

Jan. 16, 2020

State Administration and  
Veterans' Affairs Interim Committee  
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## LOBBYING LAWS:

### Background Brief - Determining the Scope of Study

#### PURPOSE

At the State Administration and Veterans' Affairs Interim Committee (SAVA) meeting September 3, 2019, Jeff Mangan, Commissioner of Political Practices (COPP) and his staff attorney, Jaime MacNaughton, reviewed the history of Montana's lobbying laws and outlined issues the COPP's office was encountering.

The COPP's presentation indicated these issues are arising because of: (1) court rulings; (2) questions from lawmakers, lobbyists, and the public; (3) outdated terminology; (3) and administrative burdens.

Because of the wide-ranging scope of these issues, Commissioner Mangan asked SAVA to include lobbying in its study plan so there could be a systematic bi-partisan examination of these issues with broad public and stakeholder participation. He said he had hoped for an actual study bill during session, but such a bill did not come together.

The committee agreed to include lobbying in its study plan and Chairwoman McKamey appointed a subcommittee to be chaired by Sen. Kary and consisting of Sen. Ellis, Rep. Bachmeier, and Rep. Karjala. The committee also approved sending legislative staff to the annual Council of Government Ethics Lawyers (COGEL) conference to learn more about lobbying laws in general, current issues, and other states' practices.

The purpose of this paper is to review the issues raised by Commissioner Mangan and set the stage for a committee discussion and decisions about the scope of work to be done. The subcommittee meets on Feb. 27.

This paper reviews lobbying issues raised by Commissioner Mangan and sets the stage for committee discussion about the scope of study.

## ISSUES RAISED

### GRASSROOTS LOBBYING AND SOCIAL MEDIA

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Commissioner Mangan reported that during the 2019 session several legislators asked about grassroots lobbying: what is it and what is reportable? Traditional lobbying involves direct contact with elected officials on behalf of an organization. The term "grassroots lobbying" describes an organization's efforts to mobilize the general public to contact elected officials rather than the organization contacting the elected officials directly. Grassroots lobbying is nothing new, but now it is often conducted online through websites, email, and social media.

Grassroots lobbying is an organization's effort to mobilize the general public to contact elected officials rather than the organization contacting the elected officials directly.

Montana law does not specifically define or address grassroots lobbying, but many other states have enacted laws that do. Policy questions involve whether Montana should specifically address grassroots lobbying and if so, how it should be defined and what is reportable by whom and when.

### REACH OF LOBBYING LAWS

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Section 5-7-102, MCA, defines lobbying as follows:

"(11)(a) "Lobbying" means:

- (i) the practice of promoting or opposing the introduction or enactment of legislation before the legislature or legislators; and
  - (ii) the practice of promoting or opposing official action of any public official or the legislature.
- (b) The term does not include actions described in subsections (11)(a)(i) and (11)(a)(ii) when performed by a public official, an elected local official, an elected federal official, or an elected tribal official while acting in an official governmental capacity."

However, even though this definition mentions any public official, the COPP's presentation indicated that certain supreme court decisions have limited the scope of this and other definitions so that the applicability of lobbying laws has effectively been limited to the legislature and legislators.

**Lobbying Laws:  
Determining the Scope of Study**

The policy questions involve whether and how lobbying laws should apply to: (1) lobbying and expenditures to influence state and local elected officials; (2) lobbying state agencies adopting administrative rules; and (3) lobbying during the interim.

**REPORTING - ACTIVITY, THRESHOLDS AND TIMING**

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Commissioner Mangan said the timelines and expenditure thresholds that trigger reporting should be examined because although some lobbyist reporting occurs during session, most of the reporting occurs after the session. The commissioner stated the type of lobbying activity conducted, the threshold, and the timing could be better synced.

Under section 5-7-208, MCA, if total payments for lobbying exceed the inflation-adjusted amount set under section 5-7-112, MCA, then the principal is subject to the following reporting requirement:

"(2) If payments are made solely to influence legislative action, a report must be made:

(a) by February 15th of any year the legislature is in session and must include all payments made in that calendar year prior to February 1;

(b) by the 15th day of the calendar month following a calendar month in which the principal spent \$5,000 or more and must include all payments made during the prior calendar month; and

(c) no later than 30 days following adjournment of a legislative session and must include all payments made during the session, except as previously reported.

(3) If payments are made to influence any other official action by a public official or made to influence other action and legislative action, a report must be made:

(a) by February 15th of the calendar year following the payments and must include all payments made during the prior calendar year; and

(b) by the 15th day of the calendar month following a calendar month in which the principal spent \$5,000 or more and must include all payments made during the prior calendar month.

(4) If payments are not made during the reporting periods provided in subsections (2)(a), (2)(c), and (3)(a), the principal shall file a report stating that fact."

## DISCLOSURES

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Commissioner Mangan mentioned three issues involving what information should be disclosed about lobbyists and their relationships, such as: (1) activities and relationships related to model legislation; (2) relationships with vendors seeking contracts; and (3) contingency fee relationships, which are not disclosed or reported unless or until the fee is paid.

## CODE OF CONDUCT

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Commissioner Mangan stated that his office continues to receive questions about the code of conduct and harassment or intimidation of lobbyists as well as by lobbyists. He suggested this also could be reviewed as lobbying laws are examined.

## ETHICS - GIFTS TO LEGISLATORS FOR EDUCATIONAL EVENTS

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Another issue mentioned in the commissioner's presentation relates to ethics laws and conflicting perspectives about current law prohibiting legislators from accepting gifts of substantial value and whether a sponsored educational event for legislators would constitute a gift of substantial value. Note: This topic is listed as a separate agenda item for SAVA's Jan. 16, 2020, meeting, and was discussed by the Legislative Council, so is not further discussed here. However, any changes to the ethics laws or to the definition of a "legislative act" under the ethics laws could potentially affect reporting and disclosure provisions under the lobbying laws.

## ADMINISTRATIVE ISSUES

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Commissioner Mangan raised three issues that may be grouped as administrative concerns: (1) electronic filing; (2) the disposition of fees; and (3) outdated statutory language.

Commissioner Mangan stated that requiring reports be filed electronically would not only enhance transparency but ease the administrative burden on staff.

With respect to fees, current law requires that the \$150 lobbyist registration fee be split several ways. Of the \$150 total, \$50 must be directed to the state general fund and \$100 must go to a special revenue account for the legislature's broadcasting service. The \$50 portion must then be split again with \$25 forwarded in one fiscal year and \$25 forwarded in the next fiscal year. The \$100 also has to be split by fiscal year. He says this complicates bookkeeping as well as auditing and seems to be an unnecessary administrative burden on a small agency.

Administrative issues relate to electronic filing, the disposition of fees, and outdated terminology.

**Lobbying Laws:  
Determining the Scope of Study**

As the committee looks at fees, policy questions may arise about the amount of the registration fee and whether lobbyists should pay a fee for each principle the lobbyist represents.

Regarding the need to update terminology, Commissioner Mangan noted that the statute listing what lobbying expenses must be reported still uses the word "telegraph". There are likely other statutes that also require modernization, especially with respect to online lobbying and the use of social media.

## **MONITORING AND ENFORCEMENT**

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Commissioner Mangan noted that as with any statutory requirement, compliance requires monitoring and enforcement, so this area of law should also be reviewed and updated.

Current law provides a general civil penalty imposed by court action as well as a civil penalty for late reports imposed by the commissioner, subject to an informal contested case proceeding.

Section 5-7-305, MCA, provides a civil penalty for any violation of chapter 7 of Title 5 of not less than \$250 or more than \$7,500 at the discretion of the district court. The enforcement action may be initiated by the commissioner, attorney general, or county attorney. A citizen may bring an action if the commissioner, attorney general, or county attorney fails to bring the action.

For late reports, section 5-7-306, MCA, provides that in addition to any other penalties, the commissioner may impose a civil penalty of \$50 for "each working day that the report is late until the report is filed or until the penalties reach a maximum of \$2,500 for each late report." The respondent may request a hearing and the matter would then be handled as an informal contested case proceeding.

## **SUMMARY**

### **POTENTIAL TOPICS FOR STUDY**

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This paper discussed the lobbying issues raised by Commissioner Mangan and grouped them into the following categories:

- Grassroots lobbying and social media.
- Scope and reach of lobbying laws.
- Reporting thresholds and timing.
- Disclosures.

**Lobbying Laws:  
Determining the Scope of Study**

- Gifts to legislators and educational events.
- Code of conduct.
- Administrative issues.
- Monitoring and enforcement.

### **COGEL CONFERENCE TOPICS**

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Presentations and discussions at the COGEL conference revealed that several other states are also grappling with the topics listed above.

Lobbying topics discussed at the conference but not yet mentioned above included:

- Revolving doors - the waiting period before a staffer or public official may become a lobbyist.
- Foreign agent registration.
- Whether certain activities by nonprofit groups, educational groups, and subject matter experts should be considered lobbying.

### **WORK PLAN OPTIONS**

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The committee's work plan contemplates only one subcommittee meeting on Feb. 27 to receive background reports, hear stakeholder and public testimony, and develop general recommendations for the full committee. The full committee would then work on the issues at the March and June meetings with any committee bills finalized by the August meeting.

Depending on which issues the committee wants to tackle this interim, the committee may adjust the study plan to provide for additional subcommittee meetings but would then need to reduce the number of full committee meetings.

Given the committee's current workload, the committee may wish to select certain topic areas or even narrow the study to specific subtopics. Or, the subcommittee could determine which issues to approach and how.

The committee may wish to select certain topic areas or even narrow the study to specific subtopics, or let the subcommittee decide the scope.

As always, the committee may develop a study bill for next interim on issues not addressed this interim.

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Rm 102, Capitol Building, Helena MT

Lobbying Laws: Background Brief - Determining the Scope of Study

Exhibit 5