



COMMISSIONER OF
POLITICAL PRACTICES

STATE OF MONTANA

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December 3, 2019

To: Todd Everts, Legal Services Director
Jaret Coles, Legislative Attorney
Ginger Aldrich, Legislative Attorney
Susan Fox, Executive Director Legislative Services

From: Commissioner Mangan

Re: 11/26/19 Request for Guidance:
Legislators' Participation in Educational Activities

I. Clarification

In the Commissioner's memorandum of September 27, 2019, to Legislative Leadership and the Code Commissioner, the Commissioner asserted jurisdiction over alleged violations of the Code of Ethics for Legislators when there is no "legislative act" involved in the complaint, Mont. Code Ann. §§ 2-2-136(1) and 2-2-103(4)(a)(ii). The Commissioner disagreed that a "legislative act" was involved in the proposed educational activity. The Commissioner did not state that the "legislators [are] acting in their capacity as legislators" or "in the performance of their legislative functions during the interim" or "acting in the legislators capacity in performance of their legislative duties and functions", pg 9 and 18.

To the best of the Commissioner's knowledge attendance at the educational event is not eligible for compensation because the legislators are not "engaged in legislative business", Mont. Code Ann. § 5-2-302. Nor is the legislative council reimbursing a legislator's salary and expenses according to the provisions of Mont. Code Ann. § 5-11-305.

II. Enforcement Provisions and Separation of Powers

The Commissioner disagrees that the Code of Ethics provides for removal of a Legislator from their elected position as a consequence for violating its provisions. As to a Legislator, the Commissioner may assess an administrative penalty and/or the costs of the proceeding, Mont. Code Ann. § 2-2-136(2). Only if the violation is made by a state employee may the Commissioner make a recommendation to the agency for discipline, which the agency can accept or reject. Put another way, if the Commissioner finds a violation by a Legislator any further action by the Legislature against the individual member is the Legislature's business, not the Commissioner's, Mont. Const. Art. V, Sec. 10.

III. Constitutional Immunity for Legislative Acts

The cases in your memorandum of November 26, 2019, to Leadership do not support the proposition that an educational seminar is "legislative acts".

- *Tenney v. Brandhove*, "We come then to the question whether from the pleadings it appears that the defendant [legislator and legislative committee] were acting in the sphere of legitimate legislative activity", 341 U.S. 367, 376 (1951). "Investigations, whether by standing or special committees, are an established part of representative government.", *id.* 378 (emphasis added). "We conclude only that here the individual defendants and the legislative committee were acting in a field where legislators traditionally have power to act, and that the statute of 1872 does not create civil liability for such conduct." *Id.* at 379 (emphasis added).
- *United States v. Johnson*, 383 U.S. 169, (1966). The speech and debate clause provided immunity for criminal allegations that a US Congressman allegedly conspired to make a speech for compensation on the floor of the US House of Representatives.
- *Cooper v. Glaser*, 2010 MT 55. Montana's speech and debate clause provided immunity from a defamation action against state Representative for speech made on the floor of the Montana House of Representatives during the legislative session.
- *Whalen v. Hanley*, 63 P.3d 254, Supreme Court of Alaska, 2003. "We have held that legislative duties include 'activities internal to the legislature such as, voting,

speaking on the floor of the House or in committee, authoring committee reports, introducing legislation, and questioning witnesses in legislative hearings”, *id.* at 257-8. “This case does not require us to define with precision the ultimate limits of protection conferred by legislative immunity, or the scope of a committee’s legislative duties protected by immunity.”, *id.* at 258. “The alleged publication of Whalen’s name occurred while [the Representatives] were carrying out legislative duties [in a legislative finance committee meeting]”, *id.*

- *Lucchesi v. State*, 807 P.2d 1185, Court of Appeals of Colorado, Division Five (1990). Lawmakers were sued alleging that legislation that was sponsored by, considered by, and voted on in a session was unconstitutional, *id.* at 1189. The Colorado speech and debate clause provided immunity to the individual lawmakers, and the case was remanded for further proceedings as to whether the statute itself was or was not constitutional. *Lucchesi’s* broad statement of legislative immunity was narrowed by the following:
- *Romer v. Colorado General Assembly*, 810 P.2d 215, Supreme Court of Colorado (1991). The Legislature passed a budget with headnotes and footnotes. The Governor approved the budget but vetoed some of the headnotes and footnotes. The president of the Senate and the speaker of the House sent back a letter claiming the vetoes were improper and had no legal effect. “The May 8, 1989, opinion letter to the governor, stating that the General Assembly believed the governor’s veto was not valid, does not fall within the sphere of legislative activity that is protected by the speech and debate clause”, *id.* at 223 (emphasis added). The Court then listed activities which are protected “conducting of hearings, preparing and authorizing the publication of reports”, “delivering floor speeches”, “voting”, “investigations relating to subjects upon which legislation could be had”, “and issuing subpoenas in conjunction with those investigations” (internal citations omitted).
- *Mehau v. Gannett Pac. Corp.*, 66 Haw. 133, Supreme Court of Hawaii (1983). A legislator’s remarks made after the close of session, in a meeting with business persons not in her district, was reversed and remanded for further proceedings as to whether or not the statements constituted a legislative act. *Id.* at 150-152. “But here, an immunizing nexus between Representative Kamalii’s legislative tasks and her identification of Mehau as the ‘Godfather’ of local crime is not readably discernible”.
- *Riddle v. Perry*, 2002 US 10, Supreme Court of Utah. Held that citizens have an immunity privilege, even if the speech contains defamatory material, when testifying to a legislative committee and if the matter has some relationship to the proceeding or bill.

Montana does have cases that explore what legislative acts are: *Denke v. Shoemaker*, 2008 MT 418 and *Bechard v. Rappold*, 287 F.3d 827 (2002). “A court should consider two questions when determining whether an act is legislative. First, a court must determine whether the act involves ad hoc decision making or the formulation of policy; and second, whether the act applies to a few individuals or to the public at large.” *Denke*, at ¶94, J. Brian Morris, special concurrence. “A court also should consider whether the act was formally legislative and whether the act bears all the hallmarks of traditional legislation.”, *Id.*

IV. Conclusion

The Code of Ethics was enacted by the Legislature who charged the Commissioner with jurisdiction over complaints against Legislators which do not contain a legislative act. Here, there is a disagreement between the Commissioner and Legal Services over whether educational programs constitute legislative acts. We appreciate the opportunity to have a robust discussion on this issue, and we look forward to the discussion at the Legislative Council meeting on December 10, 2019.