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CONFIDENTIAL – SUBJECT TO ATTORNEY-CLIENT PRIVILEGE

July 28, 2011

To: Commissioner David B. Gallik

From: Steve Brown

Re: Commissioner of Political Practices, Conflicts of Interest and Disqualification Issues

You have asked that I analyze and provide guidance regarding conflict of interest and disqualification issues that may apply to your performance of duties as the Commissioner of Political Practices. This memorandum includes the history of the Commissioner's office and my analysis of the applicable statutes and rules that apply to the performance of your duties as Commissioner. Because you are the first Commissioner who has chosen to serve as a part-time Commissioner and the first licensed attorney to serve in the position, I have attempted to analyze all potential rules of conduct and prohibitions that may apply to your service as Commissioner. My recommendations for dealing with potential conflicts of interest, disqualification, and personal conduct issues are also included.

I. HISTORY OF THE COMMISSIONER'S OFFICE

A. General Background

The Commissioner's office was created in 1975 in response to political scandals at both the national and state level.

Republican President Richard Nixon's abuses of the political and legal processes in his 1972 run for re-election (also known as the Watergate scandal) riveted the nation. Congressional hearings were televised live and Sen. Sam Ervin, John Dean, G. Gordon Liddy, Attorney General John Mitchell (and his wife Martha), H.R. Haldeman, and John Erlichman became household names. The Watergate scandal resulted in the reform of federal election laws, creation of the Federal Elections Commission (FEC), and President Nixon's resignation to avoid impeachment.

Montana's concurrent political scandal involved Democratic Governor Tom Judge's failure to report more than $94,000 of campaign contributions (received primarily from individuals who opposed workers' comp reform in Montana) during Judge's 1972 gubernatorial campaign. In 1973-74, the Montana Legislature considered campaign reform legislation but the

bill died in the 1974 session because the Democratic and Republican Parties began squabbling over amendments. Governor Judge created the Ad Hoc Committee on Election Reform after the 1974 Legislature failed to pass the campaign reporting reform legislation (I was named to chair the Ad Hoc Committee). The Governor, by executive order, appointed representatives from the Democratic and Republican parties, the Montana Chamber of Commerce, the AFL-CIO, the Montana Secretary of State's office, Common Cause, the County Attorneys Association, the League of Women Voters, and other interested groups to the Committee. Governor Judge gave the Ad Hoc Committee discretion to recommend legislation, including majority and minority proposals, to the 1975 Legislature. The Committee's comprehensive election reform legislation was enacted by the 1975 Legislature with few amendments. *See, e.g.*, SB 76, Chapter 480, L. 1975. The declared purpose of the 1975 campaign finance reporting legislation was to establish clear and consistent requirements for the "full disclosure" of campaign contributions and expenditures made to support or oppose candidates or ballot issues.

B. Creation of the Office of Commissioner of Political Practices

Montana's campaign reporting and election laws before 1975 had been historically administered by the Secretary of State, an elected state-wide official.[1] Governor Judge's unreported 1972 campaign contributions illustrated the dilemma for an elected Secretary of State (Democrat Frank Murray in 1972-76) who faced the political realities of investigating a Governor from his own party for allegedly failing to report significant campaign contributions. Secretary Murray realized that, as a partisan elected official, he was in a no-win situation. If a Democratic Secretary of State investigated and prosecuted a governor or another elected official from his own party, the Secretary would be accused of being a traitor by his political party and potentially suffer the party's wrath in the next election. If a Democratic Secretary of State investigated and prosecuted a Republican governor or another Republican elected official, the Secretary would be accused of undertaking the investigation and/or prosecution for political purposes.

Secretary Murray also understood that performance of his other constitutional duties in a non-partisan manner (*e.g.*, supervising the conduct of elections and administering State trust lands as a member of the State Land Board) would likely be jeopardized if the Secretary of State was assigned the task of conducting campaign finance investigations and prosecutions. Secretary Murray's election administrator, Joann Woodgerd, served on the Ad Hoc Committee and clearly communicated that Secretary Murray did not want to jeopardize his relationship with fellow members of the State Land Board or local election administrators by assuming responsibility for enforcing Montana's campaign finance and reporting laws. Secretary Murray did want to retain the Secretary's existing authority to administer Montana's laws governing

[1] Violations of campaign finance and reporting laws before the enactment of the 1975 legislation were prosecuted exclusively by county attorneys. Governor Judge and his criminal defense attorney (Timer Moses of Billings) argued that the Governor could not be prosecuted under the 1972 campaign reporting laws because the reporting requirements were ambiguous and unenforceable. The Lewis and Clark County Attorney, a Democrat, ultimately agreed and declined to prosecute Governor Judge.

election procedures and the Ad Hoc Committee and the 1975 Legislature accommodated that request.

The Ad Hoc Committee debated at length whether Montana's revised and expanded campaign finance and reporting laws should be administered and enforced by a single commissioner or a bi-partisan commission. This crucial debate was resolved in favor of creating the office of the Commissioner and incorporated into the main bill containing the Ad Hoc Committee's recommendations (SB 76, Chapter 480, Sec. 10, L. 1975). A minority Ad Hoc Committee bill proposing that Montana's campaign finance and reporting laws be administered by a bi-partisan commission was drafted but I do not believe that it was ever introduced or considered by the 1975 Legislature.

The Ad Hoc Committee's decision to recommend that a Commissioner of Political Practices administer and enforce Montana's campaign finance and reporting laws was based on a careful balancing of two conflicting public policy objectives.

A Commissioner needed the political independence and autonomy to take enforcement action against any candidate or elected official, even the most powerful. The Nixon administration's abuse of the public trust during the Watergate scandal figured prominently in the Ad Hoc Committee's discussions. Of particular significance was President Nixon's brazen directive to Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus to fire special prosecutor Archibald Cox when it appeared Mr. Cox was going to aggressively investigate Nixon's 1972 campaign misdeeds (Attorney General Richardson and Deputy AG Ruckelshaus both resigned rather than carry out President Nixon's order). The 1975 legislation attempted to ensure independence by providing that the Commissioner would be appointed by a majority vote of a four member selection committee comprised of the Speaker of the House, the President of the Senate, and the minority leaders of both houses (the 1975 Montana legislation was patterned after the federal legislation creating the Federal Elections Commission). If a majority of the selection committee could not agree on the appointment of a Commissioner, the Montana Supreme Court was authorized to appoint a fifth public member to break the tie vote. Chapter 480, Sec. 10, L. 1975. The Commissioner could only be removed from office by impeachment and prosecuted for official misconduct under the 1975 legislation originally enacted. *Id.*

After constitutional (separation of powers) questions were raised about the initial 1975 appointment process, §13-37-102, MCA, was subsequently amended to provide for appointment of the Commissioner by the Governor subject to confirmation by the Senate. The role of the four member legislative selection committee was reduced to recommending a list of two to five nominees to the Governor (the Governor is not required, for constitutional reasons, to appoint the Commissioner from the list of names provided by the legislative committee). However, the revised appointment process made it clear that the Commissioner did not serve at the pleasure of the Governor. The Governor is only empowered to remove a Commissioner "for incompetence, malfeasance, or neglect of duty" and the "sufficiency of the governor's stated causes for removing the commissioner is subject to judicial review." §13-37-102(2), MCA.

But even the most ardent supporters of an independent Commissioner did not want the Commissioner to become a despot or use the office for political gain. The Ad Hoc Committee recommended and the 1975 Legislature specified that the Commissioner could be prosecuted for official misconduct; could only serve one term (originally five years but subsequently extended to six years); and could not be a candidate for political office for a five-year period after the Commissioner's term expired (this latter prohibition was subsequently repealed[2]). *See* §§13-37-102, 13-37-103, and 13-37-104, MCA.[3]

The Ad Hoc Committee considered but rejected creating a bi-partisan commission to administer and enforce Montana's campaign finance and reporting laws. The decision to create the office of Commissioner was made after extensive discussion and based on the belief that a bi-partisan commission would degenerate into partisan gridlock and be unable to act on the most serious allegations of misconduct. The Ad Hoc Committee's concerns appear to have been confirmed by the partisan gridlock that has enveloped the FEC over the past 15 years.

Consistent with the current Mission Statement posted on the Commissioner's website, the clear intent of the Ad Hoc Committee, Governor Judge, and the 1975 Legislature was that Montana's revised campaign finance and reporting laws provide for full disclosure and be administered and enforced by an independent, fair, and impartial Commissioner. Republicans wanted laws that would ensure that Democratic Governor Tom Judge would have to fully disclose all future campaign contributions and expenditures and that any wrongdoing could be diligently prosecuted. Democrats also wanted full disclosure and a strong and independent Commissioner to ensure that abuses like those perpetrated by President Nixon at the national level could not occur in Montana. Republicans and Democrats alike professed to want Montana's full disclosure laws to be uniformly applied to all candidates and political committees, regardless of political affiliation or political power. The long-term test of the Commissioner's office is whether the independence, fairness, and impartiality of the office can be preserved or whether political partisanship will erode its effectiveness and jeopardize its very existence.

II. CONFLICTS OF INTEREST AND DISQUALIFICATION PROVISIONS CODIFIED IN STATUTES ADMINISTERED BY THE COMMISSIONER

[2] The five-year prohibition against running for public office after a Commissioner's term expires was repealed by the 2005 Legislature. HB 386 incorporated the recommendations of the Commissioner of Political Practices Advisory Council appointed by Governor Judy Martz in 2003. HB 386 as originally drafted shortened the five-year restriction in § 13-37-103(2), MCA to two years. HB 386 (Ch. 479, L. 2005) passed the House easily but the candidacy prohibition encountered opposition when the bill was heard in the Senate State Administration Committee. Several senators, especially Sen. Dave Lewis, expressed concerns about the constitutionality of placing any restrictions on the Commissioner related to running for public office after leaving office. The committee amended the candidacy restriction out of the statute, and that version of HB 386 passed and was signed by the Governor.

[3] Jim Scheier also advised Commissioner Linda Vaughey in a 2004 memorandum that the Commissioner is subject to recall under the Montana Recall Act, Title 2, Chapter 16, Part 6, MCA. Jim or I will provide you with a copy of Jim's 2004 memorandum upon request.

The Commissioner and staff perform a combination of record-keeping, compliance monitoring, investigation, decision-writing, prosecutorial, quasi-judicial, and quasi-legislative duties under three distinct sets of regulatory statutes.

The term "quasi-judicial function" is defined in §2-15-102 (10), MCA, to include "an adjudicatory function exercised by an agency, involving the exercise of judgment and discretion in making determinations in controversies" and includes, "but is not limited to the functions of:

(a) interpreting, applying, and enforcing existing rules and laws;
(b) granting or denying privileges, rights, or benefits;
(c) issuing, suspending, or revoking licenses, rights, or benefits;
(d) determining rights and interests of adverse parties;
(e) evaluating and passing on facts;
…
(h) ordering action or abatement of action;
(i) adopting procedural rules;
(j) holding hearings; and
(k) any other act necessary to the performance of a quasi-judicial function." [4]

The term "quasi-legislative function" is defined in §2-15-102 (11), MCA, to mean "making or having the power to make rules … and all other acts connected with or essential to the proper exercise of a quasi-legislative function." The Commissioner has been granted express rule-making authority under all of the laws discussed in the following paragraphs.

A. Title 13, Chapters 35 and 37, MCA, Campaign Finance and Reporting

The Commissioner and staff have historically devoted a majority of the office's resources to record-keeping, compliance monitoring, investigations, writing formal and informal decisions, and prosecution of violations of Title 13, Chapters 35 and 37, MCA. The Commissioner performs both quasi-judicial and quasi-legislative functions when administering and enforcing Montana's campaign finance and reporting statutes. However, the Commissioner does not conduct formal or informal contested case proceedings under Montana's Administrative Procedure Act (MAPA), Title 2, Chapter 4, part 6. Even if the Commissioner issues an order of non-compliance under §§13-37-215 and 13-37-121, MCA, the Commissioner does not hear administrative appeals of such non-compliance orders. Instead, a non-compliance order is subject to judicial review in a district court in which the candidate resides or the political committee has its headquarters. §13-37-122, MCA.

In 2005, at the urging of Commissioner Linda Vaughey, the Legislature enacted a new statute imposing restrictions on a Commissioner's personal conduct in an effort to ensure that a

[4] Montana's Supreme Court adopted its own and more expansive definition of "quasi-judicial function" in ruling on the constitutionality of Montana's Lobbying Disclosure Act. *See State Bar of Montana v. Krivec*, 193 Mont. 477, 483, 632 P. 2d 707 (1981). *See also* the preamble to the Commissioner's Lobbying Disclosure Rules, ARM 44.12.101A.

Commissioner would avoid even the appearance of impropriety or a conflict of interest. §13-37-108, MCA, imposes the following personal conduct prohibitions on a Commissioner:

A Commissioner may not "hold another position of public trust or engage in any other occupation or business if the position … interferes with or is inconsistent with the commissioner executing the duties of the commissioner's office." §13-37-108(1), MCA.

A Commissioner may not "participate in any political activity or in a political campaign." §13-37-108(2), MCA.

A Commissioner may not "make a contribution to a candidate or a political committee or for or against a ballot issue or engage in any activity that is primarily intended to support or oppose a candidate, political committee, or ballot issue." §13-37-108(3), MCA.

A Commissioner may not "attend an event that is held for the purpose of raising funds for or against a candidate, political committee, or ballot issue." §13-37-108(4), MCA.

A Commissioner may not "participate in a matter pertaining to the commissioner's office that:

(a) is a conflict of interest or results in the appearance of a conflict of interest between public duty and private interest pursuant to Title 2, chapter 2; or

(b) involves a relative of the commissioner." The term "relative" is defined in §13-37-101(4), MCA, to mean "a family member who is within the second degree of consanguinity or affinity to the commissioner." §13-37-108(5), MCA. The second degree of consanguinity or affinity would include the Commissioner's grandparents, parents, children, grandchildren, brothers, and sisters and the same kindred of your spouse.

A Commissioner is "recused" from participating in a matter if "the commissioner determines that considering a matter would give rise to the appearance of impropriety or a conflict of interest…." §13-37-111(3), MCA. §13-37-101(3) defines the term "recusal" to mean "disqualification from a matter by reason of prejudice or conflict of interest."

While serving as Commissioner, you are also both an employer and public employee subject to the prohibitions in §13-35-226, MCA. For example, a public employee "may not 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 the place of employment." §13-35-226(4), MCA. The §13-35-226(4) prohibition is subject to only two exceptions -- the "properly incidental to another activity required or authorized by law" provisions of §2-2-121(3)(b), MCA, and a public employee's right to express "personal political views."

B. Title 5, Chapter 7, Lobbying Disclosure

Montana's Lobbying Disclosure Act was approved by Montana's electorate in 1980 via I-85. I-85 authorized the Commissioner to administer and enforce the lobbying registration and reporting requirements of the initiative. *See, e.g.,* §§ 5-7-103, 5-7-105, 5-7-108, 5-7-207, 5-7-209, 5-7-212, and 5-7-305, MCA. To my knowledge, the Commissioner's office has received only three formal complaints alleging violations of applicable lobbying registration and reporting requirements since the adoption of I-85. The decisions made in those matters are posted on Commissioner's website. The legislature has never provided funding to audit lobbying expenditures as provided in §5-7-212, MCA. The Commissioner performs both quasi-judicial and quasi-legislative functions when administering and enforcing Montana's Lobbying Disclosure Act. However, the Commissioner's authority to conduct informal MAPA contested case proceedings is limited to assessing administrative penalties under §5-7-306, MCA, for failure to timely file lobbying reports.

The only prohibition imposed on the Commissioner's conduct by the Lobbying Disclosure Act is the general prohibition applicable to former legislators, elected officials, and certain appointed officials in §5-7-310, MCA. The Commissioner is an "appointed state official" and is prohibited from being licensed as a lobbyist for two years after leaving the Commissioner's office unless licensure as a lobbyist is part of future employment responsibilities "as an employee of state or local government." §5-7-102(1)(a), MCA, and ARM 44.12.106A(1)(b).

C. Title 2, Chapter 2, MCA, Code of Ethics

The Commissioner's primary duty under Montana's Code of Ethics is to conduct an informal contested case hearing under MAPA on any ethics complaint that states a potential violation of the Ethics Code. §2-2-136(1), MCA. The Commissioner does not investigate an ethics complaint but a complaint that is frivolous or fails to state a violation of the Code may be dismissed without holding a hearing under MAPA. §2-2-136(1)(b), MCA. The Commissioner's decision, including a decision to dismiss a frivolous complaint, is subject to judicial review. §2-2-136(3), MCA. The Commissioner may, after hearing, impose an administrative penalty, recommend disciplinary action, or assess the costs of the proceeding against the losing party as provided in §2-2-136(2), MCA.

In conducting an Ethics Code hearing, the Commissioner and any hearing examiner hired to conduct the hearing, are subject to certain restrictions under MAPA, including a prohibition against engaging in *ex parte* communications with a party or the party's representative. *See, e.g.*, §§2-4-613 and §2-4-611(4), MCA.

Montana's Code of Ethics applies to:

(a) Legislators (§2-2-111 and §2-2-112, MCA);

(b) Public officers, which includes "all elected officers and directors of the executive branch of state government as defined in 2-15-102" and "any elected officer of a local government" (§2-2-102(8) and (11), MCA); and

(c) All public employees, which includes any temporary or permanent employees of the state, members of quasi-judicial boards who exercise rulemaking authority, and persons under contract to the state. §2-2-102(7), MCA. You, your staff, and any person who contracts with your office (including me) are subject to the prohibitions in Montana's Code of Ethics.

The purpose of Montana's Ethics Code is "to set forth a code of ethics prohibiting conflict between public duty and private interest." §2-2-101, MCA. The term "private interest" is defined in §2-2-102(6), MCA, to include an ownership interest in a business or real property; employment or prospective employment for which negotiations have begun; a loan, debtor, or creditor interest; or a "directorship or officership in a business." The "holding of public office or employment is a public trust" and a violation of the Code of Ethics is deemed to be an "abuse of the public's trust." §2-2-103, MCA. Specific ethical standards of conduct for public officers and public employees are imposed in §§2-2-104, 2-2-105, and 2-2-121, MCA. The following restrictions in §2-2-121, MCA, appear to be most relevant to your decision to continue your private law practice while simultaneously serving as Commissioner.

§2-2-121(2)(a), MCA, prohibits a public officer or public employee from using "public time, facilities, equipment, supplies, personnel, or funds for the officer's or employee's private business purposes" subject to a limited exception in §2-2-121(7), MCA (an "electronic directory" listing under §30-17-101, MCA).

§2-2-121(2)(b), MCA, prohibits a public officer or public employee from engaging "in a substantial financial transaction for the officer's or employee's private business purposes with a person whom the officer or employee inspects or supervises in the course of official duties."

§2-2-121(2)(e), MCA, prohibits a public officer or public employee from performing "an official act directly and substantially affecting to its economic benefit a business or other undertaking in which the officer or employee either has a substantial financial interest or is engaged as counsel, consultant, representative, or agent."

§2-2-121(3), MCA, prohibits a public officer or public employee from using "public time, facilities, equipment, supplies, personnel, or funds to solicit support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue unless" such political activity is "authorized by law" or "properly incidental to another activity required or authorized by law" as specified in §2-2-121(3)(b), MCA.

III. OTHER CONFLICTS OF INTEREST AND DISQUALIFICATION PROVISIONS THAT MAY APPLY TO YOU AS AN ATTORNEY LICENSED TO PRACTICE LAW IN MONTANA

You are the first Commissioner who has chosen not to serve as Commissioner on a full-time basis. You are also the first licensed attorney to serve as Commissioner. Your decision to

continue your private law practice while simultaneously serving as Commissioner on a part-time basis is not specifically prohibited by existing Montana law. However, your decision to simultaneously continue your private law practice subjects you to additional standards of conduct imposed by the 2005 Montana Supreme Court's Rules of Professional Conduct.

My discussion of the Rules of Professional Conduct in this memorandum will be limited because you are an experienced attorney and are no doubt familiar with the prohibitions imposed by the Supreme Court's rules. Accordingly, I will only discuss the Rules of Professional Conduct that may apply to the duties you intend to perform as Commissioner.

A. Investigations, Issuance of Decisions, and Litigation Related to Matters Not Involving MAPA Contested Cases

You have advised that you intend to personally write most of the complaint and informal decisions, including decisions issued after conducting informal MAPA contested cases. I also assume that you may personally preside in conducting informal MAPA contested cases under the Code of Ethics and the Lobbying Act.

Every Commissioner I have worked for (beginning with Commissioner Colburg) has been ultimately responsible for issuing the final complaint decisions and other final actions taken by the office. The Commissioner is and always will be a potential witness for the Commissioner's office in enforcement actions or when the Commissioner's office is named as a defendant in a lawsuit. Unless you have disqualified yourself in the administrative proceeding and a Deputy Commissioner has made the decision that is the focal point of the lawsuit, you, as the ultimate decision-maker, will be a potential witness in any matter decided by the office.

If you are considering prosecuting civil penalty and other enforcement actions on behalf of the Commissioner's office, or serving as the attorney of record when the Commissioner's office is named as a defendant in lawsuits, you must consider the prohibitions in Rule 3.7 of the Rules of Professional Conduct. Rule 3.7 prohibits you from acting "as an advocate at a trial in which the lawyer is likely to be a necessary witness" subject to limited exceptions. *See also* Rule 3.8. I do not believe any of the limited exceptions in Rule 3.7 could be invoked to allow you to be both a witness and the attorney representing the Commissioner's office in litigation.

Rule 1.6(a) of the Rules of Professional Conduct requires that an attorney "shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by … [Rule 1.6(b)]." The limited exceptions in Rule 1.6(b) would not apply if, for example, you are receiving or sending e-mails related to your private law practice on the state e-mail system. State e-mails are public records and must be publicly disclosed upon request unless the demands of individual privacy clearly exceed the merits of public disclosure under Article II, Section 9 of the Montana Constitution. However, the fact that such private business e-mails have been sent or received on the state-funded e-mail system may not be a sufficient basis to prevent public disclosure under Article II, Section 9.

Rule 1.17 of the Rules of Professional Conduct applies to an attorney who is "employed full time by the State of Montana…." Although there is no statute declaring that the office of Commissioner is a full time position, you should be mindful of the prohibitions in Rule 1.17 because of the sound ethical and public policy reasons for the rule regardless of whether an attorney's government employment is full or part time. An attorney employed full time by state or local government "may not accept other employment during the course of which it would be possible to use or otherwise rely on information obtained by reason of government employment that is injurious, confidential or privileged and not otherwise discoverable." As Commissioner, you will likely receive information during the investigation of complaints that may be detrimental to individuals but not used in decisions, enforcement actions, or litigation. *See also* Rule 1.11 dealing with "Special Conflicts of Interest for Former and Current Government Officers and Employees."

If you personally investigate complaint allegations, it is important that you understand the historic reasons why Jim Scheier and I have counseled previous Commissioners to carefully consider whether they should personally conduct investigations. It has been our collective experience over more than 20 years of service to the Commissioner's office that the investigator becomes the lightning rod for displeasure with the ultimate decision made by the Commissioner. If you are acting as both the Commissioner and the investigator, an unhappy witness or respondent has no one to talk to about the investigator's perceived bias, prejudice, or unfairness. Because most contacts with witnesses involve one-on-one communications, such contacts can result in allegations that the Commissioner or the Commissioner's investigator was biased or unwilling to consider relevant information when the interview was conducted. In the past five years, targets of campaign finance and reporting complaints have been increasingly willing to name the Commissioner individually as a defendant and seek damages from the Commissioner personally in litigation. Your direct participation in investigations will only increase allegations of bias against you personally.

If you decide to personally conduct investigations in whole or in part, it is necessary that you contemporaneously document your witness interviews and include the information in an investigative report. Such documentation is crucial in defending against allegations of bias or failure to thoroughly investigate the allegations in a complaint.

B. Decisions Made in a MAPA Contested Case Hearing

MAPA defines the procedures for conducting informal contested case hearings under the Code of Ethics and the administrative penalty provisions of the Lobbying Act. *See* Title 2, Chapter 4, Part 6, MCA. Although the 2008 Code of Judicial Conduct (2008 Code) does not apply to administrative law judges or individuals appointed to perform quasi-judicial functions, you may want to consider applying some provisions of the Judicial Conduct Code to MAPA contested case proceedings you conduct under the Code of Ethics and §5-7-306(1), MCA. *See* Canons 1(B) and 2.12 of the 2008 Code and the recommendation section of this memorandum. Montana's judges, like the mandates applicable to you as Commissioner in §§13-37-108 and 13-37-111(3), MCA, are required to promote "public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Canon 1.2, 2008 Code of Judicial Conduct.

C. The Campaign Contribution Issue

You asked me to specifically address whether you must disqualify yourself from considering complaints that relate to a candidate or elected official to whom you made a campaign contribution before being appointed to serve as commissioner. The Montana Republican Party (MRP) recently asserted that you should have recused yourself and not dismissed a complaint filed by MRP against Attorney General Steve Bullock regarding Mr. Bullock's failure to declare what office he is seeking in 2012. You have publicly acknowledged making a $200 contribution to Mr. Bullock's 2008 campaign but it is my understanding that you have not made any subsequent contributions to Mr. Bullock's current campaign.

I had hoped that Montana 2008 Code of Judicial Conduct would provide guidance on the campaign contribution issue since most Montana judges are elected and solicit and receive significant campaign contributions from attorneys who appear before them. The revised 2008 Code was based on the American Bar Association's 2007 Edition of the Model Code of Judicial Conduct (ABA Model Code). The 2007 ABA Model Code, Rule 2.11: Disqualification, subsection A(4), page 26, included suggested language requiring disqualification of a judge if the judge had received an unspecified amount of campaign contributions from a party, the party's attorney, or the attorney's law firm within an unspecified period of time (the ABA Model Code left it to each state to fill in the blanks specifying the amount of the contributions and period of years that would trigger automatic disqualification of a judge). Unfortunately, Montana's 2008 Code ignored the campaign contribution disqualification issue although Canon 4 includes extensive provisions governing the conduct of judicial campaigns and prohibitions against participation in partisan political activities.

The comments to Canon 4.1 of the 2008 Code do provide a rationale for why the conduct of judges requires greater regulation and scrutiny. Comment 1 to Canon 4.1 acknowledges that "even when subject to election, a judge plays a role different from that of a legislator or executive branch official." A judge does not make "decisions based upon the expressed views or preferences of the electorate," but instead bases decisions on "the law and the facts of every case." Judges and judicial candidates must "to the greatest extent possible, be free and appear to be free from political influence and political pressure." The same rationale applies to your duties as Commissioner. Your job is to impartially and fairly evaluate the specific facts and the applicable law in each complaint matter you decide, including compliance determinations that are not based on formal complaints filed with the Commissioner's office.

Comment 3 to Canon 4.1 stresses that judges and judicial candidates are generally prohibited from participating in partisan political events and activities because "public confidence in the independence and impartiality of the judiciary is eroded if judges or judicial candidates are perceived to be subject to political influence."

I have not found any Montana statute or rule that addresses the issue of judicial disqualification related to campaign contributions. The 2007 Montana Legislature considered HB 229, introduced by Republican Rep. Scott Mendenhall. Rep. Mendenhall's bill would have

required a judge or justice not to sit on a case if an attorney in the action had made a campaign contribution to the judge or justice in the "judge's or justice's current or just previous election campaign." However, HB 229 would also have allowed the parties in a judicial proceeding to waive disqualification in writing and allow the judge or justice to decide the matter.

It must be noted that you were also a candidate of the State Senate in 2010 and reported receiving substantial campaign contributions in that campaign. As the recent recipient of campaign contributions, you may also be subject to disqualification requests based on the contributions you received in your 2010 campaign. I urge you to address the campaign contribution issue as suggested in Part IV B 3 of this memorandum.

IV. RECOMMENDATIONS

A. Objective Prohibitions and Standards of Conduct

The following prohibitions and standards of conduct are, based on the plain language of the statutes, sufficient to give a person of ordinary intelligence fair notice of conduct that is prohibited.

1. While serving as Commissioner, you cannot participate in any political activity or in a political campaign. §13-37-108(2), MCA. This expansive language applies to all political campaigns, including federal candidate campaigns, non-partisan judicial campaigns, or local government campaigns.

2. While serving as Commissioner, you cannot make a contribution to a candidate or a political committee or for or against a ballot issue or engage in any activity that is primarily intended to support or oppose a candidate, political committee, or ballot issue. §13-37-108(3), MCA.

3. While serving as Commissioner, you cannot attend an event that is held for the purpose of raising funds for or against a candidate, political committee, or ballot issue. §13-37-108(4), MCA. Commissioner Hensley asked whether she could go to a restaurant to eat even though the restaurant was, on the date and time of her intended visit, holding a partisan political gathering that her husband, a sitting State Senator, was going to attend. Jim and I advised Commissioner Hensley that she should not go to that restaurant on the date and time of the political event and that she should eat elsewhere that evening.

4. While serving as Commissioner, you cannot participate in a matter that involves a family member who is within the second degree of consanguinity or affinity. §§13-37-108(5) and 13-37-101(4), MCA. The second degree of consanguinity or affinity would include your grandparents, parents, children, grandchildren, brothers, and sisters and the same kindred of your spouse.

5. While serving as Commissioner, you cannot use public time, facilities, equipment, supplies, personnel, or funds for private business purposes. §2-2-121(2)(a), MCA. This prohibition is absolute and all encompassing. Use of any equipment, office space, or the publicly

funded resources (e.g., the electricity used to power the lights and equipment) located at the Commissioner's office for your private law business is prohibited by this Ethics Code provision. This prohibition applies to the use of state resources for any private business interest you may have, not just your law practice.

6. While serving as Commissioner, you cannot engage in a substantial financial transaction for private business purposes with a person who you inspect or supervise in the course of your official duties. §2-2-121(2)(b), MCA. The word "inspect" is not defined in the Code of Ethics but the common Webster's II New College Dictionary definition (copyright 1995) of the term includes "to examine in detail, especially for flaws" and "to review or examine officially." The examination of campaign finance and lobbying reports by you and your staff is an official duty assigned to you and your office. Accordingly, you are precluded from entering into a "substantial financial transaction" with any person who is required to file such reports with your office.

7. While serving as Commissioner, you cannot perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which you have a substantial financial interest or are engaged as counsel, consultant, representative, or agent. §2-2-121(2)(e), MCA.

8. While serving as Commissioner, you cannot use public time, facilities, equipment, supplies, personnel, or funds to solicit support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue. §2-2-121(3)(b) and §13-35-226, MCA. I do not believe that any of the §2-2-121(3)(b) exceptions ("authorized by law" or "properly incidental to another activity required or authorized by law") apply to you while serving as Commissioner, especially when considered in conjunction with the express political activity prohibitions of §13-37-108, MCA.

B. Statutes in Need of Further Definition or Explanation

The prohibitions and standards of conduct discussed in this Part are not fully defined in the statutes or are in need of further explanation in rules. I urge you not to take the position that these prohibitions and standards of conduct are ambiguous and will be ignored. Instead, I strongly suggest that you undertake a public process to further define appropriate statutory terms by rule and, if necessary, legislation. The public process should include numerous opportunities for public participation that will further define such terms as "appearance of impropriety" or the "appearance of a conflict of interest." Assuming you are willing to broadly define these terms for the purpose of preserving and enhancing the credibility, objectivity, and independence of the office, you will leave a lasting legacy for the public, your successors, the legislative committee that recommends nominees to the governor, and future governors who appoint your successors.

1. While serving as Commissioner, you cannot "hold another position of public trust or engage in any other occupation or business if the position … interferes with or is inconsistent with the commissioner executing the duties of the commissioner's office." §13-37-108(1), MCA. Title 13, Chapter 37, MCA, does not define the positions of public trust, occupations, or businesses that could potentially interfere or be inconsistent with the Commissioner's duties.

Rules could provide valuable guidance and identify potential public trust positions, occupations, and businesses that could interfere or be inconsistent with the Commissioner's duties. Better yet, the public process would enable all interested persons (the media, the political parties, the public, and elected officials) to publicly define and debate the breadth of the conflicts they believe the Commissioner should avoid.

2. While serving as Commissioner, you cannot "participate in a matter pertaining to the commissioner's office that … is a conflict of interest or results in the appearance of a conflict of interest between public duty and private interest pursuant to Title 2, chapter 2…." §13-37-108(5), MCA. I do not believe that §13-37-108(5), MCA, suffers from ambiguity that makes it unenforceable. However, it is a statute that can be further defined and reconciled with the "private interest" provisions of §2-2-102(6), MCA.

3. While serving as Commissioner, you must "recuse" (disqualify) yourself from participating in a matter if "the commissioner determines that considering a matter would give rise to the appearance of impropriety or a conflict of interest…." §13-37-111(3) and §13-37-101(3), MCA. The definition of "recusal" in §13-37-101(3) seems to equate the term "appearance of impropriety" with "prejudice," but as reflected in the 2008 Judicial Code of Conduct, the appearance of impropriety encompasses more than prejudice. Rules defining what constitutes the "appearance of impropriety" or the "appearance of a conflict of interest" (including campaign contribution issues), would be beneficial to the public and enable you and future Commissioners to apply more objective standards of conduct.

If you choose to undertake a rule-making process addressing the campaign contribution issue, I urge you to consider proposing a rule based on the 2007 ABA Code that would impose automatic disqualification requirements based on the total amount of contributions over a defined period of time. If you intend to propose such a rule, I suggest that we have a detailed discussion of the campaign contribution issue with Mary, Julie, and Jim Scheier.

In reviewing my recommendations concerning the need to define terms like the "appearance of impropriety," you should be aware of the Montana Supreme Court's decision in *Wadsworth v. State*, 275 Mont. 287, 911 P. 2d 1165 (1996). Although *Wadsworth* would not prevent you from undertaking the rule-making recommendations suggested in this memorandum, *Wadsworth* does establish some important public policy considerations that must be considered if you decide to propose conflict of interest and appearance of impropriety rules.

Wadsworth involved a Montana Department of Revenue (DOR) conflict of interest rule that prohibited Wadsworth, a DOR real estate appraiser, from being employed on his own time as a fee appraiser or in selling real estate (other than the sale of his personal residence). Such a prohibition was, in the opinion of DOR, necessary to protect the "integrity of the Department" and "prevent the appearance of impropriety." *Wadsworth*, p. 292. The Montana Supreme Court concluded that DOR had failed to establish a compelling state interest for its outside employment conflict of interest policy. The DOR policy, according to the Court, violated Wadsworth's fundamental right to pursue employment as part of life's basic necessities under Article II, Section 3 of the Montana Constitution. *Id.*, pp. 302, 305, and 306. *Wadsworth* clearly states that the decision does not determine that the State of Montana could never show a compelling interest

for restricting outside employment. *Id.*, p. 304. *Wadsworth* also did not involve any allegations that Wadsworth's outside employment violated Montana's Code of Ethics. *Id.*, p. 305.

It is my opinion that the State of Montana could show a compelling state interest for the conduct prohibitions codified in §13-37-108, §13-37-111(3), §13-35-226, Title 2, Chapter 2, and §5-7-306, MCA. However, it is also my opinion that the appearance of impropriety and appearance of a conflict of interest provisions discussed in Part IV B of this memorandum should be further defined in rules adopted by the Commissioner.

C. Practical Advice

During our only meeting following your appointment as Commissioner, I did not have an opportunity to share with you the advice I have given every new appointee based on my service as retained counsel to six previous Commissioners. You can accept or reject the following admonitions because that is your prerogative as the client. The following advice is based on the evolution of the Commissioner's office over the last 20 plus years and the fact that the commitment of Montana's elected officials to an independent, fair, and impartial administration and enforcement of the disclosure and ethics laws discussed in this memorandum appears to be waning. How you proceed as Commissioner could directly affect the public debate about the future of the Commissioner's office.

When the Commissioner's office was first created in 1975, the original emphasis was on establishing rules to implement Montana's 1975 campaign finance full disclosure laws. Complaints were not the focus of the public's attention until Commissioner Colburg assumed the office. Beginning with Commissioner Colburg's prosecution and collection of a substantial civil penalty against the Stan Stephens gubernatorial campaign, there has been a steady increase in the number of complaints and seriousness of the violations alleged. The willingness of the Commissioner's office to thoroughly investigate complaints and prosecute serious campaign reporting violations increased public confidence in the Commissioner's enforcement capabilities. In addition, the willingness of your predecessors to pursue Code of Ethics violations against some of the state's highest ranking officials has increased public confidence in the office. Recently, the Commissioner's office entered into a settlement agreement resulting in the payment of a $75,000 civil penalty to the State of Montana in the MIA matter. A substantial civil penalty and costs have also been assessed against a member of the Public Service Commission in a Code of Ethics proceeding (Commissioner Unsworth's decision in the *Fox v. Molnar* matter is now on appeal to District Court in Billings). The Commissioner's ability to independently, fairly, and impartially decide and, when appropriate, prosecute violations of the statutes discussed in this memorandum cannot be sustained if the backlog of complaints is eliminated by not conducting thorough or verified investigations. Politics is the art of deception and the Commissioner's office must continue to pursue a "trust but verify" policy when investigating complaints or alleged wrongdoing.

Within the preceding context, I must emphasize the following:

The Commissioner's job is not a political patronage job. You should not be discussing with the Governor, other partisan elected officials, party officials, or staff for these officials

hiring and firing decisions or the campaign finance, ethics, or lobbying decisions you will be making as Commissioner. The Commissioner's office can only independently, fairly, and impartially decide and, when appropriate, prosecute violations of the laws discussed in this memorandum if your staff, like you, leaves its political partisanship at the door.

I am sure you understand that personal discussions you may have with the Governor, any other partisan elected official, party officials, or staff for these officials are not protected even though the discussions occur on your personal cell phone, home phone, or business phone. If your conduct and allegations of impropriety or conflict of interest become an issue, your personal and business phone records will be discoverable.

I encourage you take a staff member with you to any meetings you schedule with the political parties or others to discuss intended action or matters relating to the office's operations. Previous Commissioners who have met privately with groups or individuals to discuss or resolve pending matters have created enormous problems for the office.

You must conduct yourself in a manner similar to a judge or justice during your term of office as Commissioner. You must leave your political partisanship at the door. You and your staff must decide every matter that comes before the Commissioner based on an objective, fair, and independent assessment of the facts and law, even if it means ruling against the political party or the office holder who put you in the position. You can resume partisan political activity after your term of office ends. You cannot use the office of Commissioner for personal or political gain.

I do have one concern about your decision to serve as a part-time Commissioner. It is my personal opinion that the office of Commissioner was never intended to be anything less than a full-time position. Nevertheless, your decision to serve as a part-time Commissioner and continue your private law practice is not barred by any applicable statute. My concern about your decision to serve as a part-time Commissioner relates to the possible effect of your decision on the office if the public perception is that a full-time Commissioner is not needed. There is much work to be done by the Commissioner's office in addition to writing decisions and reducing the backlog of complaints. It is important that you document the time spent on Political Practices matters and identify the specific CPP matters you work on each day (similar to what you would do in sending a client your bill for legal services). The best way to protect yourself and the integrity of the office is for you to fully document your work by topic in your Political Practices time sheets.

I would welcome the opportunity to discuss this memorandum with you, your staff, and Jim Scheier. If you have questions or need clarification regarding any matter discussed in this memorandum, please advise. Thank you for the opportunity to discuss this important topic.