

ETHICS AND CAMPAIGN FINANCE AND PRACTICES LAWS AFFECTING PUBLIC AGENCIES, PUBLIC EMPLOYEES, AND CORPORATIONS

April 2008

As you know, the Montana Code of Ethics and the campaign finance and practices statutes found in Title 13, chapter 35 and 37, MCA provide guidance to public agencies and public employees when it comes to involvement in the political and electoral process. The primary purpose of Montana's ethics and campaign finance and practices laws is to provide for a framework that establishes appropriate conduct for public employees and fully discloses the influence brought to bear on the election process. Title 13, chapters 35 and 37, accomplish this by establishing common definitions, requiring the registration and regular financial reporting of political committees, and establishing rules of appropriate conduct.

For the purposes of this discussion, the statutory references will be confined to permissible and prohibited activities of public employees and agencies and specific kinds of contributions and expenditures by corporations as those activities and fundraising effect the passage of ballot measures.

PUBLIC EMPLOYEE & PUBLIC AGENCY INVOLVEMENT IN ELECTIONS

Section 2-2-121(3), MCA, states that a public officer or public employee may not use public time, facilities, equipment, supplies, personnel, or funds to solicit support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue unless the use is authorized by law or properly incidental to another activity. With respect to ballot issues, properly incidental activities are restricted to the activities of a public officer or the public officer's staff related to determining the impact of passage or failure of a ballot issue on state or local government operations. This statute is not intended to restrict the right of a public employee to express personal political views.

The companion to section 2-2-121(3), MCA is found in section 13-35-226, MCA, describing prohibited activity of employers and public employees. Subsections (3) and (4) of this section state that a person may not require a public employee to support a ballot measure, and a public employee may not solicit support for or opposition to the passage of a ballot issue while on the job or at the place of employment.

GENERAL STATUTES GOVERNING CAMPAIGN FINANCE AND PRACTICES

Section 13-35-211, MCA prohibits electioneering within 100 feet of an entrance to a polling place. Electioneering has been interpreted by the Commissioner of Political Practices to mean the solicitation of support or opposition to a ballot measure at a polling place by personally discussing support for or opposition to ballot measures or the display or distribution of campaign materials with the intent to influence voters. The display of bumperstickers does not constitute electioneering. My experience is that

while complaints alleging electioneering violations are rarely filed, questions about appropriate behavior at polling places make up the vast majority of calls fielded by the Commissioner's office on election day. Section 13-35-214(2), MCA prohibits the illegal influence of voters by promising a public position or employment in exchange for support for or opposition to a ballot measure.

Section 13-35-225(1), MCA, states that all election materials must "clearly and conspicuously" include an attribution providing the name, address, and treasurer of the organization responsible for paying for the election materials. Again, in my experience, the provisions of this section generate a number of questions and official complaints.

Corporations are prohibited from making political contributions to individual candidates, but may make contributions to ballot committees. Section 13-35-228, MCA, provides that a corporation may not increase an employees salary with the intention that the increase be contributed to support or oppose a ballot measure. Also, anonymous contributions are prohibited under section 13-37-217, MCA.

IMPORTANT DEFINITIONS

Section 13-1-101, MCA provides definitions for contribution, expenditure, and political committees. Quite simply, a contribution means money, goods or services, provided to a ballot committee to influence an election. The following are generally not contributions: volunteer services offered by an individual to a committee; bona fide news stories; and the costs associated with communicating to members or employees. An example may be a university employee volunteering her time to speak to service clubs about the six mill levy renewal, or the cost associated with mailing a newsletter with information regarding the six mill levy renewal to corporate shareholders or employees.

Like the definition of contribution, expenditure simply means a purchase or payment, made for the purpose of influencing the results of an election. Expenditure doesn't mean costs of bona fide news stories or member communications. In other words, a newsletter or mailing sent to employees of Blue Cross Blue Shield of Montana providing information about renewing the six mill levy does not represent an expenditure on behalf of the ballot committee under Montana campaign finance law.

For the purposes of this discussion, a political committee is defined as two or more individuals who make a contribution or an expenditure in support of or opposition to a ballot measure. All political committees are required to register and file campaign finance reports with the Commissioner of Political Practices.

Corporations or associations that do not have a political committee designation, and that make contributions to or expenditures on behalf of the Six Mill Levy renewal effort will need to register and report their activities as an incidental political committee. An incidental committee is a political committee that is not specifically organized or maintained for the primary purpose of influencing elections but that may incidentally

become a political committee by making a contribution or expenditure to support the ballot measure. The Commissioner of Political Practices generally provides notice and filing assistance to those corporations who meet the definition of a political committee. Another option is for CMS to file the registration and finance report on the contributing corporation or organization's behalf.

NEW DEVELOPMENTS

Recently, the Montana Republican Party filed an ethics complaint with the Commissioner of Political Practices alleging that Gov. Brian Schweitzer violated section 2-2-121(4), MCA, which states that a "candidate, as defined in section 13-1-101(6)(a), MCA, may not use or permit the use of state funds for any advertisement or public service announcement..." Legal counsel for the Governor has filed a response with the Commissioner of Political Practices asking that the complaint be dismissed stating that use of "state-owned equipment, e-mail accounts and state employee work time does not constitute the use of state funds under the letter of the 2005 law." The Commissioner of Political Practices has not made a decision regarding the Governor's request to have the complaint dismissed.

The implication of the Governor's response is that the use of facilities or equipment, including a public employee's time, aren't specifically prohibited under the provisions of section 2-2-121, MCA. Because the deliberations of an ethics violation generally occur in a confidential setting, it will be difficult to get a sense of how the Commissioner of Political Practices will respond to the Governor's argument. I would suggest, regardless of the outcome of this ethics complaint, that a "formal" group of interested citizens, businesses, students, university employees volunteering their time be responsible for providing any six mill levy campaign materials directly seeking support for the levy renewal to voters.

However, under the code provision discussed earlier, university personnel have every right to discuss the impact of the measure's passage or failure with voters during the course of the campaign.