

THE SUPREME COURT OF MONTANA

MIKE McGRATH  
CHIEF JUSTICE



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April 16, 2021

Senator Mark Blasdel  
President of the Senate  
Representative Wylie Galt  
Speaker of the House  
Montana State Capitol  
Helena, MT 59620

Dear President Blasdel and Speaker Galt:

On behalf of the Montana Supreme Court, I am responding to the subpoenas addressed to each member of the Court and delivered on Wednesday afternoon. Although not the way I would have preferred to open a dialogue between our coordinate branches of government, I welcome the opportunity to provide you with information about how and under what circumstances the Judicial Branch engages with the legislative process on matters involving court operations.

The Judicial Branch does not involve itself in the mine run of legislation—only those matters that directly impact the manner in which our court system serves the people of Montana who elect each of us. On such matters, it is appropriate for judicial officers—those who sit on cases every day and manage the courts’ ever-growing caseloads—to apprise the Legislature of how its decisions may affect the functionality of the judicial system and impact Montanans. For many years, the elected members of the Judicial Branch have worked through the Montana Judges Association (MJA) to give the legislative body information important to the Legislature’s consideration.<sup>1</sup> The MJA, funded entirely by dues contributed personally from its judicial members, hires a part-time lobbyist for this purpose and occasionally judges themselves have testified before various committees regarding the impact of legislation on Judicial Branch operations. Other than the occasional bill impacting the Judges’ Retirement System, however, none of the legislative activities of the MJA affect a judge’s personal interest. They instead focus on policy matters regarding court operations and management.

On the rare occasion when I have, in my role as Chief, needed to advocate on behalf of a policy matter directly impacting the Judicial Branch, I have recused myself from any case involving the bill, as I did with SB 140. Aside from the Chief Justice, the involvement of other Court members in legislation is infrequent. Justice Baker occasionally has been engaged with the

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<sup>1</sup> The MJA is primarily an educational organization that conducts seminars twice each year. It is the primary vehicle judges use to complete their mandatory continuing educational requirements.

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Legislature in her capacity as Chair of the Supreme Court's Access to Justice Commission, a body that includes members of the Legislature, representatives from the executive branch, other judges, and community leaders. This session, for example, she has had discussions with legislators about allocation of federal relief funds to support court operations impacted by the pandemic by streamlining the resolution of family law cases. At times, the Legislature has solicited input and information from the Judiciary. As example, input was sought from the legislative committee regarding HB 90 from Justice Gustafson and others because of her expertise in child dependency.

The MJA has created a legislative committee that has authority to determine if a proposed bill should be given judicial input. Most sessions, the judiciary takes positions on a very limited number of bills outside of the budget process.

If a proposed bill has major impact on the judiciary, the association, through its president, may conduct a poll of the members. On those rare occasions, the members are asked whether MJA should support, oppose, or remain neutral toward the proposed legislation. MJA's position is not a secret. Indeed, the very purpose of the poll is to inform the Legislature of the judiciary's policy position on how the bill impacts the branch.

Members of the Supreme Court do not participate in the poll<sup>2</sup> for the reason that, if passed, a statute may come before the Court at a later time. These polls are conducted by email, which is the primary manner the Judicial Branch conducts its internal business and communications, including discussions related to cases, schedules, or personnel matters. There has been no improper use of State email.

It would be irresponsible for the Judicial Branch not to inform the Legislature on proposals that directly affect the court system and how it functions. Those policy decisions and the adjudication of a legal dispute occupy completely separate spheres. Judges come before you as witnesses, precisely because they know you are the policymakers; it has been our experience that the Legislature appreciates having information from those involved in the subject.

A judge's view of whether to support or oppose a bill as a matter of public policy is by no means the same as an indication of how a judge may construe the statute in subsequent litigation, or even whether the judge must decide its constitutionality. Like all citizens, a judge may hold personal views and opinions on any variety of subjects. The obligation of every judge, however, is to set aside those personal views and render decisions based solely on the law and the facts of a particular case. That is an obligation we all take very seriously.

The Judicial Branch operates to serve the people of Montana in a manner that complies with our judicial code of ethics. We resolve disputes that are brought before us in a straightforward manner consistent with our rules of procedure and providing due process to all sides. It is unfortunate that we have not had the opportunity thus far to discuss our procedures in a more

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<sup>2</sup> The only exception to that policy I can recall was when I inappropriately indicated a personal preference to oppose HB 685 this session.

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congenial fashion. In other years, if the Legislature desired an in-depth investigation, a referral would be made to the Legislative Auditor for a performance audit. The Judicial Branch would gladly cooperate with the Legislative Auditor process.

Incidentally, it has been suggested that after my recusal I had ex parte communications with the attorneys in OP 21-0125, *Brown, et al. v. Gianforte*, the SB 140 case. Other than the Lieutenant General, I have had no communication with any of the attorneys in months, if not years.

Unfortunately, the subpoenas issued this week broadly seek confidential judicial communications that we cannot divulge. I invite you, however, to engage with us in a civil conversation about these matters should you have additional questions.

Thank you for this opportunity to respond for the Court.

Respectfully,



Mike McGrath  
Chief Justice

Attachment

c: Sen. Greg Hertz  
Rep. Sue Vinton  
Rep. Kim Abbott  
Rep. Tom McGillvray  
Rep. Amy Regier  
Sen. Diane Sands  
Beth McLaughlin  
Supreme Court Justices  
District Court Judges

Below is a list of the bills MJA polled this session on whether to support, oppose, or remain neutral.

SB 175 (regarding removing principal from the judges' retirement system)  
SUPPORTED

HB 342 and HB 355 (regarding partisan election of judges)  
OPPOSED

HB 325 (regarding the election of Supreme Court justices by district)  
OPPOSED

HB 685 (regarding replacing the Judicial Standards Commission with a 9 member citizens committee of inquiry with the power to investigate, sanction, or remove elected judges)  
OPPOSED

SB 140 (replacing the judicial nominating commission)  
OPPOSED

In addition, the MJA also is supporting HJ 40, Representative Mercer's proposal to study the Judicial Standards Commission.