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TO: Scott Sales, Senate President
Jon Sesso, Senate Minority Leader
Greg Hertz, House Speaker
Casey Schreiner, House Minority Leader

FROM: Todd Everts, Legal Services Director
Jaret Coles, Legislative Attorney
Ginger Aldrich, Legislative Attorney

RE: Request for Guidance: Legislators' Participation in Educational Activities

In a memorandum to Director Susan Fox, dated October 21, 2019, legislative leadership requested that legal staff prepare a summary of the relevant laws and guidance regarding the participation of legislators in educational and professional development activities sponsored by outside entities. Leadership also asked whether the Legal Director agrees with the conclusion of Commissioner of Political Practices Mangan's memo dated September 27, 2019, "2019-CRL-004A, COPP Jurisdiction and Legislative Act Leadership Montana Legislative Retreat Proposal".

Set out below is our response to leadership's request.

I. FACTUAL BACKGROUND OF LEADERSHIP'S REQUEST

In the memorandum to Director Susan Fox, dated October 21, 2019, legislative leadership, in response to concerns raised by Commissioner of Political Practices Jeff Mangan regarding legislator attendance for an educational Leadership Montana workshop and the subsequent cancellation of that workshop resulting from those concerns, stated the following:

Pursuant to recent discussions, we would request your staff to prepare a summary of the relevant laws and guidance regarding the participation of legislators in educational and professional development activities sponsored by outside entities. As we know, legislators (as well as other public officials and employees) have historically, routinely attended conferences, meetings and educational opportunities with travel and lodging covered by the sponsoring entity. These opportunities have been vital for legislators to keep up with the knowledge, trends, research and skills that assist them in serving the state of Montana.

However, the recent cancellation of a Leadership Montana workshop, apparently due to questions raised about legislator participation, has created uncertainty. To help avoid further confusion – and a chilling effect on sponsoring entities interested in providing educational opportunities – we would appreciate your help in providing clear guidance for legislators to use in deciding if and when it is appropriate to attend conferences, meetings and other educational opportunities offered to them free of cost.

II. APPLICABLE LAW

Please note that this memo only addresses gifts under the Ethics statutes in Title 2, chapter 2, part 1. This memo does not analyze whether a gift may also qualify as a campaign contribution, subject to the limitations provided in Title 13, chapter 37, part 2.

The restriction on accepting "gifts of substantial value" is contained in section 2-2-104(1)(b), MCA, and provides that a legislator may not accept a gift of substantial value or a substantial economic benefit tantamount to a gift: (1) that would tend to improperly influence a reasonable person in the person's position to depart from the faithful and impartial discharge of the person's public duties; or (2) that the person knows or that a reasonable person in that position should know under the circumstances is primarily for the purpose of rewarding the person for official action taken.

Section 2-2-102(5), MCA, defines "official action" as a vote, decision, recommendation, approval, disapproval, or other action that involves the use of discretionary authority.

Section 2-2-102(3)(a), MCA, defines a "gift of substantial value" as a gift with a value of \$50 or more for an individual. Section 2-2-102(3)(b)(v), MCA, excludes from the definition of a gift of substantial value an educational activity that:

- (A) does not place or appear to place the recipient under obligation;
- (B) clearly serves the public good; and
- (C) is not lavish or extravagant.

There is only one Montana Supreme Court case that is helpful in analyzing the provisions at issue. In *Molnar v. Fox*, 2013 MT 132, 370 Mont. 238, 301 P.3d 824, a sitting commissioner of the Public Service Commission personally received two \$1,000 checks by NorthWestern Energy and PPL Montana to help support an event concerning energy conservation. The commissioner cashed both checks, personally made out to him, and used the money for brochures for the event. After the event was over, he used remaining brochures as part of his campaign for reelection by distributing them to potential voters. In determining that the commissioner violated the code of ethics, the Supreme Court concluded gift broadly means "something voluntarily transferred by one to another without compensation." The Supreme Court applied an objective standard and further found that such gifts would tend to improperly influence a reasonable person in the commissioner's position. The commissioner argued that the money should fall into an exemption for educational activity, but the Supreme Court found that the money was transferred personally and directly to the commissioner and was not a direct educational activity.

III. GUIDANCE UNDER THE MONTANA ETHICS LAWS FOR LEGISLATORS WHEN CONSIDERING WHETHER TO ATTEND AN EVENT WITH THE ASSOCIATED COSTS COVERED BY THE SPONSORING ORGANIZATION.

A. Step One -- Is the Value of the Gift \$50 or More?

The first step in the analysis is to determine whether the "value" of the educational activity is \$50 or more. In most cases the cost of the activity (*i.e.*, tuition, lodging, meals and refreshments, and transportation) will exceed the \$50 threshold and therefore will constitute a gift of substantial value pursuant to section 2-2-102(3)(a), MCA, unless it is a qualifying educational activity.

- **YES:** If the value of the activity is \$50 or more, then proceed to step two to determine if the educational activity exception is satisfied.
- **NO:** If the value of the event is less than \$50, then attendance does not likely violate state ethics laws (but see below for practice tip).
 - ★ PRACTICE TIP: As a matter of practice, a legislator should always consider whether a reasonable person would know that the gift is primarily for the purpose of rewarding you for official action taken. For example, if someone thanked you for voting one way or another on House Bill No. 1000 and then handed you a ticket to an educational event worth \$40, best practice would be to abstain from accepting the gift. First, you face potential legal and ethical consequences if the gift ends up being worth \$50 or more. Second, even if the gift is worth less than \$50, ask yourself about public perceptions and whether acceptance of a gift under these circumstances benefits the people of the state.

B. Step Two -- Do the costs qualify as an educational activity exception?

The second step in the analysis is to determine if you can answer yes to all the questions in this section III.B. If so, then the activity is likely an educational activity and not a gift of substantial value. Pursuant to section 2-2-102(3)(b)(v), MCA, an educational activity that costs \$50 or more is not a gift of substantial value if the activity:

- (A) does not place or appear to place the recipient under obligation;
- (B) clearly serves the public good; and
- (C) is not lavish or extravagant.

If you do not answer yes to all the questions in step two, then proceed to step three.

Additionally, if you answer yes to all the questions in step two, then proceed to answer the questions in step 3 as a matter of precaution, even though attendance is likely permissible.

1. Step 2.A. -- Is the activity "educational"?

The statute does not define how to determine whether an activity is educational. However, the Montana Supreme Court did determine that money "given directly and personally" to a public officer to purchase educational material was not permissible, even though some of the money was for educational materials. *See Molnar*, ¶ 34.

- **YES:** If the activity assists you in representing the people of the state and your constituents or makes you a more effective legislator, then it is likely educational. Consideration should be given to the agenda to make sure that it involves speakers and presentations regarding the educational topics. If you answer yes, then proceed to step 2.B to determine if attending the activity places you under an obligation.
- **NO:** If the activity does not assist you in representing the people of the state and your constituents or does not make you a more effective legislator, then it may not be considered an educational activity. **STOP** and consider saying no to the activity since it may not satisfy the educational activity exception. Proceed to step 3 for further analysis if you still desire to attend the activity.
 - ★ PRACTICE TIP: Given the holding in *Molnar*, a legislator should not take direct money from the provider of an educational activity. Instead, the legislator should either seek reimbursement of allowable costs through receipts (*i.e.*, tuition, lodging, meals and refreshments, and transportation), or have the provider cover the costs directly.

2. Step 2.B. -- Does the activity not place or appear to place the recipient under an obligation?

This step has a subjective test of whether you personally believe you are under an obligation to use your position one way or another. Additionally, a part of the test is very similar to the statutory test in step 3 of whether it would tend improperly to influence a reasonable person in a legislator's position to depart from the faithful and impartial discharge of the legislator's public duty.

- **YES:** First, you do not believe you are under an obligation to use your position to do anything in exchange for the activity (subjective standard). Second, a reasonable person would not believe that participation in the activity places you under an obligation to use your position to do anything in exchange for the activity (objective standard). If you answer yes to both of these statements, then proceed to step 2.C to determine if attending the activity clearly serves the public good.
- **NO:** If you believe that you are under an obligation to use your position to do anything in exchange for the activity *or* if a reasonable person would believe that participation in the activity places you under an obligation to do something by using your position, then it may not be considered an educational activity. **STOP** and consider saying no to the activity since it may not satisfy the educational activity exception. Proceed to step 3 for further analysis if you still desire to attend the activity.
 - ★ PRACTICE TIP: The objective test is whether attendance "appears" to place you under an obligation, even if you are not under a direct obligation. Consider what the people of this state and your constituents may think. Perception is reality for

this test. For example, if you sign a pledge that you *plan on* introducing legislation that is promoted during the activity, a reasonable person may believe you are under an obligation. This is despite the fact that *your plans* may change and you are not under a contractual obligation to do anything.

3. Step 2.C. -- Does the activity clearly serve the public good?

There is no statutory or judicial guidance on what serves the public good. However, this step is very similar to step 2.A and should be fairly easy to satisfy. Consideration should be given to whether attendance at the activity benefits the legislator's performance in the office.

- **YES:** If the activity assists you in representing the people of the state and your constituents or makes you a more effective legislator, then it is likely serves the public good. If you answer yes then proceed to step 2.D to determine if the activity is lavish or extravagant.
- **NO:** If the activity does not assist you in representing the people of the state and your constituents or does not make you a more effective legislator, then it may not be considered an educational activity. **STOP** and consider saying no to the activity since it may not satisfy the educational activity exception. Proceed to step 3 for further analysis if you still desire to attend the activity.

4. Step 2.D. -- Is the activity not lavish or extravagant?

There is no Montana statutory or judicial guidance on what "lavish or extravagant" means. However, the terms are frequently used in determining whether certain business expenses for meals and lodging are deductible for federal income tax purposes. See 26 U.S.C. § 162(a)(1). According to [Internal Revenue Service Publication 463](#) (2018), an "expense isn't considered lavish or extravagant if it is reasonable based on the facts and circumstances. Meal expenses won't be disallowed merely because they are more than a fixed dollar amount or because the meals take place at deluxe restaurants, hotels, or resorts."

According to an [article in Forbes magazine](#) the "IRS doesn't provide much guidance." The article provides further that "its sometimes defined as a business expense that is significantly higher than what is considered reasonable. Say a company pays triple the market rate for something. That amount may be a lavish or extravagant expense. That makes them--or at least the portion deemed lavish by the IRS--not tax deductible."¹

Clearly, all facts and circumstances should be considered. However, one could conclude that lodging and meal expenses that are equal or less than the federal per diem rates for lodging and meals and incidentals would not be lavish or extravagant. These rates can be found online for

¹ See Robert W. Wood, [Lavish Expenses Are A No-No, Unless You're The IRS](#), Forbes Magazine (June 6, 2013).

every state at <https://www.gsa.gov/travel/plan-book/per-diem-rates>.² Additionally, if the amount of lodging and meals and incidental expenses exceed the federal standard, then consideration should be given to whether there are any other viable alternatives. If a conference is being held at a hotel where the lodging is covered, the room is a standard room, and other legislators from Montana or other states are in attendance, then a strong argument exists for the activity not being lavish or extravagant.

As far as conference expenses (*i.e.*, tuition or value of activity) are concerned, it is hard to determine whether an activity or conference is lavish or extravagant. However, if the activity satisfies steps 2.A (educational activity) and 2.C (serves the public good), then it is not likely a lavish or extravagant activity. Consideration should be given to whether tours or events are offered that are not related to making you a more effective legislator. For example, attending a tour of a state capitol could give you ideas on how to make the legislative process in Montana better and serve the public good. Additionally, if tours or events are given that are not educational in nature, a legislator should exercise caution to ensure they are secondary to the educational activities. Lunch, dinner, or receptions should be permissible even though they are arguably not educational since they are typical expenses at almost all educational events. The facts and circumstances of each case may need to be evaluated.

As far as travel is concerned, keep the expenses within the guideline established for state employees on business travel. For example, be cautious and do not travel first class on a commercial airplane or utilize luxury transportation services.

NOTE: There no educational activity exception for guests. If food, entertainment, or travel is provided to a guest or spouse, then the safest approach is to cover these expenses out of your own pocket. Lodging is arguably not an additional expense since a hotel room for one person usually costs the same as a hotel room for two people. However, if lodging for two costs more, it is advisable to cover the difference between the single rate and the rate that is charged.

- **YES:** The activity is not lavish or extravagant. Consideration should be given to all the material in this subsection. If you answer yes and you answered yes to the questions in steps 2.A through 2.C, then the activity likely satisfies the educational activity exception and is not a gift of substantial value. However, complete step 3 to as a matter of precaution, just in case someone disagrees with your analysis of step 2.
- **NO:** The activity is lavish or extravagant. Consideration should be given to all the material in this subsection. If you answer no and you answered yes to the questions in steps 2.A through 2.C, then the activity may not satisfy the educational activity exception and may be a gift of substantial value. **STOP** and consider saying no to the activity, since it likely does not satisfy the educational activity exception, or determine if you can directly pay for the value of any content that does relate to the cost of education,

² The [federal per diem](#) for lodging in Big Sky, West Yellowstone, and Gardiner, Montana, for June 2020 was \$225 per day, and the federal per diem for meals and incidentals in these areas was \$61 per day.

lodging, meals and refreshments, and transportation. Proceed to step 3 for further analysis if you still desire to attend the activity.

C. Step Three -- Statutory Test if Activity Does Not Satisfy Step 2

Even if some aspects of the event or the event itself are determined to not fall within the \$50 threshold analysis in step 1 or the educational activity exception in step 2, there would need to be a benefit conveyed: (1) that would tend to improperly influence a reasonable person in the person's position to depart from the faithful and impartial discharge of the person's public duties; or (2) that the person knows or that a reasonable person in that position should know under the circumstances is primarily for the purpose of rewarding the person for official action taken. *See* section 2-2-104(1)(b), MCA.

1. Step 3.A. -- Faithful and Impartial Discharge of the Person's Public Duties

Acceptance of a gift of substantial value (*i.e.*, costs that do not satisfy steps 1 and 2) that would tend to improperly influence a reasonable person in the person's position to depart from the faithful and impartial discharge of the person's public duties is prohibited by section 2-2-104(1)(b)(i), MCA. Similar to step 2.B, under the plain meaning of this provision the inquiry is not whether the gifts, in fact, influence you as a legislator to depart from the faithful and impartial discharge of your public duties (a subjective standard), but, rather, whether the gifts would tend to improperly influence a "reasonable person" in your position as a legislator (an objective standard). *See Molnar*, ¶ 29.

The Montana Supreme Court accepted the following analysis:

While individual intentions and motivations may remain strong to the contrary, the opportunity of a small deviation or slight hesitation from the faithful and impartial discharge of public duty may result. The deviation or hesitation may be so small that no one in the room will notice, and even the parties may not fully recognize the departure from public duty, but there it will be—the quid pro quo. *Id.* ¶ 30.

In analyzing this section, it is relevant to determine what organization or person is providing the gift of substantial value and whether a reasonable person in your role as a legislator may be influenced to depart from public duties because of the gift. Public duties could include a vote, decision, recommendation, approval, disapproval, or other action that involves the use of discretionary authority as a legislator. If the organization is a not-for-profit entity that does not appear before the Legislature, then an argument exists that a reasonable person would not be influenced. However, if the person or organization providing the gift of substantial value appears before the Legislature, then a greater opportunity to be influenced to depart from your public duties exists. Other relevant factors include the value of the gift of substantial value. The more

valuable the gift, the more likely a reasonable person may be influenced.

QUESTION: Is acceptance of the gift of substantial value (*i.e.*, costs that do not satisfy steps 1 and 2) permissible because the gift would not tend to improperly influence a reasonable person in my position as a legislator (an objective standard) to depart from the faithful and impartial discharge of my public duties?

- **YES:** Consideration should be given to all the material in this subsection. Proceed to step 3.B.
- **NO:** Consideration should be given to all the material in this subsection. You are taking a risk that acceptance of the gift is not permissible under state ethics laws. **STOP** and consider saying no to accepting the gift of substantial value.

2. Step 3.B. -- Reward for Official Action Taken

Acceptance of a gift of substantial value (*i.e.*, costs that do not satisfy steps 1 and 2) that the legislator knows or that a reasonable person in the position of a legislator should know under the circumstances is primarily for the purpose of rewarding the legislator for official action taken is prohibited by section 2-2-104(1)(b)(ii), MCA.

Similar to step 2.B, there is a subjective test of whether you personally believe you are being rewarded because of the way you used your position one way or another.

Additionally, similar to steps 2.B and 3.A, under the plain meaning of this provision, the second part of the inquiry is whether a "reasonable person" in your position as a legislator (an objective standard) should know under the circumstances that costs are being covered primarily for the purpose of rewarding you as a legislator for official action taken. Official action includes a vote, decision, recommendation, approval, disapproval, or other action that involves the use of discretionary authority.

QUESTION: Is acceptance of the gift of substantial value (*i.e.*, costs that do not satisfy steps 1 and 2) permissible because as a legislator I know (subjective standard) or a reasonable person in the position of a legislator should know (objective standard) that under the circumstances the gift is not primarily for the purpose of rewarding me for official action taken?

- **YES:** First, I do not believe I am being rewarded because of any past official action. Second, a reasonable person in my position as a legislator would not know under the circumstances that costs are being covered primarily for the purpose of rewarding me for official action taken. If you also answered yes to the question in step 3.A, then the activity likely satisfies the statutory exception that allows you to accept a gift of

substantial value.

- **NO:** First, I believe I am being rewarded because of past official action (subjective standard). Second, a reasonable person in my position as a legislator would know under the circumstances that costs are being covered primarily for the purpose of rewarding me for official action taken (objective standard). You are taking a risk that acceptance of the gift is not permissible under state ethics laws. **STOP** and consider saying no to the activity since it may not satisfy the statutory exception that allows you to accept a gift of substantial value.

IV. SCOPE OF COMMISSIONER OF POLITICAL PRACTICES' JURISDICTION OVER LEGISLATORS ACTING IN PERFORMANCE OF THEIR LEGISLATIVE FUNCTIONS DURING THE INTERIM AND POTENTIAL VIOLATIONS OF THE CODE OF ETHICS.

Background

Legislative Leadership asked whether the Legal Director agrees with the conclusion of Commissioner of Political Practices (COPP) Mangan's memorandum dated September 27, 2019, "2019-CRL-004A, COPP Jurisdiction and Legislative Act Leadership Montana Legislative Retreat Proposal".

Commissioner Mangan generally asserts that as the COPP, he has jurisdiction over alleged violations of the Code of Ethics involving currently sitting legislators acting in their capacity as legislators in performance of their legislative functions during the interim if the legislators were to attend an educational forum on leadership for legislators hosted by Leadership Montana, a nonprofit organization, and sponsored via a grant by AMB West Philanthropies (see attached agenda).

Leadership Montana offered to cover the costs for legislators attending the educational forum including lodging, food, beverages, and transportation. Neither Leadership Montana or AMB West Philanthropies have, nor will have, official business proposed before the Montana Legislature.

In light of the following legal analysis, the Legal Director respectively disagrees with the COPP's assertions and conclusions that he has jurisdiction over potential violations of the Code of Ethics involving currently sitting legislators acting in their capacity as legislators taking actions naturally involved in the performance of a legislative function during the interim between legislative sessions.

Question Presented and Short Answer

1. *Question Presented:*

Does the COPP have jurisdiction over alleged violations of the Code of Ethics involving a currently sitting legislator acting in the legislator's capacity in performance of their legislative duties and functions during the interim if the legislator were to attend an educational forum in which the sponsor of the educational forum covers the costs for the legislator to attend and participate?

2. *Short Answer:*

Likely "No". *Under the Montana Constitution and the Code of Ethics, it is clear that the COPP has no authority or jurisdiction over alleged violations of the Code of Ethics involving "legislative acts." Each house of the Legislature has the exclusive constitutional authority to judge the election and qualification of its members and expel or punish those members for good cause. Those exclusive legislative powers may not be delegated to another branch of government. Under the Montana Constitution's separation of powers provision, the COPP is constitutionally prohibited from exercising those legislative powers.*

The Code of Ethics does not define what constitutes a "legislative act", which leads to confusion and ambiguity. However, the constitutional, statutory, and common law legislator immunity provisions provide broad authority for what likely constitutes a "legislative act". The legislator immunity provisions protect legislators engaged in legislative functions and activities and extend to all actions naturally involved in the performance of any legislative functions. Legislators attending an educational forum to inform themselves on effective legislative leadership likely constitutes a legislative act involving the performance of a typical legislative function. Attending educational forums and activities that assist a legislator in effectively representing the people of the state and the legislator's constituents clearly serves the public good. The Code of Ethics specifically provides that the prohibition against a legislator accepting a gift of substantial value does not apply to a legislator attending certain educational activities in which the sponsor of the educational forum covers the costs for the legislator's attendance and participation.

The Legislature should clarify and define the term "legislative act" within the Code of Ethics. Further, the Legislature should clearly delineate the limitations of the COPP's jurisdiction to determine whether a legislator's action constitutes a "legislative act".

Applicable Law

In order to address the scope of the COPP's jurisdiction over sitting legislators acting in performance of their legislative duties and functions during the interim and potential violations of the Code of Ethics, a thorough review of the applicable constitutional and statutory provisions is necessary, as well as the case law interpreting those provisions.

(1) Applicable Constitutional Provisions

There are a number of Montana constitutional provisions at play in determining the COPP's scope and jurisdiction.

(a) Constitutional Legislative Powers

Article V, Section 1, of the Montana Constitution provides in part that the "legislative power is vested in the legislature consisting of a senate and a house of representatives." Article V, Section 3, of the Montana Constitution establishes the election and terms of legislators by requiring that a member of the House of Representative shall be elected for a term of two years and a member of the Senate for a term of four years.

Article V, Section 10, provides:

Section 10. Organization and procedure. (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).

The Montana Supreme Court in *State ex rel. Smith v. District Court*, 50 Mont. 134, 145 P. 721 (1914), has held that the Constitution is a limitation of powers, but the constitutional provision that each house shall judge of the election and qualifications of its members is an exception to that rule. This is a distinct grant of power by the people to each branch of the Legislative Assembly, a power necessary to the existence and independence of each house as an instrumentality of government. This power cannot be delegated by either house or both acting together. Likewise, neither house possesses the power to divest itself of the authority conferred upon it.

Similarly, the Montana Supreme Court has held that the power to try the ultimate right of a person claiming to be a member of the Legislative Assembly is in the house where he claims his seat. (*State ex rel. Thompson v. Kenney*, 9 Mont. 223, 23 P. 733 (1890)). The court has also delineated the limitations of the Montana Supreme Court's jurisdiction by holding that since each house of the Legislature is the judge of the ultimate right of persons to seats as members thereof,

the Supreme Court is without jurisdiction to entertain a proceeding in quo warranto to determine such right. (State ex rel. Ford v. Cutts, 53 Mont. 300, 163 P. 470 (1917)).

It has universally been determined through case law that courts do not have the authority to control, direct, supervise, or forbid the exercise by either house of Legislature of the power to expel a member (Mason's Manual of Legislative Procedure, Sec. 563, pages 398-399 (2012)). According to Mason's and the case law cited:

An attempt by a court to direct or control the legislature, or either house thereof, in the exercise of the power, would be an attempt to exercise legislative functions, which is it is expressly forbidden to do so. (Mason's (2012), Sec. 563, pages 398-399).

(b) Constitutional Separation of Powers

The prohibition against the Judiciary and the Executive Branches exercising the exclusive power belonging to the Legislative Branch is set out in Article III, Section 1, of the Montana Constitution:

Section 1. 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.

The Montana Supreme Court has repeatedly held under the constitutional separation of powers provision that the officials of one branch may not usurp or exercise the powers of either of the other branches. (MEA-MFT v. McCulloch, 2012 MT 211, 366 Mont. 266, 291 P.3d 1075; State ex rel. Woodahl v. District Court, 167 Mont. 514, 540 P.2d 312 (1975); Seubert v. Seubert, 2000 MT 241, 301 Mont. 382, 13 P.3d 365, 57 St. Rep. 1006 (2000); State ex rel. DuFresne v. Leslie, 100 Mont. 449, 50 P.2d 959 (1935); Mills v. Porter, 69 Mont. 325, 222 P. 428 (1924); State ex rel. Smith v. District Court, 50 Mont. 134, 145 P. 721 (1914); O'Neill v. Yellowstone Irrigation District, 44 Mont. 492, 121 P. 283 (1912); State ex rel. Schneider v. Cunningham, 39 Mont. 165, 101 P. 962 (1909)).

(c) Constitutional Immunity For Legislators

Montana's constitutional immunity provision providing immunity from suit for legislators is particularly applicable and instructive regarding the COPP's jurisdiction with respect to potential Code of Ethics violations involving legislators performing their legislative functions:

Section 8. 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. (Article V,

Section 8, of the Montana Constitution)

The Montana Supreme Court applied this constitutional immunity provision to a sitting legislator in *Cooper v. Glaser*, 2010 MT 55, 355 Mont. 342, 228 P.3d 443. In *Cooper*, the plaintiff sued a legislator for defamation because of remarks he made on the floor of the House of Representatives during a legislative session. This Court granted the legislator's motion to dismiss, applying Article V, Section 8, of the Montana Constitution. *Id.*, ¶¶ 4-5.

The court in *Cooper* recognized that Montana's speech and debate clause is similar to the speech and debate provision of the United States Constitution and noted the historical intent behind that provision:

[T]he Framers of the Constitution believed that giving immunity to legislators was essential to protect them from intimidation from outside pressures, to reinforce the separation of powers, and to ensure the independence of the legislature. *United States v. Johnson*, 383 U.S. 169, 177-82 (1966). This immunity is not intended to protect legislators from prosecution for their own benefit, but “to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions....” *Tenney v. Brandhove*, 341 U.S. 367, 373-74 (1951). *Cooper*, ¶ 11 (citations edited).

The court also noted that almost every state has a similar provision, and that:

Many of these jurisdictions do not limit the scope of the immunity given to legislators. E.g. *Whalen v. Hanley*, 63 P.3d 254, 258 (Alaska 2003) ...; *Lucchesi v. State*, 807 P.2d 1185, 1189 (Colo.App. 1990) (holding that the Colorado **speech and debate clause must be “interpreted to provide an absolute immunity for all actions naturally involved in the performance of any legislative functions”**); *Mehau v. Gannett Pacific Corp.*, 66 Haw. 133, 658 P.2d 312, 324 (1983) ...; *Riddle v. Perry*, 40 P.3d 1128, 1131-32 (Utah 2002).... *Cooper*, ¶ 12 (emphasis added).

The court ruled:

To hold otherwise would compromise the independence of the Legislature in expressing the will of the people it represents. We must conclude that Glaser is immune from litigation and such immunity prevents prosecution.... *Cooper*, ¶ 14 (emphasis added; affirming dismissal).

The test is simple – “whether the legislator was engaged in a legislative function” See *Cooper*, ¶ 13; *Lucchesi v. State, supra* (immunity extends to “all actions naturally involved in the performance of any legislative functions”).

(d) Constitutional Authority for the Code of Ethics

Article XIII, Section 4, of the Montana Constitution sets out the authority for the Legislature to statutorily provide for a Code of Ethics:

Section 4. Code of ethics. The legislature shall provide a code of ethics prohibiting conflict between public duty and private interest for members of the legislature and all state and local officers and employees.

The Legislature enacted the Code of Ethics as provided for in Title 2, chapter 2, part 1.

(2) Applicable Statutory Provisions

(a) Code of Ethics

The purpose of the Code of Ethics is to prohibit "conflict between public duty and private interest as required by the constitution of Montana" (2-2-101, MCA). The Code recognizes the distinctions between legislators and other officers and employees of state government (2-2-101, MCA).

Section 2-2-103, MCA, provides for the enforcement of the Code of Ethics. That provision notes that the enforcement of the Code as it applies to legislators involving legislative acts is provided for in 2-2-135, MCA, and enforcement for all other acts is provided for in 2-2-136, MCA, in which the COPP has statutory jurisdiction.

Section 2-2-135(2), MCA, provides that “[p]ursuant to Article V, section 10, of the Montana constitution, the legislature is responsible for enforcement of the provisions of this part concerning legislators.” (emphasis added).

Section 2-2-135(1), MCA provides that:

Each house of the legislature shall establish an ethics committee. Subject to 5-5-234, the committee must consist of two members of the majority party and two members of the minority party. The committees may meet jointly. Each committee shall educate members concerning the provisions of this part concerning legislators and may consider conflicts between public duty and private interest as provided in 2-2-112. The joint committee may consider matters affecting the entire legislature.

Section 2-2-136(1)(a), MCA, provides that a person alleging a violation of the Code of Ethics by a legislator may file a complaint with the COPP but “[t]he commissioner does not have jurisdiction for a complaint concerning a legislator if a legislative act is involved in the complaint.” (emphasis added).

The term "legislative act" is not defined in the Code of Ethics. However, as noted below, the term "legislative act" is defined in section 2-9-111, MCA, regarding statutory immunity and may provide guidance on what constitutes a legislative act . In addition, case law regarding the

constitutional immunity provision in Article V, Section 8, of the Montana Constitution noted above provides specific direction regarding the broad scope of what constitutes a legislative act.

The Code of Ethics specifically provides that the prohibition against a legislator accepting a gift of substantial value does not apply to a legislator attending certain educational forums in which the sponsor of the educational forum covers the cost for the legislator to attend and participate (2-2-102(3), 2-2-102(5), 2-2-104(1)(b), MCA).

The restriction on accepting "gifts of substantial value" is contained in section 2-2-104(1)(b), MCA, and provides that a legislator may not accept a gift of substantial value or a substantial economic benefit tantamount to a gift: (1) that would tend to improperly influence a reasonable person in the person's position to depart from the faithful and impartial discharge of the person's public duties; or (2) that the person knows or that a reasonable person in that position should know under the circumstances is primarily for the purpose of rewarding the person for official action taken.

Section 2-2-102(5), MCA, defines "official action" as a vote, decision, recommendation, approval, disapproval, or other action that involves the use of discretionary authority.

Section 2-2-102(3)(a), MCA, defines a "gift of substantial value" as a gift with a value of \$50 or more for an individual. Section 2-2-102(3)(b)(v), MCA, excludes from the definition of a gift of substantial value an educational activity that:

- (A) does not place or appear to place the recipient under obligation;
- (B) clearly serves the public good; and
- (C) is not lavish or extravagant.

(b) Statutory Immunity

Section 2-9-111, MCA provides in relevant part:

- (1) As used in this section:
 - (a) the term "governmental entity" means only the state, counties, municipalities, school districts, and any other local government entity or local political subdivision vested with legislative power by statute;
 - (b) the term "legislative body" means only the legislature vested with legislative power by Article V of The Constitution of the State of Montana and that branch or portion of any other local governmental entity or local political subdivision empowered by law to consider and enact statutes, charters, ordinances, orders, rules, policies, resolutions, or resolves;
 - (c) (i) the term "legislative act" means:
 - (A) actions by a legislative body that result in creation of law or declaration of public policy;

(B) other actions of the legislature authorized by Article V of The Constitution of the State of Montana;

(2) A governmental entity is immune from suit for a legislative act or omission by its legislative body, or any member or staff of the legislative body, engaged in legislative acts.

(3) Any member or staff of a legislative body is immune from suit for damages arising from the lawful discharge of an official duty associated with legislative acts of the legislative body. (Emphasis added).

In the statutory immunity context, a "legislative act" means an action by a legislative body that results in the creation of law or declaration of public policy or "other actions of the legislature authorized by Article V of the Montana Constitution". (Emphasis added). As noted above, the courts have broadly construed legislative actions within the legislator constitutional immunity provision in Article V, Section 8, of the Montana Constitution, to include all actions naturally involved in the performance of any legislative functions. The statutory immunity provisions extend to any member or staff of a legislative body engaged in legislative acts.

(3) Applicable Common Law Providing Absolute Immunity From Suit to the Legislature

A third type of immunity – common-law immunity – also bars suit against the Legislature for its legislative acts. Common-law immunity from liability for legislative acts is similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause. *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 732 (1980) (citing *Tenney v. Brandhove*, 341 U.S. 367 (1951)). In order to preserve legislative independence, legislators acting in a legislative capacity are endowed with absolute immunity “not only from the consequences of litigation’s results but also from the burden of defending themselves”. *Supreme Court of Virginia*, 446 U.S. at 732; *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 406 (1979).

The United States Supreme Court has also recognized that “a private civil action, whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation”. *Eastland*, 421 U.S. at 503. Furthermore, immunity from civil liability encourages legislators to act independently in the interest of the public good without fear of outside interference from those who may be adversely affected by the legislation. *W. Birkenfeld Trust v. Bailey*, 827 F. Supp. 651, 661 (E.D. Wash. 1993) (citing and referring to *Supreme Court of Virginia, supra*).

Legal Analysis

The question presented is as follows:

Does the COPP have jurisdiction over alleged violations of the Code of Ethics involving a currently sitting legislator acting in the legislator’s capacity in performance of their legislative duties and functions during the interim if the legislator were to attend an educational forum in which the sponsor of the educational forum covers the costs for the

legislator to attend and participate?

Legislators attending an “educational” conference or activity in their capacity as a sitting legislator in performance of their legislative duties and functions during the interim has been historically construed by the Legislature's Chief Legal Counsels as performing "legislative acts" that clearly serve a public good and the legislators' constituents. Those "legislative acts" constitutionally and statutorily fall outside of the COPP's enforcement jurisdiction under the Code of Ethics.

Under the Montana Constitution and the Code of Ethics, it is clear that the COPP has no authority or jurisdiction over alleged violations of the Code of Ethics involving "legislative acts." Each house of the Legislature has the exclusive constitutional authority to judge the election and qualification of its members and expel or punish those members for good cause. (Article V, section 10, of the Montana Constitution). Those exclusive legislative powers may not be delegated to another branch of government. (State ex rel. Ford v. Cutts, 53 Mont. 300, 163 P. 470 (1917)). Under the Constitution's separation of powers provision, the COPP is constitutionally prohibited from exercising those legislative powers. (Article III, Section 1, of the Montana Constitution).

Section 2-2-135(2), MCA, provides that “[p]ursuant to Article V, section 10, of the Montana constitution, the legislature is responsible for enforcement of the provisions of this part concerning legislators.” (emphasis added). Section 2-2-103, MCA, provides that the enforcement of the Code as it applies to legislators involving legislative acts is provided for in 2-2-135, MCA, and enforcement for all other acts is provided for in 2-2-136, MCA, in which the COPP has statutory jurisdiction.

Section 2-2-135(1), MCA provides that:

Each house of the legislature shall establish an ethics committee. Subject to 5-5-234, the committee must consist of two members of the majority party and two members of the minority party. The committees may meet jointly. Each committee shall educate members concerning the provisions of this part concerning legislators and may consider conflicts between public duty and private interest as provided in 2-2-112. The joint committee may consider matters affecting the entire legislature. (Emphasis added).

Section 2-2-136(1)(a), MCA, provides that a person alleging a violation of the Code of Ethics by a legislator may file a complaint with the COPP but “the commissioner does not have jurisdiction for a complaint concerning a legislator if a legislative act is involved in the complaint.” (emphasis added).

The COPP asserts that pursuant to the Code of Ethics, a currently sitting legislator acting in the legislator's capacity in performance of their legislative duties and functions attending an educational forum on leadership for legislators does not constitute a "legislative act". The term

"legislative act" is not defined in the Code of Ethics.

In the absence of a definition, the COPP extrapolates that a "legislative act" should equate to an "official act" as defined in section 2-2-102(5) to include "a vote, decision, recommendation, approval, disapproval, or other action, including inaction, that involves the use of discretionary authority". He states in the memorandum that "[a] reasonable interpretation of a "legislative act" is an "official act" of the Legislature and would include the drafting and introduction of legislation, committee work, speech and debate, and votes on matters before the Legislature". He also notes that as applied to legislators under the Code of Ethics, that a legislator to be able to take "official action" there must be "legislative matter" before the legislature, *i.e.* pending or future state legislation.

He further notes that based on the facts provided to the Legal Director, there is no legislative matter pending, nor did the Legal Director believe there likely would be one presented to the legislature in the reasonable future by and through a legislator attending the educational conference. In the COPP's opinion, without a pending or future legislative matter the act of attending this conference is not a "legislative act" but rather is among "all other acts" of Legislators for which the enforcement of the Code of Ethics has been assigned to the Commissioner, not the Legislature's Ethics Committees.

The Legal Director respectively disagrees with the COPP's assertions of what constitutes a "legislative act".

The Code of Ethics does not define what constitutes a "legislative act", which leads to confusion and ambiguity. However, Article V, Section 8, of the Montana Constitution, regarding legislator immunity has been interpreted to provide extremely broad authority for what likely constitutes a legislative action. The COPP, in his memorandum directly refers to the legislative history on the 1995 amendments to the Code Ethics regarding the COPP's jurisdiction over "legislative acts" and the relationship to the broad protections of the constitutional legislator immunity provision by stating that:

The carve out to "exclude legislative acts from the delegation of authority" to COPP was aimed in no small part at "protect[ing] the constitutional immunity" afforded to Legislators by the speech and debate clause of Article V, § 8 of the Montana Constitution. (Free. Conf. Comm., Apr. 11, 1995 Hearing on SB 136, 54th Mont. Leg (1995) (Leg. Minutes) (Exhibit A) at pg. 9.)

The speech and debate clause of Article V, Section 8, of the Montana Constitution protects legislators engaged in legislative functions and activities and extends to all actions naturally involved in the performance of any legislative functions. (*Cooper v. Glaser*, 2010 MT 55, 355 Mont. 342, 228 P.3d 443). Based on the holding in *Cooper* and other applicable case law, legislators attending an educational forum in their capacity as legislators to inform themselves on effective legislative leadership likely constitutes a legislative act naturally involving the performance of a typical legislative function as opposed to an "official act" of the legislature.

In the statutory immunity context pursuant to section 2-9-111, MCA, a "legislative act" means an action by a legislative body that results in the creation of law or declaration of public policy "or other actions of the legislature authorized by Article V of The Constitution of the State of Montana". (Emphasis added). Other actions of the Legislature that are included in this statutory definition of "legislative act" are those authorized by the legislator immunity provision in Article V, Section 8, of the Montana Constitution. The statutory immunity provisions also extend to any member or staff of a legislative body engaged in legislative acts.

Common-law legislator immunity also provides guidance on what constitutes legislative acts. Common-law immunity from liability for legislative acts is similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause. *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 732 (1980) (citing *Tenney v. Brandhove*, 341 U.S. 367 (1951)). In order to preserve legislative independence, legislators acting in a legislative capacity are endowed with absolute immunity "not only from the consequences of litigation's results but also from the burden of defending themselves". *Supreme Court of Virginia*, 446 U.S. at 732; *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 406 (1979).

Attending educational forums and activities that assist a legislator in effectively representing the people of the state and the legislator's constituents clearly serves the public good and the legislative process in enacting law. The Code of Ethics specifically recognizes the importance of legislative educational activities by providing that the prohibition against a legislator accepting a gift of substantial value does not apply to a legislator attending certain educational forums in which the sponsor of the educational forum covers the costs for the legislator to attend and participate in the educational activity. (2-2-102(3), 2-2-102(5), 2-2-104(1)(b), MCA).

Based on the applicable law and the preceding legal analysis, the Legal Director concludes that a currently sitting legislator acting in the legislator's capacity in performance of their legislative duties and functions attending an educational forum for legislators during the interim constitutes a "legislative act" that constitutionally and statutorily fall outside of the COPP's enforcement jurisdiction under the Code of Ethics.

Given the ambiguity of what constitutes a "legislative act", the Legislature should clarify and define the term within the Code of Ethics. Further, the Legislature should clearly delineate the limitations of the COPP's jurisdiction to determine whether a legislator's action constitutes "legislative act".

V. AREAS OF APPLICABLE LAW THAT MAY NEED FURTHER CLARIFICATION THROUGH LEGISLATION.

There is no Montana statutory or judicial guidance on what "lavish or extravagant" means. See section 2-2-102(3)(b)(v)(C), MCA. Clearly, all facts and circumstances should be considered. Lodging and meal expenses that are equal or less than the federal per diem rates for lodging and meals and incidentals should not be considered lavish or extravagant. As mentioned above, these rates can be found online for every state at <https://www.gsa.gov/travel/plan-book/per-diem-rates>.

The legislature could consider whether to add federal or state per diem rates as a safety net or allow deviation up to a certain amount (*e.g.*, double or triple per diem for lodging and meals and incidentals).

As far as conference expenses (*e.g.*, tuition or value of activity) are concerned, it is hard to determine whether an activity or conference is lavish or extravagant. It is not uncommon for tours and events to be included with educational activities, and at times the line can become blurred as to what is educational and what is a leisure activity. For example, a capitol tour may be educational in nature, but a tour of a city may or may not qualify. The legislature could consider whether to require the value of the educational activity to be disclosed or provide for a safe harbor for expenses that may not be educational in nature but ultimately add to the experience of the educational activity. For example, no more than a certain percentage of the time spent or money spent can be devoted to events and tours that do not have an educational component. This is a difficult policy area.

Relating to the issues identified regarding the scope of the COPP's jurisdiction over legislators acting in performance of their legislative functions during the interim and potential violations of the Code of Ethics, the Legislature should clarify and define the term "legislative act" within the Code of Ethics. Further, the Legislature should clearly delineate the limitations of the COPP's jurisdiction to determine whether a legislator's action constitutes a "legislative act".

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