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March 24, 2015

Hon. Dirk Sandefur  
State District Court Judge  
8th Judicial District Court  
2769 Greenbriar Drive  
Great Falls, MT 59404

**COPP-2015-AO-002**

**Re:** Using A Public Facility To Take Photos For Use In Campaign

Dear Judge Sandefur:

I write in response to your inquiry of March 19, 2015 regarding the propriety of certain election related actions taken by a candidate (you) for Justice of the Montana Supreme Court at the same time that candidate serves as a District Court Judge.

Introduction

You currently serve as a District Court Judge for the Eighth Judicial District Court located in Great Falls, Montana. A District Court Judge is a public officer and employee of the State of Montana who is subject to the Standards of Conduct found in Chapter 2, Parts 1 – 3, of Mont. Code Ann., *et seq.* You are also a candidate for the Montana Supreme Court and are therefore subject to the candidate campaign requirements of Title 13 of the Montana Code.

You requested a COPP advisory opinion regarding the following issue:

- (1) "In this case, the questioned practice is the campaign use, by display on a private campaign website and perhaps inclusion in selected campaign materials, of photographs of otherwise lawfully taken in a

county courtroom generally open to the public in the Cascade County Courthouse in Great Falls.”

You offered the following facts to assist the COPP in preparing the Advisory Opinion.

- (1) “The Cascade County Courthouse is a county-owned public building and forum that... includes various courtrooms provided by the County for use by the Montana 8<sup>th</sup> Judicial District Court”.
- (2) “The primary purpose of the courtroom is as the situs of official court proceedings...[which] are generally open to the public and press to observe and photograph district court proceedings as long as photography or recording activities do not disrupt court proceedings”.
- (3) “When court is not in session, the district courtrooms have historically been open to the public, upon request to the County or district judges, for tours, site-seeing, occasional civil weddings, political appearances and gatherings (such as promotional appearances by the Governor and debates between district court candidates), occasional Boy Scout meetings, as well as related news, business promotional (law firm telephone book ads), and occasional judicial campaign photography”.

### **ADVISORY OPINION**

The Commissioner is limited to issuing an advisory opinion that addresses an ethics or campaign practice issue. See 44.10.201 ARM. Please note that Judicial candidates may also wish to look at the requirements of the Code of Judicial Conduct, in particular Cannon 4. With that qualification in mind, the Commissioner issues the following Advisory Opinion:

#### **Short Answer**

In the Commissioner’s opinion “Yes” your campaign may use photographs taken in the County Courthouse on your campaign website and in select campaign materials.

#### **Discussion**

The use of public resources in campaigns has been the subject of several Court Opinions, Attorney General Opinions, Commissioners advisory opinions

and decisions<sup>1</sup>. We appreciate the opportunity to provide additional clarification to judicial candidates.

A State District Court Judge is a public employee as defined in Mont. Code Ann. § 2-2-102(7)(a). The holding of a public office or employment is “a public trust, created by the confidence that the electorate reposes in the integrity of public officer, legislators and public employees. A public officer, legislator, or public employee shall carry out the individuals duties for the benefit of the people of the state”, Mont. Code Ann. § 2-2-103(1). Public employees and officers are subject to rules of conduct and ethical requirements found in Mont. Code Ann. §§ 2-2-104, 105 and 121.

The issue raised is whether a photograph taken of a public employee in a courthouse, for use in campaign literature and website, would constitute a violation of Mont Code Ann § 2-2-121:

“(3) (a) Except as provided in subsection (3)(b), a public officer or public employee may not use public time, facilities, equipment, supplies, personnel, or funds to solicit support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue unless the use is:

- (i) authorized by law; or
- (ii) properly incidental to another activity required or authorized by law, such as the function of an elected public officer, the officer's staff, or the legislative staff in the normal course of duties.”

There are two issues of use of public resources in the issue you raised. The first is use of public time, and the second is use of a public facility. The Commissioner assumes that any campaign would not use public equipment, supplies, personnel or funds in the taking of photographs.

District Court Judges are public employees and elected officials who receive an annual salary, Mont. Code Ann. §§ 2-16-406 and 405. “Public time”

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<sup>1</sup> Court Decisions: *Molnar v. Fox*, 2013 MT 132; 370 Mont. 238, ¶¶23-46; 301 P.3d 824. AG Opinions: Mont. Atty. Gen. Op. 51-1 (2005); COPP Decisions: *Mont Democratic Party v. Martz*, (Sept. 25, 2002); *Seher & Valazquez v. Galt*, (July 26, 2004); *Fraiser v. Charlton & Simonich*, (May 2, 2005); *Fasbender v. Toole*, (February 21, 2012). COPP Advisory Opinions: Public Official Acts, COPP-2014-AO-002; Ethics of Dual Public Employment, COPP-2014-AO-006; Public Employee Campaigning Issues, COPP-2014-AO-007.

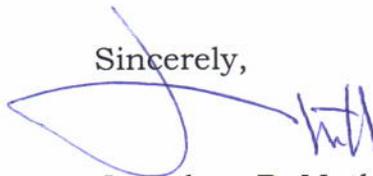
is not defined in statute, but has been interpreted by the Attorney General and the Montana Supreme Court. “To avoid absurdity and constitutional problems, we construe §2-2-121(3), MCA, to permit an elected official to use his or her time to pursue election-related activities so long as the official does not use ‘public facilities, equipment, supplies or funds’”, *Molnar v. Fox*, 2013 MT 132, ¶ 39; 370 Mont. 238; 301 P.3d 824. Therefore a district court judge may use his or her time to take campaign photographs without violating the Code of Ethics.

A courthouse is a public facility, provided by the county for district court proceedings, Mont. Code Ann. § 3-1-125. As you note in fact 3, the County or a district judge can approve requests for the public’s use of the district courtroom facilities, including use for photograph purposes. Consistent with comparable use by another candidate or member of the public, a judicial candidate’s use of the courtroom facilities to take photographs does not violate ethics or campaign practice law: “[a] photograph of a public officer or public employee taken in a public building where the officer or employee works would not equate to using a public facility to solicit support for the person’s election to a public office”, *Fasbender v. Toole*, 2/21/12 Deputy Commissioner Thomas Honzel. To allow someone who is not a public employee or officer to use the public facility to take photographs for use in a campaign, while at the same time forbidding a public employee or officer from the same use would lead to absurd results, *see Molnar v. Fox*, 2013 MT 132, fn. 3; 370 Mont. 238; 301 P.3d 824.

#### LIMITATIONS ON ADVISORY OPINION

This letter is an advisory opinion based on the specific written facts and questions as presented above. This advisory opinion may be superseded, amended, or overruled by subsequent opinions or decisions of the Commissioner of Political Practices or changes in applicable statutes or rules. This advisory opinion is not a waiver of any power or authority the Commissioner of Political Practices has to investigate and prosecute alleged violations of the Montana laws and rules over which the Commissioner has jurisdiction, including alleged violations involving all or some of the matters discussed above.

Sincerely,



Jonathan R. Motl  
Commissioner of Political Practices