

MINUTES

MONTANA SENATE/MONTANA HOUSE 53rd LEGISLATURE - REGULAR SESSION

JOINT COMMITTEE ON RULES

Call to Order: By Senator Greg Jergeson, on Tuesday, February 9, 1993, at 5:00 p.m. in Room 325.

ROLL CALL

Senate Members Present:

Sen. Greg Jergeson, Chair (D)
Sen. Fred Van Valkenburg, Vice Chair (D)
Sen. Bruce Crippen (R)
Sen. Steve Doherty (D)
Sen. Delwyn Gage (R)
Sen. John Harp (R)
Sen. Judy Jacobson (D)
Sen. J.D. Lynch (D)

House Members Present:

Rep. Larry Grinde, Chair (R)
Rep. Jim Rice, Vice Chair (R)
Rep. Dave Brown (D)
Rep. Jerry Driscoll (D)
Rep. Mike Foster (R)
Rep. Bob Gilbert (R)
Rep. Hal Harper (D)
Rep. Harriet Hayne (R)
Rep. John Mercer (R)
Rep. Ted Schye (D)
Rep. Bill Strizich (D)

House Member Absent:

Rep. Marian Hanson (R)

Staff Present: Lynn Staley, Committee Secretary

Following is a verbatim transcript of the Joint Rules Committee, In the Matter of the Suspension of Lobbying Privileges of James Jensen:

Senator Jergeson: The Joint Rules Committee will please be in order.

(At this point, the Secretary called the roll)

Senator Jergeson: A quorum of the Joint Rules Committee being present, we are now open for business. Members of the committee,

we are gathered here today under unusual circumstances, circumstances that I hope as chairman of the Joint Rules Committee not to have to repeat. There was an occurrence on February 4, 1993 involving a member of the Montana Senate and a person who lobbies for an organization in the state. An allegation was made by the Senator that the occurrence between these two individuals involved some improper conduct. Upon review of the allegations, the president of the Senate, given his authority to maintain order and decorum within the legislature in the Senate in the legislative process ordered a suspension of the lobbying activities on the floor of the Senate, before committees in the Senate of the lobbyist in question until further notice. The purpose of this meeting today is to get a statement from Senator McClernan about the incident, to describe the incident as he sees it and then to receive a response from the lobbyist, Mr. Jim Jensen, about the incident. Following those statements, we will permit brief comments that pertain directly to this matter. Following that, we will permit questions from members of the committee, and the committee will conclude by making a decision if any decision is in order to be made. We hope to be able to put this incident behind us as soon as possible and hope that this meeting need not last an extraordinary amount of time. Nevertheless, we want to make sure that both Senator McClernan and Mr. Jensen have the fullest opportunity to describe the situation as it occurred on that day, February 4, 1993. Senator McClernan, do you have a statement to make to the committee?

Mike Meloy: Mr. Chairman.

Chair Jergeson: Mr. Meloy.

Mike Meloy: In the course of your explaining the process we would follow, I didn't hear anyplace that I could be permitted to talk. I appear here on behalf of the MEIC board, its staff, including Mr. Jensen. I would like to have at least an opportunity to address the committee at some stage in this process.

Chair Jergeson: Yes, as I said, following the statements of the two individuals involved, any other person that may have a statement directly bearing on the incident of February 4th will be permitted to make a statement or comment. Senator McClernan.

Senator McClernan: My name is Senator Henry McClernan, Senate District 34. The incident we are here to discuss occurred on February 4th in the late afternoon after a democratic Senate caucus. I was on my way from the caucus room to the elevator. I was approached by Mr. Jensen on the fourth floor. He was pretty unhappy and excited about a bill dealing with revisions of the hardrock mining act that I was going to introduce. We talked about the bill briefly and Mr. Jensen told me that he would go after me personally and professionally if I persisted with introducing the bill. I have been here at the legislature every session since the early 1980's. I have been a lobbyist. I know

what is appropriate behavior for a lobbyist and what is inappropriate, and the statements that Mr. Jensen made to me made me feel threatened and intimidated. My conclusion at the end of that incident was that Mr. Jensen was out of line at least, threatening me personally. I understand that it is proper to, shall we say, go after a bill no holds barred, but I don't believe it is appropriate to threaten a person personally or professionally. That is my statement. I would be happy to answer any questions.

Chair Jergeson: I think we will take questions later. Thank you, Senator McClernan. Mr. Jensen, do you wish to make a statement at this time.

James D. Jensen: Thank you, Mr. Chairman. My name is James D. Jensen. I appear here before the joint Rules Committee as executive director of the Montana Environmental Information Center. The purpose of my coming to this meeting today is to apologize to Senator McClernan for my conduct on the 4th, which he found to be inappropriate; and that line of what is appropriate or inappropriate, although undefined, has been now defined for Mr. McClernan by Mr. McClernan, and I certainly honor that line and will not cross that line with him anytime in the future. It was certainly never my intent to bring or cause Senator McClernan the concern that he had about my statements. The statement that I made was to my recollection somewhat different than what Senator McClernan has described here that I talked about or said. I would and/or we in discussing the serious nature of this legislation and the likely dramatic response that may come from the environmental community generally that I or we -- and I believe the word was challenge him personally, professionally and politically, and by that I ended that, those comments; and given what Senator McClernan said crossed the line in what he felt was appropriate. Again, as I have said to Senator McClernan today publicly, I am sorry for that situation.

Chair Jergeson: Thank you, Mr. Jensen. Are there any other persons that wish to make a comment about the incident that occurred on February 4th between Senator McClernan and Mr. Jensen. Mr. Meloy.

Mike Meloy: As I indicated to you, Mr. Chairman, at the outset, I appear here today on behalf of the Montana Environmental Information Center and its staff. Although I have appeared before this body as a lobbyist, as a legislator and as a citizen, I appear here today as an attorney. I want to say at the outset something that I need not say, and that is that this system of ours is one of laws; it is one of rules. It is not one of men and women, and I shouldn't have to say that but I think that that principle is lost in this process. It seems to me that what needs to be recognized is that this body does not have a rule which defines what kind of conduct is appropriate or inappropriate so that a lobbyist or a citizen or another

legislator may know what it is that will get him suspended from his activities. I am not here to talk to you about whether or not in your mind or in my mind whatever happened was appropriate or not. What I am here to say is that if you want to sanction a person for violating a rule, you have to have the rule in place in the first place, and you don't have one. Now there is a statute that was not adopted by this body incidentally because it either would not or could not adopt a set of regulations governing lobbyists, but the people of Montana by initiative adopted a set of rules which govern the practice of lobbying before this body. Mr. Jensen is not charged here with violating those rules nor could he be because those rules do not prohibit the kind of conversation that he had with Mr. McClernan, regardless of who you believe in terms of what actually went on.

The existing statute simply does not prohibit that kind of discussion. What you have here it seems to me and I would ask those of you who are attorneys who have served as defense counsel, who have served as prosecutors, I ask you to think would you prosecute someone for violating a rule that existed only in your mind or did not exist at all except in the minds of the punisher. Would you do that? I think the answer is no. I think clearly it is not, and I don't think that this body wants to impose a rule suspending this person, Jim Jensen, from appearing before you, essentially precluding, until they find someone else, MEIC from participating in your process for violating a rule that exists only in the minds of you folks or in the mind of Senator McClernan or in the mind of Mr. Jensen. I would suggest to you that the best course of action here is to accept Mr. Jensen's apology and assurance that it will not happen again; that you set about devising rules governing the practice of lobbying before this body if you don't like what the people did in the initiative. I think you have the power to do that, adopt the rule, set forth the procedure that will permit the resolution of that dispute if one arises in the context of the due process clause of both the federal and state constitution. It is only fair to Mr. Jensen and Senator McClernan and the people who appear before you that you have that rule in place before you punish somebody for violating that rule. I would ask that in any event you accept Mr. Jensen's apology and proceed from this point forward to adopt a rule that then you can enforce. Thank you.

Chair Jergeson: Are there any other statements on this matter?
Representative Quilici.

Representative Quilici: Mr. Chairman, members of the committee, I suppose Mike is right as far as points of law are concerned. He is a pretty good attorney that I have known for a lot of years. But I think there is one thing also that everybody should recognize, and one of those things is that every one of us in this legislative process has got a moral obligation to make sure that any of our actions do not reflect badly on our legislative assembly or as a lobbyist. I think that gentleman's actions according to decency were not right. I think that this body will

do what they will according to what is right, and I think that we have got a lot more important things before this assembly. I just got out of Appropriations, and there are a lot of people hurting around this state and then we have to take time and work on this issue and take up time like this. I think the right action will be taken. I think the individual did more damage to himself than he did to any of us. Thank you.

Chair Jergeson: Thank you, Representative Quilici. Are there any others that wish to make a statement? (No Response) Seeing none, are there any questions from the committee? Senator Lynch.

Senator Lynch: I have a question for Mr. Meloy. Mike, I am intrigued by your suggestion that we should write rules for every incident that might occur. It seems to me that in the rules we don't have a rule that says a lobbyist shouldn't belt a legislator if he doesn't agree with his bill. Isn't there some normal conduct that the presiding officer has some inherent powers to say that that isn't right albeit it is not a rule or a suggestion that a physical threat be made upon a legislator because of his activities in introducing a bill, like a physical threat, such as beat you up outside; does that have to be put in a rule that if you threaten a legislator with physical harm or if you threaten a legislator in this case personally or professionally or politically although we are always threatened, I suppose, politically; if a lobbyist is caught slashing a legislator's tire that that would be a reason for suspension? It seems to me that some of these are already covered by criminal law. Do you think we should have every single incident in our rules on what would be allowed and would not be allowed?

Mr. Meloy: If you are going to sanction a person, punish a person for doing something, you have to let them know what it is, what rule they need to follow so they can avoid being punished. I can tell you right now that what you may think is a bad thing for a lobbyist to do, I may think is a horrible thing for a lobbyist to do and vice versa. That is not the point. The point is that until you get a rule that covers the kind of conduct that this body deems inappropriate, then under our system of justice you cannot punish a person for violating an unwritten rule. Can you do it, I think that was the question; how can you do it. There are lots of things that go on that would be really hard to draft a piece of legislation or a rule to do. The unauthorized lobbying practice definition in the statute takes a pretty good run at defining what is inappropriate. You can't pay somebody for his vote. There are six or seven things that you can't do as a lobbyist, and that is not to say that this body couldn't as well set down a series of rules, but I can tell you that you will be here for a lot longer than 90 days trying to devise a set of rules, but you need to do it. You need to have this body say what the rules are before you punish somebody for violating them. If you want to say isn't there some inherent power in the Chair, the President of the Senate or the Speaker of the House to punish somebody, I submit to you, Senator Lynch, if you think that, that

will change every time there is a change in leadership; and if you don't write it down, then it is not fair to punish a person for violating it.

Senator Lynch: One further question, Mr. Chairman. Mr. Meloy, I have been chairman of many committees over the years and if a person comes into my committee room and becomes unruly, starts shouting at the proponents if he or she is an opponent, there is not a rule but you don't feel I have a right to say to get the sergeant of arms to get the person out of the committee room, that he is disrupting the proceedings of this committee. You don't think that is a right, albeit it is not defined?

Mr. Meloy: The right that you are talking about, the power that you are talking about is the power to control the decorum in the room so that people can hear what is going on and you can have an uninterrupted hearing. That is much, much different than the kind of activity for which Mr. Jensen has been sanctioned. For what Mr. Jensen has been sanctioned is something about which reasonable people could agree or disagree should result in some sort of punishment. Getting back to the same point I made earlier, if you are going to go beyond the control of decorum in your hearing room, you should have a rule that defines what it is that someone does when they step over the line.

Chair Jergeson: Senator Van Valkenburg.

Senator Van Valkenburg: Mr. Chairman, members of the committee, let me preface my remarks by saying that I think Mr. Jensen has gone a long ways toward resolving this matter by the statements he has made, and I hope that because of the necessary discussion we must have with Mr. Meloy based on his remarks that we don't miss the mark here in terms of resolving the whole issue, but Mr. Meloy let me ask you this; you practice law. You practice law I assume in front of numerous judges who change all the time, and you know, don't you, when you practice law in front of those judges that there is a certain expected level of conduct that you must engage in in front of those judges or you will be subject to the contempt power of those judges, and they won't necessarily have written rules for you to work with, but you know when you appear in front of them that you have to behave in a certain manner, isn't that right?

Mr. Meloy: Mr. Chair. Senator, I know what I have to do to make that judge happy, but I know also what it is that I have to do to stay out of jail, and those rules are written.

Mr. Van Valkenburg: Well, let me suggest that you take a look at 45-7-102 of the Montana Code Annotated, Mr. Meloy, and I will read some relevant portions of it to you right now since you don't have a copy of it. It says that it is an offense in the criminal code of the Montana Code Annotated for a person to "threaten unlawful harm to any person with the purpose to influence his decision, opinion, recommendation, vote or other

exercise of discretion as a public servant, party official, or voter". That is a pretty clear-cut rule. It deals with this very situation, and it is laid out in the Montana Code Annotated.

Mr. Meloy: Senator, if you are suggesting that Mr. Jensen has committed a violation of the criminal law, you have an obligation as an attorney under our rules of ethics to report that to the prosecuting authority. You have no more power than the prosecuting authority does to punish Mr. Jensen, and that is my point. If you think that Mr. Jensen has committed a crime, turn him over to the county attorney and let the county attorney in the executive branch of government prosecute him. My point is that this body does not have such a rule. This body is not a court. It may judge the qualifications of its members but not citizens of the state of Montana. My only point in this whole thing is to say to you if you are going to do that, then let people know that that is going to happen before they come up here and set down the rules of conduct which you expect them to follow.

Senator Van Valkenburg: I have a question for Mr. Jensen.

Mr. Meloy: Excuse me, Senator, as you know as a prosecutor, when a person has been threatened as you suggested that Mr. Jensen may be subject to criminal prosecution, it would be my obligation as an attorney, and I am sure that you would appreciate this, to advise him not to answer any questions at this point. Can you tell me whether you are going to seek prosecution in Lewis and Clark County?

Senator Van Valkenburg: I am not as long as you don't try and talk me into it, and you have gone a long way toward it today, but I think we can get this thing resolved this afternoon, Mr. Meloy, if we can just have a chance to get to the merits of the particular issue.

Mr. Meloy: So it is, Senator Van Valkenburg, that you are reserving the option of having Mr. Jensen prosecuted; is that what I hear you say?

Senator Van Valkenburg: I think that that is the county attorney's decision to make. It is not a decision for me or anyone in the legislature to make. It is a power that rests solely with the county attorney as to whether to prosecute.

Mr. Meloy: I will allow you to ask the question, Senator. Based on what that question seeks to elicit, I might advise him not to answer it.

Senator Van Valkenburg: Thank you. Mr. Jensen, my concern when I learned of the allegation by Senator McClernan was the use of the phrase that Senator McClernan would be gone after personally and professionally. You recall that on Thursday afternoon, I asked you what you said to him, and I think you said that he

would be subjected to personal, professional and political criticism; and again today you used the words personal and professional. What I am wondering is why you would tell Senator McClernan that he would be subjected to personal and professional criticism? We all fully understand that we are all subject to political criticism. That goes with the job, but to have to face some problems on a personal or professional basis for what we do as legislators seems inappropriate to me, and I wonder if you would respond to that.

Mr. Meloy: Mr. Chairman. Senator, I have no problem with Mr. Jensen answering that question. I want the record to be clear that we are not waiving any right by the constitution by answering that particular question.

Mr. Jensen: Mr. Chairman. Senator Van Valkenburg, my reason for saying those words was to caution Senator McClernan that because of his position as professor related to mining at a university unit that receives a lot of money from the mining industry that he may be or would likely or at least may be vulnerable to criticism because of the sponsorship of a bill on behalf of the mining industry which he acknowledged to me that Mr. Fitzpatrick had asked him to carry and so forth so that was what I meant. I did not mean anything in other senses of personal which one might imagine.

Senator Van Valkenburg: If I could just make sure to clarify this, you did not mean then that there would be some injury to his family or that he might lose his job or something of that nature by virtue of his sponsorship of this bill?

Mr. Jensen: Mr. Chairman. Senator Van Valkenburg, that is correct. I did not mean that.

Chair Jergeson: Are there any other questions by members of the committee? (No Response) Are there any other questions by members of the committee? (No response) Seeing none, this concludes this hearing on the matter as has been discussed. Thank you, Senator McClernan. Thank you, Mr. Jensen, and Mr. Meloy for your participation. Chairman Grinde of the House Rules committee, are there any issues that the House Rules Committee would wish to take up at this time?

Representative Grinde: This was discussed at a House Rules Committee yesterday, and there was some concern about the article in the paper. I believe it first appeared in the Butte Standard. I believe I would leave that up to the committee members if they would like to discuss this at this time.

Chair Jergeson: Are there any members of the House that wish to take up the other issue? (No response) Seeing none, members of the committee, we now would be in executive session to decide whether or not the Joint Rules Committee would wish to make any recommendation in this matter?

EXECUTIVE ACTION

Motion:

Senator Doherty: I believe it would be best to put this matter behind us, and to that end I would make a motion that under the inherent rules of the President of the Senate and Speaker of the House for proper decorum and conduct in both bodies that the suspension of Mr. Jensen be continued for one week from this day and after that time be lifted; Mr. Jensen be allowed to lobby on issues of importance to his principle.

Chair Jergeson: Members of the Committee, you have heard the motion of Senator Doherty. Is there any discussion?

Discussion:

Representative Harper: Mr. Chairman, I guess I would agree with the motion of Senator Doherty, but I would like to respectfully disagree with Mr. Meloy. I really don't think that this body needs to address a specific set of rules relating to lobbyists' conduct. It is my experience that pretty much everyone in the halls has a feeling for the code of ethics. Lobbyist styles range from please and soft to gonzo tactics. I agree with Representative Quilici that Mr. Jensen has effected his own punishment, and the Speaker and the President have seen fit to banish him at least for the week that we are talking about, and I think that this would be appropriate punishment and, Mr. Chairman, I think will serve as a large deterrent against any further crossing of the line as we have witnessed. I would support the motion.

Chair Jergeson: Senator Crippen.


Senator Crippen: Thank you, Mr. Chairman. I too would support the motion by Senator Doherty and also would repeat some of what Representative Harper said. I do not agree with Mr. Meloy's analysis of the rules and the law. I think all legislators have an inherent power and it does not have to be defined by rule to determine what is unprofessional conduct. They have an inherent power to bring a perpetrator of that before them, and they have an inherent power to even go so far as cite for contempt. I think what we have seen now is something that we can draw a compromise, and I would hope that the committee would go along with Senator Doherty's recommendation.

Chair Jergeson: Any further discussion? (No response)
Seeing none, the question will arise on the motion of Senator Doherty to extend the ban on lobbying activities on the floor of the Senate and the House and in the committee rooms of the Senate and the House for an additional week be adopted.

Vote: Motion carried unanimously.

Chair Jergeson: This meeting of the Joint Rules Committee will be adjourned.

Adjournment: 5:40 p.m.



GREG JERGESON, Chairman



LYNN SECRETARY, Secretary

ROLL CALL

SENATE COMMITTEE

DATE _____

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Attach to each day's minutes

SENATE STANDING COMMITTEE REPORT

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February 10, 1993

MR. PRESIDENT:

We, the joint committee on Rules having had under consideration the matter concerning James Jensen and Senator McClernan recommend that the President continue to suspend the lobbying privileges of James Jensen through legislative day 37.

Signed: Greg Jergeson
Senator Greg Jergeson, Chair