

PUBLIC OFFICE - Recall petitions;
PUBLIC OFFICERS - Recall petitions;
MONTANA CODE ANNOTATED - Sections 2-16-601 to 2-16-635,
2-16-617, 2-16-619(1), 2-16-620, 2-16-621, 2-16-622(2).

- HELD: 1. Signatures may be withdrawn from a recall petition up to the time when the filing officer finally determines that the petition is sufficient and so notifies the official named in the petition.
2. Signatures may be added to a recall petition within three months after the form of the petition is approved under section 2-16-617, MCA.

4 December 1986

Claude I. Burlingame
Sanders County Attorney
Sanders County Courthouse
Thompson Falls MT 59873

Dear Mr. Burlingame:

You have requested my opinion on the following questions:

1. May signatures on recall petitions be withdrawn, and, if so, how far along in the recall procedure may such withdrawal occur?
2. May additional signatures be added to the original recall petitions, and, if so, how far along in the recall procedure may such additions be made?

The Montana Recall Act, §§ 2-16-601 to 635, MCA, was adopted by voter initiative in 1976. The recall statutes contemplate a schedule of events which is here briefly described. A sample petition is filed with the appropriate filing officer; the filing officer reviews the petition for sufficiency as to form and, within one week of receipt, approves or rejects the form. § 2-16-617(3), MCA. The requisite number of signatures is then collected by the sponsors of the recall and

submitted to the officer responsible for registration of electors within three months of the date on which the form of the petition was approved. § 2-16-619(1), MCA. The county clerk in each county in which the petition is signed must verify and compare the signature of each person who has signed the petition, within thirty days following receipt of the petition or of a portion of the petition, and certify all valid signatures to the filing officer. § 2-16-620, MCA. The filing officer totals the number of certified signatures received from the county clerks and, if the requisite number of valid signatures is certified, notifies the official named in the petition; if the official named in the petition does not resign within five days of the filing, a special election is called unless the filing is within 90 days of a general election, in which case the question is placed on a separate ballot in the general election. §§ 2-16-621, 2-16-622(2), MCA.

The Montana statutes do not provide for withdrawal of signatures from a recall petition. However, the general rule is that where a petition of a certain number of electors is required to initiate proceedings for a public purpose, any person signing the petition has an absolute right to withdraw his name at any time before the person or body created by law to determine the matter submitted by the petition has finally acted. Ford v. Mitchell, 103 Mont. 99, 113-14, 61 P.2d 815, 821-22 (1936) (initiative petition); State ex rel. Freeze v. Taylor, 90 Mont. 439, 445, 4 P.2d 479, 481 (1931) (petition seeking consolidation of a county and municipalities).

Case law in other jurisdictions has also established that there is a general right to withdrawal of names from a recall petition if exercised prior to "final action" on such petition. See generally 27 A.L.R.2d 604 (1953); 53A Am. Jur. 2d Public Officers and Employees § 205 (1984); and Mocco v. Picone, 497 A.2d 512, 513 (N.J. Super. Ct. App. Div. 1985); State ex rel. Citizens for Quality Education v. Gallagher, 697 P.2d 935, 937-38 (N.M. 1985); In re Petition of Struck, 244 N.E.2d 176, 178 (Ill. 1969); Hawthorne v. McKeithen, 216 So. 2d 899, 901 (La. Ct. App. 1968); Nunn v. New, 222 S.W.2d 261, 266 (Tex. Ct. App. 1949), rev'd on other grounds, 226 S.W.2d 116 (Tex. 1950). The above-cited opinions concerning recall petitions differ as to when "final action" on a recall petition occurs. Mocco defines final action as that point at which signatures have been

verified. Struck and Nunn hold that it is when the petition is filed, and Gallagher and Hawthorne conclude that it occurs when an election is ordered.

A Montana case, although it does not concern a recall petition, is relevant. In State ex rel. O'Connell v. Mitchell, 111 Mont. 94, 106 P.2d 180 (1940), an initiative petition had been filed with the Secretary of State. Signatures had been checked by the county clerks and forwarded to the Secretary of State. If a sufficient number of valid signatures was contained in the petition, the Secretary of State was required to certify the measure to the Governor so that it could then be voted upon by the electorate. After the signatures were checked by the county clerks but before the petition was certified to the Governor, withdrawal petitions were filed reducing the number of signatures below those required for an election on the measure. The Montana Supreme Court found that, in the absence of a relevant statute, a right of withdrawal of signatures on a voter initiative petition existed until final action was taken on the petition, i.e., notification to the Governor that the petition had qualified for the ballot. See also State ex rel. Freeze v. Taylor, *supra*, wherein the withdrawal of signatures from a petition to consolidate a county and municipalities was considered too late where the county clerk had already certified the petition to the board of county commissioners. 4 P.2d at 481. Accord Holmes v. Valley Electrical Membership Corp., 398 So. 2d 153, 155 (La. Ct. App. 1981) (in absence of relevant statute, signatures on nominating petition could be validly withdrawn where timely withdrawal was requested); Judson PTO v. New Salem School Board, 262 N.W.2d 502, 505 (N.D. 1978) (names may be withdrawn from a petition to reopen a school up to time when petition is finally acted upon, i.e., time of initial filing); McAlmond v. City of Bremerton, 374 P.2d 181, 183 (Wash. 1962) (signatures on annexation petition may be withdrawn prior to assumption of jurisdiction over petition by appropriate authority); Lynn v. Supple, 140 N.E.2d 555, 558 (Ohio 1957) (withdrawal of names from referendum petition is permitted before official action has been taken thereon).

In the instant case, applying the holding in the Montana cases, final action by a filing officer on a recall petition occurs when the filing officer finally determines that the recall petition is sufficient and so

notifies the official named in the petition. Up until that time the withdrawal of signatures is permissible.

The addition of names to an original petition for recall, however, is a different matter. If recall petitioners were permitted to submit additional names until, at some point, the requisite number of valid signatures was certified by the county clerks, the recall process could prove interminable. "Logically, somewhere there has to be an end to the conflict and a count taken." Coleman v. Allen, 347 So. 2d 84, 87 (La. Ct. App. 1977).

The deadlines contained in the Montana Recall Act are evidence of an intention to cut the procedure off at some reasonable point and to foster prompt action following the approval of the form of the sample petition. Section 2-16-619(1), MCA, permits signed circulation sheets or sections of a petition for recall to be submitted to the officer responsible for registration of electors within three months of approval of the petition's form under section 2-16-617, MCA. Thus, the point in the procedure after which the submission of additional signatures must be disallowed is at the end of the three-month period after approval of the petition's form. Permitting the submission of additional signatures after the three-month period has run would allow the recall process to continue in an endless fashion, contrary to the design of the Recall Act.

THEREFORE, IT IS MY OPINION:

1. Signatures may be withdrawn from a recall petition up to the time when the filing officer finally determines that the petition is sufficient and so notifies the official named in the petition.
2. Signatures may be added to a recall petition within three months after the form of the petition is approved under section 2-16-617, MCA.

Very truly yours,

MIKE GREELY
Attorney General