

VOLUME NO. 33

Opinion No. 26

ELECTIONS - Independent candidate, sections 23-3308 and 23-3318, Revised Codes of Montana, 1947.

HELD: A candidate unsuccessfully seeking a party's nomination in the primary election may afterwards be nominated by certificate to appear on the general election ballot as an independent candidate.

July 24, 1970

**Honorable Frank Murray
Secretary of State
State Capitol Building
Helena, Montana 59601**

Dear Mr. Murray:

You have requested my opinion on the following question:

Whether a candidate who appeared on the primary election ballot, and who was defeated, may, under section 23-3318, R.C.M. 1947, as amended, execute a certificate in accordance therewith, and thereby appear on the general election ballot as an independent candidate.

Section 23-3318, Revised Codes of Montana, 1947, reads in part:

“Except as provided in subsection (6) of this section, nominations for public office by an individual or a political party which did not appear on the ballot in the next preceding election may be made by executing a certificate of nomination . . .”

While section 23-3318, R.C.M. 1947, has no precise counterpart in previous Montana election laws, it has its origin in section 23-919(3), R.C.M. 1947, now repealed and recodified as section 23-3308, R.C.M. 1947. Section 23-3318, R.C.M. 1947, must therefore be read in conjunction with section 23-3308, R.C.M. 1947.

In determining the question you have posed, it is necessary to refer to the historical interpretation of the provisions of section 23-919(3), R.C.M. 1947, the provision of which are now contained in sections 23-3308 and 23-3318, R.C.M. 1947, which provided in part:

“ . . . in the event a candidate whose name has been printed upon the party ticket for which his nominating petition shall have been first filed shall fail of nomination upon the ticket upon which his name is so printed, his name shall not be printed upon any ballot under any **party designation**; and provided further that nothing in this act shall preclude any elector from having his name printed upon the ballot as an independent candidate.” (Emphasis supplied).

In 1914 Attorney General Kelly rendered an opinion stating that an unsuccessful partisan candidate in a primary election may afterwards be nominated by petition to be an independent candidate, and further that those who have signed nominating petitions for the primary election may afterwards legally sign petitions of independent candidates for the same office. **5 Opinions of the Attorney General**, page 618.

In 1930 Attorney General Foot handed down a similar decision in **13 Opinions of the Attorney General**, page 270, permitting a partisan candidate, defeated in the primary, to place his name on the general election ballot as an “independent candidate”. See also **21 Opinions of**

the Attorney General, opinion no. 181, page 246. While two opinions, 13 **Opinions of the Attorney General**, page 293, and 18 **Opinions of the Attorney General**, opinion no. 254, page 255, denied defeated candidates the right to appear on the general election ballot as nominees of the opposing party, neither holding was repugnant to previous opinions concerning the right to appear as independent candidates.

Section 23-3308(e), R.C.M. 1947, which amended former section 23-919, R.C.M. 1947, provides: "If a person fails to be nominated upon the party ticket contained in his nominating declaration, his name shall not be printed upon any ballot with **party designation**;" (Emphasis supplied) Section 23-3308(f), R.C.M. 1947, continues: "This act does not preclude an elector from having his name printed upon the ballot as an independent candidate, . . .".

Sections 23-3308(e) and (f), R.C.M. 1947, when construed together constitute a virtual restatement of former section 23-919, R.C.M. 1947.

If section 23-3318, R.C.M. 1947, is interpreted in this light, in conjunction with and supplementary to section 23-3308, R.C.M. 1947, the picture becomes even clearer. Section 23-3318, R.C.M. 1947, cannot be interpreted to preclude a candidate, defeated in the primary election, from appearing as an independent candidate in the general election without also being in derogation of section 23-3308, R.C.M. 1947. Section 23-3318, R.C.M. 1947, then permits a person defeated in the primary election to file as an independent candidate and to so appear in the general election. This interpretation is aided by the pronoun "which" that follows "political party". This brings section 23-3318, R.C.M. 1947, into accord with section 23-3308, R.C.M. 1947, and into accord with the settled law on this question.

THEREFORE, IT IS MY OPINION that a candidate unsuccessfully seeking a party's nomination in the primary election may afterwards be nominated by certificate, in accordance with the provisions of section 23-3318, R.C.M. 1947, and may thereby appear on the general election ballot as an independent candidate.

Very truly yours,

ROBERT L. WOODAHL
Attorney General