



August 3, 2020

TO: Legislative Council

FR: Todd Everts, Chief Legal Counsel and Code Commissioner
Jaret Coles, Legislative Staff Attorney
Julie Johnson, Legislative Staff Attorney

RE: Authority to Issue and Enforce Health Directives and Orders

INTRODUCTION

At the request of the 2021 Session Planning subcommittee of the Legislative Council, we were asked to analyze the authority to issue and enforce health directives in the State Capitol building.

The purpose of this memorandum is to address whether and to what extent a legislator is subject to either a health directive issued by the Governor or a health order issued by a local government when the legislator is conducting legislative business in the Capitol.

Before we provide you with our opinion and analysis, a few caveats are necessary. Due to the constitutional constraints inherent in the separate powers of each branch of state government, a legal opinion provided to you by Legislative Branch attorneys is obviously not binding on the Executive Branch or a local government.

QUESTION PRESENTED

Is a member of the Legislature subject to either a Governor-issued health directive or a local government health ordinance when conducting legislative business in the Capitol?

BRIEF ANSWER

First, based on the exemptions for state employees and the definitions in the Governor's directive regarding face coverings, it is arguable that the Legislative Branch is not responsible for enforcement of any of the Governor's directives.

Second, the Legislature has the sole Constitutional power to enact Legislative rules and determine where the House and the Senate chambers are located under the separation of powers doctrine. The Montana Supreme Court has reasoned that it would be an impermissible intrusion on Legislative power for another entity to regulate internal legislative operations such as the number of committees, the time within which a committee must act, the time each legislator must attend the sessions, limiting the time of discussion, and limiting the time one bill must pass from one house to the other. However, the Court has also recognized that "absolute independence" cannot exist in our form of government. As such, the Legislature could be bound

by either a Governor-issued health directive or a local government health ordinance that is considered a "minimal and inoffensive intrusion" on Legislative power. It would take a fact-specific inquiry to determine whether another entity can require legislators to wear face coverings during legislative business, and ultimately the answer to the question is unclear.

Finally, if a legislator violates either a Governor-issued health directive or a local government health ordinance during a legislative session, that legislator would have absolute constitutional immunity from arrest. Consequently, a Legislator could not be arrested at the Capitol during a legislative session for violating the terms of any directive or health ordinance.

FACTUAL BACKGROUND

I. GOVERNOR-ISSUED DIRECTIVES

A. Directives Limiting Gathering Size

In a [March 26, 2020, Directive](#), the Governor prohibited "[a]ll public and private gatherings of any number of people occurring outside a household or living unit." In an [April 22, 2020, Directive](#), the Governor directed Montanans to "[a]void gathering in groups of more than 10 people in circumstances that do not readily allow for appropriate physical distancing." For purposes of the directive, state government employees were categorically exempt.

The current directive restricting group size was issued by the Governor on May 19, 2020. This [May 19, 2020, Directive](#) is entitled "Directive implementing Executive Orders 2-2020 and 3-2020 and establishing conditions for Phase Two." This directive provides:

- Effective June 1, avoid gathering in groups of more than 50 people in circumstances that do not readily allow for appropriate physical distancing. It is recommended to continue to social distance in gatherings of any size.
- Groups larger than 50 people should be cancelled unless physical distancing can be maintained.
- If you are planning an event with more than 50 people you should consult with your local public health office on a plan to implement adequate social distancing.
- Consistent with the Centers for Disease Control and Prevention's (CDC) guidelines, event cutoff threshold is at the discretion of community leadership based on current circumstances in your community.

This directive is currently in effect. A limitation in the directive states that it shall not be construed to limit, modify, or otherwise affect the authority granted by law to any officer, agent, or employee of the State of Montana except as expressly provided in the directive.

B. Directive on Face Coverings in Public Spaces

Recently, the Governor issued a [July 15, 2020, Directive](#) entitled "Directive implementing Executive Orders 2-2020 and 3-2020 and providing for the mandatory use of face coverings in certain settings." This is the latest in a series of directives on COVID-19 that the Governor has issued since March 14, 2020. The July 15, 2020, directive mandates "all businesses, government offices, or other persons responsible for indoor spaces open to the public" to "require and take reasonable measures to ensure that all employees, contractors, volunteers, customers, or other members of the public wear a face covering that covers their mouth and nose at all times while entering or remaining in any indoor spaces open to the public." The provisions of this directive apply to counties with four or more confirmed and active COVID-19 cases and only while the county has four or more active cases.

The Directive defines "government offices" as:

any office of any department, agency, or political subdivision of the State of Montana.

The Directive further defines "indoor space open to the public" as:

any indoor space, whether publicly or privately owned, where the public has access by right or invitation, express or implied, whether by payment of money or not. In addition, "indoor spaces open to the public" include, but are not limited to, lobbies, common areas, elevators, bathrooms, meeting rooms, or other spaces where people gather. The term includes all modes of public or commercial transportation. The term does not include private residences not open to the public.

The face covering directive allows for several express exceptions. For example, children under the age of 5, persons consuming food or drinks in an establishment that offers food or drinks for sale, and persons who have a medical condition that precludes the safe wearing of a face covering are not required to wear a face covering.

The directive also provides that it is a "public health order" within the meaning of section [50-1-103\(2\)](#), MCA, and is enforceable by the Attorney General, the Department of Public Health and Human Services (DPHHS), a county attorney, or other local authorities under the direction of a county attorney. The directive preempts any inconsistent local government health ordinances or orders to the extent they are less restrictive, and expressly allows counties, cities, and towns to adopt more restrictive ordinances.

The Directive also expressly provides that it does not limit or modify authority granted by law:

Nothing in this Directive shall be construed to limit, modify, or otherwise affect the authority granted by law to the Governor or any department, agency, political subdivision, officer, agent, or employee of the State of Montana, except as provided in this Directive or other Directives now in effect implementing Executive Orders 2-2020 and 3-2020.

The face covering directive expires at the end of the declared state of emergency in Executive Orders 2-2020 and 3-2020.

II. LEWIS AND CLARK COUNTY HEALTH ORDERS

The Lewis and Clark City/County Health Officer has also issued a series of health orders related to COVID-19. By order, the Health Officer has adopted both the directive limiting group size (May 19, 2020 Directive) and the directive requiring face coverings be worn on public indoor spaces (July 15, 2020, Directive). [Order 9-2020](#) (issued May 21, 2020) and [Order 11-2020](#) (issued July 15, 2020). Additionally, as permitted by the Governor in the May 19, 2020, Directive, Lewis and Clark County has established an "event cutoff threshold" based on current circumstances in the community. [Order 10-2020](#) (dated July 7, 2020), provides:

[T]he Lewis and Clark City-County Health Officer, in conjunction with the Lewis and Clark City-County Board of Health, hereby orders ***events and gatherings limited to no more than 250 people, and events and gatherings between 50 and 249 people must adhere to the following:***

- ***Submit on the form provided by Lewis and Clark Public Health to Lewis and Clark Public Health a detailed plan outlining protective measures and environmental controls to reduce the risk of disease transmission at least ten (10) days prior to event or gathering.***

- Maintain strict physical distancing of 6 feet between individuals or between groups of family members.

- Follow guidance provided by Lewis and Clark Public Health regarding event planning and ensure plan is adhered to at the time of the event or gathering. (Emphasis added.)

This health order also addresses enforcement:

Enforcement: This order will be enforced through a complaint driven process where law enforcement will observe and document violations of this order and provide report to Lewis and Clark County Attorney for enforcement against the event or gathering organizer and attendees. Event or gathering organizers may face a misdemeanor charge under MCA [50-2-124](#) for each attendee at the event or gathering.

The statutory authority that was cited for the May 19, 2020, directive is section [50-2-118](#), MCA. The July 15, 2020, directive does not cite statutory authority. The City of Helena has not issued an independent directive.

LAW

I. SEPARATION OF POWERS

The doctrine of separation of powers is a fundamental principle of government in the United States and in Montana. [Article III, section 1](#), of the Montana Constitution provides:

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

The Montana Supreme Court has recognized that "[o]ne of the cornerstones of our system of government is the separation of powers of the three branches of government" and that "[e]ach branch is separate and distinct and is immune from the control of the other two branches of government in the absence of express constitutional authority to the contrary. *State ex rel. Morales v. City Comm'n*, 174 Mont. 237, 240, 570 P.2d 887, 889 (1977) (citing *State ex rel. Public Service Comm'n v. District Court*, 107 Mont 240, 84 P.2d 335 (1938).

Each branch of government is equal, coordinate, and independent, in that powers belonging to one branch may not be exercised by another. *Powder River County v. State*, 2002 MT 259, ¶ 112, 312 Mont. 198, ¶ 112, 60 P.3d 357, ¶ 112. And even the best of motives for one branch exercising power belonging to a different branch is not a substitute for constitutional authority. *State ex rel. Shea v. Judicial Standards Comm'n*, 198 Mont. 15, 32, 643 P.2d 210, 219 (1982).

II. EXECUTIVE POWERS

The Governor of the state is the chief executive officer of the state and the head of the executive branch. Section [2-15-103](#), MCA. [Article VI, Section 4](#), of the Montana Constitution provides that "[t]he executive power is vested in the governor who shall see that the laws are faithfully executed." The governor "shall have such other duties as are provided in this constitution and by law." *Id.* Over time, the Legislature has enacted laws to implement this constitutional provision. These laws include [Title 10, MCA](#), regarding military affairs and disaster and emergency services and [Title 50, MCA](#), regarding health and safety. By enacting these laws, the Legislature has delegated a great deal of authority and flexibility to the Executive Branch to allow the State to respond to emergencies and disasters in a timely and effective manner.

Section [10-3-104](#), MCA, delegates certain responsibility and authority to the Governor with respect to disasters and emergencies. Pursuant to section [10-3-104\(2\)](#), MCA, the Governor may:

(a) suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or orders or rules of any state agency if the strict compliance with the provisions of any statute, order, or rule would in any way prevent, hinder, or delay necessary action in coping with the emergency or disaster;

(b) direct and compel the evacuation of all or part of the population from an emergency or disaster area within the state if the governor considers this action necessary for the preservation of life or other disaster mitigation, response, or recovery;

(c) control ingress and egress to and from an incident or emergency or disaster area, the movement of persons within the area, and the occupancy of premises within the area.

The governor may issue executive orders, proclamations, and regulations and amend and rescind them. Section [10-3-104\(3\)](#), MCA. As mentioned previously, the Governor has issued multiple directives implementing Executive Order Nos. 2-2020 and 3-2020. The Governor is also the commander-in-chief of the militia and all other forces available for incident, emergency, or disaster duty. Section [10-3-305](#), MCA. The Governor is directed to delegate authority pursuant to the state disaster and emergency plan provided for in section [10-3-301](#), MCA.

The Governor through DPHHS also has very broad duties to address an emergency involving an outbreak of disease under section [50-1-202](#), MCA. These include the duty to:

- disseminate information and make recommendations for control of diseases and other conditions of public health importance;
- at the request of the Governor, accept funds for and administer any federal health program for which responsibilities are delegated to states;
- identify, assess, prevent, and mitigate conditions of public health importance through screening and testing programs; isolation and quarantine measures; treatment; collecting and maintaining health information; or other public health measures as allowed by law.

Pursuant to section [50-1-204](#), MCA, DPHHS may adopt and enforce quarantine or isolation measures to prevent the spread of communicable disease.

III. LEGISLATIVE POWERS

[Article V, section 1](#), of the Montana Constitution establishes the legislature and provides that it is composed of a Senate and a House of Representatives. [Article V, section 10](#), of the Montana Constitution provides for the organization and procedures of the Legislature as follows:

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

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

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

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

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

Section [5-2-502](#), MCA addresses the structure of legislative branch and provides that the functional organization of the Legislature is governed, in part, by its joint rules:

The legislature established in Article V, section 1, of the Montana constitution and the committees established by law constitute the legislative branch. ***The functional organization of the legislative branch is governed by the joint rules of the legislature and the laws governing the several components of the branch***. The administrative organization of the legislative branch is consolidated as provided in this part. (Emphasis added.)

Pursuant to the grant of power in the Montana Constitution, the Legislature has adopted Senate Rules, House Rules, and Joint Rules that govern the actions of both chambers, including decorum.

Not only does the Constitution confer authority to the Legislature to make rules for its proceedings, it also confers certain immunities to individual members of the Legislature when conducting legislative business. [Article V, Section 8](#), of the Montana Constitution provides:

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

This immunity is also codified at Section [46-6-102\(2\)](#), MCA:

Senators and representatives shall in all cases except felony or breach of the peace be privileged from arrest during the sessions of the state legislature and in going to and returning from the same.

The Montana Supreme Court has held that this constitutional provision also renders an individual legislator immune from a defamation lawsuit when the legislator's statements, whether true or not, are made on the floor of the House of Representatives while in session. *Cooper v. Glaser*, 2010 MT 55, 355 Mont. 342, 228 P.3d 443 (citing Art. V, sec. 8, Mont. Const.).

In addition to immunity from arrest, section [2-9-111](#), MCA, provides legislative immunity from suit for legislative acts and omissions. This immunity includes immunity for members of the Legislature and legislative staff (1) "from suit for a legislative act or omission by its legislative body... engaged in legislative acts" and (2) "damages arising from the lawful discharge of an official duty associated with legislative acts of the legislative body". The term "legislative act" includes "actions by a legislative body that result in creation of law or declaration of public policy" and "other actions of the legislature authorized by Article V of The Constitution of the State of Montana".

The Legislature's authority over its own venue has also been established. In *Goodover v. Department of Administration*, 201 Mont. 92, 651 P.2d 1005 (1982), a committee composed of several legislators and members of the executive branch voted to relocate the Senate chambers. A group of senators challenged the committee's authority to determine the location of legislative chambers and sought an injunction to prevent the relocation. The Montana Supreme Court agreed that the committee lacked authority and issued the injunction to prevent the relocation of the Senate chambers unless consent has been obtained from the Legislature. The Court concluded that while "an executive agency can allocate space for the legislative branch of government, ...the Legislature, being an independent body, has the right to determine where it will sit." *Goodover*, 201 Mont. at 96, 651 P.2d at 1008. This result was codified in section [2-17-101](#)(3), MCA, which provides:

(3) (a) The location of the chambers for the house of representatives must be determined in the ***sole discretion of the house of representatives***. The location of the chambers for the senate must be determined in the ***sole discretion of the senate***.

(b) Subject to [2-17-108](#), the department, with the advice of the legislative council, shall allocate other space for the use of the legislature, including but not limited to space for committee rooms and legislative offices. (Emphasis added.)

IV. LOCAL GOVERNMENT POWERS

A. Self-Governing Powers -- City of Helena

With the adoption of a new constitution in 1972, local governments gained the ability to organize as self-governing units. [Article XI, section 6](#), of the Montana Constitution states that local governments with a self-governing charter "may exercise any power not prohibited by [the] constitution, law, or charter." The powers of a local government with self-government powers include all powers granted to general-power governments. Section [7-1-106](#), MCA, implements [Article XI, section 6](#), of the Montana Constitution by specifying that the powers and authority of a local government unit with self-government powers must be liberally construed and every reasonable doubt must be resolved in favor of the existence of the power or authority. Given that the Legislature meets in the City of Helena, it is important to note that Helena has self-governing powers. However, the city's self-governing power is not unlimited.

Section [7-1-111](#), MCA, specifies the powers that are denied to a local government with self-government powers. The section is lengthy and comprises 20 individual subsections. None of the subsections specifically pertain to procedures of the Legislature.

Section [7-1-112](#), MCA, specifies the powers that a local government with self-government powers is prohibited from exercising unless the power is specifically delegated by law. This section provides as follows:

7-1-112. Powers requiring delegation. A local government with self-government powers is prohibited the exercise of the following powers unless the power is specifically delegated by law:

- (1) the power to authorize a tax on income or the sale of goods or services, except that, subject to 15-10-420, this section may not be construed to limit the authority of a local government to levy any other tax or establish the rate of any other tax;
- (2) the power to regulate private activity beyond its geographic limits;
- (3) the power to impose a duty on another unit of local government, except that nothing in this limitation affects the right of a self-government unit to enter into and enforce an agreement on interlocal cooperation;
- (4) the power to exercise any judicial function, except as an incident to the exercise of an independent self-government administrative power;
- (5) the power to regulate any form of gambling, lotteries, or gift enterprises.

Section [7-1-113](#), MCA, provides that a local government with self-government powers is prohibited from exercising any power in a manner inconsistent with state law or administrative regulation in any area affirmatively subjected by law to state regulation or control. This section provides as follows:

7-1-113. Consistency with state regulation required. (1) A local government with self-government powers is prohibited the exercise of any power in a manner inconsistent with state law or administrative regulation in any area affirmatively subjected by law to state regulation or control.

(2) The exercise of a power is inconsistent with state law or regulation if it establishes standards or requirements which are lower or less stringent than those imposed by state law or regulation.

(3) An area is affirmatively subjected to state control if a state agency or officer is directed to establish administrative rules governing the matter or if enforcement of standards or requirements established by statute is vested in a state officer or agency.

In the past, various Attorney General's Opinions have engaged in a three-part analysis in determining whether a particular self-government power is authorized:

(1) consult the local government's charter and consider constitutional ramifications;

(2) determine whether the exercise is prohibited under the various provisions [Title 7, chapter 1, part 1](#), MCA, or other statute specifically applicable to self-government units; and

(3) decide whether it is inconsistent with state provisions in an area affirmatively subjected to state control as defined by section [7-1-113](#), MCA. *See, e.g.*, 48 A.G. Op. 14 (2000).

This three-part review provides a logical framework for analyzing an ordinance. If one of the factors is not satisfied, the ordinance is deemed invalid.

B. General Powers -- Lewis and Clark County

The authority of local governments to regulate is derived from state law. Traditionally, local governments could exercise only those powers expressed or implied by law. [Article XI, section 4](#), of the Montana Constitution provides that local governments without self-governing powers have the powers provided or implied by law. Generally, this means that governments with general powers must receive a legislative grant of authority before they can take a particular action. Under section [7-1-2101](#), MCA, counties are vested with "power specified in [the Montana Code Annotated] or in special statutes and such powers as are necessarily implied from those expressed." The majority of Montana's local governments are organized as general power governments. Given that the Legislature meets in Lewis and Clark County, it is important to note that Lewis and Clark County is a general power government. Moreover, even though Helena has self-governing powers, it is useful to analyze powers held by general power municipalities, as the powers would also be available to Helena as a self-governing power.

The governing body of an incorporated city or town may adopt health codes in whole or in part by reference. Section [7-5-4202](#), MCA. Boards of Health are also contemplated pursuant to sections [7-31-4101](#) and [50-2-104](#), MCA, which provide that a city and each county has power to provide for a board of health. Pursuant to section [50-2-116](#), MCA, in collaboration with federal, state, and local partners, each local board of health is required to "identify, assess, prevent, and ameliorate conditions of public health importance through ... isolation and quarantine measures,

.... abatement of public health nuisances... [and] other public health measures as allowed by law." Local boards are also required to "protect the public from the introduction and spread of communicable disease or other conditions of public health importance ... [and to] bring and pursue actions and issue orders necessary to abate, restrain, or prosecute the violation of public health laws, rules, and local regulations." *Id.* Lastly, each local board may "adopt regulations that do not conflict with ... rules adopted by [DPHHS] ...for the control of communicable diseases". *Id.* Local health officers, in turn, are required by section [50-2-118](#), MCA, to "take steps to limit contact between people in order to protect the public health from imminent threats, including but not limited to ordering the closure of buildings or facilities where people congregate and canceling events[,] ... establish and maintain quarantine and isolation measures as adopted by the local board of health[,] and ... pursue action with the appropriate court" if rules are violated. The statute proscribing the requirements does not provide an exemption for state government, although it does require collaboration with the state.

Pursuant to section [50-2-120](#), MCA, a state or local health officer may request a "sheriff, constable, or other peace officer to assist the health officer in carrying out" public health laws and pursuant to section [50-2-122](#), MCA, it is unlawful to "hinder a local health officer in the performance of duties, ... remove or deface any placard or notice posted by the local health officer, or ... violate a quarantine regulation." A person that does not comply with a rule adopted by a local board is guilty of a misdemeanor and a fine of "not less than \$10 or more than \$200". Section [50-2-124](#), MCA. A person that does not comply with a rule adopted by DPHHS is also guilty of a misdemeanor, but the fine is increased to up to \$500 or imprisonment of no more than 90 days, or both. *Id.*

LEGAL ANALYSIS AND CONCLUSION

I. LEGAL ANALYSIS

A. The Governor's Directive Dated July 15, 2020 -- Legislative Branch Enforcement May Not be Required Based on the Definition of "Government Offices"

As mentioned above, the Governor has issued multiple directives, some of which exempt employees of the state. The Governor's July 15, 2020, directive regarding face coverings does not exempt employees of the state and subject to certain limited exceptions, it requires businesses, *government offices*, and persons responsible for indoor spaces open to the public to ensure the use of public face coverings. The directive applies only to counties in which there are four or more active COVID-19 cases. Lewis and Clark County presently has more than four active cases. Consequently, as long as there are four or more active cases in the county, face coverings are required in "any indoor space, whether publicly or privately owned, where the public has access by right or invitation, express or implied..."

As drafted, it is unclear if the July 15, 2020, directive requires Legislative Branch enforcement since the term "government offices" is defined as "any office of any department, agency, or political subdivision of the State of Montana." The terms "agency" and "department" are part of the Executive Branch of the State of Montana pursuant to section [2-15-102](#)(2) and (4), MCA. This section provides:

(2) "Agency" means an office, position, commission, committee, board, department, council, division, bureau, section, or any other entity or instrumentality of the executive branch of state government.

(4) "Department" means a principal functional and administrative entity that:
(a) is created by this chapter within the executive branch of state government;
(b) is one of the 20 principal departments permitted under the constitution; and
(c) includes its units.

The term "political subdivision" is used extensively in the Montana Code Annotated and typically refers to local governments and districts. *See, e.g.*, section [2-9-101](#)(5), MCA. The Legislative Branch is not a political subdivision, it does not have agencies or departments, and it uses a division, council, or committee structure. Pursuant to section [5-2-504](#), MCA, the following Legislative Branch entities are consolidated:

- (1) the senate and the house of representatives provided for in Article V, section 1, of the Montana constitution;
- (2) the legislative council established by [5-11-101](#);
- (3) the legislative services division established by [5-11-111](#);
- (4) the legislative finance committee established by [5-12-201](#);
- (5) the legislative fiscal division established by [5-12-301](#);
- (6) the legislative audit committee established by [5-13-201](#);
- (7) the legislative audit division established by [5-13-301](#); and
- (8) the environmental quality council established by [5-16-101](#).

Given the fact that the term "government offices" in the Governor's July 15, 2020, directive does not implicitly or expressly include the Legislative Branch, it is arguable that the Legislative Branch is not responsible for ensuring the use of face coverings. However, it should be noted that the Capitol is owned by the State of Montana and the public has access to much of it by right. In these spaces in the Capitol, those that are accessible to the public and where no legislative proceedings occur, the directive applies, and the Executive Branch could enforce the provisions. As such, both legislators and legislative staff would most likely be subject to Executive Branch enforcement in common areas of the Capitol during the interim. However, legislators may have immunity during the Legislative session, as discussed below.

B. The Governor's Directives and any Lewis and Clark County Directives Are Subject to Separation of Powers

[Article III, section 1](#), of the Montana Constitution provides that "*[n]o person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others*, except as in this constitution expressly directed or permitted." [Article V, section 10](#), of the Montana Constitution regarding the Legislative powers provides that each house shall make rules for its proceedings and gives the Legislature the power to establish a legislative council and other interim committees. Pursuant to section [5-2-502](#), MCA, the functional organization of the legislative branch is governed by the joint rules of the legislature and the laws governing the several components of the branch.

The Legislature is not permitted to delegate its constitutional authority to formulate rules to govern its proceedings to the Executive Branch or any local government entity. Legislative rules of procedure cover a diverse field, including decorum and committee procedures for the press and the public. The Montana Supreme Court recognized the many areas that Legislative procedures can cover. In *Coate v. Omholt*, 203 Mont. 488, 662 P.2d 591 (1983), the Supreme Court struck down two statutes enacted by the Legislature that imposed sanctions on District Court judges and Supreme Court justices when judicial decisions were not reached within time limits fixed by statute. The Court concluded that these statutes violated Montana's constitutional separation of powers in an analogy regarding Legislative rules. The Montana Supreme Court quoted and followed the reasoning of the trial court, which stated:

The totality of the effect of Chapter 375 is to interfere with the internal operations of the judiciary in the same manner as if the judiciary would impose limitations on the legislature as to its internal operations, such as the number of committees, the time within which a committee must act, the time each legislator must attend the sessions, limiting the time of discussion, limiting the time one bill must pass from one house to the other and the like. All of these legislative functions are internal with the legislature and the constitution *authorizing the legislature to govern its affairs without interference from the other constitutional branches of government*.

Coate, 203 Mont. at 498, 662 P.2d at 596-97 (emphasis added). As applied here, the Governor's health directives acknowledge that nothing in them may be construed to limit or modify authority granted by law. This would include the Legislature's authority to determine rules of procedure, the venue of its chambers, and presumably legislative interim committee procedures. To hold otherwise would be a direct interference on the affairs of the Legislative Branch.

The separation of powers doctrine also applies to local governments. In *Harlen v. City of Helena* 208 Mont. 45, 676 P.2d 191(1984), the Montana Supreme Court held that a Helena ordinance that provided for the licensing of attorneys "was invalid with respect to attorneys because it infringes upon [the] Court's constitutional authority to supervise and regulate attorneys and the practice of law." *Harlen*, 208 Mont. at 48, 676 P.2d at 193. The Court further concluded that

"any attempt by another branch of government to interfere with this constitutional prerogative interferes with the doctrine of separation of powers." *Harlen*, 208 Mont. at 48, 676 P.2d at 193.

The key question, then, is where to draw the line between what is governed by Legislative rules and what can be imposed on the Legislature through health directives issued by the Governor and local governments. Unfortunately, this may not be a bright line. Indeed, in *Coate*, the Supreme Court acknowledged that the constitutional separation of powers provision does not mean absolute independence because "absolute independence" cannot exist in our form of government. *Coate*, 203 Mont. at 492, 662 P.2d at 594. Consequently, seven years later in *Kradolfer v. Smith*, 246 Mont. 210, 214, 805 P.2d 1266, 1269 (1990), the Supreme Court stated that "the fact that this Court has the exclusive authority to regulate the practice of law does not mean that the legislature cannot, in certain limited circumstances, act in this area." The Court then determined that an annual \$25 state license tax on attorneys was a reasonable amount to cover the costs of processing licenses for attorneys and maintaining the list of attorneys licensed to practice law in this State, and was a "**minimal and inoffensive intrusion** upon this Court's constitutional prerogative." *Kradolfer*, 246 Mont. at 215, 805 P.2d at 1269 (emphasis added). Given this framework, a "minimal and inoffensive" intrusion on the Legislative Branch by the Executive Branch or a local government may be permissible under the separation of powers doctrine.

Are the Governor's and Lewis and Clark County's directives a minimal and inoffensive intrusion on Legislative affairs? Anything that stops the Legislature from complying with its constitutional duties, including the number of committees, the time within which a committee must act, the time each legislator must attend the sessions, limiting the time of discussion, and limiting the time one bill must pass from one house to the other would most likely be more than minimal. *See Coate*, 203 Mont. at 498, 662 P.2d at 596-97. This should include any attempt by another government entity to regulate access to legislative space by legislators or the public for a hearing or requiring an application or permission from another entity to meet. Doing so would impede on the abilities of the Legislature to monitor state agencies and enact laws while providing for public participation. Requiring social distancing or permission to hold meetings from another entity could also intrude on the ability of the Legislature to comply with constitutional duties if rooms are too small or if a committee is composed of numerous legislators. This does not mean that the Legislature cannot provide for rules regarding electronic participation. It just means that decisions regarding committee structure and public participation are internal decisions with the Legislature without interference from another person or entity.

Following the reasoning in *Kradolfer*, which permitted a "minimal and inoffensive intrusion" by one branch on the power of another, the next legal question is whether a face mask requirement for legislators is a "minimal and inoffensive intrusion" on legislators while they are conducting legislative business in legislative space. Perspective on this matter is likely to vary from person to person and a court would most likely evaluate facts surrounding the issue. It is truly impossible to speculate on how a Court would rule, and members of the public could be treated differently by a court than legislators given that part of the Capitol is under Executive Branch

control. In the past, legislative decorum has been left to the presiding officer by rule, but there are no prohibitions or mandates regarding face coverings in legislative rules. Moreover, administrative committees and interim committees have rules that govern their respective procedures. *See* Joint Rule 10-50 (media access subject to the presiding officer's discretion on issues of decorum and order), Joint Rule 10-80 (complaints involving decorum of a joint employee), Senate Rule 10-50 (President of the Senate shall preserve order and decorum), Senate Rule 30-60 and House Rule 30-40 (committee chairs to maintain "safety, order, and decorum"), Senate Rule 30-80 and House Rule 30-60 (committee chair may order room cleared for disorderly conduct and shall follow maximum number of people in a committee room established by the State Fire Marshall), and House Rule 10-20 (The Speaker of the House has authority for decorum in House deliberations), Rules, Procedures, and Guidelines for Legislative Interim Committees and Activities, Section I.A and E (meetings held in State Capitol unless otherwise designated by presiding officer and conducted under rules of the Senate as the quorums and parliamentary procedure).

C. Legislative Immunity and Legislative Chambers

[Article V, Section 8](#), of the Montana Constitution provides:

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

In addition to Constitutional immunity from arrest, the location of the chambers for the House of Representatives and the Senate is determined in the sole discretion of the respective bodies. Section [2-17-101](#), MCA; *see also Goodover v. Department of Administration*, 201 Mont. 92, 651 P.2d 1005 (1982).

Based on constitutional immunity and the degree of control that the Legislature has over House and Senate chambers, it could be argued that a legislator that is violating public health directives has constitutional immunity and cannot be arrested at the Capitol or going to and returning from a legislative session. This privilege does not extend to the interim. Additionally, there is a solid argument that the Governor's directive on face coverings does not apply on the floor of Senate Chambers and the floor of the House of Representatives because these areas are not accessible to the public.

D. Self-Governing Powers and the City of Helena

The question of whether Lewis and Clark County as a general power government can impact Legislative functions was discussed above. However, this leaves the question of whether the City of Helena as a self-governing power could impose restrictions in the future on legislative process.

Section [7-1-111](#), MCA, specifies the powers that are denied to a local government with self-government powers. There is nothing in this section that directly prohibits the City of Helena from becoming involved in health and safety matters that impact the Legislature. Moreover, subsection (9) of this section indirectly pertains to the Legislature by prohibiting a local government unit with self-government powers from "any power that applies to or affects the right to keep or bear arms, except that a local government has the power to regulate the carrying of concealed weapons". This provision is related to the Legislature, as section [45-8-351\(2\)\(c\)](#), MCA, provides that a "local ordinance enacted pursuant to [section [45-8-351](#), MCA] may not prohibit a legislative security officer who has been issued a concealed weapon permit from carrying a concealed weapon in the state capitol as provided in [45-8-317](#)." *See also* 57 A.G. Op. 1 (2017) (applying section [7-1-111](#), MCA, to prohibit a city with self-governing powers from enforcing a local regulation or ordinance requiring background checks). The fact that the Legislature enacted a law in order to curtail self-governing powers shows a recognition that the Legislature's powers are not absolute and can still be controlled by a local government in an area that is not related to legislative rules.

However, the three-part analysis derived from section [7-1-113](#), MCA, requires that a local government with self-government powers must exercise those powers consistent with state law and regulation. As explained in prior Attorney General's opinions, section [7-1-113](#), MCA, "allows a local government with self-government powers to enact any ordinance unless the ordinance (1) is inconsistent with state law or regulation and (2) concerns an area affirmatively subjected by law to state control." *See* 48 A.G. Op. 14 (2000) (citing 46 A.G. Op. 13 (1996); 44 A.G. Op. 34 (1992)).

As applied here, any City of Helena ordinance that infringes on the Legislature's constitutional authority to formulate rules to govern its proceedings would appear to be inconsistent with the separation of powers doctrine, as the Montana Constitution vests this authority exclusively in the Legislative Branch. This argument is analyzed in detail in subsection I.B. of the legal analysis in this memorandum. Even under a liberal construction of the law standard, there is a viable argument that the City of Helena as a self-governing local government would not have the power or authority to impede the Legislature's proceedings.

II. CONCLUSION AND RECOMMENDATIONS

Whether a member of the Montana Legislature is subject to either a health directive or health order when conducting legislative business in the Capitol is dependent on the facts and circumstances. There are no statutory prohibitions imposed on the Governor or local governments pertaining to how restrictions can be imposed on the Legislature. Moreover, the Legislature has delegated broad authority to the Governor and to local governments to manage emergencies. This includes the authority to issue directives and orders to address the current COVID-19 pandemic. However, the fundamental principles of separation of powers must also be considered. This includes the Legislature's authority to formulate rules regarding how legislative

business is conducted and an individual legislator's immunity from arrest afforded by the Montana Constitution.

Given that the Legislature delegated broad powers to the Governor and local governments, it could enact legislation to restrict the powers or provide further clarification on how far it can be regulated by another entity. Additionally, the Legislature as an equal, coordinate, and independent branch of government may desire to enact rules of proceedings regarding what are permissible and impermissible activities for legislators conducting legislative business based on the COVID-19 pandemic.