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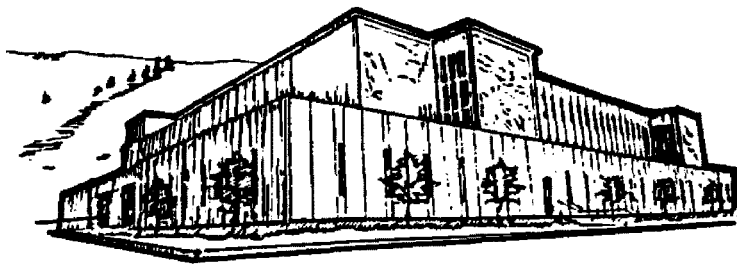
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CONFLICT OF INTEREST LAWS
IN THE STATE OF MONTANA

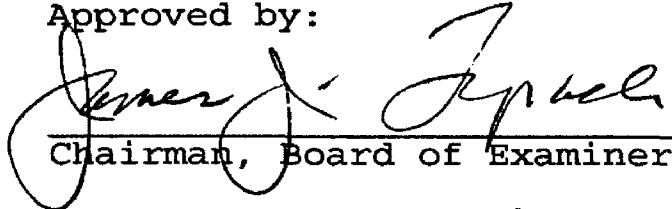
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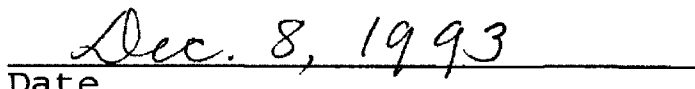
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for the degree of
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INTRODUCTION

Montana lacks any meaningful or enforceable conflict of interest statute controlling elected officials and public sector employees. The press serves as the only de facto interpreter of questions and enforcer of ethics violations. A few recent newspaper articles illustrate this point. During the summer of 1992 the Department of Fish, Wildlife and Parks (FWP) and State Representative Ed Grady negotiated a hunting easement on property owned by Representative Grady.¹ In the fall of 1992 after State Representative Dorothy Bradley's gubernatorial defeat, she and her running mate State Senator Mike Halligan accepted a free train ride from the Burlington Northern Railroad on one of their specially equipped railroad cars. Following the same election, supporters of Public Service Commissioner-elect Bob Rowe organized a fundraiser to retire his campaign debt by inviting representatives of PSC-regulated utilities. During the 1993 legislative session, immediately following his tenure as director of the Department of Health and Environmental Sciences (DHES), Dennis Iverson (an ex-legislator) worked as a lobbyist for a cement company

¹Representative Ed Grady has been negotiating with the Department of Fish, Wildlife and Parks to enter into a conservation agreement for the preservation of wildlife located on his ranch. This agreement would pay Rep. Grady over \$300,000 during a five year period to permit hunting access on his ranch (an activity he already permits). Questions have arisen as to the propriety of this agreement in light of the fact that Rep. Grady serves on both the Fish and Game, and appropriations subcommittee that oversees the budget for FWP.

seeking to defeat legislation that would control the burning of hazardous waste at cement plants. In April 1993 PSC Commissioner Danny Oberg sought clarification from the Attorney General as to the propriety of working for the Burlington Northern Railroad for a day to qualify for early retirement benefits. He had been on leave of absence from the BN during his tenure as commissioner.

These instances illustrate that there is no satisfactory mechanism for the review or determination of the propriety of such activities. These situations also demonstrate a major deficiency in the operations of Montana's government, namely Montana lacks any meaningful conflict of interest laws. This is the subject matter of this professional paper.

The problem with the present situation is that decisions concerning what constitutes acceptable behaviors are initially determined by the actors. They are guided only by their personal moral judgment, which may deviate from what society considers proper behavior. The press then plays its role of interpreter and enforcer of ethics considerations by writing a story or editorial on the matter. If an article appears raising the issue of impropriety of a public official, then that person immediately faces potential public ridicule and must explain his or her position in the public forum. In this case everyone loses. Some may argue that only the press can deter conflicts of interest through their exposure. However, the press can not invoke penalties against public officials.

The press may play the role of the deterrent, but they cannot act as the enforcer.

If some entity issued advisory opinions prior to the action, then the public official would have some protection from public ridicule and the public could be protected from the bad ethical judgments of its officials. The opinion would help to insure that the public official's action is consistent with the state's best interest. While this would not stop all improprieties, it would reduce the likelihood of the problem.

If a conflict of interest violation occurs, then there should be some method of enforcing ethics laws short of criminal prosecution. Under the present system, a press story about an alleged conflict of interest will not for certain stop the official from continuing the activity. The story can only bring some compliance through public shame and ridicule.

Clearly we are all losers under our present system. Questions of impropriety by a public official erode public confidence in government and raise doubts about the integrity of the institution.² "Great danger looms: 'For as public officials continue to betray the public trust, the erosion of democracy necessary follows.'"³

This paper argues that Montana needs a meaningful conflict of interest statute to implement the Montana

²Bob Gerwitt, "Deadly Sins & Wounded Legislatures," Governing, June 1991 at 26.

³Robert Bauer, "Law and Ethics in Political Life," Journal of Law and Politics, (Spring 93): 461.

Constitution's mandate to preclude conflicts between public duty and private interest. The paper begins by tracing the history of the conflict of interest laws in Montana. It then reviews current literature regarding implementing and enforcing effective conflict of interest laws and some leading states' approaches to controlling conflict of interest problems. Finally, drawing upon this material, the paper suggests legislation to establish effective and enforceable conflict of interest laws in Montana and makes suggestions for the passage of the legislation.

PART I.

BACKGROUND OF CONFLICT OF INTEREST LAWS IN MONTANA

Conflict of interest laws are not new in Montana. Such laws date back to 1889. In 1972 the new Montana Constitution called for a code of ethics to prohibit conflict between public duty and private interest. The legislature enacted the Code of Ethics Act to meet the constitutional mandate. However, neither this act nor the constitutional provision offer enforcement provisions which mitigate conflicts of interest. Therefore, it is appropriate to review the history of conflict of interest statutes and rules and their interpretation to explain why there has been a failure in Montana to have meaningful control over conflicts of interest.

In reviewing conflict of interest laws, it is necessary to understand the concept and its origins. The idea of conflict of interest has its roots in the early writings of western society. The biblical expression, "No man can serve two masters," perhaps best demonstrates such origins.

Black's Law Dictionary defines conflict of interest as, "a clash between public interest and the private pecuniary interest of the individual concerned."⁴ Courts that have dealt with this matter have expressed the idea as follows: "The conflict of interest theory is based . . . on the fact that an individual occupying a public position uses the trust

⁴Black's Law Dictionary, 5th ed. (1979) at 271.

imposed in him and the position he occupies to further his own personal gain. It is the influence he exerts in his official position to gain personally in spite of his official trust which is the evil the law seeks to eradicate."⁵ "A 'conflict of interest' may be defined as any circumstance in which the personal interest of a public official in a matter before him in his official capacity may prevent or appear to prevent him from making an unbiased decision with respect to a matter."⁶

The 1889 Montana Constitution addressed a conflict of interest in Article V, Section 30. The section prohibited very limited forms of conflict of interest.⁷ The focus of the prohibition centered on a public official's private interest in public contracts.

The Montana legislature in the early days of statehood enacted laws that prohibited personal gain from positions of power. The laws, however, were limited in scope to conflict

⁵Coral Gables v. Weskler, 164 So.2nd 260, 263 (Fla. Ct. App. 1964).

⁶"Fighting Conflicts of Interest in Officialdom: Constitutional and Practical Guidelines for State Financial Disclosure Laws," 73 Mich. L. Rev. 758 (1975).

⁷Mont. Const. of 1889, Art. V, § 30. "All stationery, printing, paper, fuel and lights used in the legislative and other departments of government, shall be furnished, and the printing, and binding and distribution of the laws, journals, and department reports and other printing and binding, and the repairing and furnishing the halls and rooms used for the meeting of the legislative assembly, and its committees shall be performed under contract, to be given to the lowest responsible bidder below such maximum price and under such regulations as may be prescribed by law. No member or officer of any department of government shall be in any way interested in any such contracts; . . ."

of interests involving contracts:

"Members of the legislative assembly, state, county, city, town, or township officers, must not be interested in any contract made by them in their official capacity or by any body or board of which they are members."⁸

The legislature also adopted miscellaneous conflict of interest laws, such as anti-nepotism laws to prohibit an official from hiring his family,⁹ statutes prohibiting county commissioners from entering into private contacts with their county,¹⁰ and a prohibition of land board members from holding an interest in a state lands lease.¹¹ Between the time of the enactment of these statutes and the adoption of the 1972 Montana Constitution, only one Montana Supreme Court case arose involving the enforcement of the contract conflict of interest laws.¹² The nepotism statutes resulted in only two cases in the Montana Supreme Court during this period.¹³ This paucity of cases suggests that either there was little enforcement of these statutes or there was never a challenge to the proceedings. In 1972 the Montana Constitutional Convention dealt with the issue of conflict of interest.

⁸Political Codes of Montana, § 1023 (1895).

⁹1933 Mont. Laws, Ch. 12.

¹⁰See Mont. Code Ann. § 7-5-2106.

¹¹See Mont. Code Ann. § 77-1-113.

¹²Grady v. Livingston, 115 Mont. 47, 141 P.2d 346 (1943).

¹³Hoagland v. School District, 116 Mont. 608, 151 P.2d 168 (1944); Kurth v. Grinde, 96 Mont. 608, 32 P.2d 15 (1934).

Instead of taking a specific approach, the delegates took a more general approach. Initially, Delegate Aronow introduced language which prohibited conflict of interest in government contracts. His language read similar to the above mentioned statute:

"No member or officer of any department of the government shall be in any way interested in any contract with the state or any of its agencies or departments."¹⁴

In the debate on the matter it became clear that the language did not meet the desired effect of establishing "a policy and standard of honesty and fair dealing on the part of officers and employees of state government."¹⁵ The debate indicated that there were many conflict situations that the provision did not contemplate. Delegate Vermillion then introduced a substitute motion containing the following language:

"A code of ethics for all state officials, officers, legislators and state employees prohibiting conflict between public duty and private interest shall be described by law."¹⁶

This language was later adjusted during the style and drafting part of the constitutional convention to read in its present form found at Article XIII, Section 4.

Code of ethics. The legislature shall provide a

¹⁴Mont. Const. Con. 1972, Trans. Vol. IV at 793.

¹⁵Mont. Const. Con. 1972, Trans. Vol. IV at 793.

¹⁶Mont. Const. Con. 1972, Trans. Vol. IV at 796.

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

In describing the purpose of the provision Delegate Vermillion said:

"I think Mr. Aronow has brought up a very important area here, the conflict of interest; but as you can see from the questions that have been raised tonight that it is a difficult area to deal with in a constitution. . . . The 1989 Constitution has several sections on it and I think perhaps this broad area in the proposed section might mandate the Legislature to have conflict of interest laws but that for us to spell them out here might prove to be a difficult task. But if we do mandate, we do ask the Legislature to have conflict of interest laws, as in the case of Florida, I think that the Legislature would see fit to follow up on this and give us some good, workable laws to take care of some of the problems that Mr. Aronow has pointed out, and some of the other delegates here have pointed out. Conflict of interest is an important area; it's a problem that has been developed and [sic] think with this section that I propose, we would not find ourselves getting into an area of problem, but instead leave it up to the Legislature."¹⁷

What is most revealing about Delegate Vermillion's comments is his recognition of the difficulty of the subject matter. It may not be hard to recognize a conflict of interest when it occurs, but it is hard to establish provisions to prohibit it.

The Constitution was approved by the voters in June of 1972, but it took five years before the legislature finally implemented the code of ethics. After three legislative sessions the forty-fifth legislative assembly finally dealt

¹⁷Mont. Const. Con. 1972, Trans. Vol. IV at 796.

with the matter. This was perhaps the last item in the 1972 Constitution that the legislature implemented. The 1977 legislature passed HB 462 which established "The code of ethics for elected officials and prohibited conflicts of interest." However, despite the enactment of a code of ethics, the legislature failed to establish any enforcement mechanism. The original form of the bill, which contained enforcement procedures, failed on second reading in the House on a 46-48 vote. "After the bill failed to pass the House, it was sent back to committee. Almost all of its teeth were pulled, including the **entire** section dealing with enforcement. This hollow shell of HB 462 then strongly passed the House (76-19)."¹⁸

The legislature recognized the difficulties in establishing the code of ethics in the statute's statement of purpose:

Statement of purpose. The purpose of this part is to set forth a code of ethics 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.¹⁹

¹⁸"Common Cause of Montana Special Bulletin," 1977.

¹⁹See Mont. Code Ann. § 2-2-101.

The legislature laid down some general principles and rules for conduct to avoid conflict of interest situations. The legislature then added the limited enforcement section that gave the Secretary of State the authority to: (1) issue advisory opinions, (2) keep and permit public access to voluntary disclosure statements and (3) "make rules for the conduct of his affairs under this part."²⁰ As with the constitution, the legislature delegated its decision-making to some other entity. It appeared the task was too politically difficult for legislators to reach a consensus on what would or would not constitute a conflict of interest. Therefore, it would be the duty of the Secretary of State to decide what comprises conflict of interest in the specific case, with no means to enforce violations of conflict of interest.

Within a few months after the passage of the legislation, the Secretary of State's office received its first request for determining the proper course of action in a conflict situation. The Missoula County Attorney asked for an opinion regarding several conflict of interest situations involving county officials. (One of those conflicts involved Missoula County Commissioner, Jim Waltermire.) The Secretary of State did the easy thing; he bucked the question to the Attorney General for his opinion. In 37 Op. Att'y Gen. 104, the Attorney General determined the matter. During the remaining years of Secretary of State Frank Murray's term of office, he

²⁰See Mont. Code Ann. § 2-2-132.

issued no advisory opinions. All conflict of interest matters were handled in opinions issued by the Attorney General upon direct requests of county attorneys.²¹

In 1979 the legislature attempted to clarify the 1977 act by strengthening the provisions in Title 2, Part 2. These bills met resounding defeat in the Montana House of Representatives.²² In 1981 another bill to strengthen and clarify ethics provisions met its demise in the House.²³ The 1981 Legislature did, however, pass Senate Joint Resolution 36 which called for an interim legislative committee to be assigned the task of studying the code of ethics for the purpose of making improvements to the statutes.²⁴ Unfortunately the resolution failed to achieve a high enough level of priority to result in an interim study.²⁵ The resolution once again identified the problem, but no action was taken.²⁶

Meanwhile, Jim Waltermire succeeded Frank Murray as Secretary of State. In his first opportunity to address the

²¹38 Op. Att'y Gen. 55, 79, 103 (1979-1980).

²²Montana House Journal, 432, 970 (1979).

²³Montana House Journal, 290 (1981).

²⁴Mont. Sess. Laws, Vol. II, 1577.

²⁵At the end of each session the legislature rates the proposed study resolutions in priority order. Only the top few topics are assigned interim study status. The rest of the resolution studies are deposited in the files, usually never to be heard of again.

²⁶See appendix for copy of resolution.

issue, Waltermire declined to issue an official advisory opinion. This opinion was sought by Senator Eck(D) and Representative McBride(D) regarding the conduct of Senator Anderson(R). The requested opinion was charged with politics and met with a political result. The Great Falls Tribune reported the matter this way:

Waltermire last week declined to review the conduct of Sen. Mike Anderson, R-Belgrade, who earlier this year reminded his Republican colleagues that the insurance industry has been a generous contributor to GOP legislative campaigns. At the time, Anderson - who is an insurance agent - was trying unsuccessfully to legalize the sale of life insurance policies that are invested in common stocks. . . .

Waltermire, in the first ruling of its kind said the code gave him no power to review the past actions of a legislator but only to answer questions about prospective future actions. . . .

Eck and McBride responded to that ruling Tuesday by introducing a resolution saying Waltermire's opinion "demonstrated deficiencies in the current Code of Ethics and (has) raised questions of interpretation, administration and enforcement."²⁷

This incident resulted in the introduction and passage of the before-mentioned Senate Resolution 36.

Shortly after the 1981 session ended, Secretary of State Waltermire proposed rules pursuant to §2-2-132, Montana Code Annotated to implement the Code of Ethics Act. In June 1981, a hearing was held to consider the proposed rules. Seven people testified at the hearing with only one person (counsel to the Secretary of State) speaking in support of the rules.

²⁷Great Falls Tribune, April 22, 1981 at 9-D.

The group of opponents included: the League of Women Voters, Common Cause, the Montana Democratic Party, Montana AFL-CIO and other individuals.²⁸ The general consensus of the opponents was the belief that the rules failed to deal with ethics violations. Representative McBride summed up the opposition's position by saying: "If the interpretation of the statute by the Secretary of State is to be so narrow and restrictive as to render this statutory provision meaningless in my judgment, then the public may be justified in asking if the Secretary of State is attempting to avoid his responsibility."²⁹

Waltermire decided not to adopt the proposed rules but instead sought an Attorney General's Opinion regarding his authority to adopt the rules. In a tersely worded letter he asked for an opinion from the Democratic Attorney General Mike Greely. The letter started out by saying, "I'm tired of Montana's Code of Ethics being used as a political ploy. . . . The kinds of shallow accusations that have been coming from the Democrat's Executive Secretary do a great disservice to the cause of improved ethics administration in this state. This concerns me very much because I am committed to a strong

²⁸Admin. Ethics Rules Hearing, Testimony sign-in sheet, June 17, 1981.

²⁹Letter from Kathleen McBride to Jim Waltermire (June 17, 1981).

workable ethics code for all Montanans."³⁰ He then went on to ask the Attorney General's opinion on nine principal questions and thirty-six sub-issues.

Waltermire received an Attorney General's Opinion in reply which held:

1. The Secretary of State is required to issue advisory opinions, permit public access to voluntary disclosure statements, and adopt rules concerning the conduct of his affairs pursuant to the provisions of the Montana Code of Ethics.
2. The Secretary of State is required to issue advisory opinions concerning the ethical conduct of either the requesting party or a third party.
3. The method of conducting the Secretary's duties under the Code of Ethics is within the discretion of the Secretary of State.³¹

Not surprisingly the opinion reflected the position of the opponents at the June 1981 hearing. Waltermire again faced the task of implementing rules. The June rules, which provided a very narrow role for the Secretary of State in reviewing ethics violations, now had to be expanded to deal with an apparently enlarged role for the Secretary of State's office.

On November 2, 1981, Waltermire proposed a new set of rules which established a six-person ethics commission.³² This commission would handle all matters of ethics violations

³⁰Letter from Jim Waltermire to Mike Greely (July 24, 1981).

³¹39 Op. Att'y Gen. 32 (1981).

³²Mont. Admin. Reg. (1981), Issue No. 21, 1367.

and issue advisory opinions.³³ These rules resulted in one more delegation of the duty of enforcement of conflict of interest determinations. The chain of delegation had now reached the fourth level: Montana Constitution to Legislature to Secretary of State to Ethics Commission.

Following the notice of the proposed rules, new opponents emerged to attack Waltermire. This time the Legislative Council's Administrative Code Committee and then House Speaker Bob Marks (Republican) objected to the rules. The new opponents joined the earlier mentioned opponents in criticizing Waltermire for proposing rules that went beyond the legislative intent. They objected to the delegation of authority to a commission not identified in the statutes.

The press also became critical of Waltermire's proposed ethics commission. They objected to the abdication of the duty to make a decision regarding ethical matters. "He can let the commission render its decisions and then sit back and say, 'Don't blame me, I didn't have anything to do with that decision.'"³⁴

Two memoranda from the Secretary of State's Office legal

³³Rule IV. Purpose. (1) The purpose of the Montana Ethics Commission is to examine requests for advisory opinions which are received by the secretary of state and determine if further consideration of the request is warranted. If so, the commission will examine the facts known to it or found as a result of any investigation it may conduct or of any hearing it may hold, apply the standards established in the Code of Ethics to those facts, and adopt the advisory opinion to be issued by the secretary of state.

³⁴Helena Independent Record, December 14, 1981, Editorial.

counsel Alan Robertson to Waltermire reveal that the rules dispute had turned into an intra-party and personal squabble between Waltermire and Marks. Marks had sent two letters highly critical of the proposed rules. The Robertson memoranda suggested ways to fight Marks. Interestingly, the memos hinted that the basis of the disagreement rested in dispute over a private land transaction between Waltermire and Marks:

The options (of dealing with the criticism of the rules) I see are these: First, let the war continue. . . .

The second option would be somehow to attempt to separate the personal business aspects of this controversy from the political/state government business aspects. . . .

The third option would be some kind of reconciliation scenario. For example, if you could work the \$30,000 cash deal and make the annual payment, thus keeping the land, it would be possible to apologize for any trouble caused and blame it on financial pressures and go forward in a positive manner.

I want you to know that I know I'm advising you only on a political basis. I want you to know that I do not think you are at fault in your business transaction. I certainly don't know enough about it. Plus I have complete confidence and trust in what you're doing. I only mean to point out, as I did with the Missoula County salary situation, the potential consequences of actions which may be taken for personal reasons. Only you can make those choices ultimately, and I'm completely willing to support and deal with whatever you decide.

In hindsight, it probably would have been better not to have gotten involved at all in a deal with this particular person.³⁵

³⁵Memorandum from Alan Robertson to Jim Waltermire (November 29, 1981).

In December 1981, Waltermire proceeded to adopt amended rules that established the ethics commission.³⁶ He then named members to the commission and they began reviewing alleged conflict of interest violations.³⁷

Shortly after the ethics committee began functioning, a group of people brought a legal challenge seeking to enjoin the actions of the ethics commission. Judge Bennett issued an "Opinion and Order," dated July 9, 1982, which found unconstitutional the statutes that granted the Secretary of State authority to issue advisory opinions.³⁸ Judge Bennett, in a cleverly worded opinion, expressed the entire matter as follows:

Conceding, for the sake of argument only, that the legislature intended the opinions called for by Sections 2-2-132(1) to have something to do with the code of ethics laid down in the rest of the statute, one is left to speculate as to whether these are opinions as to the rules of conduct and the violation of a fiduciary duty (covered by Sections 2-2-104, 2-2-111, 2-2-121 and 2-2-125), in which case they would be legal opinions, or whether they are opinions having to do with ethical principles (covered by Sections 2-2-105 and 2-2-122), in which case they would be moral opinions, not having to do with the legal concept of breach of public trust. And it would seem that if the opinions were legal in nature they would be trenching on the prerogative, generally considered up until now to be exclusive, of the attorney general. (Section 2-15-501(7) and the common law

³⁶Mont. Admin. Reg. (1981), Issue No. 24, 1936.

³⁷The initial members of the commission included: Jane Hudson, chairman, Wanda Alsaker, Carrol Graham, Jack E. King, Franklin Stayaert, and James Vidal.

³⁸State, ex rel. Spencer et al. v. Jim Waltermire, et al., First Judicial District, Cause No. 47692 (1982).

antedating out statehood.) If, on the other hand, the opinions were moral in nature it would seem they would be trenching on the prerogative of the Pope and other ecclesiastical authority. It is difficult to believe that the legislature intended to establish the Secretary of State as either an auxiliary attorney general or the state's vicar of morality, yet those seem to be the two functions assigned by the section in question. Nothing, nothing at all, is provided the hapless Secretary of State in the way of guidance as to why, what, when, where or how these opinions are to be generated. The mystery created by the cryptic legislative command is so deep the Secretary was moved to ask the legal advice of the individual he apparently was intended to replace, the attorney general, on not one but nine principal issues and approximately 36 sub-issues before he could proceed with any confidence to sanitize the body politic. (July 24, 1981 letter.) The attorney general shrewdly limited his answers to three (Opinion 39-31, 9/01/81). He advised the Secretary had no choice, he must issue some kind of opinion to anybody that might ask about anything without mentioning anybody's name. Whereupon, the Secretary provided his own guidance by way of promulgating an extensive body of law, in the form of rules, and establishing an advisory commission, presumably to provide the advice and direction denied him by the legislature and the attorney general.

All to the point that no one, however insightful of legislative intent, could possibly provide administrative implementation of the section in question with any confidence that he was carrying out the will of either the electorate, expressed in their approval of the 1972 Montana Constitution, or of the forty-fifth legislative assembly. By simply authorizing the Secretary of State to "issue advisory opinions" the legislature ceded nearly its entire constitutional obligation and authority to effectuate a code of ethics to that officer and, we hope, wished him well.³⁹

With that opinion the conflict of interest statutes met a major blow. There now exists little if any enforcement

³⁹Ibid., 3, 4.

capabilities in the code of ethics. Admittedly, there may be civil penalties that can be assessed against individuals for enjoying private benefits through a public position. But the remedy would be to return whatever benefit that is received. Additionally, certain conflicts of interest could give rise to criminal activities such as bribery,⁴⁰ compensation for past official behavior,⁴¹ gifts to public servants by persons subject to their jurisdiction,⁴² or official misconduct.⁴³ However, prosecution has rarely occurred and the burden of proof would make these cases difficult to prove. In essence the Montana code of ethics is a dead body of laws. Only public shame through the press provides negative sanction for public officials.

As demonstrated in the development of the code of ethics laws, no one entity wanted to assume responsibility for answering the difficult question of what constitutes a conflict of interest. The political mess that surrounded the entire process, with perhaps the exception of the constitutional convention, destroyed any chance for meaningful regulation. Pervasive throughout the implementation of the rules were conflicts of personalities, personal agreements, and political motivations which prevented meeting the public

⁴⁰Mont. Code Ann. § 45-7-101.

⁴¹Mont. Code Ann. § 45-7-103.

⁴²Mont. Code Ann. § 45-7-104.

⁴³Mont. Code Ann. § 45-7-401.

duty -- assuming the public duty could be fulfilled in the first place.

After the Bennett ruling, other legislation has been introduced. Two measures called for placing the ethics enforcement with the Commissioner of Campaign Practices Office.⁴⁴ In 1991 and 1993, legislation was introduced to address the lack-of-enforcement problem. In 1991, House Bills 632 and 633 failed to make it out of committee. In 1993, House Bill 227 passed second reading in the House but was sent to the appropriations committee for a quiet death.⁴⁵ House Bill 94 passed out of committee after extensive revision and made its way to the Senate for its defeat during second reading debate.⁴⁶ During debate on House Bill 94, one state senator expressed his opinion about the need for ethics laws as follows: "I resent the implication that we're doing wrong or that we need this type of legislation."⁴⁷

It remains clear that no one has resolved the problem of

⁴⁴House Bill 689 (1983); House Bill 107 (1987).

⁴⁵Under Montana House of Representative procedures, house bills that have a fiscal impact can be referred to the Appropriations Committee for its approval. Sending a bill to the Appropriations Committee is tantamount to killing the bill without voting against it.

⁴⁶House Bill 94 would have tightened restrictions on conflicts of interest for legislators. The 28-22 majority in the Senate apparently felt that the laws were not needed because there was no problem.

⁴⁷The Montana Standard, April 1, 1993 at 12. Statement made during 2nd Reading debate by Senator Gary Aklestad (R-Galata) on HB 94 (new ethics code for legislators).

how to get meaningful conflict of interest legislation passed. It resembles the children's story about, "Who will bell the cat?"

PART II.

SURVEY OF LITERATURE AND STATE STATUTES

Molly Ivins, a reporter for the Dallas Times Herald, summed up the attitude of legislators about conflict of interest problems as follows: "As they say around the legislature, if you can't drink their whiskey, screw their women, take their money, and vote against them anyway, you don't belong in office."⁴⁸ While this attitude may explain legislative behavior, it does little to restore public confidence in government. Therefore, it is necessary to explore the literature discussing conflict of interest laws to discover workable solutions.

Part I of this paper identifies the historical context of the conflict of interest laws in Montana. It demonstrates why it has been so difficult to establish enforceable conflict of interest statutes. This part surveys literature on the conflict of interest laws and reviews some of the leading states' conflict of interest statutes. This part analyzes conflict of interest laws in two ways. First, it focuses on the limitations of conflict of interest laws. It discusses what can or cannot be accomplished by promulgating these laws. Second, it identifies the components of the laws and the various approaches taken by some leading states. These components include prevention, prohibition, and enforcement.

⁴⁸Molly Ivins, Molly Ivins Can't Say That, Can She? (1991), 1.

This part also reviews practical and political problems that must be overcome for the laws to become effective.

LIMITATIONS IN CONFLICT OF INTEREST LAW

In the pursuit of creating enforceable conflict of interest laws it remains important to recognize what can and cannot be accomplished. First, no set of laws can change the character of the individuals asked to follow them. Second, not all conflict of interest situations can be avoided because certain features of overly restrictive laws will be ignored. The laws must be balanced and reasonable and not overly restrictive to be enforceable.

It would be naive to believe that the passage of enforceable laws is the panacea to conflict of interest problems. "A common criticism of ethics laws is that one cannot legislate ethics."⁴⁹ Laws do not change a person's character, but they might keep a good person honest. "We tend to expect too much from laws and demand too little from people."⁵⁰ The laws themselves cannot supplant the need for voters to elect good people with reputations for integrity. Public officials will decline to do what society fails to

⁴⁹Michael Josephson, "Ethics Legislation: Problems and Potential," State Legislatures, July 1989, 30.

⁵⁰Michael S. Josephson, "Traversing the Mine Field of Public Service Ethics," The Journal of State Government 62, No. 5, 185.

promote.⁵¹ Therefore, conflict of interest laws will only carry as much weight as society gives them. If the public fails to elect honest candidates or fails to remove corrupt officials, these laws will have no effect. Ultimately, the integrity of government lies not in having understandable and enforceable conflict of interest laws, but in having public officials who do not need those laws imposed against them.

It is perhaps easier to instill proper conduct in elected officials through having virtuous people in office than by having enforceable conflict of interest laws. Those people can lead by example and discourage unethical behavior among their colleagues. "Personal example, however is not enough. After all, people pass from the scene -- some sooner and some later."⁵² Further, even the most honest can bend under the pressures of the office. "The temptations that come to people who hold elected office, particularly in a legislature or Congress, are far greater and more numerous than most of them will ever encounter elsewhere. Their decisions can create monopolies, bail out failure and make companies and individuals rich."⁵³ Therefore, even honest officials can be

⁵¹John Feerick, "Do We Really Want Ethical Government?" New York State Bar Journal, (Jan. 1992): 8-11.

⁵²Charles E. Roemer, III, "Putting Honesty in Politics," Journal of State Government 62, No. 5, 171.

⁵³Tom Loftus, "The Road to Ethical Legislatures isn't Paved with Tougher Laws," Governing, (Nov. 1991): 11.

corrupted without conflict of interest laws.⁵⁴

It remains important to keep a focus on what problem is being eradicated by conflict of interest laws and how that can be best accomplished. The effectiveness of the laws is limited to their reasonableness. For the laws to be reasonable there must be a balance between overly restrictive and loose laws. If the laws are overly restrictive, they will not be enforced. If the laws are too loose, the loopholes could permit unacceptable behavior. For example, if the law prohibited a legislator from receiving "anything of value" from a lobbyist, then technically the act of receiving a free cup of coffee could violate the act. A prosecutor would refuse to prosecute or have a hard time convicting an elected official for the violation of the law for one cup of coffee. Such overly restrictive laws are either ignored or ridiculed. Conversely, public scandals can occur even though the questionable behavior is technically legal.

Unfortunately, it usually takes the public outrage of a scandal to pass strong conflict of interest legislation.⁵⁵ "History tells us that unless pressed by the backlash from scandal, political leaders will almost invariably ignore

⁵⁴Karen Hansen, "Walking the Ethical Tightrope," State Legislatures, (July 1988): 17.

⁵⁵In 1991, House Bills 632 and 633 (very restrictive conflict of interest legislation) died swift deaths in the House State Administration Committee.

proposals for ethics reform."⁵⁶ "There is no doubt that some of the fallout (from a governmental ethics scandal) has been healthy. Ethics reforms that were sorely needed but seemed unattainable gained new life."⁵⁷ However, following a scandal the legislature often enacts statutes that contain overly restrictive provisions.⁵⁸ In reaction to conflict of interest scandals, lawmakers have absolutely prohibited decision-makers from taking "anything of value" from interested persons. This prohibition includes anything from vacation trips to cups of coffee. South Carolina's Attorney General explained this interpretation as follows:

Because it was not entirely clear what that meant, (a thing of value), many of the lawmakers were jolted by Attorney General Michael J. Bower's opinion that the new language prohibits legislators from receiving any of the gifts and free trips they had been accustomed to, cups of coffee and exotic vacations alike. Bowers says he doubts that anyone will be prosecuted for accepting a free meal, but he suggests that the law be observed to the letter.⁵⁹

These overly restrictive provisions could plant the seeds for inconsistency in the enforcement of the laws. On the other hand, you end up with the type of laws the state of Montana has on the books if there is no impetus to enact

⁵⁶John Feerick, "Do We Really Want Ethical Government?" Id. at 10.

⁵⁷Bob Gerwitt, "Deadly Stings & Wounded Legislatures," Governing, June 1991, 28.

⁵⁸Jeffrey L. Katz, "Sipping from the Cup of Corruption," Governing, Nov. 1991, 27.

⁵⁹Ibid.

meaningful conflict of interest laws. As shown above, Montana's laws are nebulous and unenforceable.

If you accept the contention that conflict of interest laws must be reasonable (neither too stringent nor too lenient), then it follows that not all conflicts of interest will be prevented. As long as we have a system that requires raising funds to get elected, then we will have inherent conflicts of interest within the system that "reasonable" laws do not address. "The root of much corruption, according to Robert M. Stern, general counsel of the California Commission on Campaign Financing, is money and a political system that requires more and more of it to win and maintain office."⁶⁰ Those who contribute large amounts of money to a candidate certainly have more influence when the candidate becomes an elected official. But "reasonable" laws only set the minimum acceptable standards for proper conduct of public officials. "Laws . . . establish standards of behavior that may or may not correlate with individuals' consciences and do not purport to establish any more than minimal criteria for behavior."⁶¹

For example, U.S. Senator Cranston violated no law by using his influence to assist the major savings and loan scandle kingpin Mr. Keating (a major contributor to his fund-raisers). Yet, the Senate Ethics Committee still condemned

⁶⁰Karen Hansen, "Walking the Ethical Tightrope," *Id.* at 15.

⁶¹Michael Josephson, "Ethics Legislation: Problems and Potential," *id.*

his actions. "'The Committee concluded that while "none of Senator Cranston's . . . activities concerning [Keating's business] were [sic] illegal,' he had acted unethically by 'substantially linking' fund-raising and legislative action."⁶² The laws can only control clearly defined and consensus backed violations of conflicts of interest; the voters must do the rest.

While strong enforceable conflict of interest laws may offer some deterrent effect, they are not the only deterrent. The former Speaker of the Wisconsin House of Representatives expresses his belief that the press serves an important role in controlling legislators' behavior: "Fear of the consequences is the most important deterrent to unethical behavior, and fear of the press is paramount. A watchful, picky, even vengeful--but consistent--newspaper is better than legal structures that try to anticipate every possible human foible or temptation. The thud of the newspaper at the doorstep should make the politician's heart beat a little faster."⁶³

Another expert on ethics put it this way -- the press, the public and the opposition party may be perhaps "the most

⁶²Robert Bauer, "Law and Ethics in Political Life: Considering the Cranston Case," Journal of Law and Ethics, (Spring 1993): 464.

⁶³Tom Loftus, "The Road to Ethical Legislatures isn't Paved with Tougher Laws," *id.*

effective watchdogs of ethical behavior."⁶⁴ However, as shown above there still is a need to establish enforceable conflict of interest laws to curb the behaviors that erode the public trust.

CHARACTERISTICS OF CONFLICT OF INTEREST LAWS

While there are many features of effective conflict of interest laws, they generally divide into three categories. Those components include: prevention, prohibitions, and enforcement.

The elements of prevention include disclosure of financial interests, gifts, benefits received, and political contributions. Additional preventative measures involve advisory opinions and education. Preventative measures try to sensitize officials to ethical considerations and remind them of the possible sanctions for improper behavior.

The prohibition provisions identify and make illegal the activities which constitute conflicts of interests. Those prohibitions focus on the use of one's position for personal gain during and after the period of service. Some of the major prohibited conflicts of interest include:

- Contracts between the state and state officials or employees who can personally benefit from the contract.

⁶⁴Karen Hansen, "Walking the Ethical Tightrope," *id.* at 17.

- Exerting undue influence by virtue of one's position on behalf of family, clients, political contributors or receiving payments or gifts for actions taken.
- Nepotism.
- Representing an individual, for a fee or personal benefit, before governmental agencies while serving in public office.
- Improper use of one's office resources for campaigning purposes.
- Using one's public position for post-employment opportunities.

In the category of enforcement the statutes generally provide for investigations, hearing, prosecution, and sanctions. Because of the political nature of conflict of interest violations, the structure of an enforcement agency must often be different from normal executive branch agencies to prevent abuses in enforcement. Such abuses could include prosecution of adversaries for political purposes. Improper or selective enforcement of conflict of interest laws creates results as abhorrent as the violations themselves. "Ethical standards can be violated not only by those whose conduct breaks the rules but also by those who interpret and enforce the rules, if they do so in a way -- and for a motive -- that violates and undermines the basic purposes those standards are

supposed to serve."⁶⁵

Preventative Statutes

As mentioned above, preventative conflict of interest statutes are designed to make officials aware of potential problems. To that end, disclosure of one's personal financial interests serves to sensitize office-holders to the presence of potential conflicts of interest.⁶⁶ It also puts the world on notice of potential conflicts of interest the office-holder may have. "This provision allows public review and scrutiny of the private holdings of public servants to assure that these holdings do not pose a conflict with respect to the officials' public responsibilities."⁶⁷

However, these disclosures usually are not reviewed by anyone other than a few investigative reporters⁶⁸ and those conducting opposition candidate research. While most believe disclosure information is a necessary component of effective conflict of interest laws, the extent of its usefulness

⁶⁵Bruce Jennings, "Too Much of a Good Thing?" Journal of State Government 62, No. 5 (1989): 175.

⁶⁶Burke and Benson, "State Ethics Codes, Commissions and Conflicts," Journal of State Government, 62, No. 5 (1989) : 195.

⁶⁷Mario Cuomo, "Restoring Trust in Government," Journal of State Government 62, No. 5 (1989): 177.

⁶⁸Burke and Benson, "State Ethic Codes, Commissions and Conflict," *id.* at 196.

remains unknown.⁶⁹ Further, there remains a question of the proper balance between the public's right to know and the public official's right to privacy.⁷⁰ The disclosure laws also may have a chilling effect on participation in government; individuals may refuse to sacrifice their privacy for public service.⁷¹

State disclosure requirements divide in two ways: who has to file and the information they disclose. The state statutes range from no disclosure to extensive divulgence. The amount of information required usually depends upon the status of the office. State-wide elected officials typically must reveal much more financial information and gift receipts than lower level officials. Montana requires financial disclosure of only the business interests of elected officials, their spouses, and their immediate minor children.⁷² Montana's disclosure laws ignore top appointed officials, employees in key decision-making positions, hired consultants, and candidates for office. These statutes do not require the reporting of the receipt of gifts or other benefits bestowed upon the office holder.

⁶⁹Ibid.

⁷⁰"Fighting Conflicts of Interest in Officialdom: Constitutional and Practical Guidelines for State Financial Disclosure Laws," 73 Mich. L. Rev. 758 (March 1975). Also see Mont. Const. of 1972, Art. II, § 9 (Right to Know about Government Operations) and § 10 (Right of Privacy).

⁷¹Id. at 781.

⁷²Mont. Code Ann. § 5-7-213.

Montana law does encourage voluntary disclosure of conflicts of interest.⁷³ However, this provision seems to suggest that the questionable action is acceptable if disclosure is made. Michael Josephson, a recognized expert on ethics laws, expressed his criticism of disclosure laws as follows:

The non judgmental nature of revelation rules seems to suggest that all conduct is proper so long as it is disclosed. I am uncomfortable, for example, with the idea that honoraria or loans given to influential government officials can be considered proper just because they are reported. Such transactions ought to be prohibited.⁷⁴

Contrast Montana to the requirement of California,⁷⁵ South Carolina,⁷⁶ Texas,⁷⁷ and Wisconsin.⁷⁸ California requires all elected and key officials to disclose all economic interests and gifts in excess of \$50.⁷⁹ South Carolina requires disclosure statements from an extensive list

⁷³Mont. Code Ann. § 2-2-131.

⁷⁴Michael Josephson, "Ethics Legislation: Problems and Potential," id.

⁷⁵California often serves as a model state for other states in the west. It maintains modern conflict of interest laws with its latest amendments occurring in 1991.

⁷⁶In 1991, South Carolina made major changes to its conflict of interest statutes following a scandal.

⁷⁷Texas enacted major changes to its conflict of interest statutes in 1991.

⁷⁸Wisconsin has had stringent conflict of interest statutes for many years and recently tightened them even further.

⁷⁹Cal. Gov't Code §§87202, 87207 and 87501.

of public officials and employees including hired consultants. These officials must disclose all economic interests and the receipt of "anything of value," only excluding gifts from family members.⁸⁰ Texas requires all elected and key government officials and top officials in the political parties to disclose all economic activities and receipt of gifts of "anything of value," in excess of \$250.⁸¹ Wisconsin requires elected officials, candidates and key government officials to disclose all economic interests and gifts in excess of \$50 except from family members.⁸²

The clear trend in the most recent enactments of conflict of interest laws is to require economic disclosures from all elected or appointed government officials who make key policy decisions. These disclosures usually include the receipt of gifts from non family members. While it may be excessive to require the reporting of every free cup of coffee received from a lobbyist, there needs to be an upgrade of the disclosure requirements in Montana.

The other aspects of preventative laws usually comes in the form of educational and advisory activities performed by the agency administering the conflict of interest law. These activities include educating those who must file disclosure

⁸⁰S.C. Code Ann. § 8-13-1110 et seq.

⁸¹Tex. Code Ann. Art. 6252-9b.

⁸²Wis. Stat. Ann. § 19.43.

statements on the proper way of accomplishing that task.⁸³ Education also should include not only information about the do's and don'ts of the laws but also explanations about the principles surrounding the concepts of conflict of interest.⁸⁴ "People in government could benefit greatly from the opportunity for concentrated consideration of ethical problems they typically encounter, so they can learn more effective strategies to perceive and deal with the ethical implications of their conduct."⁸⁵

Equally important to education is the availability of both published and unpublished advisory opinions on real or hypothetical conflict of interest matters.⁸⁶ These opinions inform the public and interested parties as to the specific do's and don'ts and offer an opportunity for individuals to seek advice before the questionable activities occur. They not only can prevent a questionable action from occurring, but also can save an official from potentially embarrassing after-the-fact scrutiny by the press. This unpublished information should remain confidential unless the requestor makes it public.

⁸³S.C. Code Ann. § 8-13-320(2).

⁸⁴ Michael Josephson, "Ethics Legislation: Problems and Potential," *id.*

⁸⁵*Ibid.*

⁸⁶S.C. Code Ann. § 8-13-320 (11).

Prohibitions

Conflict of interest prohibitions center around the identification of activities which constitute conflicts between private activities or benefits and public duty. While the Montana statutes cover most of the above-identified activities, they are often written in philosophical and obtuse language that sounds like biblical directives.⁸⁷ The Montana laws also contain many gray areas which contain large loopholes.⁸⁸

Montana prohibits nepotism⁸⁹ and contracts between state officials and the state.⁹⁰ There are revolving door restrictions prohibiting former employees from contracting with his or her former agency.⁹¹ However, the restriction is only for six months and is limited to matters in which the employee was directly involved. This leaves much room for use of personal contacts and insider information gained through

⁸⁷"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." Mont. Code Ann. §2-2-105 (1).

⁸⁸Mont. Code Ann. § 2-2-112(1) illustrates the looseness of the statutes. "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." (emphasis added)

⁸⁹Mont. Code Ann. § 2-2-301, et seq.

⁹⁰Mont. Code Ann. § 2-2-201, et seq. This section only prohibits contracts made by public officials in their official capacity.

⁹¹Mont. Code Ann. § 2-2-201.

public employment.

Other states show more definitive prohibitions. The following paragraphs summarize those statutes.

Contracts between state officials or employees and the state.

This item on its face may be the easiest conflict to identify. Obviously public officials can not have an interest in a contract made by them in their official capacity.⁹² However, there may be more than direct contracts that must be prohibited.

South Carolina prohibits public officials or employees from having an economic interest in a contract if he or she has an official function relating to the contract.⁹³ Texas prohibits the leasing of office space or real property between an elected official and the state. It further prohibits the receipt of fees for solicitation of contracts from the state.⁹⁴

Exerting undue influence by virtue of one's position.

This provision precludes both accepting benefits from an individual seeking a special favor and using public office to advance one's economic interests. The offensive conduct may

⁹²Mont. Code Ann. § 2-2-202.

⁹³Mont. Code Ann. § 8-13-775.

⁹⁴Tex. Code Ann. Art. 6252-9b §§7C and 8A.

include anything from taking bribes or kickbacks for the awarding of contracts, to accepting a cup of coffee from a lobbyist seeking favorable treatment of certain legislation.⁹⁵ While Montana has criminal sanctions against the receipt of bribes and gifts,⁹⁶ the present laws only provide a fuzzy prohibition against other related matters.

South Carolina makes a direct and broad prohibition against such activities:

(A) No public official, public member, or public employee may knowingly use his official office, membership, or employment to obtain an economic interest for himself, a member of his immediate family, and individual with whom he is associated, or a business with which he is associated. * * *

(B) No public official, public member, or public employee may make, or participate in making, or in any way attempt to use his office, memberships, or employment to influence a governmental decision in which he, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated has an economic interest. * * *⁹⁷

If officials in the course of official duties come across a conflict of interest situation, then they are required to disclose the conflict situation and decline to participate in the decision-making activity.⁹⁸

Another South Carolina statute prohibits legislators from voting on that portion of an appropriations bill which relates

⁹⁵Tom Loftus, "The Road to Ethical Legislatures isn't Paved with Tougher Laws," Governing, id.

⁹⁶Mont. Code Ann. §§45-7-101 and 45-7-104.

⁹⁷S.C. Code Ann. §8-13-700.

⁹⁸Ibid.

to an area of government that he has conducted business with or before which he has represented clients. This would address the concern that certain legislators employed by or contracting with state government may be taking advantage of their position to better fund the agency that employs them. Likewise, it could prevent lawyer-legislators from using the budget process to punish or reward governmental agencies that adjudicated their clients' administrative contested cases. This provision affects legislators employed in the public sector or legislator-lawyers who represent clients before administrative agencies.

The South Carolina statutes further prohibit offering anything of value to influence public decision-making:

(A) A person may not, directly or indirectly, give, offer, or promise anything of value to a public official, public member, or public employee with the intent to: (1) influence the discharge of a public official's, public member's, or public employee's official responsibilities; (2) influence a public official, public member, or public employee to commit, aid in committing, collude in, or allow fraud on a governmental entity; or (3) induce a public official, public member, or public employee to perform or fail to perform an act in violation of the public official's, public member's, or public employee's official responsibilities.⁹⁹

Likewise, a public official could not solicit anything of value for the above-mentioned purposes.¹⁰⁰

Older Wisconsin legislation presented a looser approach

⁹⁹S.C. Code Ann. § 8-13-705.

¹⁰⁰Ibid.

by not absolutely banning gifts or favors. It tempered the prohibitions by requiring a value judgment as to the likelihood that there would be an improper influence or economic gain as a result of the gift or action. This would permit the receipt of a cup of coffee or even a meal from a lobbyist trying to seek favorable treatment of certain legislation:

(2) No state public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization which he or she is associated.

(3) No person may offer or give to a state public official, directly or indirectly, and no state public official may solicit or accept from any person, directly or indirectly, anything of value if it could reasonably be expected to influence the state public official's vote, official actions or judgment, or could reasonably be considered as a reward for any official action or inaction on the part of the state public official. This subsection does not prohibit a state public official from engaging in outside employment.

* * *

(5) No state public official may use or attempt to use his public position to influence or gain unlawful benefits, advantages or privileges for himself or others.¹⁰¹

However, after a recent scandal the Wisconsin legislature shortened subsections three and five to the following:

(3m) No state public official may accept or retain any transportation, lodging, meals, food or beverage, or reimbursement therefor, except in accordance with section 1956(3) [relating to honorariums, fee and expenses for speaking engagements].¹⁰²

¹⁰¹Wis. Stat. Ann. § 19.45.

¹⁰²Amended by 1989 Act 338, § 54.

(5) No state public official may or attempt to use the public position held by the public official to influence or gain unlawful benefits, advantages or privileges personally or for others.¹⁰³

Additionally, the Wisconsin legislature specifically prohibited the receipt of tickets or parking privileges for sporting events.¹⁰⁴

California prohibits the use of official position for the purpose of influencing a governmental decision "relating to any person with whom he or she is negotiating, or has any arrangement concerning, prospective employment."¹⁰⁵

Nepotism.

Nepotism is defined as "the bestowal of political patronage by reason of relationship rather than merit."¹⁰⁶ The Montana statutes in this area are clear and unambiguous. Section 2-2-302, MCA generally prohibits a public official from employing family members.¹⁰⁷ A South Carolina statute includes provisions which address other personnel matters relating to an official's family member if that individual is already employed before the official assumes office:

¹⁰³Amended by 1991 Act 316, § 182.

¹⁰⁴Wis. Stat. Ann. §19.451.

¹⁰⁵Cal. Code Ann § 87407 Gov't. Code.

¹⁰⁶Mont. Code Ann. § 2-2-301.

¹⁰⁷There are some minor exceptions to this prohibition, such as a sheriff may appoint a family member as a cook or attendant.

(A) No public official, public member, or public employee may cause the employment, appointment, promotion, transfer, or advancement of a family member to a state or local office or position in which the public official, public member, or public employee supervises or manages.

(B) A public official, public member, or public employee may not participate in an action relating to the discipline of the public official's, public members's or public employee's family member.¹⁰⁸

Representing others while serving in public office.

An emerging area in conflict of interest statutes is the prohibition of public personnel from representing clients before agencies or boards. The primary focus of this prohibition is to prevent a public official or his family or business associates from representing another person before a governmental entity. The insider information, personal contacts, and influence gained through one's position could lead to an unfair advantage for the client. This also prohibits state legislators who are attorneys from having their firms represent clients before state agencies.^{109,110}

Improper use of one's office for campaigning purposes.

One of the often raised complaints about elected officials is the use of their offices for campaign purposes.¹¹¹ This concern is not limited to candidates for

¹⁰⁸S.C. Code Ann. § 8-13-750.

¹⁰⁹See S.C. Code Ann. § 8-13-740.

¹¹⁰George Carinello, "Should Lawyers Be Legislators?" State Government News, (May 1991): 12. Also see Hastings Law Journal 41 (1989).

¹¹¹See Missouliau, November 19, 1985 at 11.

elected office seeking reelection or another office. It can also apply to elected officials or public employees who may have an interest in a ballot measure. Montana law somewhat addresses this concern:

No public employee may 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 while on the job or at his place of employment. However, nothing in this section is intended to restrict the right of a public employee to express his personal political views.¹¹²

South Carolina specifically prohibits the use of governmental personnel or facilities for election purposes: "No person may use government personnel, equipment, materials, or an office building in an election campaign."¹¹³

Using an office for future employment opportunities.

This area of conflict of interest laws deals with prohibitions on the use of public office for employment opportunities after leaving a government position. This practice (revolving door activities) generated much criticism of President Reagan's appointees during his administration. The practice centers around officials either taking advantage of their position to obtain future employment or using insider information and personal contacts from their former position in post-office employment -- such as: lobbying or appearing

¹¹²Mont. Codes Ann. § 13-35-226(3).

¹¹³S.C. Code Ann. § 8-13-770.

before the agency that had employed that individual. By Executive Order the Clinton administration prohibited former employees from having any contact with their former agency or lobby for up to five years.¹¹⁴

State governments unfortunately can not draw upon high salaries or prestige to overcome tight revolving door restrictions in attracting good candidates for appointive positions. "While many states may be criticized for ignoring the problem of 'revolving doors,' care should be taken not to draw too strict barriers. Too tight of a 'revolving door' provision may make it difficult to recruit administrators."¹¹⁵

Montana addresses the revolving door problem only to the extent it applies to interests in contracts with the state. Former employees cannot have any contractual ties to the state for six months after termination of their employment in matters directly related to their employment.¹¹⁶ This approach leaves major revolving door problems that should be addressed.

Some other state statutes require a one-year waiting period before having business contacts with the government. The type of contact with the government that is permitted depends upon the position and the activities of that position.

¹¹⁴Exec. Order No. 12834 (Jan 20, 1993); 58 Fed. Reg. 13 (Jan. 22, 1993).

¹¹⁵Burke and Benson, "State Ethics Codes, Commissions and Conflicts," Journal of State Government 62, No. 5 (1989): 197.

¹¹⁶Mont. Code Ann. § 2-2-201.

California specifically precludes former legislators from lobbying the legislature or representing any other person before any state agency for the year immediately after leaving office. State officers are also prohibited from representing anyone before a state agency for one year following their leaving office. State employees and consultants are prohibited from representing anyone before the agency in which they were employed.¹¹⁷ A California statute also precludes having any involvement with a governmental decision pertaining to an entity with whom that person is negotiating employment.¹¹⁸ South Carolina prohibits accepting employment from "a person who is regulated by the agency or department on which the former public official, former public member, or former public employee served or was employed," if the employment involves a matter they participated in during their public service.¹¹⁹

Enforcement

No matter what conflict of interest laws are enacted, they are ineffective without a workable enforcement mechanism. Enforcement needs to occur through an independent agency that has the ability to fairly and completely administer the laws. "A second essential is consistent application of the laws . .

¹¹⁷Cal. Code Ann. § 87406, Gov't Code

¹¹⁸Cal Code Ann. § 87501, Gov't Code

¹¹⁹S.C. Code Ann. § 8-13-755.

. . . pursued to a guilty or not-guilty conclusion."¹²⁰ Tom Loftus, the former speaker of the Wisconsin Assembly, came to that conclusion after following an influence-peddling scandal which happened in spite of strong state conflict of interest laws. Strong laws without proper enforcement result in the ignoring of the laws. Therefore, it is necessary to establish a structure for enforcement that secures the consequences for violating conflict of interest laws.

As shown above, Montana lacks any enforcement of conflict of interest laws, with the exception of criminal prosecution for bribery or official misconduct for receiving gifts from those whom you regulate. This enforcement only addresses the most flagrant of abuses of conflict of interest situations, and little or no prosecution in this area has occurred. There are no sanctions short of severe criminal prosecution to control a conflict of interest problem.

Generally the states with modern conflict of interest laws provide for their enforcement through ethics commissions.

In the post-Watergate years of 1974 to 1978, states rushed to write ethics laws that were mostly ineffective because there were few, if any, enforcement measures included. But in the past four years there has been a great deal of recodification, tightening of loopholes and wholesale revisions of some of these laws.¹²¹

The makeup of the enforcement agency is crucial because

¹²⁰Tom Loftus, "The Road to Ethical Legislatures Isn't Paved With Tougher Laws," Governing, id.

¹²¹Karen Hansen, "Walking the Ethical Tightrope," id. at 16.

it determines if the state will have "ethical politics" or "political ethics."¹²² "Ethical politics" is a game that everyone wins, and "political ethics" is a game in which everyone loses because prosecution of violations is for political purposes.

There are two approaches to avoiding a partisan and abusive commission. The statutes can either acknowledge the political sensitivity of the commission and insure a balance between the major parties or alternatively attempt to sanitize the politics by selecting politically neutral members. Illustrative of the former method, the Texas Commission has eight members with an equal division between the political parties.¹²³ This division attempts to maintain a balance of interests between the major parties. Alternatively, South Carolina makes its governor select the ethics commission (subject to legislative confirmation) from supposedly politically neutral people with none of the members having any ties to government.¹²⁴

Derivatives of these formulas could include the methods used by Montana for appointing the Reapportionment Commission¹²⁵ or selecting the Commissioner of Campaign

¹²²Bruce Jennings, "Too Much of a Good Thing," *id.*

¹²³Tex. Code Ann. § 1.04, Art. 6252-9d.1.

¹²⁴S.C. Code Ann. §§ 8-13-310 and 8-13-330.

¹²⁵Mont. Code Ann. § 5-1-102.

Practices.¹²⁶ In the former, the political balance is achieved with one tie-breaker, politically neutral member selected by a majority of the partisan members. In the latter, the governor selects the Commissioner from a list submitted by the politically balanced legislative leadership.

Other important features of enforcement are the powers of the agency to investigate and prosecute conflict of interest violations. Commissions in other states have powers similar to those granted to state agencies under the Montana Administrative Practices Act (MAPA).¹²⁷ Those powers include administrative searches, subpoenas and authority to conduct contested cases. However, due to the sensitive nature of these type of complaints, public disclosure of the proceedings may be limited until the case reaches final disposition.¹²⁸ These cases could be handled the same way the Commission on Practice presently handles lawyer discipline.

The enforcement agencies generally have the authority to either impose civil penalties or refer the matter for criminal prosecution. The civil penalties may include fines, restitution of inappropriately used funds, suspension or removal from office, revoking lobbying privileges, and the

¹²⁶Mont. Code Ann. § 13-37-102.

¹²⁷See Mont. Code Ann., Tit. 2, Ch. 4.

¹²⁸S.C. Code Ann. § 8-13-320(g).

cancellation of contracts.¹²⁹ Additionally, sanctions can be imposed for failing to file timely financial disclosure reports. Some statutes provide for penalties against persons submitting fraudulent or frivolous claims.¹³⁰

Clearly the capacity to enforce conflict of interest laws rests greatly upon the quality and integrity of the members of the enforcement agency. But no matter how the members are selected or what the political balance of the commission is, it is equally important to have an enforcement agency with members who have solid political moxie and good political judgment. "Political judgment, in the classical sense of the term, is the capacity to tell the difference between public and private ends. It is also the ability to spot a private interest masquerading as a public good."¹³¹

Finally, there must be a commitment by the legislature to fully fund the enforcement agency so it can do its job. The quality of the conflict of interest laws or of the individuals serving in the enforcement agency matters little if there is not a real financial commitment by the legislature to enforcement of the laws.

¹²⁹See S.C. Code Ann. § 8-13-1510; Tex. Code Ann. §1.28, Art. 6252-9d.1; Wis. Stat. Ann. § 19.53.

¹³⁰Wis. Stat. Ann. § 19.53.

¹³¹Bruce Jennings, "Too Much of a Good Thing?" *id.*

PART III.

RECOMMENDATIONS AND CONCLUSION

Part I discussed the past (history of the conflict of interest laws in Montana). Part II reviewed the present, through a survey of literature and statutes. Part III makes recommendations for the future of conflict of interest laws in Montana. Part III proposes legislation and a strategy for its passage in Montana. Attached to this paper is the appendix containing the proposed legislation.

PROPOSED LEGISLATION

The Council of State Governments, through its subgroup the Council on Governmental Ethics Laws (COGEL), formed a committee to draft and recommend model ethics legislation. It sought to draft uniform legislation and find ways to deal with difficult issues (as identified in this paper). A f t e r reviewing conflict of interest legislation from other states it becomes clear that the model legislation prepared by COGEL offered a composite of the most advantageous features from all of the states. The "Model Law for Campaign Finance, Ethics and Lobbying Regulation" offers a balanced and comprehensive approach to addressing conflict of interest issues identified in Part II. COGEL's membership includes a geographical diverse group of people involved with different aspects of ethics laws. This group included experts in the fields of campaign finance, ethics and lobbying regulation. All the

council members have experience in the regulation of governmental ethics. COGEL operates with assistance and support staff from the Council of State Governments (CSG).

While the model legislation deals with more than conflict of interests issues¹³², the "Ethics" part that focuses on conflicts of interest makes a suitable starting point for drafting proposed legislation. The legislation found in the appendix relies heavily on the language found in the model act. The proposed legislation deviates from the model act in areas that require modification for passage and operation in Montana.

This legislation provides softer prohibitions than the model legislation. This makes its passage more likely because legislators are not likely to pass strict measures which control their own behavior. Specifically, it is acceptable to receive minor gifts, meals and "anything of value" in reasonable small monetary values under an aggregate amount of \$500 a year. Reporting is not necessary for the receipt of anything of value in an aggregate amount of less than \$500 a year. This recognizes the difficulty in enforcing prohibitions as stringent as the South Carolina laws. It further makes financial disclosure requirements apply only to

¹³² "A Model Law for Campaign Finance, Ethics, and Lobbying Regulation" contains three integrated parts as identified in its title. Edward D. Feigenbaum served as chair of the committee and also edited the campaign finance portion of the act. John L. Larsen served as the editor of the ethics part and Betty J. Reynolds edited the lobbying section.

the upper administration offices and elected officials. The cost of administration is thus reduced by requiring information from only those who hold positions that set administrative policy.

This legislation substantially modifies the model act's enforcement procedures. The enforcement portion of the legislation uses an existing administrative agency by assigning the duties of investigation and prosecution of conflict of interest violations to the Commissioner of Campaign Practices. This merely expands the duties of that agency and should result in a minimal fiscal impact. Every attempt to minimize fiscal impact is important to secure passage of the legislation. Legislation that includes a fiscal impact receives very close scrutiny and usually its passage is unlikely.

The legislation assigns adjudicatory and advisory opinion functions to an ethics commission. The legislature would appoint the membership of the commission in the same manner as the Legislative Reapportionment Commission.¹³³ The separation of the prosecution from the adjudication would further insure fair and impartial treatment of the alleged violator. This would prevent a "star chamber"¹³⁴ atmosphere, where the same

¹³³See Mont. Code Ann. § 5-1-102.

¹³⁴Ancient Britain used a "Star Chamber" to prosecute individuals. This procedure lacked major due process protection because of its structure and treatment of the defendants.

agency serves as investigator, prosecutor, judge and jury.

The legislation also contemplates punishing individuals making false complaints. Therefore, if an individual tries to use the enforcement process to falsely accuse somebody, then they may face a penalty. This should prevent political parties from using the process for harassment or political purposes.

The accused also has an opportunity to force a show cause hearing to make the prosecutor prove that enough evidence exists to continue the proceeding. This may prevent unfounded accusations and innuendoes from ruining a person's career. Because of the sensitive nature of the matter, the accused would have the option to make the proceedings either open or closed to the public. However, the results of the findings ultimately would become available for public inspection.

Finally, the proposed legislation incorporates the existing nepotism statutes. The existing Montana statutes address nepotism issues; however, they permit flexibility for quirks in the law peculiar to Montana. For example, under existing statutes, a sheriff may hire a relative to prepare meals for prisoners. This provision addresses the problem of finding employees in small towns.

RECOMMENDATIONS FOR PASSAGE

This paper identified the difficulty of gaining passage of any meaningful conflict of interest legislation. As a result of the problem, someone must develop legislation

through a consensus building process. It would require bringing all of the interest groups together prior to the session to recommend and review conflict of interest legislation. Such interest groups would include everyone from Common Cause to the people subject to the legislation.

The following process would provide the political groundwork necessary for the passage of the legislation. The first step begins with building a coalition of interested parties to participate in the development of the conflict of interest legislation. That coalition should include representatives from many interest groups including: elected officials, public employees, lobbyists, media reporters, political party officials, and public interest groups.

This group must first identify the problems the legislation should solve and then draft the legislation to solve those problems. This process would include researching what legislative solutions are used by other states and reviewing model legislation in order to determine the best approach for Montana. The group should then draft the legislation deemed appropriate for Montana. The diversity of the group may make it difficult to reach a consensus as to what issues need to be addressed and how. However, once the consensus is reached the participants can help sell the legislation to their respective groups.

The legislation drafting group should use model

legislation as modified for Montana needs. By using the model laws as a starting point, the legislature should have a greater confidence in its contents. It would also insure a more consistent interpretation by the courts. The courts then can use established case law from other states that use the same language. This is consistent with the reasons for adoption of "uniform laws" throughout the country.¹³⁵ The legislature tends to trust these uniform laws.

Once the legislation is drafted, it should be circulated to all interested parties for comments and recommendations. This will help identify the detractors. Additionally, the drafters of the legislation can deflect the detractors' criticism by finding ways to incorporate the suggestions or by being able to respond to objections. The group should also lobby the detractors to help them understand why it is in their interest to support the legislation. However, if they can't be converted, then the identification of the opponents will help in developing a game plan for the passage of the legislation in spite of their objection. Further, those who fail to respond to the request for comments will lose some of their credibility if they first raise their objections during the legislative process.

To make the passage of the legislation possible, it is

¹³⁵Many uniform law exist, such as the uniform commercial code, the Model Business act, the uniform probate code. These laws are drafted by Uniform Code Commissioners or the American Bar Association select committees.

necessary to create a groundswell of supportive public opinion. The drafters of the legislation should seek public support for the legislation through press releases and opinion/editorial pieces. They should also seek opportunities to give speeches to business or civic groups, clubs or organizations. The focus should be to educate the public about conflict of interest problems and then to sell the proposed legislation as the solution to these problems. Throughout the process, the drafters should solicit, from outside the group, supporters to write letters to the editor or make comments on call-in radio shows.

The drafters of the legislation should seek to get public commitments from legislative candidates. The proposed draft legislation should be provided to candidates with a request for their support. If the legislation is properly drafted, then it will be difficult for candidates to publicly oppose the legislation. If a candidate does oppose or fails to support this legislation, then he or she most likely would receive criticism from the press and the public. This "on record" support for the legislation will be necessary to hold votes when behind-the-scenes opponents seek to kill the legislation. This process will remind legislative candidates and elected legislators why conflict of interest law reform is necessary.

Immediately after the election, the drafters should start

planning how to obtain the passage of the legislation. They should identify the key legislative leaders who would be willing to sponsor this legislation. Emphasis should be given to finding both Democrat and Republican leaders from both houses to sponsor the bill. The drafters should lobby the leadership to send the legislation to favorable committees, or, at least, get their commitment to help marshall the legislation through.

It is also necessary to gain support form top state elected officials. The support of the Governor and the Attorney General may prove essential for the passage of the legislation. The governor serves as the leader of one political party and the top executive officer. The Attorney General, as the top legal officer, plays a key role in promoting proper standards of conduct. Therefore, they both must sign off on this legislation early in the process and be committed to being publicly identified as supporting the legislation.

Without the presence of some scandal to force the legislature to make the necessary reform, the likelihood of success may become problematic. However, passage is possible if the proponents of the reform legislation do the necessary work. Finally, should the legislation fail, then the initiative process should be pursued to obtain passage of the legislation.

CONCLUSION

In conclusion, it will be difficult to gain passage of meaningful and enforceable conflict of interest legislation. Its passage will not guarantee proper conduct of public officials, but it should provide appropriate treatment of those who violate the public trust. The press will always play a significant role in the process of maintaining integrity in government. Any conflict of interest legislation must get support from as many sources as possible to assure passage.

APPENDIX

A BILL FOR AN ACT ENTITLED AN ACT TO GENERALLY REVISE THE ETHICS, CONFLICT OF INTEREST, AND PERSONAL FINANCE DISCLOSURE LAWS OF PUBLIC OFFICIALS AND EMPLOYEES, AND REPEALING TITLE 1 CHAPTER 2.

This shall be known as the Ethics, Conflict of Interest, and Personal Financial Disclosure Act.

§ 1 Intent and Purpose

The purpose of this act is to set forth an enforceable code of ethics prohibiting conflict between public duty and private interest as required by the constitution of Montana. The proper operation of democratic government requires that a public official or employee be independent and impartial; that government policy and decisions be made through the established processes of government; that a public official or employee not use public office to obtain private benefits; that a public official or employee avoid action which creates the appearance of using public office to obtain benefit; and that the public have confidence in the integrity of its government and public officials and employees.

§ 2 Definitions As used in this act, unless the context clearly indicates otherwise, the following definitions apply:

(1) "Anything of value" includes the following:

(a) A pecuniary item, including money, or a bank bill or note.

(b) A promissory note, bill of exchange, order, draft,

warrant, check, or bond given for the payment of money.

(c) A contract, agreement, promise, or other obligation for an advance, conveyance, forgiveness of indebtedness, deposit, distribution, loan, payment, gift, pledge, or transfer of money.

(d) A stock, bond, note, or other investment interest in an entity.

(e) A receipt given for the payment of money or other property.

(f) A right in action.

(g) A gift, tangible good, chattel, or an interest in a gift, tangible good, or chattel.

(h) A loan or forgiveness of indebtedness.

(i) A work of art, antique, or collectible.

(j) An automobile or other means of personal transportation.

(k) Real property or an interest in real property, including title to realty, a fee simple or partial interest, present or future, contingent or vested within realty, a leasehold interest, or other beneficial interest in realty.

(l) An honorarium or compensation for services.

(m) A rebate or discount in the price of anything of value unless the rebate or discount is made in the ordinary course of business to a member of the public without regard to that person's status as a public official or public employee, or the sale or trade of something for reasonable compensation

that would ordinarily not be available to a member of the public.

(n) A promise or offer of employment.

(o) Any other thing of value that is pecuniary or compensatory in value to a person.

(p) The agency may also promulgate rules and regulations defining additional things of value.

(q) "Anything of value" does not mean a campaign contribution properly received and reported, if reportable, as required under the Campaign Finance Act.

(2) "Associated," when used with reference to an organization, includes an organization in which an individual or a member of his or her immediate family is a director, officer, fiduciary, trustee, agent, or partner, or owns or controls, in the aggregate, at least [should range from any interest at all to two (2) percent or a value of \$5,000 or greater, in comport with the following definition] of the outstanding equity.

(3) "Business associate" includes the following:

(a) An employer.

(b) A general or limited partnership, or a general or limited partner within the partnership.

(c) A corporation:

(i) that is family-owned; or

(ii) in which all shares of stock are closely-held;

or the shareholders, owners, or officers of the corporation.

(d) A corporation in which the public official or employee, or other person subject to the Act:

(i) has an investment interest;

(ii) owns; or

(iii) has a beneficial interest in shares of stock which constitute more than:

(A) five percent (5%) of the value of the corporation, or

(B) \$1,000.

(e) A corporation, business association, or other business entity in which the public official or employee, or other person subject to the Act serves as an agent or a compensated representative.

(f) An association not otherwise covered by this definition between the public official or employee, or other person subject to the Act, and another person, which involves the conduct of a common enterprise.

(4) "Candidate" means an individual who seeks nomination or election to [state] office. An individual is a candidate when the individual:

(a) files a statement of candidacy or petition for nomination for office with the appropriate filing officer;

(b) is nominated for office by:

(i) a party at a primary;

(ii) nominating convention; or

(iii) petition for nomination;

(c) solicits or receives and retains contributions, makes expenditures, or gives consent to an individual, organization, political party, or committee to solicit or receive and retain contributions or make expenditures to secure nomination or election to any office at any time, whether or not the office for which the individual will seek nomination or election is known when the:

(i) solicitation is made;

(ii) contribution is received and retained; or

(iii) expenditure is made; or

(d) is an officeholder who is subject of a recall election.

(5) "Charitable organization" means an organization identified in Title 35 Chapter 2 as a public benefit nonprofit corporation as it currently exists or as it may be amended.

(6) "Compensation" includes:

(1) an advance, conveyance, forgiveness of indebtedness, deposit, distribution, loan, payment, gift, pledge, or transfer of money or anything of value; or

(2) a contract, agreement, promise, or other obligation for an advance, conveyance, forgiveness of indebtedness, deposit, distribution, loan, payment, gift, pledge, or transfer of money or anything of value, for services rendered or to be rendered.

(3) The term does not include reimbursement of expenses if:

(a) the reimbursement does not exceed the amount actually expended for the expenses; and

(b) it is substantiated by an itemization of expenses.

(7) "Consultant" means an individual other than a public official or public employee who contracts to:

(a) evaluate bids for public contracts; or

(b) award public contracts;

for the state [or political subdivision].

(8) "Economic Interest" means an interest distinct from that of the general public in a state purchase, sale, lease, contract, option, or other transaction or arrangement involving property or services in which a public official or public employee may gain an economic benefit of fifty dollars (\$50) or more.

(9) "Family member" means an individual:

(a) who is the spouse, parent, sibling, child, mother-in-law, father-in-law, son-in-law, daughter-in-law, grandparent, or grandchild; or

(b) is a member of the individual's household.

(10) "Filer" means an individual who is:

(a) a public official or who is nominated to be a public official;

(b) a public employee appointed by a public official;

(c) a candidate under the Campaign Finance Act;

(d) a public member; or

(e) a consultant.

(11) (a) "Gift" means anything of value other than a contribution to a candidate as defined under the Campaign Finance Act in Section 13-1-101 to the extent that consideration of equal or greater value is not received. The term includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the ordinary course of business to a member of the public without regard to that person's status as a candidate.

(b) The term does not include the following:

(i) Printed informational promotional material.

(ii) A gift that:

(A) is not used; and

(b) no later than thirty (30) days after receipt, is returned to the donor or delivered to a charitable organization and is not claimed as a charitable contribution for federal income tax purposes.

(iii) A gift, devise, or inheritance from an individual's spouse, child, parent, grandparent, brother, sister, parent-in-law, brother-in-law, sister-in-law, nephew, niece, aunt, uncle, or first cousin or the spouse of that individual, if the donor is not acting as the agent or intermediary for someone other than a person covered by this paragraph.

(d) A personalized plaque or trophy with a value that does not exceed one hundred and fifty dollars (\$150).

(e) Food and beverage consumed on the occasion when participation in a charitable, civic, or community event which

bears a relationship to the public official's or public employee's office and the official or employee is attending in an official capacity.

(12) "Immediate family" means an unemancipated child residing in a public official's or public employee's household, a spouse or significant other living at the same residence of a public official or public employee, or an individual claimed by the public official or public employee, or the public official's or public employee's spouse as a dependent for tax purposes.

(13) "Informal representation" means a contact, including a request for information, whether in person, by mail, or by telephone, made with a state or local agency official or employee on behalf of a client or constituent.

(14) "Judge" means an official who presides over a state, county, or municipal court or an administrative law hearings officer.

(15) (a) "Local entity" means a local or regional government office, department, division, bureau, board, or commission.

(b) The term does not include a court.

(16) "Negotiating" or "negotiate for employment" means a communication, directly or indirectly, with a prospective employer to discuss rendering services for compensation to that prospective employer.

(17) "Negotiation for employment" means the period that

begins with a communication to a prospective employer to discuss rendering services for compensation to the prospective employer.

(18) "Official responsibility" means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct government action.

(19) "Participation" includes decision, approval, disapproval, recommendation, the rendering of advice, or vote.

(20) "Particular matter" includes a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, rulemaking, or legislation.

(21) "Person" means an individual, proprietorship, firm, partnership, joint venture, joint stock company, syndicate, business trust, estate, company, corporation, association, club, committee, organization, or group of person acting in concert.

(22) "Prime contractor" means a person who has entered into a public contract.

(23) "Prime contractor employee" means an officer, employee, or agent of a prime contractor.

(24) "Public contract" means a contractor for goods, services, or construction let by a unit of government.

(25) "Public employee" means an individual appointed to

a position, including a person appointed to a position created by statute, whether compensated or not, in state [, county, or municipal] government, including members of the judiciary.

(26) "Public member" means a member appointed to a noncompensated part-time position on a board, commission, or council. A public member does not lose this status by receiving reimbursement of expenses or a per diem payment for services.

(27) (a) "Public official" means an individual elected to a state, district, county, or municipal office, or an individual who is appointed to fill a vacancy in the office, whether or not the individual has yet assumed the office. The term includes a member of the board of regents, commissioner of higher education, chancellor and vice chancellor or equivalent of the state university system, and a president of a state university.

(b) The term does not include a public member of an advisory board, commission, or council as defined in Section 2-15-122.

(28) "Remunerable activity" means a service for which a person receives payment in the form of a wage, salary, or other goods or services.

(29) "Representation" means an appearance before a state or local entity whether gratuitous or for compensation.

(30) "Sheltered market" has the meaning ascribed to it in Section 2 of the federal Minority and Female Business Enterprise Act as it currently exists and as it may be

amended.

(31) (a) "State entity" means a state agency, office, department, division, bureau, board, commission, or council, including the legislature.

(b) The term does not include a court or an agency in the judicial branch.

(31) "Subcontract" means a contract or contractual action entered into by a prime contractor or subcontractor for obtaining goods or services under a prime contract.

(32) "Subcontract" means:

(a) a person, other than the prime contractor, who offers to furnish or furnishes goods or services under a prime contract or a subcontract entered into in connection with the prime contract; and

(b) a person who offers to furnish or furnishes goods or services to the prime contractor or a higher tier subcontractor.

(33) "Subcontractor employee" means an officer, employee, or agent of a subcontractor.

(34) "Substantial value" means a monetary value of one hundred dollars (\$100) or more, if a monetary value is ascertainable, or if a monetary value is not ascertainable, anything of more than nominal value.

(35) "Unit of state or local government" means the state or a unit or agency of state government; a county or municipal government or committee or an agency of county or municipal

government; or any other entity funded by or expending tax dollars or the proceeds of publicly guaranteed bonds.

(36) "Unwarranted privilege" means a privilege, treatment, or advantage not available to others on an equal basis.

§ 3 Use of Title and Prestige of Public Office

(1) A public official or employee shall not receive anything of value for the private benefit of the official or employee or his or her immediate family or an organization with which the official is associated, unless the public official or public employee can show by clear and convincing evidence that:

(a) the thing of value was conveyed for a reason unrelated to and not arising from the recipient's holding or having held a public office or public position; and

(b) was unrelated to actions or matters before or affecting the government body of which the public official's or public employee's office or employment is a part.

(2) This provision does not apply to receipt of the following things of value:

(a) a certificate or plaque or commemorative token [of less than \$150 value];

(b) informational promotional material; or

(c) education material [directly related to the public official or public employee's government duties].

§ 4 Nepotism

(1) A public official or public employee shall not advocate or cause the:

- (A) employment;
- (B) appointment;
- (C) promotion;
- (D) transfer; or
- (E) advancement;

to an office or position of the state, county, municipality, or political subdivision], or supervise or manage a member of the public official or public employee's household or family member or any person related or connected by consanguinity within the fourth degree or by affinity with the second degree.

(2) A public official or public employee shall not participate in an action relating to the employment or discipline of a member of the public official's or public employee's household or a family member.

(3) The provisions of subsection (1) do not apply to:

(a) a sheriff in the appointment of a person as a cook or an attendant;

(b) school district trustees if all the trustees, with the exception of any trustee who is related to the person being appointed and who must abstain from voting for the appointment, approve the appointment of a person related to a trustee;

(c) a school district in the employment of a person as a

substitute teacher who is not employed as a substitute teacher for more than 30 consecutive school days; or

(d) 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.

§ 5 Misuse of Office

(1) A public official or employee shall not use public funds, time, personnel, facilities, or equipment for the official or employee's private gain or that of another unless the use is authorized by law.

(2) A public official or public employee shall not use public funds, time, personnel, facilities, or equipment for political or campaign activity unless the use is:

(A) authorized by law; or

(B) properly incidental to another activity required or authorized by law.

(3) The agency may adopt rules specifying examples of political or campaign activity permissible or not permissible under this section.

§ 6 Representation by Public Officials and Public Employees

(1) (a) A state elective official other than a legislator shall not represent another person before a state or local entity, except as required by statute.

(b) A legislator or members of his firm or business shall not represent another person before a state entity, other than

a court.

(d) A public official shall not represent another person before an entity of the same political subdivision which the public official serves, except as required by statute.

(e) A public official or public employee shall not represent another person before the entity the public official or public employee serves.

(f) A public employee of a bureau chief level or higher receiving compensation other than reimbursement or per diem payments for the public employee's official duties shall not represent another person before an entity of the same political division including a court.

(g) These restrictions do not apply to the following:

(i) Purely ministerial matters do not require discretion on the part of the entity.

(ii) Representation by a public official or public employee in the course of the official or employee's official duties.

(iii) Representation of the public official or public employee in the official or employee's personal capacity.

(iv) Representation by an attorney who is a public official or a public employee before a court when such representation is not otherwise prohibited by applicable codes of attorney or judicial conduct.

(2) The restrictions set forth in this section do not

apply if the former public official or former public employee is:

(a) testifying under oath to facts that are within the individual's knowledge, or as an expert witness who does not accept compensation other than regularly provided for by law, or rule for subpoenaed witnesses; or

(b) an elected representative of the federal government, or a local government within the state, or whose principal occupation or employment is with the federal government or a local government, and the appearance, communication, assistance, or representation is on behalf of the government.

§ 7 Votes, Deliberations, and Discussions

(1) A public official or public employee shall not participate in, vote on, influence, or attempt to influence an official decision if the public official or public employee or a business or organization with which the public official or public employee is associated has:

(a) a pecuniary interest in; or

(b) a reasonably foreseeable benefit from;

the matter under consideration by the governmental entity of which the public official or public employee is a member. A potential benefit includes detriment to a business competitor to the public official or public employee or business or organization with which the public official or public employee is associated.

(2) Except as permitted in subsection (3), a public official described by this subdivision but not exempt shall abstain from participation in the discussion and vote on the decision. The public official's abstention must be recorded in the governmental entity's minutes.

(3) A public official or public employee may participate in, vote on, or influence or attempt to influence an official decision if the only pecuniary interest or reasonably foreseeable benefit that may accrue to the public official or public employee is incidental to the public official's or public employee's position, or which accrues to the public official or public employee as a member of a profession, occupation, or large class, to no greater extent than the pecuniary interest or potential benefit could reasonably be foreseen to accrue to all other members of the profession, occupation, or large class.

(4) The restrictions of this section apply to a business or organization with which a family member of a public official or employee is associated if the family member's pecuniary interest or a business or organization with which a family member is associated has a reasonably foreseeable benefit from a matter under consideration.

(5) No member of the legislature during his term of office may be associated with a business or firm which actively lobbies the legislature or represents clients before state agencies.

(6) A member of the Legislature, may not vote on the section of that year's general appropriation bill relating to a particular agency or commission if the member is employed by that agency or, an individual with whom he is associated, or a business with which he is associated has represented any clients before that agency or commission within one year prior to such vote. This subsection does not prohibit a member from voting on other sections of the general appropriation bill or from voting on the general appropriation bill as a whole.

§ 8 Restraints on Solicitation or Acceptance of Gifts and Gratuities

(1) A person shall not, directly or indirectly, give, offer, or promise anything of value to:

(a) a public official or public employee; or

(b) a person who has been elected or selected to be a public official or public employee; with the intent to:

(i) influence an official act;

(ii) influence a public official or public employee, or individual who has been selected to be a public official or public employee, to commit, aid in committing, collude in, or allow fraud on a state, county, or municipal entity; or

(iii) induce a public official or public employee, or individual who has been selected to be a public official or public employee, to perform or fail to perform an act in violation of the public official or public employee's

lawful duty.

(2) A public official or employee, or individual who has been elected or selected to be a public official or public employee, shall not, directly or indirectly, ask, demand, exact, solicit, seek, accept, assign, receive, or agree to receive anything of value for the public official or employee, or individual who has been selected to be a public official or public employee, or for any other person or entity, in return for being:

(a) influenced in the performance of an official act;

(b) influenced to commit, aid in committing, collude in, allow fraud, or make an opportunity for the commission of fraud on a state, county, or municipal governmental entity; or

(c) induced to perform or fail to perform an act in violation of the public official or public employee's official duty.

(3) A person shall not, directly or indirectly, give, offer, or promise to give anything of value to another person or entity, with intent to influence testimony under oath or affirmation in a trial or other proceeding before:

(a) a court;

(b) a committee or either house or both houses of the legislature; or

(c) an agency, commission, or officer authorized to hear evidence or take testimony, or with intent to influence

a witness to fail to appear.

(4) A person shall not, directly or indirectly, ask, demand, exact, solicit, seek, accept, assign, receive, or agree to receive anything of value in return for influencing testimony under oath or affirmation in a trial or other proceeding before:

(a) a court;

(b) a committee or either house or both houses of the legislature; or

(c) an agency, commission, or officer authorized to hear evidence or take testimony, or with intent to influence a witness to fail to appear.

(5) Subsections (3) and (4) do not prohibit the payment or receipt of witness fees provided by law or the payment by the party upon whose behalf a witness is called and receipt by a witness of the reasonable cost of travel and subsistence at a trial, hearing, or proceeding, or, in the case of an expert witness involving a technical or professional opinion, a reasonable fee for time spent in the preparation of the opinion, and in appearing or testifying.

§ 9 Private Interests by a Public Official or Public Employee in Public Contracts

(1) A public official or public employee may not have an interest in a public contract if the public official or public employee is authorized to perform an official function relating to the contract requiring the exercise of discretion.

(2) A public official or public employee may not have an interest in a public contract if the public official or public employee or a family member of a public official or public employee or a business or organization with which the official is associated has a substantial financial interest.

§ 10 Actions Taken While Negotiating for Employment

A public official or public employee may not act or fail to take action in a matter affecting a person with whom the public official or public employee is negotiating for employment.

§ 11 Representation of Clients After Government Service

(1) A former public official or former public employee may not represent a person in a matter before a government entity in which the former public official or former public employee participated personally and substantially while a public official or public employee.

(2) A former public official or former public employee may not represent a person in a matter which was pending under the former public official's or former public employee's official responsibility within one (1) year before the termination of that responsibility for one (1) year after the former public official's or former public employee's service in the public position has ceased.

(3) A former public official or former public employee may not represent a person in a matter before the government entity which the former public official or former public

employee served for a period of one (1) year after the former public official's or former public employee's employment has ceased.

(4) A former public official may not register as a lobbyist or lobbyist's principal, other than for a government entity, for a period of one (1) year after the latter of:

(A) the date of leaving office; or

(B) the date the term of office to which the public official was elected expires.

§ 12 Blind Trusts

(a) A public official or public employee who has direct, indirect, or beneficial interest in a blind trust which meets the standards set forth below is not required to disclose the pro rata share of interests in real property or investments, or income deriving from such interests or investments, if those interests are acquired by the trustee after the trust complies with subsection (b).

(b) A blind trust must comply with the following conditions:

(1) the trustee must be:

(a) a disinterested party other than the public official or employee's spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, aunt, uncle, first cousin, or the spouse of any such person;

(b) someone who is not a public official or

public employee; and

(c) someone who has not been appointed to a public entity by the public official or public employee, or by a public official or public employee supervised by the filer.

(2) the trustee must be given complete discretion to manage the trust, including, but not limited to, the power to dispose of and acquire trust assets without consulting or notifying the filer.

(3) the trustee must be required to notify the filer of the date of disposition and value at disposition of any original investments or interests in real property so that information can be reported on the filer's personal financial disclosure statement.

(4) the trustee must be prohibited from disclosing to the filer any information concerning the replacement assets except for information required under this subsection or the minimum tax information which lists only the totals of taxable items from the trust and does not describe the source of individual items of income.

(5) a copy of the trust agreement must be filed with the Agency within five (5) business days after execution, including:

(a) an identification of the assets placed in trust;

(b) a statement detailing the date of its creation, and the name and address of the trustee; and

(c) a statement signed by the trustee, under penalty

of perjury, stating that he or she has not revealed any information to the filer, except that which is permitted under this section, and that, to the best of the trustee's knowledge, the trust is in compliance with this section.

(6) (i) if the trust is revoked while the filer is a public official or public employee, or if the filer learns of any replacement assets of the trust, the filer must file an amendment to the most recent statement of personal financial disclosure disclosing the date of revocation and the previously unreported pro rata share of the trust's interests in real property or investments or income deriving from any such interests in real property or investments, and disqualify himself or herself as necessary.

(ii) For purposes of this section, any replacement of assets of which the filer learns shall thereafter be treated as though they were original assets of the trust.

§ 13 Personal Financial Disclosure

(1) Exception to Reporting Requirements.

This section does not require the disclosure of financial information concerning the following:

(a) A spouse legally separated from the public official or public employee.

(b) A former spouse.

(c) A gift from a family member.

(d) A campaign contribution that is permitted and reported under [the Campaign Finance Act], if required.

(2) Individuals Required to File.

The following individuals shall file a statement of financial interests with the agency:

(a) A public official or public employee who is an exempt employee or classified grade 18 or higher.

(b) An individual nominated to become a public official or public employee.

(c) An individual who is a candidate to become a public official.

(d) A public member.

(e) A consultant.

(3) Deadline for Filing Statements

The statement of financial interest must be filed for the preceding year no later than April 30 of each year, complete through December 31 of the preceding year, except;

(a) In the case of an individual nominated to be a public official, public member, or public employee, no later than 21 (twenty-one) days after the nomination.

(b) In the case of a candidate to become a public official, at the time of filing for public office.

(c) In the case of a public employee employed after January 1, the later of April 30 or 21 days after employment.

(4) Filing Entity for Consultant Statements

A consultant shall file a statement of economic interests no later than twenty-one (21) days after entering into a contractual relationship with the state or a political

subdivision if the consultant, or member of the household of the consultant has an economic interest in an entity:

(a) whose bid was evaluated by the consultant and who was subsequently awarded the contract by the state or the political subdivision that contracted with the consultant; or

(b) who was awarded a contract by the consultant.

(5) Amounts to be Reported.

(a) Where an amount is reported, a filer must report information in the following category amounts unless otherwise indicated:

(i) \$1,000 - \$9,999

(ii) \$10,000 - \$24,999

(iii) \$25,000 - \$49,999

(iv) \$50,000 - \$99,999

(v) \$100,000 - \$149,000

(vi) \$150,000 - \$249,000

(vii) \$250,000 - \$499,000

(viii) \$500,000 - \$999,999

(ix) \$1,000,000 and above

§ 14 Agency Handling Disclosure of Statements

(1) The Agency may grant a reasonable extension of time for filing a statement of financial interests. The extension may not exceed thirty (30) days, except in cases of illness or incapacitation.

(2) A statement of financial interests becomes a public record available for copying when received by the Agency. A

statement may be reviewed and copied at the office of the Agency during ordinary business hours.

(3) A statement of financial interests must be retained by the Agency for a period of five (5) years after filing in a form, including microfilming, that will facilitate document retention, except that:

(a) Upon the expiration of three (3) years after an individual ceases to be a public official, the Agency shall, unless the former public official otherwise requests, destroy any statements of financial interests or copies of such statements filed by the former public official and any copies in the possession of the Agency.

(b) Upon the expiration of three years after any election at which a candidate for election as a public official was not elected, or a nominee for a public office or public employee is not confirmed in the position, the Agency shall destroy any statements of financial interests or copies of such statements filed by him or her as a candidate,

(i) unless the individual is otherwise required to file a statement; or

(ii) unless the individual otherwise requests.

§ 15 Information Required

(1) A statement of financial interests must contain full and complete information concerning the following:

(a) The name, business or governmental address, and work place telephone number of the filer.

(b) The source, type, and amount or value of income received from a governmental entity by the filer and the filer's spouse and dependents.

(c) The source, type, and amount of income in cash or in-kind received by the filer and the filer's spouse, and dependents.

(d) The source, payee, type, date, and exact amount of gifts, including food, lodging, or entertainment:

(i) received by a filer and a filer's spouse and dependents; and

(ii) in excess of five hundred dollars (\$500) in a calendar year.

(e) The source, payee, type, date, and exact amount of anything of value received from a lobbyist, lobbyist's principal, including a notation of the word "lobbyist" to identify gifts received by the filer, or filer's spouse and dependents from a person engaged in lobbying activities or any lobbyist organization.

(f) (i) The description (commercial, residential, or rural), value, and location of all real property owned during the calendar year by a public official, public employee, or consultant, and the official's or employee's immediate family members, and the same information for options to purchase such real property;

(ii) the amount received from the sale, lease, or rental of real property; the name of the person that payment

was received from; and

(iii) an identification of all commercial tenants, lobbyists, and lobbyist's principals (but not individuals who are not lobbyists or lobbyist's principals) from which income of [\$1,000 or more] including rent or purchase money was derived during the reporting period.

If the sale, lease, or rental of real property involves a state, county, or municipal instrumentality of government, a copy of the contract, lease, or rental agreement must be attached to the statement of financial interests.

(g) The description, location, and amount of payment received from the sale, lease, or rental of personal property during the preceding calendar year by a public official, or public employee, and the official's or employee's immediate family members, and an identification of all lobbyists and lobbyist's principals from which income of \$250 or more was derived during the reporting period.

If the sale, lease, or rental of personal property involves a state, county, or municipal instrumentality of government, a copy of the contract, lease, or rental agreement must be attached to the statement of financial interests.

(h) The identity of every business or entity in which the public official or public employee, or a family member of the public official or public employee held securities valued at \$1,000 or more during the reporting period.

(i) A listing by name and address of:

(i) each creditor to whom the public official, public employee, or consultant, and the official or employee or consultant's immediate family members owed a debt in excess of five hundred dollars (\$500) at any time during the calendar year, other than for a credit card or retail installment contract, and the original amount of the debt and amount outstanding; and

(ii) the rate of interest charged the public official, public employee, or consultant, and the official or employee or consultant's immediate family members.

If a discharge of the debt has been made, the date of the transaction must be shown.

(j) The amount and listing by name and address of all clients represented by the public official, public employee, or consultant, and the official's or employee's immediate family members before a state, county, or municipal regulatory Agency for a fee, reward, gift, or other compensation in excess of \$250 during the preceding calendar year.

(k) Every officership, directorship, trusteeship, or other fiduciary relationship held in a business during the disclosure period, the term of office, and the annual compensation

(l) The amount and identity of every creditor interest in an insolvent business held during the disclosure period having a value of five hundred dollars (\$500) or more.

(m) The amount of every loan made to someone by the

public official or public employee and their immediate family members in an amount of five hundred dollars (\$500) or more, the original amount of the loan and amount outstanding, rate of interest, payment schedule, and the name and address of the person to whom the loan was made.

(n) State professional or occupation permits or licenses held.

(o) The name of a lobbyist who is:

(i) an immediate family member of the public official or employee;

(ii) a partner of the public official or employee or of an immediate family member;

(iii) an officer or director of the public official or public employee's employer, or employer of the public official or public employee or an immediate family member; or

(iv) a business associate of a public official or public employee or member of the public official's or public employee's immediate family.

(2) The information shall be filed on a form prescribed by the Agency.

§ 16 Technical Violations of Disclosure Requirement

(1) The Agency may , in its discretion, determine that errors or omissions on statement of economic interests are inadvertent and unintentional and not an effort to violate a requirement of this act and may be handled as technical violations not subject to the provisions of this act

pertaining to violations. Technical violations must remain confidential unless requested to be made public by the person filing the statement. In lieu of all other penalties the agency may assess a technical violations penalty not exceeding fifty dollars.

§ 17 Establishment and Composition of the Agency

(1) The Agency is established as an independent authority.

(2) The Agency consists of five (5) members. The members are appointed in the same manner as proscribed in Section 5-1-102. A member of the Agency must be a citizen of the United States and resident of this state. A member of the Agency shall not be a:

- (A) public official;
- (B) public employee; or
- (C) candidate;
- (D) lobbyist or lobbyist's principal;

or a member of the immediate family of such an individual while a member of the Agency.

(3) A member of the Agency serves a term of four (4) years. However, the initial members of the Agency serve the following terms:

- (A) One (1) member serves a term of one (1) year.
- (B) One (1) member serves a term of two (2) years.
- (C) One (1) member serves a term of three (3) years.
- (D) Two (2) members serve a term of four (4) years.

(4) An individual may not serve more than two (2) consecutive term as a member of the Agency. A member of the Agency continues in office until a successor is appointed and has qualified.

(5) (a) In the event a reappointment or vacancy occurs on the agency, the appointing authority of the seat needing an appointment shall designate a successor.

(b) In the event the appointing authority at the time a vacancy occurs is of the opposite political party than that of the appointing authority that made the appointment that is vacant, the majority or minority leader in the same house of the same political party as the appointing authority that made the original appointment of the commissioner whose position is vacated shall designate the successor.

§ 2 Election and Duties of the Chair and Vice Chair

The chair and vice chair of the Agency are elected by a majority of the members of the Agency. The chair and vice chair serve a term of one (1) year, and may be re-elected. The chair presides at meetings of the Agency. The vice chair presides in the absence or disability of the chair.

§ 18 Agency Meetings

The Agency meets at the call of the chair or a majority of its members. A quorum consists of three (3) or more members. An affirmative vote of three (3) or more members is necessary for an Agency action.

§ 19 Filling of a Vacancy

A vacancy is filled for the remainder of an unexpired term in the same manners as an original appointment, except that the chief justice of the [state court of last resort] shall nominate two (2) individuals for gubernatorial appointment to a vacancy.

§ 20 Removal of a Member

(1) The governor may remove or suspend a member of the Agency upon filing with the Agency a written finding of the member's misfeasance or malfeasance, and upon serving a copy of the written finding on the member removed or suspended.

(2) The removal or suspension may be appealed immediately to the first district court and may take precedence over all other matters pending before the court.

§ 21 Expenses for Agency Members

(1) A member of the Agency serves without compensation, but is afforded actual and necessary expenses incurred in the performance of duties.

§ 22 Agency Staff

(1) The Agency may employ and remove at its pleasure an executive director to perform its functions. The executive director shall have the responsibility for employing and removing other personnel as may be necessary.

(2) An executive director shall administer the daily business of the Agency, and perform the duties assigned by the Agency.

(3) The Agency shall fix the compensation of its

employees. The staff of the Agency is outside of the statewide classification pay schedule. A member of the staff of the Agency shall not be:

(A) a public official; or

(B) a candidate;

while a member of the staff of the Agency.

§500.08 Filing of Statement of Financial Disclosure

A member and an employee of the Agency shall file a statement of financial disclosure with the Agency which shall be a public record.

§ 23 Prohibition on Political Activity by Agency Members and Staff

(1) A member of the Agency and its staff shall not participate in political management or in a political campaign during the member or employee's term of office or employment.

A member of the Agency and its staff shall not:

(a) make a financial contribution to a candidate;

(b) make a financial contribution to a political committee; or

(c) knowingly attend a fundraiser held for the benefit of a candidate or political committee.

§ 24 Prohibition on Lobbying Activity by Agency Members and Staff

(1) A member of the Agency and its staff may not be a registered lobbyist or participate in lobbying activities that would require the individual to register as a lobbyist, unless

the lobbyist activities are:

- (a) authorized by the Agency;
- (b) conducted on behalf of the Agency; and
- (c) permitted under state law.

§ 25 Agency Authority and General Powers

(1) Except as expressly provided otherwise, the Agency is responsible for administering the provisions of this chapter. The Agency shall have the power and duties set forth in this Act.

§ 26 Advisory Opinions

(1) The agency may render advisory opinions concerning this Act based upon real or hypothetical circumstances, when requested in writing by:

- (a) a public official or public employee;
- (b) a former public official or former public employee; or
- (c) a person who is personally and directly involved in the matter.

(2) An advisory opinion request by a public official or public employee concerning his or her own affairs or the affairs of a subordinate public official or employee or potential public official or public employee shall be confidential.

(3) An advisory opinion request by a former public official or former public employee concerning his or her own affairs shall be confidential.

(4) An advisory opinion request by a person concerning his or her own affairs with regard to potential public service shall be confidential.

(5) An advisory opinion shall be in writing and must be made available to the public, but in the case of confidential advisory opinion, the identity of the person requesting the opinion and of a person whose affairs are involved in the circumstances described in the request for the advisory opinion, are confidential.

(6) An advisory opinion shall be deemed rendered when signed by three or more Agency members subscribing to the advisory opinion.

(7) An Agency member who agrees with the advisory opinion but for different reasons than as stated may file a written concurring opinion.

(8) An Agency member who disagrees with the advisory opinion may file a written dissenting opinion, which will be placed at the end of the majority opinion, or at the end of a concurring opinion, if any.

(9) Agency attorneys may issue advice either orally or in writing concerning this Act based upon real or hypothetical circumstances when requested when such advice is consistent with this Act or previous advisory opinions issued by the Agency, provided that such advice shall be confidential when an advisory opinion on the matter would be confidential. Advice so issued by Agency attorneys need not be made

available to the public.

(10) An advisory opinion requested under this section and any related internal Agency materials requested or prepared as a result of such an advisory opinion request shall be confidential.

(11) The confidentiality of an advisory opinion may be waived either:

(A) in writing, by the person who requested the advisory opinion; or

(B) by majority vote of the members of the Agency, if a person makes or purports to make public the substance or any portion of an advisory opinion requested by or on behalf of the person. The Agency, may in such an event, also vote to make public the advisory opinion request and related materials.

§ 27 Conduct of Investigations

(1) The Commissioner of Campaign Practices may conduct investigations, inquiries, and hearings concerning any matter covered by this Act and certify its own acts and records.

(2) The Commissioner may determine whether to:

(A) investigate; and

(B) act upon a complaint.

(3) When the Commissioner determines that assistance is needed in conducting investigations, or when required by law, the Commissioner shall request the assistance of other appropriate agencies.

§ 28 Adoption of Rules

The Agency shall adopt, amend, repeal, and enforce rules to implement this Act.

§ 29 Prescription of Forms and Preservation of Documents

The Agency shall prescribe and provide forms for reports, statements, notices, and other documents required by this Act. Documents filed with the Agency as public records must be retained for at least four (4) years from the date of their receipt.

§ 30 Review of Statements

(1) The Commissioner of Campaign Practices shall:

(a) review each statement filed in accordance with this Act for compliance with its provisions; and

(b) notify the individual on whose behalf the statement is filed of an omission or deficiency.

§ 31 Access to Statements

(1) The Commissioner of Campaign Practices shall make statements and reports filed with the Agency available upon the written request of an individual for public inspection and copying during regular office hours. The Agency shall make copying facilities available free of charge or at a cost not to exceed actual cost. A statement may be requested by mail, and the Agency shall mail a copy of the requested statement to the individual making the request upon payment of appropriate postage costs.

§502.08 Maintenance of Statements

(2) The Agency shall compile and maintain an index of reports and statements filed with the Agency to facilitate public access to the reports and statements.

§ 32 Access to Information for Investigations

(1) The Commissioner may require the cooperation of a state agency, official, employee, and other person whose conduct is regulated by this Act. An individual shall make information reasonably related to an investigation available to the Agency on written request.

§ 33 Annual Report of the Agency

No later than January 1 of each year, the Agency shall report to the legislature and the governor on the Agency's activities in the preceding year. The report must contain the names and duties of each individual employed by the Agency, and a summary of Agency determinations and advisory opinions. The Agency shall prevent disclosure of the identity of a person involved in [decisions or] confidential advisory opinions. The report may contain other information on matters within the Agency's jurisdiction and recommendations for legislation as the Agency deems desirable.

§ 34 Publication of Information

(1) The Agency shall publish and make available to the persons subject to this Act and the public explanatory information concerning this Act, the duties imposed by it, and the means for enforcing it.

§ 35 Research and Education Outreach

(1) The Agency may:

(a) conduct research concerning state governmental ethics; and

(b) implement the educational programs it considers necessary to effectuate this Act.

§ 36 Oaths and Subpoenas

(1) The Agency May:

(a) administer oaths and affirmations for testimony of witnesses; and

(b) issue subpoenas by a vote of three or more members, subject to judicial enforcement, for the procurement of witnesses and materials relevant to the Commissioners investigations, including books, papers, records, documents, or other tangible objects.

§ 37 Local Rules

(1) The Agency shall issue rules governing state government campaign finance, conflicts of interest, financial disclosure, and lobbyist regulation. The rules may be adopted by a local jurisdiction or imposed upon a local jurisdiction under this Act.

§ 38 Other Duties

(1) The Agency may perform the other acts, duties, and functions authorized by this Act that it deems appropriate in connection with this Act.

§ 39 Complaints

(1) The Commissioner shall accept from an individual,

either personally or on behalf of an organization or governmental body, a verified complaint in writing that states the name of a person alleged to have committed a violation of this Act, and sets forth the particulars of the violation.

(2) The Commissioner shall forward a copy of the complaint and a general statement of the applicable law with respect to the complaint to the respondent.

(3) If the Commissioner determines that the complaint does not allege facts sufficient to constitute a violation of the Act, it shall dismiss the complaint and notify the complainant and the respondent. If the Commissioner determines that the complaint alleges facts sufficient to constitute a violation of the Act, an investigation may be conducted with respect to an alleged violation.

(4) If the Commissioner determines that information he has received:

(a) provides an adequate basis for the belief that a violation of the Act has been committed; or

(b) that an investigation of a possible violation is warranted;

an investigation may be conducted with respect to an alleged violation.

(5) If the Commissioner, during the course of an investigation, or upon the receipt of information finds probable cause to believe that a violation of the Act has occurred, it may, upon its own motion, make a complaint in

writing, stating the name of the person who is alleged to have committed the violation of the Act, and set forth the particulars thereof. A complaint initiated by the Agency must be signed by a majority of the members of the Agency.

(6) The Agency shall forward a copy of the complaint, and a general statement of the applicable laws with respect to the complaint to the respondent.

§ 40 Amendment of Complaints

(1) If a verified complaint has been filed, or if the Commissioner has issued its own complaint, and subsequently the Agency finds probable cause to believe that a violation of the Act has occurred, other than an alleged violation in the complaint, the Commissioner may amend the complaint upon his own motion to include the violation.

(2) An amended complaint issued by the Commissioner must be signed by a majority of the members of Agency. The Commissioner shall forward a copy of the amended complaint, and a general statement of the applicable laws with respect to the amended complaint to the complainant and respondent.

§ 41 Right to Appear

(1) The Agency shall afford a public official or employee who is subject of a complaint an opportunity at a preliminary hearing to explain the conduct alleged to be in violation of the Act. A public official or employee who is the subject of a complaint has the right to appear and be heard under oath and to offer information which may tend to exonerate the

public official or employee of probable cause to believe that there has been a violation of the Act.

(2) Unless requested otherwise by the respondent this hearing shall not be open to the public.

§ 42 Right to Request an Investigation of One's Own Conduct

(1) A public official or employee may request the Commissioner of Campaign Practices to make an investigation of the public official's or employee's own conduct, or of allegations made by another individual as to the public official or employee's conduct. This request must be in writing and set forth in detail the reasons for requesting an investigation.

§ 43 Statute of limitations

(1) Action may not be taken on a complaint filed more than three (3) years after the violation of the Act is alleged to have occurred.

(2) Nothing herein shall bar proceedings against a person who by fraud or other device prevents discovery of a violation of the act.

§ 44 Referral of Evidence of a Violation of Law

(1) Notwithstanding of the provisions of confidentiality of investigations, the Commissioner may, in his discretion, turn over to an appropriate government agency upon request or as a matter of course, apparent evidence of a violation of law.

§ 45 Authorization to Conduct an Investigation

(1) Before the Commissioner may subpoena a witness, administer oaths, take testimony, or require the production for examination of books or papers with respect to an investigation or hearing he shall fill a notice of a complaint with the agency which shall define the nature and scope of his inquiry.

(2) The agency may quash or limit the scope of the investigation after a proceeding specified in Section 32 upon a showing that there exists no basis for a complaint and that the matter is frivolous.

(3) At the conclusion of the investigation if the Commissioner determines through the investigation that probable cause exists to believe that a violation of the act has occurred then he shall issue a notice to appear before the agency, setting forth;

(a) Finding of facts and conclusions of law that demonstrate probable cause exists to believe that a violation of the act has occurred.

(b) The date, time, and place the hearing before the Agency will take place pursuant to the provisions in MAPA.

(c) The possible penalties or sanctions that may be imposed against the respondent in the event the Agency finds a violation of the Act occurred.

(4) In the event the Commissioner determines that no probable cause exists to prosecute the respondent then he

shall file a written notice of no probable cause and his finding and conclusions with the agency.

(5) If the Commissioner finds probable cause to believe that a violation of the act has occurred the Commissioner may waive further proceedings because of action the respondent takes to remedy or correct the alleged violation which may including the payment of fines or acceptance of other sanctions. The Agency must issue an order which approves the remedial or corrective action taken by the respondent, the Commissioner's decision in light of the action to waive further proceedings, and the Commissioner's justification for his decision which will then become part of the public record.

(a) If the Agency refused to approve the settlement of the matter then the Commissioner shall issue a notice of hearing pursuant to subsection (3).

(6) The Commissioner at the end of his investigation may initiate an action against a complainant if the allegations made by the complainant prove to be frivolous, or groundless and are made recklessly or maliciously. Proceedings under such action shall be made in accordance with section 37 the agency could order the complainant to pay civil penalties up to \$1,000 plus pay to the respondent an amount equal to the expenses incurred by the respondent for attorney fees and other expenses related to the investigation of the complaint.

§ 46 Hearing procedures

(1) The agency shall conduct a hearing pursuant to the

provisions of MAPA with the exception that if a hearings examiner is appointed he must:

(a) be a licensed attorney in the state of Montana;

(b) not be an elective official or full-time employee of the executive or legislative branch; and

(c) not be a member or employee of the Agency or Commissioner.

(2) The Commissioner or his designee shall prosecute the case before the agency.

(3) The respondent shall have the full rights granted under the adverse hearing proceeding specified in MAPA.

(4) After the conclusion of its hearing, the Agency shall, as soon as practicable;

(a) begin deliberations on the evidence presented at the hearing; and

(b) determine whether the respondent has violated the act.

(5) If a hearing officer is appointed and a majority of the members of the Agency are not present at the hearing the Agency shall not begin deliberations until after:

(a) the proposed decision prepared by the hearings officer is served upon the Agency and the parties; and

(b) an opportunity is provided for oral arguments.

§ 47 Orders and Recommendations

(1) No later than 120 days after the conclusion of a hearing to determine whether a violation of the act has

occurred, the Agency shall set forth its determination in a written decision with findings of fact and conclusions of law. The Agency shall send its written decision with findings of fact and conclusions of law to the respondent and complainant and Commissioner.

(2) If the Agency determines that a violation of the Act has occurred, its written decision with findings of fact and conclusions of law must contain one (1) or more of the following orders or recommendations:

(A) In the case of a state official liable to impeachment, a recommendation to the presiding officer of each chamber of the legislature that the official be removed from office.

(B) In the case of a public official or public employee in the [classified or unclassified] service, a recommendation to the appropriate appointing authority that the public official or public employee be censured, suspended, or removed from office or employment.

(C) In the case of a member of the state legislature, a recommendation to the presiding officer of the appropriate chamber of the legislature that the legislator be censured, suspended, or removed from office.

(D) In the case of a judge, a recommendation to the [state court of last resort] and to the presiding officer of each chamber of the legislature that the judge be censured, suspended, or removed from office.

(E) An order requiring the public official or public employee to conform the official's or employee's conduct to the requirements of the Act.

(F) An order requiring the public official or public employee to pay a civil penalty of not more than [\$2,000] for each violation of the Act. The attorney general, when requested by the Agency, shall institute proceedings to recover a fine or forfeiture incurred under this section not paid by, or on behalf of, the person against whom it is assessed.

(G) Other recommendations or orders, including:

(i) forfeiture of gifts, receipts or profits obtained through a violation of the Act;

(ii) voiding of a state action obtained through a violation of the Act; or

(iii) or a combination of the above, as necessary and appropriate, consistent with the Act.

(3) A fine imposed by the Agency, disciplinary action taken by an appropriate authority, or a determination not to take disciplinary action made by an appropriate authority is public record.

(4) This section does not limit the power of:

(A) either chamber of the legislature to discipline its own members or to impeach a public official; or

(B) of a department to discipline its official or employees.

§ 48 Action by the Attorney General

(1) The attorney general may recover a fee, compensation, gift, or profit received by a person as a result of a violation of the Act.

(2) Action taken by the attorney general under this subsection must be brought no later than one (1) year after a determination of a violation of the Act

§ 49 Public Inspection of Records

(1) Except as provided in subsection (2) below, all Agency records are open for public inspection during normal business hours.

(2) The following records are not open for public inspection:

(A) Records obtained in connection with a request for an advisory opinion. The Agency may make records described by this subdivision public with the consent of the individual whom the records pertain.

(B) Records obtained or prepared by the Agency in connection with an investigation or complaint. However, the Agency shall permit inspection of the following:

(i) Records made public in the course of a hearing.

(ii) Verified complaints filed with the Agency.

(iii) Complaints issued by the Agency.

(iv) Probable cause decision with findings of fact and conclusions of law.

(v) Decisions with findings of fact and conclusions of law issued after a hearing.

(vi) A determination made by the Agency regarding a rehearing.

(vii) A settlement entered into by the Agency and a respondent.

(3) A person who makes or purports to make public the substance or a portion of a confidential advisory opinion requested by or on behalf of the person has waived the confidentiality of the request for an advisory opinion, and of a record obtained by the Agency in connection with the request for an advisory opinion.

(4) The agency may publicly respond to a statement or interpretation made concerning the contents of an advisory opinion or decision it has issued or its purported to have issued.

§ 50 Forfeiture of Pension and Retirement Benefits

(1) A public official or public employee, or a survivor, heir, successor, or estate of a public official or public employee who is convicted of a felony:

(A) relating to; or

(B) arising out of;

the public official or public employee's public service may not receive the portion of pension or retirement benefits paid by a public entity and interest accrued on that portion.

(2) A public official or public employee entering a

public service subsequent to the passage of this Act is deemed to have consented to this section as a condition of coverage.

§ 51 Tax Treatment of Fines and Repayments

(1) A fine, penalty, reimbursement, or other payment ordered by the Agency or court in connection with making the government whole for a transaction improperly entered into by a public official, employee or consultant, or a member of the immediate household of a public official, employee, or consultant does not qualify for a state or local tax credit or deduction.

(2) The guilt or innocence of a party making under subsection (1) has no effect upon the state or local tax consequences, nor does an admission or failure to admit guilt or complicity in a transaction.

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