



PO BOX 201706
Helena, MT 59620-1706
(406) 444-3064
FAX (406) 444-3036

Law and Justice Interim Committee

61st Montana Legislature

SENATE MEMBERS

JOHN ESP
GREG HINKLE
CAROL JUNEAU
JESSE LASLOVICH
LYNDA MOSS
JIM SHOCKLEY

HOUSE MEMBERS

SHANNON AUGARE--Chair
RON STOKER--Vice Chair
BOB EBINGER
DAVID HOWARD
MIKE MENAHAN
KEN PETERSON

COMMITTEE STAFF

SHERI HEFFELFINGER, Research Analyst
VALENCIA LANE, Staff Attorney
DAWN FIELD, Secretary

MINUTES

December 17, 2009

Room 137, State Capitol
Helena, Montana

Please note: These minutes provide abbreviated information about committee discussion, public testimony, action taken, and other activities. The minutes are accompanied by an audio recording. For each action listed, the minutes indicate the approximate amount of time in hours, minutes, and seconds that has elapsed since the start of the meeting. This time may be used to locate the activity on the audio recording.

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COMMITTEE MEMBERS PRESENT

REP. SHANNON AUGARE, Chair

SEN. JOHN ESP
SEN. GREG HINKLE
SEN. JESSE LASLOVICH
SEN. LYNDA MOSS
SEN. JIM SHOCKLEY

REP. BOB EBINGER
REP. DAVID HOWARD
REP. MIKE MENAHAN
REP. KEN PETERSON

COMMITTEE MEMBERS EXCUSED

REP. RON STOKER, Vice Chair
SEN. CAROL JUNEAU

STAFF PRESENT

SUSAN FOX, Executive Director, Legislative Services Division (LSD)
VALENCIA LANE, Staff Attorney
DAWN FIELD, Secretary

AGENDA & VISITORS' LIST

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

COMMITTEE ACTION

The Law and Justice Interim Committee approved the September 28 & 29, 2009, meeting minutes, as written.

CALL TO ORDER AND ROLL CALL

00:00:01 REP. AUGARE called the Law and Justice Interim Committee (LJIC) meeting to order at 3:02 p.m. The Secretary took roll, SEN. JUNEAU and REP. STOKER were excused (ATTACHMENT #3). REP. AUGARE reviewed the tour of the Warm Springs Addiction Treatment and Change (WATCh) program, Department of Corrections (DOC) in Warm Springs and the meeting agenda.

DEPARTMENT OF JUSTICE: VEHICLE TITLE REGISTRATION (MERLIN)

00:01:34 **Tim Burton, Deputy Director, Chief of Staff, Department of Justice (DOJ)**, discussed the rationale for implementing the MERLIN system, as well a time line of the process to date. He said the MERLIN system is finally beginning to work as designed and the majority of problems and malfunctions have been dealt with.

00:09:44 **Brenda Nordlund, Administrator, Motor Vehicle Division, DOJ**, updated the LJIC on the current status of the MERLIN system, saying that there has been demonstrable progress in dealing with the backlog. Ms. Nordlund discussed several charts relating to the improved status of the MERLIN system:

- Title and Registration Bureau Weekly Production (EXHIBIT #1);
- County Treasurer Office & Dealer Title turnaround (EXHIBIT #2);
- Other Title Registration Bureau (TRB) turnaround time (EXHIBIT #3);
- Titles Pending Approval (CTO work) (EXHIBIT #4); and
- Records Selection turnaround (EXHIBIT #5).

00:17:00 Ms. Nordlund reported on the SABRES (financial) portion of MERLIN. She stated that, in a recent report to the Performance Measures Subcommittee of the Legislative Finance Committee, the DOJ shows earned income in excess of \$54 million. She also reported that approximately \$51 million has been collected and allocated, leaving an uncollected balance of \$5.7 million. Ms. Nordlund said that great progress has been made and that the interface between MERLIN and the state accounting system is working smoothly.

00:19:33 **Pat Gervais, Legislative Fiscal Division**, reported on the Legislative Finance Committee oversight activities related to MERLIN.

Public Comment

00:23:18 **Rhonda Wiggers, Montana County Treasurers Association**, said that while the county treasurers appreciate the great strides taken by DOJ, they have had to deal with additional issues since the last report from the DOJ. She said that several county treasurers were present and wished to discuss their experiences and problems with the MERLIN system. Ms. Wiggers also presented written comments on behalf of the Montana County Treasurer's Association, which also

included several recommendations from the Association on how the system could be further improved (EXHIBIT #6) and a letter from Vicki Zeier, Missoula County Clerk and Recorder/Treasurer (EXHIBIT #7).

- 00:26:10 **Kevin Larkin, Park County Treasurer**, testified to difficulties in working with MERLIN system, specifically title work.
- 00:27:51 **Anita Crane, Senior Motor Vehicle Clerk, Chief Title Officer, Park County Treasurer's Office**, testified that a primary concern is communication with the TRB, saying that the wait time to have questions answered is very frustrating to the treasurers and the customers. She also discussed problems with the computer system and the issue of discretionary edits. Ms. Crane said the treasurers want to be able to do a better job for the customers.
- 00:30:49 **Jenny Reinhart, Valley County Treasurer's Office**, said that there needs to be a workable plan in place to deal with issuing license plates, particularly for personalized license plates and the new license plates due to be released in January 2010.
- 00:33:30 **Amy Reeves, Lewis and Clark County, Accounting Department**, said that the MERLIN system does have helpful features but that problems with adjustments of journal entries by the MERLIN system have been particularly troublesome. She said that she has requested that the DOJ not do any adjusted journal entries (AJE) and that debit and credit issues have been problematic as well.
- 00:35:30 **Paulette DeHart, Clerk and Recorder County Treasurer, Lewis and Clark County**, said that the test printers being used in Lewis and Clark County are working well. She expressed strong concern about the issue of AJE being done by the DOJ without notification to the county, saying that jeopardizes her books and could cause auditing problems. Ms. DeHart also discussed her concerns about the DOJ call center, saying that more staffing is needed for the call center because it is still very difficult to get through. She said communication is key and needs to be strengthened.
- 00:38:21 **Delores Sramek, Fergus County Treasurer**, said that MERLIN has been a challenge to all of the counties and that county treasurers are getting better at dealing with the system. She asked that the DOJ be encouraged to communicate better with the county treasurers, that discretionary edits not be done until the DOJ has contacted the county treasurer's office, and that the next phase should not be implemented until the current problems have been completely resolved.
- 00:40:24 **Robert War, Vice President and General Manager for Montana, Enterprise Rent-A-Car**, said that he is very happy with the progress that has been made.

Committee Questions

- 00:41:31 SEN. HINKLE discussed his recent visit to the Mineral County Treasurer's Office, He said that both the staff and customers are very frustrated and that he compiled a list of 11 items of particular concern (EXHIBIT #8). SEN. HINKLE discussed each of the items. In response, Ms. Nordlund said she would be happy

to work with SEN. HINKLE and the Mineral County staff to improve the situation. She addressed several of the concerns specifically and said that she is willing to continue to work on communication and will continue to improve access and efficiency. She said she could not commit to instant access for 56 counties and that there will be instances in which it will take time to get an answer. Ms. Nordlund said that the DOJ will continue to work on problems and appreciates all those who have been working diligently to keep up with the process.

- 00:53:53 SEN. ESP referred to EXHIBIT #3 - TRB turnaround time, and asked about the categories of security interests and replacements, noting that they both have a long response time. Ms. Nordlund said that those two categories account for less than 10% of related title work but that efforts are being concentrated in those categories to improve the turnaround time. She said that new electronic record transfer process has helped. SEN. ESP asked that specific numbers be provided to the LJIC. SEN. ESP referred to EXHIBIT #4 - titles pending approval, and asked, as a comparison, how many titles were pending in December 2007. Ms. Nordlund said that she did not have that information, but that every effort is made to complete the titling process in a reasonable time. SEN. ESP and Ms. Nordlund discussed what would be considered a reasonable time. SEN. ESP asked Ms. Nordlund if she has given direction to county treasurers on how to deal with customers who have to wait for responses to questions. Ms. Nordlund said that she has not done that yet, but would be happy to do it in the future.
- 00:58:37 SEN. ESP asked how the bugs will be worked out of the system regarding the January 1, 2010, release date for the new license plates. Ms. Nordlund said that fixes are being tested but that it is likely that there will be a delay in the issuance of the new plates. She predicted that the release date would be January 11, 2010. Regarding SEN. ESP's earlier request for 2007 titling information, Ms. Nordlund said that the old Legacy system did not have the capability to capture that information.
- 01:01:03 REP. PETERSON said that problems in the Yellowstone County Treasurer's Office have decreased and that he is fully confident that the remaining issues will be dealt with. He asked Ms. Nordlund if the about the Request For Proposal (RFP) for the vehicle insurance verification system should be delayed until the MERLIN system is completely stable. Ms. Nordlund explained that the vehicle insurance verification system will be an online, realtime system for insurance verification and how it will work. She discussed the statutory requirements regarding that program and said that it will be many months before it is implemented in the county offices and that much testing will be done before rolling it out.
- 01:05:03 SEN. LASLOVICH said that the lack of communication is alarming and that it is unacceptable that county treasurer's questions are not being responded to. He asked how many trainers are available. Ms. Nordlund listed seven trainers located around the state and explained what they do. She said there are 57 staff members in the Titling and Registration Bureau and explained their duties. SEN. LASLOVICH asked if the DOJ or the Attorney General have considered hiring additional staff. Ms. Nordlund said that a staff review is long overdue. SEN.

LASLOVICH said that this should have been anticipated when planning for the new system.

- 01:10:24 Mr. Burton said that the bankruptcy of Bearing Point was not anticipated, nor were the subsequent problems that arose from that. He discussed the problems created by the bankruptcy, including staffing levels, and said that the DOJ is working its way out of the situation. SEN. LASLOVICH asked if the DOJ has considered moving existing personnel to help deal with MERLIN issues. Mr. Burton said that all staff and resources have been reallocated to the extent possible and provided several examples of how staff and resources have been moved around. He said that in February, allocation of carry forward money can be considered.
- 01:15:24 SEN. SHOCKLEY said that the biggest complaint he has heard from county treasurers is that the county offices are not able to work as efficiently as before because of the loss of authority in certain areas. Mr. Burton said that efficiency has been affected because the MERLIN system hasn't worked as it was supposed to and that as the system improves, so will efficiency. SEN. SHOCKLEY asked if Mr. Burton would agree that county treasurers don't have the same amount of information or authority as before MERLIN. Mr. Burton said in certain respects, he would agree with that statement.
- 01:18:27 SEN. SHOCKLEY said that the treasurers are very concerned about the DOJ makes changes in the system with no notification or explanation to the county offices. Mr. Burton explained the pressures on the new system to get the money spread. He said that after December, the DOJ will be working with each of the counties to roll out the new printers and to address the financial issues. SEN. SHOCKLEY said it is his understanding, as the new printers are rolled out in each county, that a MERLIN expert will be onsite to train and assist the treasurers. Mr. Burton said that is correct.
- 01:22:30 REP. EBINGER asked for confirmation that the number of letters allowed on personalized plates has been reduced. Ms. Nordlund said that the number of digits or letters has not been changed, but that because certain symbols will now be allowed on plates, the amount of space left on a plate for number of letters or digits may be affected. She said that most plates would not be affected.
- 01:28:47 SEN. ESP asked Ms. Wiggers to comment about the lack of communication, and how or if the process could be improved. Ms. Wiggers said that MERLIN was designed to move the authority for decisions previously made at the local government to the state level, but that the state greatly underestimated the number of decisions made daily in the county offices. She said if that is the process that is to be followed, then a bigger and better help desk and call center has to be a part of that. She said that it is not reasonable to ask a customer to come back in a few days for an answer when the customer may live 80 miles away.
- 01:32:16 REP. AUGARE said that the LJIC will receive another update on the MERLIN system at its next meeting. He recessed the committee for a 10-minute break.

PUBLIC DEFENDER

Overview of the American University final report

01:45:16 **Valencia Lane, Staff Attorney, Legislative Services Division (LSD)**, said that American University prepared an assessment of the initial period of operations of the Montana Public Defender System and its final report was published in October 2009, with 32 recommendations and several observations (EXHIBIT #9). She said that the recommendations were categorized: 1. management and communication; 2. budget; and 3. conflict of interest resolution and handling. Ms. Lane said that the Public Defender Commission has prepared a response (EXHIBIT #10). She briefly discussed each of the three categories of recommendations from the report.

Public Defender Commission Roundtable discussion and questions

01:49:54 **Randi Hood, Chief Public Defender**, introduced Commissioners Jennifer Hensley, Jim Taylor, Mike Sherwood, Fritz Gillespie, Caroline Fleming, Bill Snell, Chuck Petaja, and Terry Jessee. She said the Office of Public Defender (OPD) and Commissioners take the final report very seriously and have already been proactive in trying to improve each of the areas discussed by Ms. Lane. Ms. Hood discussed several actions that have already been taken.

01:52:39 **Michael Sherwood, Chair, Montana Public Defender Commission (PDC)**, said that he prepared a memorandum for the LJIC (EXHIBIT # 11). He also provided copies of the Public Defender Commission August 6, 2009, response to American University's (AU) draft report (EXHIBIT #10). Mr. Sherwood noted that the study was done free of charge to the taxpayers. He discussed several issues of concern identified by the AU report and the OPD/PDC response, saying that the Commission acknowledges that there are problems and that the lack of financial resources is the main reason it has not been able to perform all of its duties and functions to adequate levels. Mr. Sherwood also briefly discussed a law suit (St. Dennis) related to the conflict of interest concerns raised by the AU report that could result in at least a \$3 million price tag to set up a system to eliminate conflict of interest concerns.

02:06:06 SEN. ESP asked for additional information regarding to the St. Dennis law suit. Mr. Sherwood said that the case is before the Montana Supreme Court and could cost the state up to \$3 million to design, set up, and implement a new system that would satisfy the conflict of interest concerns. SEN. ESP asked if the \$3 million would be per year or per biennium. Mr. Sherwood said it would be per year. He said that with the rapid increase in federal cases, it is increasingly difficult to hire attorneys at the state's lower wage.

02:08:09 REP. PETERSON asked why a manager to administer the program hasn't been hired. Mr. Sherwood said that it would be difficult for someone who is not an attorney to manage the OPD, that the OPD organizational chart does not have a manager position in it, nor is there funding for a managerial position.

02:12:13 **Jennifer Hensley, PDC Board Member**, clarified that the Chief Public Defender is statutorily required to carry a caseload and may not take herself out of active practice to assume managerial duties. In response to a question from REP.

PETERSON about comparing the federal defender system to the state defender system and equitable pay, Mr. Sherwood said criminal defense lawyers take cases knowing they will lose money, but even so, the OPD is running out of attorneys who will take these cases. He said he has heard discussion of attorneys organizing into a union, which would shut the current system down.

- 02:15:36 REP. MENAHAN noted that the 11-member PDC serves without compensation. He asked if it would help to decrease the size of the Commission and to modify the duties of the Chief Public Defender. **Fritz Gillespie, PDC Board Member**, said he did not think that the size of the board is an issue but did agree that a serious look should be taken at the statutory responsibilities of Chief Public Defender. He said that a reorganization may benefit the system.
- 02:19:48 **Jim Taylor, former Chair and PDC Board Member**, said it is valuable to have a diverse group of people on the Commission because of the vast amount of institutional knowledge and expertise to be drawn from. He agreed that management issues are of concern, but said it is a matter of lack of resources.
- 02:21:25 REP. MENAHAN asked if it would be more cost-efficient to hire more staff attorneys, rather than hire contract attorneys from the field. Ms. Hood said that it is critical that private attorneys be a part of the system because of conflict of interest cases. She said that the system must maintain a balance between using the private bar and full-time public defenders.
- 02:25:11 SEN. SHOCKLEY recommended that a maximum case load be established for the Chief Public Defender, saying that Ms. Hood is a very fine attorney but that it is very difficult for her to manage the OPD and maintain an active practice. SEN. SHOCKLEY discussed his written comments to that end and his response to the AU report (EXHIBIT #12). Mr. Sherwood disagreed with SEN. SHOCKLEY's comments that there has been a lack of management. He said that in conversations with the public defenders, they indicated that they feel under-mentored, rather than under-managed. He agreed there are certain areas, such as communication, that are lacking and that there are flaws in the system but said that steps are being taken to rectify as many of them as possible. He said that the Commission is looking at the possibility of a managerial position but that there is no budget for it. SEN. SHOCKLEY responded that there is no way to measure the caseload right now, and that the legislation was flawed in not placing a maximum case load on the chief public defender. He agreed that more funding is needed.
- 02:36:43 Ms. Hensley said SEN. SHOCKLEY's points were well taken but that the Commission has to deal with the practicality of the situation. She said that Montana has a small pool of crack litigators and to pull Ms. Hood out of the system would be a disservice. She agreed that a full-time manager would be beneficial but said that removing the chief public defender to manage is not a good solution.
- 02:39:01 REP. HOWARD commented that he has an MBA and contracts with companies for management services. He agreed with previous statements that a great

attorney may not be the most effective office manager and recommended that the Commission seriously consider hiring an overall operational manager. Mr. Sherwood said it has been researched and would take \$1 million to hire managers to replace the managerial work being done under the current system.

- 02:43:02 SEN. LASLOVICH agreed that the statutory framework does not allow for hiring a manager and that the chief public defender does have a great many duties. He said that subsection 11 of the public defender act contains language regarding determining a minimum case load for the chief public defender and asked if that minimum has been established. Mr. Sherwood said that the Commission has imposed minimums and maximums for all staff members, including the chief public defender and that chain-of-command protocol is being formalized. SEN. LASLOVICH asked about minimum and maximum case loads. Mr. Taylor said that five cases is the minimum. He said he has concerns about that number but that additional resources is the key to reducing case load. SEN. LASLOVICH asked Ms. Hood, as Chief Public Defender, to comment.
- 02:47:45 Ms. Hood said that she handled four cases in the last 18 months and reviewed the amount of time she spent defending those clients. She said that Harry Freeborn is the administrative director of the OPD and is an invaluable asset. She said that he and other staff assume extra duties when she is involved in time consuming cases. She said that it may not be the best way to manage an office but that the OPD is doing the best it can with the resources it has. She noted that a benefit of her taking prominent cases is the opportunity for her to mentor less experienced public defenders.
- 02:54:23 SEN. LASLOVICH asked Ms. Hood if she thought a manager is needed. Ms. Hood said that, in her opinion, a deficit in the statute is that there is no provision for a deputy chief public defender. She explained how a deputy could assist her with managerial duties and said that the position would also provide valuable training for the chief public defender position when it becomes available.
- 02:55:43 SEN. SHOCKLEY said that the OPD does not collect for services rendered, which has been a continual bone of contention for him. He discussed an email exchange between Fred Van Valkenburg and others regarding the collection of fees for services provided by the OPD (EXHIBIT #13) and a collections report from the OPD (EXHIBIT #14). He said that the Legislature will not support additional funding if the OPD continues to drag its feet on collections. Mr. Sherwood responded, saying that he is the liaison to the American Bar Association and that experience shows that little money is collected from any public defender system. He said that public defenders are now tracking their time and that data will be presented to the Legislature to support a request for additional funding. He said he is aware that this issue is of concern to legislators but explained that many judges don't bother to order collection. He said he will continue to look into the matter.
- 03:02:05 REP. AUGARE commented that a budget shortfall is predicted for the next biennium and suggested that the Commission keep that in mind when considering this issue.

Public Comment

03:04:00 **Niki Zupanik, American Civil Liberties Union (ACLU)**, testified regarding the American University report, saying that Montana's public defender system is a good system but needs to be tweaked. She said that the ACLU's position is that it is appropriate for the legislature to reconsider the OPD budget and that some degree of restructuring is necessary. Ms. Zupanik discussed concerns regarding conflict of interest and the ACLU's involvement in the St. Dennis law suit. She said that concerns about conflict of interest questions are affecting the morale and willingness of attorneys to act as public defenders.

Ms. Zupanik reviewed the issue of the lack of mental health care within correctional facilities and the lack of jail standards. She noted that there have been five jail suicides in 2009. Ms Zupanik urged the LJIC to request that the Sheriffs and Peace Officers Association to report to the LJIC on the progress being made on its voluntary jail standards. She also briefly discussed ACLU litigation filed against the MSP regarding the Crossroads Correctional Facility in Shelby, Montana.

03:11:43 **Matt Kuntz, Executive Director, National Alliance for the Mentally Ill (NAMI)**, said that NAMI is concerned about the reliance on attorneys to determine if clients should be hospitalized and that he would like the LJIC to look at that. Mr. Kuntz also passed out copies of a *Missoulian* article on jail suicides (EXHIBIT #15) and said that the corrections system can't adequately care for the mentally ill.

03:13:15 The LJIC recessed at 6:15 p.m., to reconvene at 8:00 a.m. on December 18, 2009.

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