

44.12.101A PREAMBLE AND STATEMENT OF APPLICABILITY

(1) The 2002 rule revisions were the first substantive revision of the Montana Lobbyist Disclosure Act rules in 20 years. The 2002 revisions address inconsistencies and conflicts between the Act and previous rules, most of which were adopted in 1982. The commissioner of political practices determined that the 2002 rule changes only would be applied to legislative lobbying promoting or opposing the introduction or enactment of legislation before the legislature or legislators. Although rule language may appear to apply to non-legislative lobbying and legislative lobbying involving official action other than the introduction or enactment of legislation, the commissioner of political practices has determined that it is not possible to apply existing and new lobbying rules to these lobbying activities under the Montana supreme court decision in *State Bar of Montana v. Krivec*, 193 Mont. 477, 632 P.2d 707 (1981) . In *Krivec*, the court cited its 1903 decision in *Bair v. Struck*, 29 Mont. 45, 50, 74 P.69, 71, and applied the following definition of quasi-judicial functions:

"Quasi-judicial functions are those which lie midway between the judicial and ministerial ones. The line separating them...[is] necessarily indistinct; but, in general terms, when the law, in words or by implication, commits to any officer the duty of looking into facts, and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed quasi-judicial...."

"Where a power rests in judgment or discretion, so that it is of a judicial nature or character, but does not involve the exercise of the functions of a judge, or is conferred upon an officer other than a judicial officer, the expression used is generally "quasi-judicial.... The officer may not in strictness be a judge; still, if his powers are discretionary, to be exerted or withheld according to his own view of what is necessary and proper, they are in their nature judicial. *Id.*, at page 483."

The *Krivec* court declared that "when an attorney seeks to influence a public official exercising a quasi-judicial function who is acting in a matter or field in which the public official has discretion, such an attorney is not engaged in lobbying under the terms of the Initiative" (*Id.*, at p. 484) . The court went on to recognize that legislators are public officials under 5-7-102 (13) , MCA, but the quasi-judicial function exemption does not prevent the reporting of lobbying expenditures to support or oppose the introduction or enactment of legislation under 5-7-102 (6) (a) , MCA, (*Id.*) . Based on *Krivec*, it is difficult if not impossible to discern what actions fall "midway between the judicial and ministerial ones" and do not involve some exercise of discretion. It appears that most lobbying activities, except for the practice of promoting or opposing the introduction or enactment of legislation before the legislature or legislators, are exempt from reporting under *Krivec*.

(2) Based on the preceding, the commissioner has attempted to clarify legislative lobbying issues relating to promoting or opposing the introduction or enactment of legislation in 2002 rulemaking. It likely will be necessary to seek clarification of non-legislative lobbying issues in a future legislative session. Until the quasi-judicial function exemption and other non-legislative lobbying provisions of the Act are revised, either legislatively or via court decision, the rules will not be applied to non-legislative lobbying activities.

History: Sec. 5-7-111, MCA; IMP, Sec. 5-7-101, MCA; NEW, 2002 MAR p. 2458, Eff. 9/13/02; AMD, 2004 MAR p. 1979, Eff. 8/20/04.