

Montana's Code of Ethics and the "Gift Ban"

- Montana's Constitution mandates that the Legislature adopt a Code of Ethics "prohibiting conflict between public duty and private interest...." Article XIII, § 4.
- Public duties are to be carried out "for the benefit of the people of Montana" and a violation of those public duties makes the public officer or public employee "liable to the people of the state" and subject to the Ethics Act's penalties. Section 2-2-103(1) & (2), MCA.
- A public officer (defined in Section 2-2-102, MCA), legislators, and public employees are prohibited from accepting "a gift of substantial value or a substantial economic benefit tantamount to a gift":
 - o if the gift "would tend improperly to influence a reasonable person . . . to depart from the faithful and impartial discharge of the person's public duties" or
 - o the person knows or "that a reasonable person in that position should know under the circumstances [that the gift] is primarily for the purpose of rewarding the person for official action taken." Section 2-2-104(1)(b), MCA.

Gifts

A "gift of substantial value" is defined to mean "a gift with a value of \$50 or more for an individual." Section 2-2-102(3), MCA. The same statute specifies that a "gift of substantial value" does *not* include the following:

1. A gift that is returned to the donor or contributed to a charity (without taking a federal tax deduction) within 30 days after the gift is received;
2. Consumption of food or beverages at a charitable, civic, or community event that bears a relationship to a public officer's or a public employee's "office or employment" or if the officer or employee is attending the event "in an official capacity;"
3. Educational material "directly related to official government duties;"
4. Public presentation of an award for "public service;" and
5. Educational activity that does not place the recipient "under obligation," clearly serves the "public good," and is "not lavish or extravagant."¹

Former Commissioner Linda Vaughey ruled that the term "gift" used in the Montana Code of Ethics is intended to "be broadly defined to prohibit improper public influence" and that the Legislature "sought to regulate all types of gratuities, limiting the reach of the Code only as to the amount of the gratuity and not the type. . ." *Matter of the Complaint of the Montana Democratic Party Against Judy Martz*, Sept. 25, 2002 Findings of Fact and Conclusions of Law, at page 16 (hereinafter "*Martz Decision*").

¹ If one determines that the "educational activity" exemption may apply, be aware that former Commissioner Ed Argenbright determined that payment of travel expenses for a public officer's or a legislator's spouse to attend a conference (in Florida) was "lavish or extravagant."

Gifts (continued)

Commissioner Vaughey recognized that "persons seeking to gain influence may not only give expecting nothing in return except influence but may also transfer an item of value for an extremely discounted price, i.e., air fare, hotel rooms, works of art, entertainment, etc." *Id.*, at page 17.

The *Martz Decision* clearly recognizes that "direct evidence" of improper gift giving to influence public officials is usually non-existent because those seeking improper influence and the recipients know that such tainted gifts are illegal. *Id.*, at page 19. Accordingly, most allegations of improper gift giving under the Ethics Act will have to be established by "circumstantial evidence." *Id.* The *Martz Decision* can be found at www.politicalpractices.mt.gov/pdf/2recentdecisions1-ethics/martz_final_decision.pdf

Legislators have additional Code of Ethics provisions to consider. Section 2-2-111(1), MCA, prohibits a legislator from receiving any other fee or compensation, "except the official compensation provided by statute, for promoting or opposing the passage of legislation." (The term "compensation" is defined in Section 2-2-102(2), MCA, to mean "any money or economic benefit conferred on or received by any person in return for services rendered or to be rendered by the person or another.")

In addition, a legislator is prohibited from seeking employment or soliciting a "contract for the legislator's services by the use of the office." Section 2-2-111(2), MCA.

I am not aware of any Montana Supreme Court decisions interpreting or defining the gift provisions in the Montana Code of Ethics.

This handout is a summary and intentionally limited; there may be other criteria that it would be prudent to assess.

Suggested Considerations

Based on a review of past ethics decisions and determinations, the following considerations may be helpful in assessing how the so-called "gift ban" applies:

1. What is the value of the offer to each official or employee? Does it exceed \$50?
2. Does the offer satisfy the criteria applied in the *Martz Decision*, at page 18, for determining that a "gift" has been made; i.e. grantor had "donative intent" and voluntarily delivered the gift; grantee accepted it?
3. Does the giver have a "motive" for making the offer? *Martz Decision*, at pages 17-27. Consider, for instance, whether the same offer is being made to members of the general public and not just elected officials or influential public employees.
4. Is the offer or gift related in any way to past official action? (Sections 2-2-104(1)(b)(ii) and 2-2-111(1), MCA; and *Martz Decision*, at pages 27-28.)
5. Is the offer or gift related in any way to discussions involving attempts to influence future official action? *Id.*
6. Note that ethics concerns are heightened if gift giving involves significant expenditures on a public official's spouse or an immediate family member.