

**Opinion No. 77.****Elections—Direct Primary—Nomination by Petition.**

HELD: The names of persons wishing to file as independent candidates for public office, without party affiliation, are not to be placed upon the ballot at the primary nominating election.

May 21, 1954.

Mr. Robert T. Pantzer  
County Attorney  
Park County  
Livingston, Montana

Dear Mr. Pantzer:

You have requested my opinion upon the following question:

"Are the names of persons wishing to file as independent candidates for public office, without party affiliation, to be placed upon the primary election ballot and, if so, in what manner are the names to appear?"

You have informed me that several persons in your county have filed nominating petitions in accordance with

the provisions of Section 23-910, R. C. M., 1947, and have listed themselves as "Independents" thereon.

The purpose of securing nominations is to have names properly certified and placed upon the ballot at the general election. A nominee may be the representative of a party or a group, or may be merely a person who files independently without formal recognition or endorsement by any group.

The Direct Primary Law is not the exclusive method of making nominations of candidates for public office. Political parties which have not cast three per cent of the vote in the preceding congressional election, and new political parties, are permitted to make nominations in the manner provided by Section 23-801, R. C. M., 1947 (see Section 23-909, supra); and candidates may be nominated by certificate of nomination signed by the requisite number of electors as prescribed by Section 23-804, R. C. M., 1947.

The Direct Primary Law, Chapter 9, Title 23, Sections 23-901 through 23-936, R. C. M., 1947, was enacted "... for the purpose of choosing candidates by the political parties . . ." (Section 23-902, R. C. M., 1947). Its provisions are mandatory and are the exclusive method of nominating candidates of all political parties which have cast more than three per cent of the total vote cast for representative in Congress at the preceding general election. Section 23-909, R. C. M., 1947, provides in part:

"Every political party which has cast three per centum (3%) or more of the total vote cast for Representative in Congress at the next preceding general election in the county, district or state for which nominations are proposed to be made, shall nominate its candidates for public office in such county, district or state, under the provisions of this law, and not in any other manner; . . ."

The Supreme Court of the State of Montana has held that the Direct Primary Law is the exclusive method of nominating candidates by political parties which have cast more than three per cent of the total vote at the preceding congressional election. In the case of *LaBorde v. McGrath*, 116 Mont. 283 149 Pac. (2d) 913, the court said:

“ . . . whenever the provisions of the Primary Nominating Election Laws (Secs. 23-901 through 23-936) apply then the convention or primary meeting methods of making nominations provided for in Section 612 (Sec. 23-801) are expressly ruled out and prohibited . . . ”

The Supreme Court of this state has also held that in cases where the Direct Primary Law is not applicable, the methods of making nominations provided by other sections of the Montana statutes are available. In the case of *State ex rel. Wheeler v. Stewart*, 71 Mont. 358, 230 Pac. 366, the court said:

“It is next contended that Section 615, Revised Codes of 1921 (Sec. 23-804, R. C. M., 1947), does not permit the nomination of independent candidates for presidential electors. The section provides: ‘Candidates for public office may be nominated otherwise than by convention or primary meeting in the manner following’: and then follow the procedural requirements for a certificate of nomination by petition. This section was first enacted in 1889 (Laws 1889, p. 136, Sec. 5), and has been reenacted twice since in identical form. In *State ex rel. Woody v. Rotwitt*, 18 Mont. 502, 46 Pac. 370, this court treated this ‘section of the Code as contemplating simply the candidacy of one not a nominee of a party—an independent or electors’ candidate.’ That it is applicable to the nomination of independent candidates for public office is not debatable.”

The only basis for belief that the Direct Primary Law intended the participation of independent candidates is contained in the last sentence of Section 23-919, (3), R. C. M., 1947, where it is said:

“ . . . and provided further that nothing in this Act shall preclude any elector from having his name printed upon the ballot as an independent candidate.”

This portion of Section 23-919, *supra*, was added to the law by Chapter 67, Laws of 1929. It is part of a section

of the Act which concerns the placement of names upon the general election ballot under their proper party designations, and directly follows a provision that no candidate who has failed to secure the nomination of the party upon whose ticket he has first filed may have his name placed upon the ballot under any party designation. When the section is read in its entirety, it plainly refers to the general election ballot and does not have any reference to placing names of independent candidates on primary election ballots.

Section 23-804, *supra*, is the section applicable to the nomination of independent candidates under the holding of *State ex rel. Wheeler v. Stewart*, *supra*. That section provides:

“Certificates of Nomination Otherwise Made. Candidates for public office may be nominated otherwise than by convention or primary meeting in the manner following:

“A certificate of nomination, containing the name of a candidate for the office to be filled, with such information as is required to be given in certificates provided for in Section 23-802, must be signed by electors residing within the state and district, or political division in and for which the officer or officers are to be elected, in the following required numbers:

“The number of signatures must not be less in number than five per cent of the number of votes cast for the successful candidate for the same office at the next preceding election, whether the said candidate be state, county, township, municipal, or any other political division or subdivision of state or county; but the signatures need not all be appended to one paper. Each elector signing a certificate shall add to his signature his place of residence, his business, and his business address. Any such certificate may be filed as provided for in the next preceding section of this chapter, in the manner and with the same effect as a certificate of nomination made by a party convention or primary meeting.”

Under the provisions of this section, any person who complies with its requirements is nominated, and therefore is qualified to have his name placed on the general election ballot. There is no necessity for his participation in the primary nominating election, which is conducted only for the selection of candidates by political parties which have received 3% of the vote in the preceding congressional election.

It is, therefore, my opinion that the names of persons wishing to file as independent candidates for public office, without party affiliation, are not to be placed upon the ballot at the primary nominating election.