr. Wendlandt said some of the definitions were obtained from the Diagnostic and Statistical Manual (DMS) and that others were found in the Montana Code Annotated. She said several global terms are also used. SEN. MCGEE said he is concerned is that prosecuting attorneys and defense attorneys will use different definitions and said that the definitions should be based on statute. Dr. Wendlandt said the definition for mental disorder is in the MCA.

Dr. Wendlandt said the Committee can make recommendations for additional definitions, if needed.

**TAPE 9 - SIDE B**

SEN. MCGEE thought that too many definitions have been discussed and said the Committee may have to create statutory language in order to get everyone on the same page. He said it is confusing to those working in the system. Dr. Wendlandt said she would gladly assist the Committee in working to establish statutory definitions.

REP. STOKER asked if the protocol complies with Health Information Privacy and Portability Act (HIPAA) requirements. Dr. Wendlandt said yes, and that a form has been created that meets all requirements and that clients sign off on the form.

**SECRETARY NOTE: At the request of SEN. SHOCKLEY, the next portion of the meeting minutes are verbatim minutes. NOTE: the meeting was audio tape-recorded off-site in a large room with one microphone. The sound quality of the audio tapes is poor and inaudible at times. These portions are noted in the minutes.**

SEN. SHOCKLEY: Dr. Laura, my (inaudible) wasn't about your presentation. An in-house psychologist is money well-spent. The clerical people, like your (inaudible)- that's what I've heard and I've talked to them... it has some glitches, like all new software. The judges in Ravalli County - and I've talked to all of them - are either ecstatic about you or like you very much. DOC likes you and the County Attorneys like you. (INAUDIBLE COMMENT FROM DR. WENDLANDT, LAUGHTER).

SEN. SHOCKLEY: Knowledgeable county attorneys and deputies know that if you have a good defense counsel, it's really best for everybody. I had Terry provide me with the amount of money that you collected last year from clients. Unless he didn't put the decimal point in the right spot, it was \$10,749.84, and I would imagine Ravalli County collected more than that before you took over. So, your defense?

**Steve Nardi:** We were lucky to get that. (SECRETARY NOTES THAT MR. NARDI WAS NOT SEATED NEAR THE MICROPHONE AND HIS RESPONSE WAS MOSTLY INAUDIBLE. THE SECRETARY TYPED WHAT WAS DISCERNABLE)

SEN. SHOCKLEY: Well Steve, I did this for years too, you know.

Mr. Nardi: But, I mean, normally... I did it too, for 30 years. We are on the tail end of the...(INAUDIBLE) restitution, all the other things come off the top and if a guy has a nickel left, we get it.

SEN. MCGEE: I would just like to ask everybody to please use the microphone.

Mr. Nardi: I wasn't going to answer that question..(INAUDIBLE).

SEN. SHOCKLEY: Randi, do you want to answer?

Randi Hood: Mr. Chairman, Senator Shockley, you'll see that in the first four months of this year, we've doubled that amount. What happens..

SEN. SHOCKLEY: Well, actually, it is almost the same amount, at least... you were \$10,749 and....

Ms. Hood: Right, but it was in a much shorter space of time.

SEN. SHOCKLEY: Yes.

Ms. Hood: So, I think that we'll more than double over this year.

SEN. SHOCKLEY: At this rate, you'll triple.

Ms. Hood: No, I'm pessimistic on this one. (INAUDIBLE) Steve is absolutely right, most criminal defendants do not walk in with the thousand dollars that's going to pay their fees and fines and public defender fees on the day they get sentenced because they are poor people. So, money trickles in. The defendant goes in and pays his fifty dollars each month to restitution and it is divided up between a multitude of sources and there is hierarchy in it and we are not very high in that. Restitution and court costs always come first and the other pieces are taken at the end, so the money trickles in, first of all. Second of all, the law requires a judge to make a specific finding that the person has the ability to pay before he can assess any public defender fees or any other costs against the defendant. We have fought a few battles on that where we have asked...argued a judge can't impose those fees on our clients because they don't have the ability to pay. There are other instances in which we have not, because frankly, the assessment the judge is making is probably going to be less than if he found out how much we were going to be spending on the case. A judge is doing \$200 on every case and it didn't seem to be in the best interest of our clients. This is an ongoing concern of ours and an ongoing process for us. Sandra Law, who is our financial advisor, has tried to encourage or demand that people let her know when any judge assesses public defender fees so that we can track these amounts. We are also working with primarily the clerks of court in terms of if they collect any money on our behalf, how they get it to us. We are still dealing with cases where a portion of the work happened in 2006, before July, and then cases that came afterwards. We are having to divide those monies up. So, it's not an easy process. Beyond that, as I told you, we have the process whereby our attorneys have entered into some agreement with clients that we think have the ability to pay us outside of the court involvement. There hasn't been a lot of those cases but it's certainly seems to be a number that is increasing, and as our attorneys get more familiar with doing it and with the requirement that they do it... because frankly, most of the attorneys get the case and they start work and they don't think about, "should I be getting this guy to pay me back for some of this work".

SEN. SHOCKLEY: We had a different philosophy but I did do it for quite a few years. I had clients that had more money that I did, in land, not cash flow. But your protocol says to bill the client and the judges in my county - maybe not Judge (INAUDIBLE) in Darby, I don't know what she is doing, really - but the District Court judges and the JP judges and the City of Hamilton

judge says - forget the Hamilton judge, I forgot to ask him - but the JPs and District Court judges said they have never collected any money, you've never presented any bills to them to put in a judgement.

Ms. Hood: Mr. Chairman, Sen. Shockley, we only do that when we, based upon the indigency information that is provided to us when we truly believe that the client has the ability to pay, and we have entered into some five agreements with clients to pay. When a judge has requested us to provide the information to the court, we will provide that information, as long as the court will follow the law and make a determination that the client has the ability to pay.

SEN. SHOCKLEY: As I understood it, you took to the Supreme Court a case that said the judge doesn't have the right to ask whether the person has the money or not or has the ability to pay or not.

Ms. Hood: Mr. Chairman, Senator Shockley, that was the (INAUDIBLE) case, that actually was a writ and what it was was that judges do not have the right to review the determination of indigency, except when the clients themselves raise the issue. It did not relate to the court requiring (INAUDIBLE) indigency. The court always has, in sentencing, the ability, by statute, to make the determination in whatever fashion the court chooses to do it.

SEN. SHOCKLEY: If the defendant raises the issue, now that the judge thinks that the person has the money or not if the county attorney, the county attorney can't raise it, only the defendant, so if he's got a good deal, he ain't gonna raise it. Who's looking out for the taxpayer?

Ms. Hood: Senator Shockley, I don't quite ...do you mean at sentencing?

SEN. SHOCKLEY: During the process, as I understand it, before (INAUDIBLE), the judge would ask... first off, the judge made the determination of whether the person was indigent or not and then at sentencing, they would determine, probably based upon what the probation officer found out, whether the person had the ability to pay them, or would likely pay in the future. Then, the judge could make it part of the judgement. That's not what is happening now. And now, as I understand the law - I may misunderstand it - the judge can't say, "why isn't it in the judgement that this person pay his fees:, and the county attorney cannot either. The only person that can say, cause any of the judges to look into the fact of whether the person is or is not indigent, is the indigent person and he would only do that if he thought he was indigent and you thought he wasn't.

Ms. Hood: Senator McGee, Senator Shockley, I think that you may be confused with two different types of proceedings. If we determine that a person does not qualify, that person can raise the issue to the court, and then their financial situation is before the court.

SEN. SHOCKLEY: I understand that.

Ms. Hood: That's one situation. When the judge is sentencing someone, the judge has a variety of ways to determine whether someone has the ability to pay. The judge can inquire of the defendant, certainly, and say, "You know, you look able-bodied. I don't see any reason you can't pay. You got any reason you can't pay?" Judges do that all of the time because its part of the sentencing structure.

SEN. MCGEE: And that's the important part, I think, Senator Shockley.

SEN. SHOCKLEY: Right, so the judges in my county that aren't collecting the money, aren't putting it in the judgement are the ones that I should talk to?

SEN. MCGEE: Right.

Ms. Hood: If the court makes a finding that the person has the ability to pay, the court can impose it.

SEN. SHOCKLEY: And the court can inquire, in sentencing, as to whether or not this person has the ability to pay.

Ms. Hood: I certainly think so.

SEN. SHOCKLEY: OK.

Mike Sherwood: Senator Shockley, I'm sure you're aware, at least in the (INAUDIBLE) setting, there is almost universally, unless the defendant waives it and the prosecution agrees, there is a presentence report and a part of that report is full disclosure (INAUDIBLE) as to his financial position. So at that point, it is no longer confidential communication with the Office of the Public Defender. It is now, in fact, information (INAUDIBLE) presumably accurately disclosed to the court.

SEN. SHOCKLEY: At that point, when the judge gets the PSI, he can say, "Oh, I think this guy can pay. Tell me what the bill is.". Right?

Ms. Hood: Then he (INAUDIBLE).

SEN. SHOCKLEY: And then he can put it in the judgement, correct? That's what (INAUDIBLE). So if the judges aren't doing that, then I should be taking this up with the judges, right?

SEN. MCGEE: Correct, because it is part of the sentencing, not the part of the (INAUDIBLE) determination of indigence.

## **END OF VERBATIM MINUTES**

SEN. MCGEE asked if there were further questions.

**Mr. Taylor** said that the mental health protocol is really a significant cost saving device for the State and that it prevents paying for unneeded services.

**Jennifer Hensley** said that as one of the fiscal conservatives on the Commission, she asked what prosecution pays for similar professionals and the answer across the board around the State were whatever they are asked to pay. She said that a mental health professional simply submits a bill and that there is no standard for an hourly rate. She said that OPD's mental health protocol is the first time within the State of Montana, places a cap on rates. She said she thinks it is a very fiscally prudent move by the Commission.

SEN. MCGEE said he appreciated that very much and that his concern has no bearing on the protocol per se, nor the fact that the Commission was limiting the amount of mental health investigation. His concern was the lack of commonality in mental health definitions being used by DPHHS, the prosecution, the defense, and other involved parties. He said he was complimenting the Commission for its protocol and that he was 100% in favor of it.

**Mr. Taylor** said he had two brief items to bring to the Committee's attention. One is the extraordinary cost the OPD is incurring trying to talk to clients at the jails. He said under the current system, when an inmate calls out it costs two dollars a minute and OPD pays those costs. He said OPD is trying to get it resolved so that those costs don't get charged one state agency to another because it is not a good use of state resources. He said another matter is attorney-client telephone conversations are being recorded and that the OPD is trying to find out who has access to the recordings. He said the OPD may be asking for a legislative fix if that matter isn't resolved.

SEN. MCGEE said the rules update and rule review will be postponed until November 30, 2007.

#### **PUBLIC COMMENT**

**Sheryl Wood, MACo**, said she would continue working with Ms. Heffelfinger on the HJR 50 draft survey and said she is at the Committee's disposal.

**Lillian Gunder, Stevensville**, discussed her experience with relatives who were diagnosed with mental illnesses. She said there would be fewer cases of mental illness if people weren't being needlessly medicated. Ms. Gunder submitted written comments (EXHIBIT #18).

TAPE 10 - SIDE A

**Pastor Cook, Stevensville**, spoke of how his children has been affected by mental illness after being removed from their home by Child Protective Services. Pastor Cook said he and his family have been treated poorly by the DPHHS. He agreed that a standard definition for mental illness is needed and recommended that families be very wary of Child Protective Services.

**Kandi Matthew-Jenkins, Missoula**, entered into the record a letter from David J. Moree, relating to his involvement with the court system and Public Defender Office (EXHIBIT #19). Ms. Matthews-Jenkins read the testimony to the Committee. Ms. Matthews-Jenkins said she has been advocating for Mr. Moree for almost two years, and said she was hopeful that the public defender system would work, but that she does not feel that has been the case. She said she knows of cases who have contacted Ms. Hood with no response, such as herself. She also said she feels the taxpayers of Montana are being deceived because Ms. Hood, the State Public Defender, is married to **John Connor, Department of Justice**. She made some disparaging comments about Ms. Hood and Mr. Connor.

Ms. Matthews-Jenkins said it is her personal opinion that the Communist Manifesto is being implemented in America. She discussed several issues that she feels proves her case. She quoted a February 2, 2007, newspaper article from the *Missoulian* about the effects of unneeded medications, saying that people become calm, complacent, and addicted.

TAPE 10 - SIDE B

#### **COMMITTEE DISCUSSION AND INSTRUCTIONS TO STAFF**

Ms. Heffelfinger said a summary regarding the Request for Proposals (RFP) for the \$200,000 mental health study (EXHIBIT #20) is in the meeting materials and that the Legislative Council wanted the study to be responsive to the needs of LJIC's study of criminal mental health. Ms.

Heffelfinger said if any Committee member has comments or questions to please contact her before November 14, 2007.

Ms. Heffelfinger announced she will be attending a national conference on mental health in Pittsburgh, Pennsylvania, on the Intercept model as legislative staff and that Deb Matteucci is attending also.

SEN. MCGEE asked Ms. Matthews-Jenkins to stand before the Committee. He said he has known John Connor for thirteen years and Randi Hood for several years. He said that they have been married for a number of years. He said he took great exception to the way Ms. Matthews-Jenkins categorized their relationship. He said it was damaging to her credibility before LJIC to make such comments. SEN. MCGEE asked that his comments be noted in the record.

Regarding the SJR 24 study on drug offenders, SEN. MCGEE asked for a breakdown of first, second, and third drug possession offenses, and numbers of probation and parole violations related to drugs and resulting in revocations. He also wanted a breakdown of the data into the categories of male, female, judicial district, county, and race.

SEN. MCGEE asked Mr. Daubert to prepare a written document outlining his suggestions and concerns. He asked to include Mr. Crichton's suggestion of co-occurring mental health issues with drug abuse and who in the county jails, in pre-release, and other programs.

SEN. JENT asked if the drug statistics would include possession offenses only or if drug sale offenses could also be included. SEN. MCGEE agreed. SEN. MCGEE said that the issue of plea bargains also has to be considered. SEN. JENT said discussions have revolved around the problem of recidivism and that parole or probation is meaningless if the person is going to end up back in prison anyway.

REP. STOKER asked if a subcommittee would be appointed. SEN. MCGEE said he had to digest the information and confer with SEN. JENT after SEN. JENT has reviewed some of the information. He said if he does create a subcommittee, he would appoint SEN. JENT, REP. KERN, REP. STOKER, and another Republican senator.

REP. STOKER said he has protocols from the Las Vegas Police Department on how officers are to conduct themselves when dealing with a mentally ill person. He said he would like to have copies distributed to the members. SEN. MCGEE said the Committee could look at legislation to establish statewide protocols. REP. STOKER asked Ms. Heffelfinger to try to find a copy of the new version of standards for law enforcement agencies. He said it is a how-to protocol book. He said his version is dated 1996 and said he would like a newer version. Ms. Heffelfinger said she would do that.

Ms. Heffelfinger said there are two action items: approval of the July 13, 2007, meeting minutes and approval of the HJR 50 draft survey.

REP. EBINGER **moved** to accept the July 13, 2007, minutes as written. The **motion passed** on a voice vote.

Ms. Heffelfinger said there were two items suggested as additions to the survey: private insurance policy information and hospital costs being billed to counties. SEN. MCGEE asked if insurance is paying back the county or the hospital. Ms. Heffelfinger said insurance is supposed to be the second payer, if the person can't pay. It is before the county gets billed. SEN. MCGEE said HJR 50 is specific in that it talks about counties, not hospitals. He asked if the study was going to be expanded to include hospitals. **Ms. Matteucci** said the panelists indicated that in order to get an accurate picture of how the civil involuntary process impacts counties, hospitals must be looked at first because that is who is delivering the care.

**Sheryl Wood, MACo**, said counties will have information only on what they were billed for. She said that information is needed from hospitals and local health facilities and thought it could be gathered. Ms. Heffelfinger said that would be a be a different survey and asked if a different survey should be drafted. SEN. MCGEE said he would work with Ms Heffelfinger on that, if the Committee will allow them to develop and send it out. He said the survey will target hospitals and other facilities, not the counties. He said a cover letter will explain the purpose of the survey.

SEN. JENT **moved** to approve the draft HJR 50 survey. The **motion passed** on a voice vote, SEN. JUNEAU voted by proxy, given to SEN. JENT.

#### **ADJOURNMENT**

With no further business before the Committee, SEN. MCGEE adjourned the meeting. The next meeting for the Law and Justice Interim Committee was scheduled for November 30, 2007, in Helena.

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