

**MINUTES**

**MONTANA SENATE  
53rd LEGISLATURE - REGULAR SESSION**

**COMMITTEE ON STATE ADMINISTRATION**

**Call to Order:** By Senator Eleanor Vaughn, on March 9, 1993, at 10:00 a.m.

**ROLL CALL**

**Members Present:**

Sen. Eleanor Vaughn, Chair (D)  
Sen. Jeff Weldon, Vice Chair (D)  
Sen. Jim Burnett (R)  
Sen. Harry Fritz (D)  
Sen. John Hertel (R)  
Sen. Bob Hockett (D)  
Sen. Bob Pipinich (D)  
Sen. Bernie Swift (R)  
Sen. Henry McClernan (D)  
Sen. Larry Tveit (R)

**Members Excused:** None.

**Members Absent:** None.

**Staff Present:** David Niss, Legislative Council  
Deborah Stanton, Committee Secretary

**Please Note:** These are summary minutes. Testimony and discussion are paraphrased and condensed.

**Committee Business Summary:**

Hearing: HB 317, HB 94  
Executive Action: HB 94

**HEARING ON HB 317**

**Opening Statement by Sponsor:**

Rep. Bob Gilbert, House District #22, presented HB 317. HB 317 is the Negotiated Rule Making Act. HB 317 came as a result of some concerns of the way that we do rulemaking in the State of Montana under Montana Administrative Procedures Act. When the department writes their own rules oftentimes they don't get the input from the affected or concerned people that they need to get. So as an additional tool to what they do now, HB 317 was drafted at the request of Rep. Cobb to work with a gentleman from the Department of Natural Resources and Development, who actually wrote the bill, and Mr. Paul Seiver from EQC. They wrote the

bill which talks about the way the process works. He explained the sections of the bill. The bill is laid out mechanically. This is a voluntary program and will be decided on by the department depending on the size and interest of the issue, the department director will appoint a facilitator and will inform the committee. If the committee is uncomfortable with the facilitator who is supposed to be neutral they may tell the director they do not want that facilitator and the director will appoint another facilitator. The objective is to keep the facilitator as neutral as possible. The bill talks about the expenses of the committee members and the facilitator. It also talks about the way the agencies may accept grants or gifts. There are no identified fiscal impacts. There may be some instance where, with the size of the committee and the duties depending on the complexity of the issue, there may need to be some money raised. This bill is a voluntary tool that will fit in very well with the Montana Administrative Rulemaking Authority that is now used. It allows for the ability to broaden that authority.

**Proponents' Testimony:**

None.

**Opponents' Testimony:**

None.

**Questions From Committee Members and Responses:**

Sen. Pipinich asked Rep. Gilbert if some of the studies could be assigned to the committee to look at such as stream access, floating of rivers, transplanting a species of fish, streamflow, and so on. Rep. Gilbert said it would not work if it were not the result of a specific bill. This is aimed at rulemaking authority. If there were a bill that dealt with floating rivers and it became controversial, rather than Department of Fish, Wildlife and Parks making up the rules under the normal act they could assign that issue to a committee. Oftentimes a bill that has gone through the Legislature and signed by the Governor, then goes to a department and when the rules are written it does not resemble the bill as it was written and passed.

Sen. Swift asked Rep. Gilbert who had control of the number of members on the committee. Rep. Gilbert said the director of the department would set the number. Sen. Swift asked about Section 10 of the bill and the paying of per diem. Rep. Gilbert said the reason it was in the bill the way it is, is to keep the cost down. Sen. Swift stated to avoid problems the code says the members will be allowed \$25 per diem.

Sen. Burnett asked if serving on the committee is voluntary. Rep. Gilbert said it was.

Sen. Weldon stated there was amendments to this bill. Rep. Gilbert said as the sponsor of the bill he is usually the last one to know about amendments but if the amendments are housekeeping in nature he did not have a problem with them.

Sen. Hockett asked Rep. Gilbert if there was anything like this that would help establish fees. Rep. Gilbert said establishing fees would require the Montana Administrative Procedures Act which is rulemaking now. So if the fees were of a nature that would raise the ire of the public the committee could be put together to explain the reasons why and maybe the fee could be modified in some way. Sen. Hockett asked if there was a time for public hearings on the rules that the people establish. Rep. Gilbert said it was under the same notification procedure used by the Montana Administrative Procedures Act now.

Sen. Vaughn said that one of the concerns was better notification of the hearings. She asked if the committee could get the information out to the local people through this process. Rep. Gilbert said yes and people will be more aware.

**Closing by Sponsor:**

Rep. Gilbert said this bill is another tool. He recommended passage of this bill and if passed, Sen. Halligan will carry the bill.

**HEARING ON HB 94**

**Opening Statement by Sponsor:**

Rep. Harper, House District #44, presented HB 94. HB 94 is an act which would revise the disclosure of conflict of interest law and the rules of conduct for legislators. It would also require disclosure of a conflict of interest. This bill follows the suggestions made by Greg Petesch of the Legislative Council in a paper he prepared for this issue called "Through the Looking Glass." The bill separates out legislators and leaves the one relating to rules of conduct for all other public officers and employees and applies 211 to Legislators. The bill attempts to clarify what is conflict of interest to legislators and how legislators should relate to conflict of interest. On page 3 it says it is not legal to disclose or to use confidential information acquired in the course of the legislator's official duties in order to further the legislator's personal economic interest. For example, if you were a member of a conference committee and you knew that a certain change in tax law was going to be made towards the end of the session, and you sent out to your cohorts to buy the stocks or whatever, you do have privileged information in your possession. The original attempt of this bill was to try to put a monetary value per occurrence and a limit on what you could and could not accept and the subcommittee rejected it. On line 16 if you received, directly

or indirectly, a gift of substantial economic benefits as a gratuity from a person or entity except as provided in this section which was intended to influence your performance in your official capacity and you know it is for the purpose of rewarding you for your official action, you are in violation. On page 4, it says you may accept reimbursement for reasonable expenses for a speaking engagement, or participation in a discussion as a legislator in an official capacity. On line 13, page 4, campaign contribution reported as required by statute are not gifts or economic benefits tantamount to gifts. In section 3, current ethical principles for legislators in the stricken language, are only intended as guidelines and do not constitute violations. This section now will make disclosure mandatory. It says, when you must take an official action on a legislative matter as to which the legislator has a conflict increased by a financial interest that would be directly and substantially affected by the legislative matter, the legislator shall disclose or eliminate the interest creating the conflict or abstain from the official action. The kicker and the question that is always asked is when is it a conflict of interest. If I am a school teacher, can I vote on a pay raise for school teachers. If I am a contractor, can I vote to eliminate building codes inspections. On page 5, line 13 and 14, a conflict situation does not arise from legislation affecting the entire membership of a class. There are a number of gray areas. Pat Regan suggested an amendment saying when any legislator is in doubt they should be able to apply to the respective rules committee of that body. The House State Administration Committee chose not to accept those amendments. The last sentence of this bill says a legislator who elects to disclose or eliminate the interest creating the conflict or who elects to abstain, shall do so as provided in the joint rules of the legislature. Rep. Harper stated he was elected to the first legislature session after the new constitution was adopted. I was on a committee that was charged with implementing the new constitution and we wrestled with the ethics provision for a while and decided that this was too complicated a subject for the Legislature to deal with and we would shift the responsibility to the Secretary of State. The Secretary of State at that time, did not do anything with it. When Jim Waltermire became Secretary of State he proposed to implement this duty by appointing a six-member ethics committee. At that point, the Montana Constitution had delegated the responsibility to the Legislature and the Legislature delegated it to the Secretary of State who delegated it to an ethics commission that he had appointed. That action was supercharged that a Montana State Senator had written a letter to some of his present party members saying the bill had to be passed in order to get campaign money. That action was appealed to the ethics committee and the whole thing blew apart. It ended up in First Judicial District in Helena. The judge ruled that the whole thing was an unconstitutional violation, a delegation of powers and he put it back in the lap of the Legislature. That is the reason for the bill today. This bill will establish a much more solid basis for conflict of interest of legislators.

**Proponents' Testimony:**

Amy Kelly, Director of Common Cause/Montana spoke in support of HB 94 and gave written testimony (EXHIBIT #2).

**Opponents' Testimony:**

None.

**Questions From Committee Members and Responses:**

None.

**Closing by Sponsor:**

Rep. Harper pointed out one provision that was taken out of the bill by the subcommittee on page 6. Originally it said a legislator could not lobby within two years from leaving office. He could not be licensed as a lobbyist. That did not seem to be very popular and not a very good idea. The real benefit of this law is hoping that is not ever used. In the days immediately following the implementation of the new constitution, people were standing up on the floor of the house and disclosing an interest, a personal or private interest in bills, saying because I have a personal interest in this bill I wish to be excused from voting. Rep. Fagg always did that when an architectural issue was to be voted on since he was in the architectural business. That is taking it a little too far but this legislature should get back in the mode of disclosing an interest anytime they think they have a conflict of interest. That would be favorably received in this state.

**EXECUTIVE ACTION ON HB 94**

**Motion/Vote:** Sen. Weldon moved HB 94 BE CONCURRED IN. The motion to CONCUR in HB 94 CARRIED with Sen. Tveit voting no. Sen. Weldon will carry the bill.

**ADJOURNMENT**

**Adjournment:** 10:45 a.m.

  
SENATOR ELEANOR VAUGHN, Chair

  
DEBORAH STANTON, Secretary





# THROUGH THE MAGNIFYING GLASS

## AN ANALYSIS OF MONTANA'S GOVERNMENTAL ETHICS LAWS

Prepared by

Gregory J. Petesch  
Director of Legal Services  
Montana Legislative Council

March 1990

"I don't think they play at all fairly," Alice began, in a rather complaining tone, "and they all quarrel so dreadfully one can't hear oneself speak--and they don't seem to have any rules in particular: at least, if there are, nobody attends to them . . . ." Carroll, Lewis, Alice's Adventures in Wonderland, Chapter 8.

Information has been requested on Montana's ethics laws, including information regarding a potential code of ethics for legislators. This memorandum will discuss the existing Montana framework relating to governmental ethics generally and legislative ethics in particular. It will also consider recent developments regarding legislative ethics in other states.

Montana statutory provisions cited in this memorandum are set forth in an appendix.

Legislative ethics have been the object of intense public scrutiny in other states in recent years. The July 1988 issue of State Legislatures reported that federal prosecutions of state and local officials had more than doubled since 1986. State legislators had been indicted on charges of tax evasion, extortion, conspiracy, obstruction of justice, and accepting bribes. In 1989,

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Arkansas, Connecticut, Louisiana, Maine, Minnesota, New York, Tennessee, and West Virginia enacted legislation dealing with conflict of interest. The September/October issue of The Journal of State Government, published by the Council of State Governments, is devoted entirely to ethics in government. The January 1990 Leader's Letter noted that respondents to an issues survey conducted by the National Conference of State Legislatures (NCSL) ranked ethics in government as the second most important issue that will face state legislatures during 1990.

In 1973, the National Legislative Conference created the Committee on Legislative Ethics and Campaign Financing. The Committee eventually became the Committee on Ethics and Elections of the NCSL. The Committee proposed three model laws to be used as guidelines in considering ethics legislation. The model laws dealt with:

- (1) conflict of interest;
- (2) lobbyist registration and disclosure; and
- (3) open meetings.

Article XIII, section 4, of the Montana Constitution requires the enactment of ethics legislation. It provides:

**Code of ethics.** The legislature shall provide a code of ethics prohibiting conflict between public duty and private interest for members of the legislature and all state and local officers and employees.

The Legislature has implemented this provision by enacting legislation in the three areas recommended by the NCSL's Committee on Ethics and Elections.

The purpose of governmental ethics laws is to establish standards of conduct for public servants in order to protect the public interest. Ethics laws focus on the conflicts between the private interests of public officials and their duty to uphold the public interest. Ethics laws are designed to give

guidance and set standards to assure that the public interest will not be set aside by the advancement of personal or private interest. State ethics laws typically contain many of the same features; however, ethics laws must be tailored to local traditions and circumstances.

## ETHICS AND CONFLICT OF INTEREST

**"Consider anything, only don't cry!" [said the White Queen]  
Carroll, Lewis, Through the Looking Glass, Chapter 5.**

Montana's statutes regarding ethics and conflicts of interest were enacted in 1977 and are codified at Title 2, chapter 2, MCA. Rules of conduct and ethical principles are prescribed for legislators, state officers, state employees, local government officers, and local government employees. Sections 2-2-104, 2-2-111, 2-2-121, and 2-2-125, MCA, provide rules of conduct, the breach of which is a violation of the fiduciary duty owed the public. A violation may be actionable in a civil suit brought by the County Attorney. Sections 2-2-105 and 2-2-112, MCA, provide ethical principles, the breach of which is not a breach of the public trust and is not actionable. Montana has also enacted laws that prohibit an official from having an interest in contracts (Title 2, chapter 2, part 2, MCA) and that proscribe nepotism (Title 2, chapter 2, part 3, MCA).

Section 2-2-132, MCA, authorizes the Secretary of State to issue advisory opinions, keep and allow public access to voluntary disclosure statements filed under section 2-2-131, MCA, and adopt rules for the conduct of the Secretary of State's affairs under Title 2, chapter 2, part 1, MCA.

### Historical Perspective

In 1981, the Secretary of State attempted to implement his statutory role

under section 2-2-132, MCA, resulting in a major controversy. In September of 1981, the Secretary of State requested an Attorney General's opinion on 8 questions containing 36 separate issues concerning his role under section 2-2-132, MCA. The Attorney General determined that the discretionary language "may" in the introductory clause of section 2-2-132, MCA, was actually a mandate requiring the Secretary of State to perform the authorized activities. The Attorney General, relying on Montana precedent, determined that because the purpose of Title 2, chapter 2, part 1, MCA, was to protect the public interest, the Secretary of State was required to act. The Attorney General held that the Secretary of State must issue advisory opinions, permit public access to voluntary disclosure statements, and adopt rules concerning the conduct of the Secretary of State's affairs under Title 2, chapter 2, part 1, MCA. The Attorney General declined to advise the Secretary of State as to the method of performing these duties.

The Secretary of State, faced with the obligation of issuing advisory opinions, proceeded to adopt extensive rules and appoint an ethics commission to provide the advice and direction lacking from the Legislature and the Attorney General. In February of 1982, the Montana State Ethics Commission scheduled a hearing to determine whether "a violation of the Code of Ethics has occurred" with respect to certain individuals. The individuals scheduled to appear before the hearing petitioned for and were granted a writ of prohibition staying the hearing. The individuals also sought a declaratory judgment concerning the constitutionality of section 2-2-132, MCA. In State ex rel. Hegstad v. Waltermire, No. 47692 (1st Judicial District 1982), District Judge Gordon Bennett found section 2-2-132, MCA, unconstitutional. The authority to issue advisory opinions was an unconstitutional delegation of legislative authority to the Secretary of State. The Legislature failed to provide adequate guidelines to govern the discretion of the Secretary of State in exercising his mandated duty. The administrative rules adopted by the Secretary of State were declared void as an unauthorized exercise of legislative power. The Secretary of State did not have the authority to constitute, appoint, or expend public funds for the

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Commission.

The provisions of Title 2, chapter 2, part 1, MCA, have not been addressed by the Legislature since Judge Bennett's opinion in Hegstad. The statutory provisions are therefore merely statements to guide conduct.

### Areas of Concern

Two provisions of the Montana Constitution not addressed in the Hegstad case make suspect the enforcement of legislative ethics, such as those found in the ethical principles contained in section 2-2-112, MCA, by any entity other than the Legislature. Article V, sections 8 and 10, of the Montana Constitution raise serious issues as to whether the Legislature could validly delegate enforcement of legislative ethics principles to a nonlegislative entity. Article V, section 8, of the Montana Constitution states:

Section 8. Immunity. A member of the legislature is privileged from arrest during attendance at sessions of the legislature and in going to and returning therefrom, unless apprehended in the commission of a felony or a breach of the peace. He shall not be questioned in any other place for any speech or debate in the legislature.

Article V, section 10(1), of the Montana Constitution vests each house with the authority to determine the good cause for which it may punish members. It provides:

Section 10. Organization and procedure. (1) Each house shall judge the election and qualifications of its members. It may by law vest in the courts the power to try and determine contested elections. Each house shall choose its officers from among its members, keep a journal, and make rules for its proceedings. Each house may expel or punish a member for good cause shown with the concurrence of two-thirds of all its members.

If the Legislature decides to revise the ethics provisions found in Title 2, chapter 2, part 1, MCA, in an effort to make them more enforceable, it is advisable that the legislative ethical principle provisions be separated from

the provisions governing public officers and employees in order to avoid a challenge under Article III, section 1, or Article V, sections 8 and 10, of the Montana Constitution. The Legislature could establish provisions similar to the rules of conduct found in section 2-2-111, MCA, that would be enforceable through legal action.

### Other States' Actions

Most state ethics laws contain a statement of findings and purpose aspiring to public confidence and trust. Many such laws contain provisions concerning avoiding even the appearance of impropriety. The substantive provisions of ethics acts are not always reconcilable with the stated purpose. Exceptions to the stated purpose abound in the various acts. If there is a general consensus that a particular action is unethical, the provision is often found in the criminal statutes. For example, see Title 45, chapter 7, part 1, MCA. Section 45-7-104(4), MCA, specifically applies to legislators and public servants employed by the Legislature. It provides:

(4) No legislator or public servant employed by the legislature or by any committee or agency thereof shall solicit, accept, or agree to accept any pecuniary benefit from a person known to be interested in or likely to become interested in any matter before the legislature or any committee or agency thereof.

Conflict of interest laws generally do the following:

- (1) prohibit the acceptance of gifts and additional compensation;
- (2) prohibit the solicitation of things of value;
- (3) prohibit the use of confidential information for personal gain;
- (4) restrict an employee's or an official's interaction with his or her own

agency or other agencies on personal or private business;

(5) restrict an employee's or an official's outside business interests and employment and restrict official acts that would affect his or her financial interests; and

(6) restrict an employee's or an official's business contracts with the state.

A nearly universal component of state ethics laws is an ethics commission that is established to provide guidance to those being regulated and to enforce violations. The most obvious defect in Montana's ethics legislation is lack of enforcement.

Situations that have been specifically addressed elsewhere that are or could be applicable in Montana are as follows:

- Alabama requires the state ethics commission to initiate educational programs for public officials and citizens on ethics in government service. Section 36-25-4 Alabama Code.
  
- Section 24.60.090 of the Standards of Conduct of Legislators and Legislative Employees of Alaska prohibits those holding certain relationships to a member of the Legislature from being employed in the house in which the legislator is a member, by an agency of the Legislature, or in either house during the interim. An individual who is related to an employee of the Legislature may not be employed in a position over which the employee has supervisory authority. The proscribed relationships are those of child, stepchild, husband, wife, mother, father, sister, or brother.
  
- Connecticut enacted legislation prohibiting lobbying by legislators, the Governor, and the Governor's staff in the year following their leaving

office.

- Florida prohibits an officer of a state, county, or regional professional or occupational organization or association from serving as a member of the state licensing board for that profession or occupation during his or her term of office. Section 112.313(11) Florida Statutes.
- Hawaii's ethics commission has prohibited legislators from using the title of their positions to endorse candidates for election.
- The Indiana ethics commission adopted a code of ethics for state employees that controls conflicts of interest, moonlighting, and the kinds of honoraria that employees may accept.
- Section 6.800(3) of the Kentucky Revised Statutes states that:
  - No legislator shall, while in the discharge of the duties of his office, become intoxicated by the use of spiritous [sic], vinous or malt liquors. Any legislator who is unable, incompetent or disqualified to discharge any of the duties of his office because of the use of spiritous [sic], vinous or malt liquors shall be deemed to have violated this subsection.
- The Massachusetts Ethics Commission found that the Secretary of Economic Affairs violated state ethics laws when he used his office to solicit interest in a tour of the Soviet Union. The secretary would travel free if he solicited a sufficient number of travelers, and his spouse would travel free for a specified greater number of participants. The secretary withdrew from the trip, reimbursed the state for misdirection of resources, and was reprimanded.
- Minnesota prohibits current state employees from contracting with another state agency to provide consultation services or professional or technical services. Section 16B.17 subd. 2 Minnesota Statutes.

- Mississippi enacted legislation giving the ethics commission's advisory opinions legal standing. Public servants are relieved from liability for good faith reliance on an advisory opinion. Senate Bill 2853 (1988).
  
- In 1987, the New York Legislature, at the urging of Governor Cuomo, enacted legislation barring legislators and state officers and employees from representing private parties before state agencies and requiring annual detailed financial disclosure. Chapter 813, 1987 New York Laws.
  
- Ohio prohibits a public officer or employee from selling any goods or services to the state unless competitive bidding is used in making the purchase. Section 102.04 Revised Code of Ohio.
  
- West Virginia specifically exempts from the category of gifts all reasonable expenses for food, travel, and lodging for a meeting at which the official or employee has a speaking engagement or participates in a panel. Section 6B-2-5 West Virginia Governmental Ethics Act.
  
- Section 19.45(3) of the Wisconsin Code of Ethics prohibits a lawmaker from accepting gifts of any pecuniary value from lobbyists, including meals, beverages, and transportation.

#### LOBBYIST REGISTRATION AND DISCLOSURE

"But I don't want to go among mad people," Alice remarked.

"Oh, you can't help that," said the Cat, "we're all mad here. I'm mad. You're mad."



"How do you know I'm mad?" said Alice.

"You must be," said the Cat, "or you wouldn't have come here." Carroll, Lewis, Alice's Adventures in Wonderland, Chapter 6.

The interaction between legislators and lobbyists must be considered and made a part of any scheme of legislative ethics. Lobbyist disclosure and registration laws are codified at Title 5, chapter 7, MCA. Lobbyist registration and disclosure laws are not constitutionally mandated in Montana.

#### Historical Perspective

The first lobbyist registration and disclosure legislation was enacted in 1959. Minor revisions in 1965 and 1977 did not alter the scope of the 1959 law. Six lobbyist disclosure bills were introduced in the Legislature between 1975 and 1980. The political interest in lobbyist disclosure intensified in 1980, when Initiative 85 qualified for the ballot. The title of the initiative stated its intent as follows:

AN ACT TO REQUIRE PUBLIC DISCLOSURE OF MONEY SPENT TO INFLUENCE ACTION OF A PUBLIC OFFICIAL. ALL INDIVIDUALS OR BUSINESSES WHO EMPLOY LOBBYISTS AND SPEND MORE THAN \$1000 A YEAR TO PROMOTE OR OPPOSE OFFICIAL ACTION OF A PUBLIC OFFICIAL MUST GIVE A COMPLETE ACCOUNTING OF ALL MONEY SPENT. THE PROPOSAL DOES NOT APPLY TO INDIVIDUAL CITIZENS LOBBYING ON THEIR OWN BEHALF. ELECTED OFFICIALS ARE REQUIRED TO PUBLICLY DISCLOSE THEIR BUSINESS INTERESTS. CRIMINAL AND CIVIL PENALTIES ARE PROVIDED FOR VIOLATIONS OF THE PROVISIONS OF THIS INITIATIVE.

The proponents of the initiative stated that it would do three things:

- (1) Lobbying groups, including government agencies, would have to

make public where they get their money and how they spend it to influence public officials.

- (2) Those elected to state offices would have to make public the names, addresses, and types of businesses they own.
- (3) Loopholes in the present code of ethics for lobbyists would be closed.

Opponents of the initiative contended that it was vague, badly worded, inconsistent, and mechanically unsound. Opponents also contended that much of the money spent in lobbying was actually spent by representatives of governmental bureaus and agencies that would not come within the scope of the initiative.

Initiative 85 was favored by 77 percent of the electors voting on the issue. A challenge to the initiative immediately followed the election. After an unsuccessful attempt by the defendants (the Attorney General and the Commissioner of Political Practices) to remove the case to federal court, the case was heard in District Court. The District Court held Initiative 85 unconstitutional as violative of the rights of privacy, freedom of speech, freedom of the press, freedom of association, freedom to petition the government, equal protection of the laws, and freedom from compelled self-incrimination. The District Court permanently enjoined the defendants from enforcing the initiative's provisions. The District Court held that the constitutionally offensive provisions of the initiative could not be severed because the validity of the entire measure depended upon the showing of a compelling state interest. The defendants appealed to the Montana Supreme Court. The Supreme Court agreed with the District Court that Initiative 85 conflicted with various constitutional rights, but it found that a compelling state interest had been established by the statewide vote. Montana Automobile Association v. Greely, 632 P.2d 300, 38 St. Rep. 1174 (1981). The court found numerous provisions of the initiative beyond

redemption but determined that striking the offensive provisions would not result in an incomplete law incapable of fulfilling its purpose. The Supreme Court went so far as to include an appendix to its decision, showing the text of Initiative 85 with the offensive provisions stricken.

Shortly after the decision in Greely was rendered, Initiative 85 was back before the Supreme Court. The State Bar of Montana challenged the initiative as a violation of the separation of powers provision of the Montana Constitution with regard to the licensing and supervision of attorneys and as being so vague as to deny its members due process of law. The Supreme Court granted original jurisdiction to consider the challenge. The Court considered the challenge to Initiative 85 as the Court had emended it 20 days earlier. The Court held the emended initiative constitutional by broadly construing the exemption for quasi-judicial activity. The emended initiative was determined to apply only to attorneys in the field of lobbying. State Bar of Montana v. Krivec, 632 P.2d 707, 38 St. Rep. 1322 (1981). The lobbyist disclosure and registration laws have not been addressed since the 1983 Legislature revised the laws to conform to Greely. The laws appear to be working as intended and are no longer an area of great contention.

#### Areas of Concern

Montana has a part-time Legislature that does not employ partisan committee staff. Lobbyists provide a great deal of information to legislators. Often the only time a lobbyist can find the time to talk with a legislator is after adjournment for the day. The existing law requires a lobbyist to report all expenditures intended to influence legislation. In Montana's legislative setting, everyone tends to know the interested parties. Legislators often solicit information on an issue from certain lobbyists. Legislators receive minimal pay for their legislative work. Restrictions on legislators accepting meals from lobbyists similar to that contained in Wisconsin's law might be too restrictive in Montana.

## Other States' Actions

- California has extensive provisions concerning the valuation of various types of gifts, including tickets, fundraisers, testimonial dinners, and wedding gifts. Title 2, Division 6 California Administrative Code.
- Iowa excludes from gifts to legislators food, beverages, registration, and entertainment at group events to which all members of either or both houses are invited. Section 68B.2 Iowa Code Annotated.
- Section 46-287 of the Kansas Statutes Annotated requires any paid advertisement promoting or opposing action or nonaction by the Legislature to be clearly identified as an advertisement and to identify the individual or chairperson of the organization causing the advertisement to be published.
- Kentucky prohibits a legislator from lobbying for compensation and requires a legislator to file a written disclosure of lobbying by a member of a legislator's family or a person with whom the legislator maintains a close economic relationship. Section 6.785 Kentucky Revised Statutes.
- Section 6B-3-5 of the West Virginia Governmental Ethics Act regulates "grass roots" lobbying campaigns. A grass roots lobbying campaign is a program presented to the public, a substantial portion of which is intended, designed, or calculated to primarily to influence legislation. The sponsor of the campaign is required to register within 30 days of spending either \$500 in any 3-month period or \$200 in any month. Disclosure of contributors and expenses is then required.
- West Virginia exempts lobbyists who lobby on behalf of a nonprofit

organization who lobby without compensation and who restrict  
lobbying to no more than 20 days during a regular legislative session.  
Section 6B-3-1(7)(B)(iv) West Virginia Governmental Ethics Act.

## OPEN MEETINGS

**"Let's fight till six, and then have dinner," said Tweedledum.  
Carroll, Lewis, Through the Looking Glass, Chapter 4.**

Open meetings and records laws implement Article II, section 9, of the Montana Constitution and are codified at Title 2, chapter 3, MCA. In addition, the Montana Constitution, in Article V, section 10(3), requires that:

The sessions of the legislature and of the committee of the whole, all committee meetings, and all hearings shall be open to the public.

### Historical Perspective

The constitutional mandates governing open meetings in Montana arguably require the most open government in the United States. The framers of the Montana Constitution realized that tension would arise between the right to know and the right of privacy. The framers made a conscious choice to have the courts resolve the tension. The inherent conflicts between the competing rights have been addressed in the courts as envisioned by the framers. The framers did not address the question of a privacy exception for legislative meetings. Issues such as personnel decisions that would need to be made by statutorily created legislative committees were not considered at the time of the 1972 Constitutional Convention.

### Areas of Concern

Article V, section 10(3), of the Montana Constitution appears to prohibit the closure of a legislative meeting for any purpose. If an individual employed by the Legislature does not surrender fundamental constitutional rights. An individual facing termination or discipline by a statutorily created legislative committee could raise his privacy right in an attempt to close the committee's meeting. This issue has not been before the courts. The

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constitutional distinction between the right to know and the mandate that all legislative meetings be open to the public has not been addressed.

### Others States' Actions

The NCSL model open meeting law contains five reasons for closing meetings to the general public:

- (1) personnel matters;
- (2) real estate transactions;
- (3) collective bargaining strategy sessions;
- (4) labor negotiations; and
- (5) closed public records.

Some states expressly exclude party caucuses from their open meeting laws. The Montana political parties have adopted this method of operation.

Some states specifically exclude chance or social meetings from their open meeting laws.

### CONCLUSION

"No! no!" said the Queen. "Sentence first--verdict afterwards." Carroll, Lewis, Alice's Adventures in Wonderland, Chapter 12.

"Fan her head!" the Red Queen anxiously interrupted. "She'll be feverish after so much thinking." Carroll, Lewis, Through the Looking Glass, Chapter 9.

Ethical conduct is often in the eye of the beholder. Acting pursuant to one's own ethical code is insufficient for public servants due to the variances that

must result. Life experiences shape each person's view of proper behavior. Action is easy in areas in which there is consensus agreement on the proper conduct of public officers and employees. Many of the ethical provisions contained in Montana law are unenforceable, although individuals may choose to adhere to them. The Montana Constitution requires and the public demands ethical conduct from government. The Legislature should fulfill its constitutional mandate and revise the existing ethics codes to provide public servants with advice and to guarantee to the public enforcement of the ethics codes. Separate enforcement entities should be provided for the legislative and executive branches.

Good government is based on the decency and virtue inherent in each of its components. Intense scrutiny of the conduct of public officers and employees is likely to continue and even increase. A code of ethics is advisable for providing guidance to those who choose to make the sacrifices necessary to serve the public. Ethics commissions with the authority to issue advisory opinions to public servants seeking guidance are most commonly used. Service on an ethics commission is likely to be extremely wrenching and nonrewarding. Passing judgment on colleagues is by nature difficult, particularly in the grayer areas of ethical conduct. Once they are established, ethics commissions are quickly besieged with requests for advice. The propensity is to "Go ask Alice, I think she'll know." Jefferson Airplane, "White Rabbit".

The high road is often the most difficult road to travel. The public's confidence in and support of government is tied directly to its faith that government is acting in the public's best interest. Public officers and employees would be well advised to adhere to the Red Queen's advice to:

**"Always speak the truth--think before you speak--and write it down afterwards." Carroll, Lewis, Through the Looking Glass, Chapter 9.**



## APPENDIX

"Is that all?" Alice timidly asked. "That's all," said Humpty Dumpty. "Goodbye." Carroll, Lewis, Through the Looking Glass, Chapter 6.

**Article II, Section 9. Right to know.** No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

**Article III, Section 1. Separation of powers.** The power of the government of this state is divided into three distinct branches--legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

**Article V, Section 8. Immunity.** A member of the legislature is privileged from arrest during attendance at sessions of the legislature and in going to and returning therefrom, unless apprehended in the commission of a felony or a breach of the peace. He shall not be questioned in any other place for any speech or debate in the legislature.

**Article V, Section 10. Organization and procedure.** (1) Each house shall judge the election and qualifications of its members. It may by law vest in the courts the power to try and determine contested elections. Each house shall choose its officers from among its members, keep a journal, and make rules for its proceedings. Each house may expel or punish a member for good cause shown with the concurrence of two-thirds of all its

members.

(2) A majority of each house constitutes a quorum. A smaller number may adjourn from day to day and compel attendance of absent members.

(3) The sessions of the legislature and of the committee of the whole, all committee meetings, and all hearings shall be open to the public.

(4) The legislature may establish a legislative council and other interim committees. The legislature shall establish a legislative post-audit committee which shall supervise post-auditing duties provided by law.

(5) Neither house shall, without the consent of the other, adjourn or recess for more than three days or to any place other than that in which the two houses are sitting.

**Article XIII, Section 4. Code of ethics.** The legislature shall provide a code of ethics prohibiting conflict between public duty and private interest for members of the legislature and all state and local officers and employees.

**2-2-101. Statement of purpose.** The purpose of this part is to set forth a code of ethics prohibiting conflict between public duty and private interest as required by the constitution of Montana. This code recognizes distinctions between legislators, other officers and employees of state government, and officers and employees of local government and prescribes some standards of conduct common to all categories and some standards of conduct adapted to each category. The provisions of this part recognize that some actions are conflicts per se between public duty and private interest while other actions may or may not pose such conflicts depending upon the surrounding circumstances.

**2-2-102. Definitions.** As used in this part, the following definitions apply:

(1) "Business" includes a corporation, partnership, sole proprietorship, trust or foundation, or any other individual or organization

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carrying on a business, whether or not operated for profit.

(2) "Compensation" means any money, thing of value, or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another.

(3) "Employee" means any temporary or permanent employee of the state or any subdivision thereof or member of the judiciary, including a member of a board, commission, or committee except a legislator and an employee under contract to the state.

(4) "Financial interest" means an interest held by an individual, his spouse, or minor children which is:

- (a) an ownership interest in a business;
- (b) a creditor interest in an insolvent business;
- (c) an employment or prospective employment for which negotiations have begun;
- (d) an ownership interest in real or personal property;
- (e) a loan or other debtor interest; or
- (f) a directorship or officership in a business.

(5) "Official act" or "official action" means a vote, decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority.

(6) "Public officer" includes any state officer except a legislator or member of the judiciary or any elected officer of any subdivision of the state.

(7) "State agency" includes the state; the legislature and its committees; all executive departments, boards, commissions, committees, bureaus, and offices; the university system; and all independent commissions and other establishments of the state government except the courts.

(8) "State officer" includes all elected officers and directors of the executive branch of state government as defined in 2-15-102.

**2-2-103. Public trust.** (1) The holding of public office or employment is a public trust, created by the confidence which the electorate reposes in

the integrity of public officers, legislators, and employees. A public officer, legislator, or employee shall carry out his duties for the benefit of the people of the state.

(2) A public officer, legislator, or employee whose conduct departs from his fiduciary duty is liable to the people of the state as a trustee of property, is liable to a beneficiary under 72-34-105, and shall suffer such other liabilities as a private fiduciary would suffer for abuse of his trust. The county attorney of the county where the trust is violated may bring appropriate judicial proceedings on behalf of the people. Any moneys collected in such actions shall be paid to the general fund of the aggrieved agency.

(3) The following sections set forth various rules of conduct, the transgression of any of which is, as such, a violation of fiduciary duty, and various ethical principles, the transgression of any of which is not, as such, a violation of fiduciary duty.

**2-2-104. Rules of conduct for all public officers, legislators, and employees.** (1) Proof of commission of any act enumerated in this section is proof that the actor has breached his fiduciary duty. A public officer, legislator, or employee may not:

(a) disclose or use confidential information acquired in the course of his official duties in order to further substantially his personal economic interests; or

(b) accept a gift of substantial value or a substantial economic benefit tantamount to a gift:

(i) which would tend improperly to influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties; or

(ii) which he knows or which a reasonable person in his position should know under the circumstances is primarily for the purpose of rewarding him for official action he has taken.

(2) An economic benefit tantamount to a gift includes without limitation a loan at a rate of interest substantially lower than the commercial

rate then currently prevalent for similar loans and compensation received for private services rendered at a rate substantially exceeding the fair market value of such services. Campaign contributions reported as required by statute are not gifts or economic benefits tantamount to gifts.

**2-2-105. Ethical principles for public officers and employees.** (1) The principles in this section are intended as guides to conduct and do not constitute violations as such of the public trust of office or employment in state or local government.

(2) A public officer or employee should not acquire an interest in any business or undertaking which he has reason to believe may be directly and substantially affected to its economic benefit by official action to be taken by his agency.

(3) A public officer or employee should not, within the months following the voluntary termination of his office or employment, obtain employment in which he will take direct advantage, unavailable to others, of matters with which he was directly involved during his term or employment. These matters are rules, other than rules of general application, which he actively helped to formulate and applications, claims, or contested cases in the consideration of which he was an active participant.

(4) A public officer or employee should not perform an official act directly and substantially affecting a business or other undertaking to its economic detriment when he has a substantial financial interest in a competing firm or undertaking.

**2-2-111. Rules of conduct for legislators.** Proof of commission of any act enumerated in this section is proof that the legislator committing the act has breached his fiduciary duty. A legislator may not:

(1) accept a fee, contingent fee, or any other compensation, except his official compensation provided by statute, for promoting or opposing the passage of legislation;

(2) seek other employment for himself or solicit a contract for his services by the use of his office.

**2-2-112. Ethical principles for legislators.** (1) The principles in this section are intended only as guides to legislator conduct and do not constitute violations as such of the public trust of legislative office.

(2) When a legislator must take official action on a legislative matter as to which he has a conflict created by a personal or financial interest which would be directly and substantially affected by the legislative matter, he should consider disclosing or eliminating the interest creating the conflict or abstaining from the official action. In making his decision, he should further consider:

(a) whether the conflict impedes his independence of judgment;

(b) the effect of his participation on public confidence in the integrity of the legislature; and

(c) whether his participation is likely to have any significant effect on the disposition of the matter.

(3) A conflict situation does not arise from legislation affecting the entire membership of a class.

(4) If a legislator elects to disclose the interest creating the conflict, he shall do so as provided in the joint rules of the legislature.

**2-2-121. Rules of conduct for state officers and state employees.** (1) Proof of commission of any act enumerated in this section is proof that the actor has breached his fiduciary duty.

(2) A state officer or a state employee may not:

(a) use state time, facilities, or equipment for his private business purposes;

(b) engage in a substantial financial transaction for his private business purposes with a person whom he inspects or supervises in the course of his official duties;

(c) assist any person for a fee or other compensation in obtaining a contract, claim, license, or other economic benefit from his agency;

(d) assist any person for a contingent fee in obtaining a contract, claim, license, or other economic benefit from any state agency; or

(e) perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which he either has a

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substantial financial interest or is engaged as counsel, consultant, representative, or agent.

(3) A department head or a member of a quasi-judicial or rulemaking board may perform an official act notwithstanding subsection (2)(e) if his participation is necessary to the administration of a statute and if he complies with the voluntary disclosure procedures under 2-2-131.

(4) Subsection (2)(d) does not apply to a member of a board, commission, council, or committee unless he is also a full-time state employee.

**2-2-125. Rules of conduct for local government officers and employees.** (1) Proof of commission of any act enumerated in this section is proof that the actor has breached his fiduciary duty.

(2) An officer or employee of local government may not:

(a) engage in a substantial financial transaction for his private business purposes with a person whom he inspects or supervises in the course of his official duties; or

(b) perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which he either has a substantial financial interest or is engaged as counsel, consultant, representative, or agent.

(3) A member of the governing body of a local government may perform an official act notwithstanding this section when his participation is necessary to obtain a quorum or otherwise enable the body to act, if he complies with the voluntary disclosure procedures under 2-2-131.

**2-2-131. Voluntary disclosure.** A public officer or employee may, prior to acting in a manner which may impinge on his fiduciary duty, disclose the nature of his private interest which creates the conflict. He shall make the disclosure in writing to the secretary of state, listing the amount of his financial interest, if any, the purpose and duration of his services rendered, if any, and the compensation received for the services or such other information as is necessary to describe his interest. If he then

performs the official act involved, he shall state for the record the fact and summary nature of the interest disclosed at the time of performing the act.

**2-2-132. Powers of the secretary of state.** The secretary of state may:

- (1) issue advisory opinions with such deletions as are necessary to protect the identity of the requesting party or the party about whom the opinion is written;
- (2) keep and permit reasonable public access to voluntary disclosure statements;
- (3) make rules for the conduct of his affairs under this part.

**2-2-201. Public officers, employees, and former employees not to have interest in contracts.** Members of the legislature, state, county, city, town, or township officers or any deputy or employee thereof must not be interested in any contract made by them in their official capacity or by any body, agency, or board of which they are members or employees. A former employee may not, within 6 months following the termination of his employment, contract or be employed by an employer who contracts with the state or any of its subdivisions involving matters with which he was directly involved during his employment. In this section the term:

- (1) "be interested in" does not include holding a minority interest in a corporation;
- (2) "contract" does not include:
  - (a) contracts awarded to the lowest responsible bidder based on competitive bidding procedures;
  - (b) merchandise sold to the highest bidder at public auctions;
  - (c) investments or deposits in financial institutions which are in the business of loaning or receiving money;
  - (d) a contract with an interested party if, because of geographic restrictions, a local government could not otherwise reasonably afford itself of the subject of the contract. It shall be presumed that a local government could not otherwise reasonably afford itself of the subject of a contract if the



additional cost to the local government is greater than 10% of a contract with an interested party or if the contract is for services that must be performed within a limited time period and no other contractor can provide those services within that time period.

**2-2-202. Public officers not to have interest in sales or purchases.**

State, county, town, township, and city officers must not be purchasers at any sale or vendors at any purchase made by them in their official capacity.

**2-2-203. Voidable contracts.** Every contract made in violation of any of the provisions of 2-2-201 or 2-2-202 may be avoided at the instance of any party except the officer interested therein.

**2-2-204. Dealings in warrants and other claims prohibited.** The state officers, the several county, city, town, and township officers of this state, their deputies and clerks, are prohibited from purchasing or selling or in any manner receiving to their own use or benefit or to the use or benefit of any person or persons whatever any state, county, or city warrants, scrip, orders, demands, claims, or other evidences of indebtedness against the state or any county, city, town, or township thereof except evidences of indebtedness issued to or held by them for services rendered as such officer, deputy, clerk, and evidences of the funded indebtedness of such state, county, city, township, town, or corporation.

**2-2-205. Affidavit to be required by auditing officers.** Every officer whose duty it is to audit and allow the accounts of other state, county, city, township, or town officers must, before allowing such accounts, require each of such officers to make and file with him an affidavit that he has not violated any of the provisions of this part.

**2-2-206. Officers not to pay illegal warrant.** Officers charged with the disbursement of public moneys must not pay any warrant or other evidence

of indebtedness against the state, county, city, town, or township when the same has been purchased, sold, received, or transferred contrary to any of the provisions of this part.

**2-2-207. Settlements to be withheld on affidavit.** (1) Every officer charged with the disbursement of public moneys who is informed by affidavit establishing probable cause that any officer whose account is about to be settled, audited, or paid by him has violated any of the provisions of this part must suspend such settlement or payment and cause such officer to be prosecuted for such violation by the county attorney of the county.

(2) In case there be judgment for the defendant upon such prosecution, the proper officer may proceed to settle, audit, or pay such account as if no such affidavit had been filed.

**2-2-301. Nepotism defined.** Nepotism is the bestowal of political patronage by reason of relationship rather than of merit.

**2-2-302. Appointment of relative to office of trust or emolument unlawful.** (1) It shall be unlawful for any person or any member of any board, bureau, or commission or employee at the head of any department of this state or any political subdivision thereof to appoint to any position of trust or emolument any person related or connected by consanguinity within the fourth degree or by affinity within the second degree.

(2) The provisions of this section and 2-2-303 do not apply to:

(a) sheriffs in the appointment of persons as cooks and/or attendants; and

(b) the renewal of an employment contract of a person who was initially hired before the member of the board, bureau, or commission or the department head to whom he is related assumed the duties of the office.

**2-2-303. Agreements to appoint relative to office unlawful.** It shall further be unlawful for any person or any member of any board, bureau, or commission or employee of any department of this state or any political

subdivision thereof to enter into any agreement or any promise with other persons or any members of any boards, bureaus, or commissions or employees of any department of this state or any of its political subdivisions thereof to appoint to any position of trust or emolument any person or persons related to them or connected with them by consanguinity within the fourth degree or by affinity within the second degree.

**2-2-304. Penalty for violation of nepotism law.** Any public officer or employee or any member of any board, bureau, or commission of this state or any political subdivision thereof who shall, by virtue of his office, have the right to make or appoint any person to render services to this state or any subdivision thereof and who shall make or appoint to such services or enter into any agreement or promise with any other person or employee or any member of any board, bureau, or commission of any other department of this state or any of its subdivisions to appoint to any position any person or persons related to him or them or connected with him or them by consanguinity within the fourth degree or by affinity within the second degree shall thereby be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not less than \$50 or more than \$1,000 or by imprisonment in the county jail for not more than 6 months or by both such fine and imprisonment.

**5-7-101. Purposes of chapter -- applicability.** (1) The purposes of this chapter are to promote a high standard of ethics in the practice of lobbying, to prevent unfair and unethical lobbying practices, to provide for the licensing of lobbyists and the suspension or revocation of the licenses, to require elected officials to make public their business, financial, and occupational interests, and to require disclosure of the amounts of money spent for lobbying.

(2) Nothing in this chapter subjects any citizen lobbying on his own behalf to any reporting requirements nor deprives any such citizen of the constitutional right to communicate with public officials.

**5-7-102. Definitions.** The following definitions apply in this chapter:

(1) "Individual" means a human being.

(2) "Person" means an individual, corporation, association, firm, partnership, state or local government or subdivision thereof, or other organization or group of persons.

(3) "Public official" means any individual, elected or appointed, acting in his official capacity for the state government, but does not include those acting in a judicial or quasi-judicial capacity or performing ministerial acts.

(4) "Lobbying" includes:

(a) the practice of promoting or opposing the introduction or enactment of legislation before the legislature or the members thereof by any person other than a member of the legislature or a public official acting in his official capacity; and

(b) the practice of promoting or opposing official action by any public official in the event the person engaged in such practice expends \$1,000 per calendar year or more exclusive of personal travel and living expenses.

(5) (a) "Lobbyist" means any person who engages in the practice of lobbying for hire.

(b) "Lobbyist" does not include:

(i) any individual citizen acting solely on his own behalf; or

(ii) any individual working for the same principal as a licensed lobbyist, such individual having no personal contact involving lobbying with any public official on behalf of his principal.

(c) Nothing in this section deprives any citizen not lobbying for hire of the constitutional right to communicate with public officials.

(6) "Lobbying for hire" includes activities of any officers, agents, attorneys, or employees of any principal who are paid, reimbursed, or retained by such principal and whose duties include lobbying. When an individual is reimbursed only for his personal living and travel expenses, which together do not exceed \$1,000 per calendar year, that individual shall not be considered to be lobbying for hire.

(7) "Unprofessional conduct" means:

- (a) a violation of any of the provisions of this chapter;
- (b) instigating action by any public official for the purpose of obtaining employment in opposition thereto;
- (c) attempting to influence the action of any public official on any measure pending or to be proposed by:
  - (i) promise of financial support; or
  - (ii) making public any unsubstantiated charges of improper conduct on the part of any other lobbyist, any principal, or any legislator;
- (d) attempting to knowingly deceive any public official with regard to the pertinent facts of an official matter or attempt to knowingly misrepresent pertinent facts of an official matter to any public official.

(8) "Principal" means any person who makes payments in excess of \$1,000 per calendar year to engage a lobbyist.

(9) "Docket" means the register and reports of lobbyists and principals maintained by the commissioner pursuant to 5-7-201.

(10) "Payment" means distribution, transfer, loan, advance, deposit, gift, or other rendering made or to be made of money, property, or anything of value.

(11) "Payment to influence official action" means any of the following types of payment:

- (a) direct or indirect payment to a lobbyist by a principal, as salary, fee, compensation, or reimbursement for expenses, excluding personal living expenses;

- (b) payment in support of or assistance to a lobbyist or lobbying activities, including, but not limited to, the direct payment of expenses incurred at the request or suggestion of the lobbyist.

(12) "Business" means:

- (a) any holding or interest whose fair market value is greater than \$1,000, in any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, self-employed individual, holding company, joint stock company, receivership, trust, or other entity or property held in anticipation of profit, but does not include nonprofit organizations; and

- (b) present or past employment from which benefits, including

retirement allowances, are received.

(13) "Commissioner" means the commissioner of political practices.

(14) "Elected official" means a public official holding a state office filled by a statewide vote of all the electors of Montana or a state district office, including, but not limited to legislators, public service commissioners, and district court judges. The term "official-elect" shall also apply only to such offices.

**5-7-103. Licenses -- fees -- eligibility.** (1) Any adult of good moral character who is a citizen of the United States and who is otherwise qualified under this chapter may be licensed as a lobbyist. The commissioner shall provide a license application form. The application form may be obtained in the office of the commissioner and filed therein. Upon approval of the application and receipt of the license fee of \$10 by the commissioner, a license shall be issued which entitles the licensee to practice lobbying on behalf of one or more enumerated principals. Each license shall expire on December 31 of each even-numbered year or may be terminated at the request of the lobbyist.

(2) No application may be disapproved without affording the applicant a hearing. The hearing shall be held and the decision entered within 10 days of the date of the filing of the application.

(3) The fines and license fees collected under this chapter shall be deposited in the state treasury.

**5-7-105. Suspension of lobbying privileges.** No lobbyist whose license has been suspended and no person who has been adjudged guilty of a violation of any provision of this chapter may engage in lobbying for hire until that person has been reinstated to the practice and duly licensed.

**5-7-111. Commissioner to make rules.** (1) The commissioner shall promulgate and publish rules necessary to carry out the provisions of this chapter in conformance with the Montana Administrative Procedure Act and, in particular, shall provide rules necessary to allocate salary, expenses, and

any other payments between lobbying activities and other activities not connected with lobbying for any person whose activities are not solely limited to lobbying.

(2) Such rules shall be designed to effect and promote the purposes of this chapter, express or implied. Such rules shall be as simple and easily complied with as possible.

**5-7-201. Docket -- contents.** The commissioner shall make available to the public the information required by this chapter, including but not limited to the name and business address of each lobbyist, the name and business address of his principal, and the subject or subjects to which the employment relates or a statement that the employment relates to all matters in which the principal has an interest. The docket entry for each principal shall also indicate the principal's required reports of payments to influence official action by a public official.

**5-7-202. Docket -- public record.** Such docket shall be a public record and open to the inspection of any individual upon demand at any time during the regular business hours of the office of the commissioner.

**5-7-203. Principal -- name of lobbyist on docket.** Every principal who employs any lobbyist shall within 1 week after such employment cause the name of said lobbyist to be entered upon the docket. It shall also be the duty of the lobbyist to enter his name upon the docket. Upon the termination of such employment, such fact may be entered opposite the name of the lobbyist either by the lobbyist or the principal.

**5-7-204. Updating docket.** Any principal employing any lobbyist shall, when further subjects of legislation are introduced or arise which such lobbyist is to promote or oppose, make or cause to be made additional entries in the docket stating such employment so that the docket will show at all times all subjects of legislation in relation to which the lobbyist is employed or the general statement provided

in 5-7-201.

**5-7-207. Report to legislature.** Beginning with the first Tuesday following the beginning of any regular or special session of the legislature and on the first Tuesday of every month thereafter during which the legislature is in session, the commissioner shall from his records report to each member of each house of the legislature the names of lobbyists registered under this chapter, not previously reported, the names of the principals whom they represent as lobbyists, and the subjects of legislation in which each principal is interested.

**5-7-208. Principals to file accountings.** (1) A principal subject to this chapter shall file with the commissioner an accounting of payments made for the purpose of lobbying.

(2) If such payments are made solely to influence legislative action, such accounting shall be made:

(a) before February 16th of any year the legislature is in session and shall include all payments made in that calendar year prior to February 1;

(b) before the 16th day of the calendar month following any calendar month in which the principal spent \$5,000 or more and shall include all payments made during the prior calendar month; and

(c) within 60 days following adjournment of such session and shall include all payments made during such session, except as has previously been reported.

(3) If such payments are made to influence any other official action by a public official or made to influence such other action and legislative action, such accounting shall be made:

(a) before February 16th of the calendar year following such payments and shall include all payments made during the prior calendar year; and

(b) before the 16th day of the calendar month following any calendar month in which the principal spent \$5,000 or more and shall include all payments made during the prior calendar month.



(4) If no such payments are made during the reporting periods provided in subsections (2)(a), (2)(c), and (3)(a) above, the principal shall file a report stating such.

(5) Each accounting filed under this section shall:

(a) list all payments for lobbying in each of the following categories:

(i) printing;

(ii) advertising, including production costs;

(iii) postage;

(iv) travel expenses;

- (v) salaries and fees, including allowances, rewards, and contingency fees;
  - (vi) entertainment, including all foods and refreshments;
  - (vii) telephone and telegraph; and
  - (viii) other office expenses;
- (b) itemize, identifying the payee and the beneficiary:
- (i) each separate payment conferring \$25 or more benefit to any public official when the payment was made for the purpose of lobbying; and
  - (ii) each separate payment conferring \$100 or more benefit to more than one public official, regardless of individual benefit when the payment was made for the purpose of lobbying, except that in regard to a dinner or other function to which all senators or all representatives have been invited, the beneficiary may be listed as all members of that group without listing separately each person who attended;
  - (c) list each contribution and membership fee which amounts to \$250 or more when aggregated over the period of 1 calendar year paid to the principal for the purpose of lobbying, with the full address of each payer and the issue area, if any, for which such payment was earmarked;
  - (d) list each official action which the principal or his agents exerted a major effort to support, oppose, or modify, together with a statement of the principal's position for or against such action; and
  - (e) be kept by the commissioner for a period of 10 years.

**5-7-209. Payments prohibited unless reported – penalty for failure to report or for false statement.** A principal may not make payments to influence official action by any public official unless that principal files the reports required under this chapter. A principal who fails to file a required report is subject to the penalty provided in 5-7-305 as well as any civil action provided for in that section. A principal who knowingly files a false, erroneous, or incomplete statement commits the offense of unsworn falsification to authorities.

**5-7-210. Reimbursement.** Whenever a lobbyist invites a public

official to attend a function which the lobbyist or his principal has fully or partially funded or sponsored, or whenever a lobbyist offers a public official a gift, the lobbyist must, upon request, supply the recipient public official with the benefit's true or estimated cost and allow the public official to reimburse. Such expenditures must be itemized in the principal's reports with a notation "reimbursed by benefactee".

**5-7-211. Governmental responses not lobbying payments.** Budget preparation or response to requests of a house or committee of the legislature by any governmental entity shall not be considered lobbying payments for the purposes of this chapter.

**5-7-212. Audit of final accounting statements.** (1) The commissioner shall examine and may audit the accountings filed under 5-7-208 and shall investigate any irregularities and report any apparent violations of this chapter to the attorneys having authority to prosecute. The lobbyist is required to provide and the principal is required to obtain and keep for a period of 7 years from the date of filing all records supporting the accountings filed under 5-7-208.

(2) All such records shall be open to inspection on request of the commissioner or an attorney having authority to prosecute violations of this chapter. The commissioner and such attorneys are given the power to:

- (a) subpoena and compel attendance;
- (b) issue enforceable civil investigative demands;
- (c) take evidence; and
- (d) require the production of any books, correspondence, memoranda, bank account statements, or other records which are relevant or material for the purpose of conducting any investigation pursuant to the provisions of this chapter.

**5-7-213. Disclosure by elected officials.** (1) Prior to December 15 of each even-numbered year, each elected official or official-elect shall file with the commissioner a business disclosure statement on a form provided by

the commissioner. The statement shall provide the following information: the name, address, and type of business of such individual and each member of such individual's immediate family. For this purpose "immediate family" includes the individual's spouse and minor children only.

(2) No such individual may assume or continue to exercise the powers and duties of the office to which that individual has been elected or appointed until such statement has been filed.

(3) The commissioner shall make such business disclosure statements available to any individual upon request.

**5-7-301. Prohibition of practice without license and registration.** (1)

No individual may practice as a lobbyist unless that individual has been licensed under 5-7-103 and listed on the docket as employed in respect to all the matters he is promoting or opposing.

(2) No principal may directly or indirectly authorize or permit any lobbyist employed by that principal to practice lobbying until the lobbyist is duly licensed and the names of the lobbyist and the principal are duly entered on the docket.

**5-7-302. Unprofessional conduct.** No lobbyist or principal shall engage in or directly or indirectly authorize any unprofessional conduct.

**5-7-305. Penalties and enforcement.** (1) Any person violating the provisions of this chapter shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in the county jail not more than 6 months or by a fine not exceeding \$200, or both.

(2) Any person who violates any of the provisions of this chapter shall be subject to civil penalties of not less than \$250 and not more than \$7,500 according to the discretion of the district court, as court of original jurisdiction. A lobbyist who violates any of the provisions of this chapter shall have his license suspended or revoked according to the discretion of the court. Any public official holding elective office adjudged in violation of the provisions of this act is additionally subject to recall under Montana Recall Act, 2-16-601, et seq., and such violation shall constitute an additional basis

for recall to those mentioned in 2-16-603(3).

(3) The attorney general, commissioner, or the county attorney of the county in which the violation takes place may bring criminal or civil actions in the name of the state for any appropriate criminal or civil remedy.

(4) If a prosecution is undertaken by the commissioner or any county attorney, all costs associated with the prosecution shall be paid by the state of Montana.

(5) (a) Any individual who has notified the commissioner, the attorney general, and the appropriate county attorney in writing that there is reason to believe that some portion of this chapter is being violated may himself bring in the name of the state an action (hereinafter referred to as a citizen's action) authorized under this chapter if:

(i) the attorney general and the appropriate county attorney have failed to commence an action hereunder within 40 days after such notice; and

(ii) said attorneys then fail to commence an action within 10 days after a written notice delivered to them advising them that a citizen's action will be brought if they do not bring an action.

(b) Each notification shall toll the statute of limitations applicable until the expiration of the waiting period.

(c) If the individual who brings the citizen's action prevails, he shall be entitled to be reimbursed by the state of Montana for costs and attorney's fees incurred; provided that in the case of a citizen's action which is dismissed and which the court also finds was brought without reasonable cause, the court may order the individual commencing the action to pay all costs of trial and reasonable attorney's fees incurred by the defendant.

(6) No civil action may be brought under this section more than 7 years after the occurrence of the facts which give rise to the action.

(7) All civil penalties imposed pursuant to this section shall be deposited in the state general fund.

(8) A hearing under this chapter shall be held by the court unless the defendant-licensee demands a jury trial. The trial shall be held as soon as possible but at least 20 days after the filing of the charges and shall take

precedence over all other matters pending before the court.

(9) If the court finds for the plaintiff, judgment shall be rendered revoking or suspending the license and the clerk of court shall file a certified copy of the judgment with the commissioner.

**45-7-101. Bribery in official and political matters.** (1) A person commits the offense of bribery if he purposely or knowingly offers, confers, or agrees to confer upon another or solicits, accepts, or agrees to accept from another:

(a) any pecuniary benefit as a consideration for the recipient's decision, opinion, recommendation, vote, or other exercise of discretion as a public servant, party official, or voter;

(b) any benefit as consideration for the recipient's decision, vote, recommendation, or other exercise of official discretion in a judicial or administrative proceeding; or

(c) any benefit as consideration for a violation of a known duty as a public servant or party official.

(2) It is no defense to prosecution under this section that a person whom the offender sought to influence was not qualified to act in the desired way whether because he had not yet assumed office or lacked jurisdiction or for any other reason.

(3) A person convicted of the offense of bribery shall be imprisoned in the state prison for any term not to exceed 10 years or be fined an amount not to exceed \$50,000, or both, and shall forever be disqualified from holding any public office in this state.

**45-7-102. Threats and other improper influence in official and political matters.** (1) A person commits an offense under this section if he purposely or knowingly:

(a) threatens 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;

(b) threatens harm to any public servant with the purpose to

Exhibit # 4  
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HB-94

influence his decision, opinion, recommendation, vote, or other exercise of discretion in a judicial or administrative proceeding;

(c) threatens harm to any public servant or party official with the purpose to influence him to violate his duty;

(d) privately addresses to any public servant who has or will have official discretion in a judicial or administrative proceeding any representation, entreaty, argument, or other communication designed to influence the outcome on the basis of considerations other than those authorized by law; or

(e) as a juror or officer in charge of a jury receives or permits to be received any communication relating to any matter pending before such jury, except according to the regular course of proceedings.

(2) It is no defense to prosecution under subsections (1)(a) through (1)(d) that a person whom the offender sought to influence was not qualified to act in the desired way, whether because he had not yet assumed office or lacked jurisdiction or for any other reason.

(3) A person convicted under this section shall be fined not to exceed \$500 or imprisoned in the county jail for any term not to exceed 6 months, or both, unless the offender threatened to commit an offense or made a threat with the purpose to influence a judicial or administrative proceeding, in which case the offender shall be fined not to exceed \$50,000 or be imprisoned in the state prison for any term not to exceed 10 years, or both.

**45-7-103. Compensation for past official behavior.** (1) A person commits an offense under this section if he knowingly solicits, accepts, or agrees to accept any pecuniary benefit as compensation for having, as a public servant, given a decision, opinion, recommendation, or vote favorable to another, for having otherwise exercised a discretion in another's favor, or for having violated his duty. A person commits an offense under this section if he knowingly offers, confers, or agrees to confer compensation which is prohibited by this section.

(2) A person convicted under this section shall be fined not to

exceed \$500 or imprisoned in the county jail for any term not to exceed 6 months, or both.



**45-7-104. Gifts to public servants by persons subject to their jurisdiction.** (1) No public servant in any department or agency exercising regulatory function, conducting inspections or investigations, carrying on a civil or criminal litigation on behalf of the government, or having custody of prisoners shall solicit, accept, or agree to accept any pecuniary benefit from a person known to be subject to such regulation, inspection, investigation, or custody or against whom such litigation is known to be pending or contemplated.

(2) No public servant having any discretionary function to perform in connection with contracts, purchases, payments, claims, or other pecuniary transactions of the government shall solicit, accept, or agree to accept any pecuniary benefit from any person known to be interested in or likely to become interested in any such contract, purchase, payment, claim, or transaction.

(3) No public servant having judicial or administrative authority and no public servant employed by or in a court or other tribunal having such authority or participating in the enforcement of its decision shall solicit, accept, or agree to accept any pecuniary benefit from a person known to be interested in or likely to become interested in any matter before such public servant or tribunal with which he is associated.

(4) No legislator or public servant employed by the legislature or by any committee or agency thereof shall solicit, accept, or agree to accept any pecuniary benefit from a person known to be interested in or likely to become interested in any matter before the legislature or any committee or agency thereof.

(5) This section shall not apply to:

(a) fees prescribed by law to be received by a public servant or any other benefit for which the recipient gives legitimate consideration or to which he is otherwise entitled; or

(b) trivial benefits incidental to personal, professional, or business contacts and involving no substantial risk of undermining official impartiality.

(6) No person shall knowingly confer or offer or agree to confer any benefit prohibited by subsections (1) through (5).

(7) A person convicted of an offense under this section shall be fined not to exceed \$500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

**45-7-401. Official misconduct.** (1) A public servant commits the offense of official misconduct when in his official capacity he commits any of the following acts:

- (a) purposely or negligently fails to perform any mandatory duty as required by law or by a court of competent jurisdiction;
- (b) knowingly performs an act in his official capacity which he knows is forbidden by law;
- (c) with the purpose to obtain advantage for himself or another, performs an act in excess of his lawful authority;
- (d) solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law; or
- (e) knowingly conducts a meeting of a public agency in violation of 2-3-203.

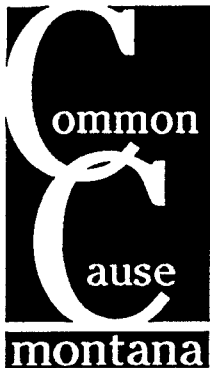
(2) A public servant convicted of the offense of official misconduct shall be fined not to exceed \$500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

(3) The district court shall have exclusive jurisdiction in prosecutions under this section. Any action for official misconduct must be commenced by an information filed after leave to file has been granted by the district court or after a grand jury indictment has been found.

(4) A public servant who has been charged as provided in subsection (3) may be suspended from his office without pay pending final judgment. Upon final judgment of conviction he shall permanently forfeit his office. Upon acquittal he shall be reinstated in his office and shall receive all backpay.

(5) This section does not affect any power conferred by law to impeach or remove any public servant or any proceeding authorized by law to carry into effect such impeachment or removal.

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SENATE STATE ACCOUNT  
EXHIBIT NO. 2  
DATE 3-9-93  
BILL NO. HB 94

COMMON CAUSE TESTIMONY  
IN SUPPORT OF HB 94  
MARCH 9, 1993

P.O. Box 623  
Helena, MT  
59624  
406/442-9251

Madame Chair, members of the Senate State Administration Committee, for the record my name is Amy Kelley, Executive Director of Common Cause/Montana. On behalf of more than 800 citizens working to promote more open and accessible government in Montana, I register our support for HB 94.

This is a time of profound crisis of public confidence in government. At stake is the health of our democratic system of government, for self-government rests upon the people's trust and confidence in public officials. Even Governor Racicot put forward a challenge to this Legislature to *"join me and work together to restore the confidence of Montanans in their government."*

The problem affects state officials across the country. In its July 1988 issue, State Legislatures reported that federal prosecutions of state and local officials had more than doubled between 1986 and 1988. In fact, ten times as many state and local officials are being convicted on federal corruption charges today as were two decades ago.

Even here in Montana, recent newspaper headlines have raised questions concerning ethics in government. A recent Independent Record editorial criticizing several events involving Public Service Commission members said, *"...it points to the need for the state to have a code of ethics that governs elected officials and employees. They should never forget that they must be like Caesar's wife -- above reproach..."*

The Montana Constitution mandates the enactment of such a code of ethics. Article XIII, section 4 provides:

Code of ethics. The legislature shall provide a code of ethics prohibiting conflict between public duty and private interest for members of the legislature and all state and local officers and employees.

Despite this mandate, the legislature has not, to date, established a comprehensive code of ethics. HB 94 addresses one aspect of that code: conflicts of interest pertaining to legislators.

The fundamental goal of a conflict-of-interest statute should be to prevent public officials from abusing -- or appearing to abuse -- the power and status of public office for private gain. It should protect the public against potential abuses, and the legislature itself against the appearance of abuse.

This bill helps achieve that goal in two ways.

First, it clarifies the statutory rules of conduct for legislators regarding the use of confidential information and the acceptance of gifts while in office.

Second, it requires, rather than leave voluntary, financial conflicts of interest rules for legislators. The bill would require a legislator to either remove or disclose such conflicts, or abstain from taking official action on that issue. We feel that such a disclosure provision not only benefits the public, it protects a legislator from the appearance of impropriety.

It is not our intention to imply that the Montana legislature is corrupt or self-interested. Quite the opposite: we are fully aware of the sacrifices each of you makes to serve the public as a legislator, and commend you for that service. It is our intent to help address the concerns of the public and support legislation strengthening very basic ethical principals -- principals we feel will benefit legislators as well, who stand at risk of potentially unjust yet politically damaging public criticism.

Greg Petesch expressed this issue in his March 1990 study for the Legislative Council entitled Through the Magnifying Glass: An Analysis of Montana's Governmental Ethics Laws:

*"Ethical conduct is often in the eye of the beholder. Acting pursuant to one's own ethical code is insufficient for public servants due to the variances that must result."*

This bill is a simple, straightforward strengthening of the ethics laws already on the books. Common Cause/Montana urges a "do pass" recommendation from this Committee on HB 94.

## Fainting spell

### Citizen legislators appalled at specter of ethics code

Rep. Hal Harper of Helena flashed a modest ethics bill at the House Judiciary Committee the other day and his colleagues recoiled like Dracula before the cross.

If we understand the horrified objections of Harper's fellow reps, Montana's lawmakers must not be bound by any meaningful code of ethics because they are "citizen legislators." Rep. Karyl Winslow of Billings said, "We are not a professional body. We are citizen lawmakers." Winslow is right on both counts. Rep. Dave Brown of Butte also raised the citizen lawmaker objection.

We've heard the citizen lawmaker defense against ethical standards for 20 years and we still don't understand it. Presumably, a "citizen lawmaker" — one who earns a living outside the Legislature — will find his or her livelihood constantly clashing with official duties, and cannot be expected to disclose conflicts of interest or do anything about them. We com-

pletely disagree. Harper's bill would bar a lawmaker from serving as a lobbyist within two years of leaving the Legislature. It would prohibit lawmakers from accepting expensive gifts from certain people. Most desirable, in our opinion, it would require legislators to disclose any conflict of interest before voting on a bill, and either eliminate the conflict or abstain from voting.

We'd be happy if the lawmakers would simply pass a bill requiring public disclosure of conflicts. Over the years, the Legislature has seen many members who have used their official positions in a way that feathers their own nests.

Some voters know about these things, but we don't think the average citizen is aware enough. Public disclosure of conflicts would inform them, so they could decide for themselves whether their elected reps are serving self or public.

Simple disclosure of conflicts would not be difficult at all — even for citizen legislators.

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Great Falls Tribune  
Friday, January 15, 1993

## Our view

# Racicot said what needed to be said

**The issue:** The governor framed Montana's most pressing problems well, and he proposed sound solutions to the Legislature.

**Our opinion:** Racicot's willingness to work with the Legislature will be a tremendous help in achieving those goals this session.

## What he said

Here are some brief highlights of the governor's speech.

• "Montana has one of the highest percentages of small businesses in the nation and our tax structure and workers' compensation system are strangling them. They simply must be fixed without delay."

• "Over the last decade government has grown 15 times larger than our population growth. During the same period our expenditures for higher education saw an inflation adjusted growth of over thirty-three percent. I trust you will agree that our present financial difficulties are not the result of our spending too



• "The crisis in our workers' compensation system is like an anvil draped around the neck of our economy. It completely stifles small business growth and places the jobs those businesses create in harm's way. Burdened by soaring medical costs, litigation, inadequate claims management and fraud, our workers' compensation system is a sorry mess in need of repair."

• "I challenge this Legislature and my co-workers in this administration to join me and work together to restore the confidence of Montanans in their government."

DATE 5-9-93

SENATE COMMITTEE ON State Admin.

BILLS BEING HEARD TODAY: HB 317, HB 94

Name	Representing	Bill No.	Check One Support Oppose	
AMY KELLY	Common Cause	HB 94	<input checked="" type="checkbox"/>	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY