

**BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES**

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|------------------------------|---|------------------------------|
| In the Matter of the         | ) | <b>SUMMARY OF FACTS</b>      |
| Complaint Against Blue Cross | ) |                              |
| Blue Shield of Montana       | ) | <b>STATEMENT OF FINDINGS</b> |

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**INTRODUCTION**

M. Susan Good of Allied Citizens for Healthcare Equity (ACHE) filed a complaint on May 3, 2000 against Blue Cross Blue Shield of Montana (BCBSMT), alleging violations of Montana laws and regulations governing lobbying. The complaint alleges that BCBSMT filed false lobbying reports with the Commissioner of Political Practices (Commissioner) during 1999.

On May 4, 2000, the Commissioner advised both parties, under the provisions of Montana's lobbying laws, that either party had a right to request an administrative hearing to address the complaint. The Commissioner further advised, if an administrative hearing was not requested by either party, BCBSMT was invited to submit a written response to the complaint.

On May 16, 2000, the Commissioner notified each party that an administrative hearing had not been requested by either party, and a hearing would not be held. BCBSMT's written response to the complaint was delivered to the Commissioner on May 24, 2000. Thereafter, on June 5, 2000, the Commissioner advised each party she had determined additional information was necessary and an investigation of the complaint would ensue.

**ISSUES**

The complaint alleges that BCBSMT filed false lobbying reports during 1999 by:

(1) under-reporting payments made to its salaried employees whose duties included lobbying during the 1999 Montana Legislative Session; and

(2) failing to report payments made in connection with BCBSMT's involvement in the adoption of quality assurance rules by the Department of Public Health and Human Services (DPHHS).

## **CONCLUSION**

From the Summary of Facts and Statement of Findings set out herein, I have concluded that an action based on allegations that Blue Cross Blue Shield of Montana violated Montana's lobbying laws and regulations is not justified.

## **SUMMARY OF FACTS**

1. M. Susan Good is executive director of an organization known as Allied Citizens for Healthcare Equity (ACHE). On behalf of ACHE, Good filed a complaint against Blue Cross Blue Shield of Montana (BCBSMT), alleging that BCBSMT filed false lobbying reports with the Commissioner of Political Practices (Commissioner) during 1999. The complaint alleges that BCBSMT: 1) under-reported payments made to its salaried employees whose duties included lobbying during the 1999 Montana Legislative Session; and 2) failed to report payments made in connection with BCBSMT's involvement in the adoption of quality assurance rules by the Department of Public Health and Human Services (DPHHS).

2. BCBSMT is a Montana corporation that provides healthcare insurance services. BCBSMT has several salaried employees whose duties include lobbying. During calendar year 1999, the following BCBSMT employees engaged in lobbying activities before the Montana Legislature: Tanya Ask, Michael Becker, Chuck Butler, William Jensen, and Susan Witte.

3. Under Montana laws and regulations governing lobbying, a principal is a person (defined as including a corporation) who employs or retains a lobbyist.

Principals are required to periodically file reports with the Commissioner. These reports, designated by the Commissioner as L-5 reports, must include a record of payments made by the principal for the purpose of lobbying during the period covered by the report.

4. BCBSMT lobbyists kept track of the time they devoted to lobbying efforts. Several days before L-5 reports were due, Lore Morgan, former cost accountant for BCBSMT, e-mailed each of the lobbyists and requested information regarding the time they had spent and any expenses they had incurred related to lobbying. Based on the information she received from the lobbyists, Morgan prepared the L-5 reports and submitted them to the lobbyists for their review. She then submitted the reports to Joseph Donohoue, her supervisor and the former BCBSMT Controller. Donohoue reviewed the L-5's, signed them, and filed them with the Commissioner.

5. During calendar year 1999, BCBSMT filed L-5 reports containing the following information:

| <b>Reporting Period</b> | <b>Amount Reported</b> | <b>Lobbyists</b>                   |
|-------------------------|------------------------|------------------------------------|
| 01-01-99 to 01-31-99    | \$2,573                | Ask, Butler, Jensen, Witte         |
| 02-01-99 to 02-28-99    | \$4,023                | Ask, Butler, Jensen, Witte, Becker |
| 03-01-99 to 03-31-99    | \$2,710                | Ask, Butler, Jensen, Witte, Becker |
| 04-01-99 to 05-21-99    | \$2,409                | Ask, Butler, Jensen, Witte, Becker |
| 05-22-99 to 06-16-99    | \$ 0                   | Ask, Butler, Jensen, Witte, Becker |
| 06-17-99 to 12-31-99    | \$ 0                   | Ask, Butler, Jensen, Witte, Becker |

**TOTAL REPORTED:      \$11,715<sup>1</sup>**

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<sup>1</sup>During the 1999 session BCBSMT also made payments to two lobbyists who are not employed by BCBSMT: Aidan Myhre and Stuart Doggett. According to L-5 reports filed with the Commissioner, BCBSMT paid Myhre and Doggett a total of \$10,000 for lobbying during calendar year 1999. There is no dispute regarding the accuracy of the reports of payments made to Myhre and Doggett by BCBSMT.

6. The L-5 reports filed by BCBSMT listed each lobbyist paid during the period covered by the report, the legislative bills lobbied, and the salaries or portions of salaries paid to the lobbyists during the period. On each L-5, the salaries or portions of salaries were listed in a lump sum for all employee-lobbyists; i.e., they were not itemized to indicate what portion of the lump sum listed was attributable to the salary of each employee.

7. The L-5 reports listed in Summary Fact 5 reflect salary payments by BCBSMT to its employee-lobbyists amounting to \$9,500. The reports also list the following additional lobbying expenses:

|                                    |                |
|------------------------------------|----------------|
| Printing                           | \$ 16          |
| Postage                            | \$ 53          |
| Advertising                        | \$ 52          |
| Other office expenses              | \$ 12          |
| Travel                             | \$1,186        |
| Entertainment (food and beverages) | <u>\$ 896</u>  |
| TOTAL ADDITIONAL EXPENSES:         | <u>\$2,215</u> |

8. According to internal records maintained by BCBSMT, the following hours were devoted to lobbying activities by the BCBSMT employee-lobbyists during calendar year 1999:

January, 1999

|        |         |
|--------|---------|
| Ask    | 1 hr.   |
| Butler | 20 hrs. |
| Jensen | 5 hrs.  |
| Witte  | 10 hrs. |

February, 1999

|        |           |
|--------|-----------|
| Ask    | 3 hrs.    |
| Becker | 11.1 hrs. |
| Butler | 25.5 hrs. |
| Jensen | 12.1 hrs. |
| Witte  | 16.5 hrs. |

March, 1999

|        |          |
|--------|----------|
| Ask    | 9.5 hrs. |
| Becker | 7 hrs.   |
| Butler | 18 hrs.  |
| Jensen | 3 hrs.   |
| Witte  | 8.5 hrs. |

April and May, 1999

|        |        |
|--------|--------|
| Butler | 9 hrs. |
| Witte  | 2 hrs. |

The total hours recorded for each employee-lobbyist during calendar year 1999 are:

|         |                   |
|---------|-------------------|
| Ask     | 13.5 hours        |
| Becker  | 18.1 hours        |
| Butler: | 72.5 hours        |
| Jensen  | 20.1 hours        |
| Witte   | <u>37.0 hours</u> |

TOTAL HOURS: 161.2<sup>2</sup>

All hours listed were attributable to lobbying activities during the 1999 session of the Montana Legislature.

9. According to BCBSMT, the hourly rate attributed to each employee-lobbyist for reporting purposes is their base hourly salary plus a factor for fringe benefits and payroll taxes. The hourly rates claimed for each employee-lobbyist are:

|        |                    |
|--------|--------------------|
| Ask    | \$46               |
| Becker | \$65               |
| Butler | \$70.00 to \$70.50 |
| Jensen | \$64.91 to \$65.00 |
| Witte  | \$35.00 to \$35.06 |

10. At the time of this investigation, Michael Becker was the General Counsel, Vice President, and Corporate Secretary for BCBSMT. During the 1999 session of the Montana Legislature he was Assistant General Counsel and Assistant Corporate

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<sup>2</sup>This information is derived from BCBSMT's internal worksheets used to prepare the L-5 reports.

Secretary. During the session Becker's responsibilities included review of draft legislation to determine what impact, if any, the bills would have on BCBSMT's insurance programs that are collectively referred to as "the Plan." Specifically, Becker testified on Senate Bill (SB) 322 and House Bill (HB) 607. Becker was not at the Capitol building on a regular basis during the 1999 session. He continued to perform his regular duties for BCBSMT during the time the Legislature was in session.

11. SB 322 would have given the Attorney General authority to review and approve conversions of nonprofit healthcare entities to for-profit status. On behalf of BCBSMT, Becker testified in opposition to the bill on February 10, 1999 before the Senate Public Health, Safety, and Welfare Committee. He testified again when the committee met and took executive action on the bill on March 19, 1999. The bill failed to make it past second reading in the Senate.

12. Becker contends he reported the entire time he spent at hearings on SB 322. He recalled several instances in which he engaged in "walk and talk" lobbying,<sup>3</sup> and in each instance he reported the time spent with the legislators as lobbying time. Becker also reported time he spent in meetings to discuss the bill with persons who were not legislators, including a meeting with Attorney General Joe Mazurek and his Chief Counsel Chris Tweeten, and a meeting with Chuck Butler and attorney and lobbyist Tom Ebzery.

13. Chuck Butler is Vice President of Government and Public Relations for BCBSMT. During the 1999 legislative session, Butler had oversight responsibility for legislative and governmental affairs issues. While he did engage in lobbying during the session, he also continued to perform his regular job responsibilities. Butler recalled that the Attorney General's office scheduled a meeting to discuss SB 322 and invited

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<sup>3</sup>"Walk and talk" lobbying refers to lobbying-related discussions with legislators between hearings in the halls of the Capitol.

representatives of BCBSMT to attend. Butler, Becker, and Susan Witte attended the meeting. Senator Mignon Waterman was also present. The meeting consisted of an exchange of information by those present regarding the bill. Butler later reported the time spent in the meeting as lobbying. Butler also testified on SB 81, SB 209, SB 219, SB 322, SB 388, HB 156, HB 240, HB 400, HB 428, HB 512, HB 536, HB 537, and HB 538. Butler contends he reported all direct communication with legislators as lobbying, including walk and talk time, testimony, responding to questions from legislators, and meetings with legislators. He did not, however, report as lobbying the time it took to write letters to legislators.

14. On February 3, 1999, Butler wrote a letter to Representative John Witt regarding HB 131, which would have allocated money recovered by the State of Montana as a result of claims against tobacco companies to certain designated accounts. One of the accounts designated for receipt of a portion of the funds would have been for the benefit of the Montana Comprehensive Health Association (MCHA). The MCHA was created by the 1985 Legislature. It is an association whose members, by statute, include all insurers, HMO's, and health service corporations licensed to do business in Montana. As described in Butler's letter, MCHA "is the health insurer of last resort for those Montanans with very serious and costly medical conditions." The program provides "portability" coverage for persons who leave other health plans. The MCHA program is funded by premiums paid by insureds and by assessments on insurers, including BCBSMT.

15. Butler's letter to Representative Witt explained BCBSMT's "request for an appropriation of up to \$2 million" during the next biennium from tobacco claims money for the MCHA. The letter concluded with a reiteration of that plea:

On behalf of MCHA and BCBSMT, I appreciate your consideration of an appropriation from the tobacco settlement funds of \$1 million a year in each year of the biennium toward this worthwhile program. I hope to be

able to discuss this matter more with you as the legislative session progresses.

The letter to Representative Witt is two pages long and probably took less than an hour to draft. As noted, Butler did not report the time spent composing this letter as lobbying time.

16. On April 5, 1999, Butler wrote a letter to Senator Chuck Swysgood regarding SB 534, an act that generally revised the laws regarding public mental health delivery and requiring DPHHS to establish a mental health managed care system. The letter states, "We [BCBSMT] have been honored by your request to provide our input to you on SB 534." The letter then describes some laws related to managed health care passed by previous Montana legislatures and concludes:

You may be interested to know that any health plan administered by Blue Cross Blue Shield of Montana has an appeals mechanism built in to address situations where a subscriber believes medical care or payment has been wrongly denied. We think our appeals process works well.

I am sending you a thorough compilation of laws governing health plans put together by the American Association of Health Plans. I know that you will find it informative.

The letter is one page long and probably took less than half an hour to draft. Butler did not report the time spent composing this letter as lobbying time.

17. Susan Witte is Director of Government and Public Relations at BCBSMT. She engaged in lobbying activities during the 1999 legislative session but also continued to perform her regular duties during the session. Witte had several lunch meetings with legislators during which legislation was discussed. She reported the entire time for the meetings as lobbying, even though legislation was only discussed during a portion of each lunch meeting. During the session Witte testified on SB 27, SB 82, SB 99, SB 103, SB 322, SB 369, SB 388, HB 2, HB 47, HB 111, HB 384, HB 512, HB 536, and HB 607. She reported the entire time for hearings as lobbying time even though her testimony only occupied a portion of each hearing. At the request of

Representative Soft, Witte attended a meeting regarding HB 607. Several other non-legislators participated in the meeting. She reported the entire time as lobbying. Witte attended a meeting at the Attorney General's office to discuss SB 322. Butler and Becker were also present. Witte reported that time as lobbying. Witte also reported walk and talk time as lobbying.

18. Tanya Ask is Co-CEO of Montana Health, a limited liability company formed as a joint venture between BCBSMT and the Western Montana Clinic in Missoula. During the 1999 session, Ask worked primarily on SB 322 and HB 607. She reported as lobbying the time spent engaged in direct testimony on a bill, time spent responding to questions from committee members, walk and talk lobbying, all other one-on-one communications with legislators, and meetings with public officials other than legislators.

19. William Jensen formerly served as General Counsel and Corporate Secretary for BCBSMT. He is now retired. Jensen engaged in some lobbying for BCBSMT during the 1999 session. He testified on HB 536, HB 537, and HB 538. He reported as lobbying the time spent testifying on bills, direct contact with legislators (including lunch meetings during which legislation is discussed), and time spent preparing written communication with legislators (including e-mails).

20. Russ Ritter is on the Board of Directors of BCBSMT. His employer is Washington Company. Ritter appeared as a lobbyist for Washington Company during the 1999 session of the Montana Legislature. He testified in opposition to SB 322, noting that his employer was opposed based on the costs that Washington Company, which is self-insured, would incur. There is no evidence that Ritter engaged in any lobbying for BCBSMT during the 1999 session of the Montana Legislature.

21. Richard Brown is on the Board of Directors of BCBSMT. He is the Chief Executive Officer of the Livingston Memorial Hospital. Brown prepared written testimony regarding SB 322. He was not paid to prepare the written testimony. As he

was unable to attend the hearing regarding SB 322, he asked Chuck Butler to read his prepared testimony into the record. There is no evidence that Brown engaged in any lobbying for BCBSMT during the 1999 session of the Montana Legislature.

22. BCBSMT engaged in grassroots lobbying with respect to SB 322 and HB 607. On SB 322 the grassroots lobbying primarily consisted of communications by e-mail and facsimile with lobbyists from other organizations with similar interests. The grassroots lobbying effort on HB 607 also consisted of communications with lobbyists from other organizations, as well as organizing testimony with various members of the medical community across Montana. Additionally, BCBSMT lobbyists requested BCBSMT's Regional Managers to ask employees to contact their legislators and oppose the legislation. In its publication, *The Montana Legislative Review*, BCBSMT asked readers to contact their legislators to oppose HB 607.

23. Prior to instituting formal rulemaking proceedings, DPHHS invited BCBSMT and other interested parties to participate in work sessions to develop administrative rules pertaining to network adequacy in managed care. On July 22, 1999, DPHHS issued a formal Notice of Public Hearing on the proposed adoption of rules regarding that same subject matter. The Notice, which scheduled a public hearing for August 11, 1999, contained a paragraph stating that interested persons could submit their data, views, or arguments either orally or in writing at the hearing, or in written form prior to the hearing. In response to the invitation in the Notice, BCBSMT and other interested parties submitted to DPHHS information and comments regarding the proposed rules. The rules were adopted with an effective date of October 1, 1999. BCBSMT did not report any lobbying time or expense associated with its submission of information and comments pertaining to the rules.

24. The Children, Families, Health, and Human Services Legislative Interim Committee (Committee) registered an objection to one of the network adequacy for managed care rules adopted by DPHHS. The Committee convened a meeting to

discuss the rule in November 1999. Apparently the discussion primarily involved whether the Committee's objection was timely and whether the Committee had jurisdiction to suspend the rule. Representatives of BCBSMT appeared and supported the legal position taken by DPHHS. Ultimately the Committee voted to take no further action with respect to its objection to the rule. BCBSMT did not report any lobbying time or expense associated with its appearance before the Committee.

## **STATEMENT OF FINDINGS**

### **Overview**

Montana Code Annotated (MCA) §§5-7-101 to 5-7-305 govern lobbying in Montana. MCA §5-7-305 provides the Commissioner, the Attorney General, and county attorneys with jurisdiction to enforce the provisions of Montana law regulating lobbying.

The complaint alleges that BCBSMT knowingly filed false lobbying reports in violation of MCA §5-7-209, which provides:

**Payments prohibited unless reported -- penalty for failure to report or for false statement.** A principal may not make payments to influence official action by any public official unless that principal files the reports required under this chapter. A principal who fails to file a required report is subject to the penalty provided in 5-7-305 as well as any civil action provided for in that section. A principal who knowingly files a false, erroneous, or incomplete statement commits the offense of unsworn falsification to authorities.

A "principal" is defined as a person (including a corporation) who employs a lobbyist. MCA §5-7-102(12). "Lobbying" is the practice of promoting or opposing the introduction or enactment of legislation before the legislature or members of the legislature by a person other than a member of the legislature or a public official. "Lobbying" is also the practice of promoting or opposing official action by any public official. MCA §5-7-102(6)(a) and (b). A "lobbyist" is a person who engages in the practice of lobbying for hire. MCA §5-7-102(8)(a). "Lobbying for hire" includes "activities of the officers, agents,

attorneys, or employees of a principal who are paid, reimbursed, or retained by the principal and whose duties include lobbying.” MCA §5-7-102(7).

Applying these definitions to the facts set out in the Summary of Facts, it is clear that BCBSMT is a principal and employees Ask, Becker, Butler, Jensen, and Witte acted as its lobbyists during the 1999 session of the Montana Legislature. Pursuant to MCA §5-7-208, BCBSMT was required to file with the Commissioner periodic reports of all payments made for the purpose of lobbying. BCBSMT timely filed reports reflecting salary payments of \$9,500 to its employee-lobbyists and \$2,215 in additional expenses pertaining to lobbying. The complaint alleges that BCBSMT under-reported its 1999 lobbying expenditures and payments.

Montana’s Lobbyist Disclosure Initiative (I-85) was approved by the Montana electorate in the November 1980 election. I-85 was immediately the subject of two legal challenges resulting in two 1981 Montana Supreme Court decisions. See Montana Automobile Association v. Greely, 193 Mont. 378, 632 P. 2d 300 (1981); and State Bar of Montana v. Krivec, 193 Mont. 477, 632 P. 2d 707 (1981). After this initial flurry of litigation and rulemaking proceedings to implement I-85, there have been only infrequent but failed attempts to enact legislation or adopt rules clarifying provisions of the Montana Lobbyist Disclosure Act and rules. See, e.g., Common Cause of Montana v. Argenbright, 276 Mont. 382, 917 P. 2d 425 (1996); and Montana Common Cause’s April 29, 1994 Petition for Rulemaking filed with the Commissioner of Political Practices.

The history of various rulemaking proceedings conducted by my predecessors, which includes lobbyist surveys conducted by Montana Common Cause, establishes that there is great disparity of opinion among lobbyists and principals about the reporting requirements under Montana’s Lobbyist Disclosure Act. See, e.g., Montana Common Cause’s April 29, 1994 Petition for Rulemaking. The great disparity of opinion has not been addressed by the legislature, the courts, or my predecessors over the past two decades. Most of the Act’s rules in effect today were adopted in 1982 and have not

been amended over the past 19 years. See, e.g., Administrative Rules of Montana (ARM) 44.12.101, 103, 201, 203, 205, 207, 209, 211, 213, and 215. In the 21 years since I-85 was adopted, this is the first complaint ever filed alleging that a principal has failed to properly report lobbying expenditures.

The investigation of this complaint confirms that the complainant and BCBSMT have a substantial difference of opinion about the reporting requirements of the Act and rules. Even within BCBSMT, lobbyists had varying opinions about what should be reported and the amount to be reported. Unfortunately, the Act's rules are sometimes inconsistent with the Act or ambiguous. Nevertheless, Montana's Supreme Court has ruled that the purpose of I-85 is to "provide for the disclosure of money spent to influence action of public officials" and that this purpose was "not frustrated" by the Court's decision to invalidate several provisions of I-85. Montana Automobile Association, supra, at p. 399. Montana's highest court also held that "the statewide vote on I-85 is a demonstration of a compelling state interest" establishing the need for disclosure of lobbying expenditures. Id., at p. 384. In Krivec, supra, at p. 485, the Montana Supreme Court declared that there "is an obvious public interest in the regulation and disclosure of lobbying activities."

### **Legislative Lobbying**

The following legislative lobbying reporting requirements are clear and unambiguous under Montana's Lobbyist Disclosure Act and rules:

1. All of the time spent by a lobbyist in direct communication with a legislator or legislative committee to support or oppose legislation or legislative or administrative action must be reported as a lobbying expenditure. ARM 44.12.102(2)(a), (2)(c)(i), ARM 44.12.102(1)(c) and MCA §5-7-102(6). This lobbying expenditure reporting obligation applies even if a legislator is involved in taking administrative action as

defined in ARM 44.12.102(1)(a); for example, a legislator who serves on an executive branch advisory council that is created to draft or develop policy, practice, or rules is subject to the lobbying definitions in ARM 44.12.102(2)(a).

2. A lobbyist or individual employed by a principal who attends a legislative hearing does not have to report attendance at the hearing as a lobbying expenditure if:

- a. testimony is not presented;
- b. there is no personal contact with a member of the committee or the committee involving lobbying; and
- c. the lobbyist or individual employed by a principal does not sign the legislative committee's sign-in sheet as a proponent or opponent. MCA §5-7-102(8)(b)(ii) and Commissioner Argenbright's December 17, 1993 Declaratory Ruling.

3. Lobbying legislators on issues and matters other than the passage or defeat of legislation is reportable under Montana's Lobbyist Disclosure Act and rules. MCA §5-7-102(6)(b) defines lobbying to include "promoting or opposing official action by a public official." The term "official action" includes administrative action or legislative action. ARM 44.12.102(1)(e). The term "legislative action" includes not only the introduction or enactment of legislation but acts "that result in the creation of law or declaration of public policy, and other actions of the legislature authorized by Article V of the Montana Constitution." ARM 44.12.102(1)(c). Lobbyists and principals who lobby legislators and legislative committees performing legislative functions under Article V of the Montana Constitution must report these lobbying expenses in the same manner that lobbying expenses are reported when supporting or opposing the enactment of legislation. For

example, BCBSMT's appearance before an interim legislative committee (see Summary Fact 24) to oppose the committee's possible objection to a rule being adopted by DPHHS is legislative lobbying and should have been reported as a legislative lobbying expenditure. The interim committee was performing an official legislative function under the Montana Administrative Procedure Act (MAPA). BCBSMT appeared at the committee's meeting and opposed the committee's proposed action. This was a reportable lobbying expenditure. Similarly, lobbying to support or oppose audit conclusions in reports prepared by the Legislative Audit Committee or financial reports prepared by the Legislative Finance Committee are reportable lobbying expenses.

4. Lobbyists and principals who direct that expenditures be made "in support of or assistance to a lobbyist or a lobbying activity" must report those expenditures. MCA §5-7-102(10)(b). MCA §5-7-208(5) requires that each lobbying report filed by a principal must list all payments for lobbying in each of the following categories:

- (i) printing;
- (ii) advertising, including production costs;
- (iii) postage;
- (iv) travel expenses;
- (v) salaries and fees, including allowances, rewards, and contingency fees;
- (vi) entertainment, including all foods and refreshments;
- (vii) telephone and telegraph; and
- (viii) other office expenses;....

Under these provisions of the Act, the principal or lobbyist who pays an attorney to analyze a bill and presents the written opinion to a legislative committee or distributes the opinion to a legislator as part of walk and talk lobbying must report the cost of the attorney's opinion as a lobbying expenditure. Similarly, payments made to prepare a fact sheet or other written material used in legislative floor debate or a legislative

committee executive session must be reported. Lobbying reports for these expenditures must include the payments made to employees or consultants and payment for any of the items listed in MCA §5-7-208(5)(a).

BCBSMT's 1999 legislative lobbying strategy included a "grassroots" component that focused primarily on opposition to SB 322 and HB 607. See Summary Fact 22. The grassroots efforts included such activities as requests for assistance from BCBSMT employees and district representatives, and electronic communications with other lobbying groups. BCBSMT reported no expenditures or payments for its grassroots lobbying efforts. BCBSMT should have reported the organizational costs of these grassroots efforts.

Montana Automobile Association discussed at length I-85's definition of the term "principal." Id., at pp. 390-392. Montana's Supreme Court upheld the present definition of "principal" in MCA §5-7-102(12) but declared unconstitutional a second definition which included the following groups, corporations, or entities:

(b) in the case of a person other than an individual, to solicit, directly, indirectly or by an advertising campaign, the lobbying efforts of another person.

Id., at p. 389. Montana's Supreme Court relied heavily on the U.S. Supreme Court case of United States v. Harriss, 347 U.S. 612, 74 S.Ct. 808 (1954) to declare unconstitutional the second definition of principal in I-85; however, a close reading of Montana Automobile Association and Harriss indicates that a principal who has hired a lobbyist must report organizational expenditures or payments made in support of or assistance to a lobbyist or a lobbying activity, including grassroots lobbying costs.

Harriss involved a legal challenge to the Federal Regulation of Lobbying Act. 2

U.S.C. §261, et seq.. Montana Automobile Association correctly notes that Harriss narrowly construed the phrase “to influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States” to mean “direct communication with members of Congress on pending or proposed federal legislation.” Montana Automobile Association, supra, at pp. 390 and 391. Omitted from Montana Automobile Association’s discussion of Harriss was the full import and breadth of the U.S. Supreme Court decision.

Chief Justice Earl Warren delivered the 5-3 majority opinion of the U.S. Supreme Court in Harriss.<sup>4</sup> The majority concluded that in construing the Federal Act “narrowly to avoid unconstitutional doubts, we must also avoid a construction that would seriously impair the effectiveness of the Act in coping with the problem it was designed to alleviate.” Harriss, supra, at p. 623. Chief Justice Warren and the majority described the lawful purpose of the Federal Act as follows:

Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. This is the evil which the Lobbying Act was designed to help prevent.

Emphasis added. Id., at p. 625. The Federal Act “merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose” and, like the Federal Corrupt Practices Act, was enacted “to maintain the integrity of a basic governmental process.” Id. The Federal Act,

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<sup>4</sup> Famous Montana lawyer and politician Burton K. Wheeler defended Harriss, who was charged in a seven-count information with violating the Federal Regulation of Lobbying Act.

according to Chief Justice Warren, did not violate the freedom to speak, publish, and petition guaranteed by the First Amendment. Id.

The majority opinion specifically addressed the issue of whether an entity lobbying the Congress via direct communication with members of Congress on pending or proposed legislation must report organizational expenses soliciting others to lobby Congress. Chief Justice Warren concluded that:

The legislative history of the Act makes clear that, at the very least, Congress sought disclosure of such direct pressures, exerted by the lobbyists themselves or through their hirelings or through an artificially stimulated letter campaign. It is likewise clear that Congress would have intended the Act to operate on this narrower basis, even if a broader application to organizations seeking to propagandize the general public were not permissible.

Emphasis added. Id., at pp. 620 and 621.

Chief Justice Warren also made it clear that the “principal purpose” language of the Federal Act could not be used to shield an organization that was soliciting lobbying funds and involved in direct communication with Congress from reporting those contributions received and payments made under the Federal Act. The Chief Justice ruled that an entity which is involved in lobbying as only one of its main activities must report the payments made for lobbying activities to avoid a construction of the Act that would “seriously impair the effectiveness” of the Federal Regulation of Lobbying Act. Id., at pp. 622 and 623.

The dissenters in Harriss left no doubt that the majority opinion required a principal engaged in lobbying to report money spent to induce others to lobby Congress. Justice William Douglas, whose dissent was joined by Justice Hugo Black, described the majority ruling as follows:

It is contended that the Act plainly applies

--to persons who pay others to present views to Congress either in committee hearings or by letters or other communications to Congress or Congressmen and

--to persons who spend money to induce others to communicate with Congress.

The [majority of the] Court adopts that view, with one minor limitation which the Court places on the Act—that only persons who solicit, collect, or receive money are included.

Id., at p. 629.

Justice Douglas criticized the majority for what he believed was an impermissible narrowing of the Federal Act “as applying only to those who are paid to ‘buttonhole’ Congressmen or who collect and expend moneys to get others to do so.” Id., at p. 632. Justice Jackson’s dissent contained a similar criticism. Id., at pp. 633-636.

Montana Automobile Association is consistent with the substantive decision reached by the United States Supreme Court in Harriss. Montana’s Supreme Court listed the five examples used by Justice Douglas in his dissenting opinion in Harriss to address the “organizational actions” of unions, churches, farm organizations, business organizations, and other entities (but not individuals) urging members, readers, or recipients to contact a public official to support or oppose a law. Montana Automobile Association, supra, at pp. 390 and 391. The Montana Supreme Court declared unconstitutional I-85’s expansive attempt to require groups, corporations, businesses, or entities other than an individual to report as a “principal” if the entity solicited, directly or indirectly, others to contact lawmakers supporting or opposing legislation, Id., at p. 391; but in concluding that it could find no compelling state interest for the all-encompassing second definition of principal in I-85, Montana’s highest court stated, consistent with the

majority opinion in Harriss, that the “fundamental purposes of the Initiative are accomplished by including, as a principal, the person who hires a lobbyist.” Id., at p. 392. Montana Automobile Association clearly recognized the distinction between an organization’s efforts to induce others to lobby public officials when a lobbyist or lobbying activity is not involved and a grassroots lobbying campaign that is induced, directed, and financed by a lobbyist and the lobbyist’s principal.

The express requirements of MCA §5-7-102(10)(b), Harriss, and Montana Automobile Association recognize that payments made to support or assist a lobbyist or a lobbying activity, including but not limited to the direct payment of expenses incurred at the request or suggestion of a lobbyist, are payments to influence official action which must be reported under the Act. Payments by a principal for a grassroots lobbying campaign (which Chief Justice Warren described in Harriss as “an artificially stimulated letter campaign”) must be reported under Montana Automobile Association, MCA §5-7-102(10)(b), and Harriss.

Based on a consideration of the substantive rulings in Montana Automobile Association and Harriss, a person must report grassroots lobbying expenditures and payments if:

1. the person becomes a principal by hiring and paying a lobbyist as defined in the Montana Lobbyist Disclosure Act;
2. the principal and/or the lobbyist are engaged in direct communication with the legislature or individual legislators to support or oppose pending or proposed

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legislation or legislative action;<sup>5</sup> and

3. Payments are made by a principal or a lobbyist in support or of assistance to a lobbyist or a lobbying activity, including but not limited to, the direct payment of expenses incurred to support or oppose pending or proposed legislative action at the request or suggestion of the lobbyist. MCA §5-7-102(10)(b).

Within the preceding context, BCBSMT paid for grassroots lobbying efforts opposing SB 322 and HB 607. BCBSMT opposed these bills in the 1999 Legislature and engaged in direct communication with legislators to defeat these bills. BCBSMT's grassroots lobbying efforts were undertaken to support or assist BCBSMT's lobbying activity. BCBSMT was required under the Lobbyist Disclosure Act to report payments made to implement its grassroots lobbying efforts subject to the conflicting miscellaneous office expense language in ARM 44.12.207. See pp. 24-26 of this decision.

Contrary to the clear and unambiguous provisions of the Montana Lobbyist Disclosure Act and rules just discussed, there are serious inconsistencies and ambiguities on several issues directly related to the complaint and investigation in this matter. The Montana Supreme Court has noted that the provisions of the Act governing lobbying, since they are penal in nature, "must be sufficiently definite to give a person of ordinary intelligence fair notice that his conduct is forbidden." Montana Automobile Association, supra, at p. 394. Unfortunately, the following rules do not give fair notice of what conduct is forbidden:

1. ARM 44.12.102(2) defines what constitutes lobbying under the Act. The provisions of the rule specifying how appearances before a legislative committee must

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<sup>5</sup> Non-legislative lobbying issues and problems are discussed on pp. 29-33 of this decision.

be reported are riddled with inconsistencies. §(2)(b) requires a lobbyist to report only the time “to present oral or written testimony promoting or opposing official action by any public official or group of public officials, including the legislature or a committee of the legislature.” Conversely, §(2)(c)(ii) and (2)(d) require a lobbyist to report all time spent at interim legislative committee meetings or meetings with public officials if the lobbyist has direct communication with the legislators or public officials to promote or oppose official action. In other words, if a lobbyist presents ten minutes of testimony to a legislative committee but the hearing lasts three hours, §(2)(c)(ii) and (2)(d) require the lobbyist to report three hours of lobbying. §(2)(b) only requires the lobbyist to report ten minutes.

The five BCBSMT lobbyists exemplified the inconsistent requirements of ARM 44.12.102(2). Becker and Witte reported all time spent at a committee hearing if they testified. Butler, Ask, and Jensen only reported the time spent testifying and answering questions at legislative committee hearings. Both interpretations are correct under the conflicting definitions of lobbying in 44.12.102(2). The rule should be amended to eliminate this fundamental internal conflict.

2. There is great confusion regarding the use of legislative committee sign-in sheets. For example, some individuals believe sign-in sheets constitute part of the official record of the hearing and, as such, are direct communication with the committee members and constitute reportable lobbying time. Other individuals believe sign-in sheets are for the convenience of committee secretaries when preparing minutes. One former legislator said she reviewed the sign-in sheets on a regular basis. Another current two-term legislator said she considered sign-in sheets to be a reference tool for

the committee secretary; and, as a legislator, she does not refer to them. All of these interpretations beg the question of what amount of time should be reported if a lobbyist signs a sign-in sheet as a proponent or opponent but immediately leaves the hearing or stays for only a portion of the hearing. This issue should be addressed in the Act's rules.

3. ARM 44.12.101 creates two exemptions from the definition of lobbying contained in the Act. §(1) exempts a lobbyist from reporting appearances before the legislature or a legislative committee "in response to a subpoena or written request to appear from the presiding official of the body...." Summary Fact 16 indicates that BCBSMT received a request from Senator Chuck Swysgood, Chairman of the Senate Finance Committee in 1999, to provide input on SB 534. BCBSMT sent a letter to Senator Swysgood in response to his oral request for information. Does a response to an oral request for information from a legislator fall within the "written request to appear" exemption in ARM 44.12.101(1)? A strict application of 44.12.101(1) would result in lobbyists being subject to enforcement action for responding to oral requests for information from legislators if the lobbyist/principal did not report the response effort as a lobbying payment. This Commissioner is reluctant to initiate enforcement action against a lobbyist who responds to an oral request for information from a legislator, especially when BCBSMT's letter "providing input" on SB 534 does not appear to be a letter supporting or opposing the legislation.

ARM 44.12.101(2) contains a much broader exemption from the definition of lobbying. §(2) states that a response to "a public invitation for comment" is not lobbying. The exemption does not specify who must issue the public invitation for comment or

describe what constitutes a public invitation for comment. For example, is a legislative hearing on a bill considered a public invitation for comment? If a legislative committee only invites certain lobbyists or groups to provide information but does not solicit comments from the public in general, is the solicitation a public invitation? Lobbyists and principals should not be put in the position of having to guess when a response to an invitation for comment, whether oral or written, is a public invitation. The exemptions in 44.12.101 should be revisited, refined, and subjected to a thorough public discussion by lobbyists, principals, and the public.

4. MCA §5-7-212 governs the audit of lobbying reports by the Commissioner. §5-7-212(1) requires a lobbyist to provide records to the principal substantiating lobbying activities and the principal “is required to obtain and keep for a period of 3 years from the date of filing all records supporting the reports filed under 5-7-208.” ARM 44.12.103 requires a lobbyist “to maintain records relating to information required to be reported” and to transmit the records to the principal for timely reporting. The Act and rules provide no details about the content of the records that must be maintained. For example, must records document on a daily basis which hearings the lobbyist attended, which legislators have been lobbied, and the total time spent on lobbying activities? Or, is it sufficient to maintain monthly summaries of lobbying activities? What records are required to verify and support walk and talk lobbying? These and related issues should be addressed in rules that promote uniformity of reporting and facilitate audits of lobbying payments under MCA §5-7-212.

5. ARM 44.12.207 specifies what must be reported as “other office expenses” under MCA §5-7-208(5)(a). The rule properly recognizes that “expenses related to or

incurred in....the support of a lobbyist” must be reported. ARM 44.12.207(1). The same subsection, however, also states that regular and recurring “expenses such as rent, utilities and staff time need not be reported unless lobbying is the primary purpose of the organization.” §2 of 44.12.207 specifies that an organization’s primary purpose is not lobbying unless “over 75% of its yearly budget is allocated to lobbying efforts.” There are several problems with this rule.

First, the rule impermissibly restricts the reporting of lobbying payments for miscellaneous office expenditures by inserting a “primary purpose” test in Title 5, Chapter 7. Nothing in the Lobbyist Disclosure Act authorizes the adoption of a “primary purpose” test for determining when payments for lobbying activities should be reported.<sup>6</sup>

Second, ARM 44.12.207 creates discriminatory lobbyist reporting requirements. A small organization or a sole proprietor who meets the “primary purpose” test in the rule is required to report miscellaneous office expenses (rent, utilities, and staff time) even though the amount of such expenses may be substantially less than similar expenses incurred by a large business entity that does not meet the primary purpose test. BCBSMT, for example, does not spend 75% of its yearly budget on lobbying efforts and, therefore, does not have to report such miscellaneous office expenses as rent, utilities, and staff time allocated to lobbying activities under ARM 44.12.207. Nevertheless, BCBSMT most likely spends significant amounts providing office space for five lobbyists, support staff, and the equipment and utilities to support BCBSMT’s lobbying activities, including grassroots lobbying efforts.

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<sup>6</sup> MCA §5-7-102(7) excludes from the definition of “lobbying for hire” payments of less than \$1,000 per calendar year for personal living and travel expenses if that is the only compensation paid to a lobbyist. Otherwise, lobbying payments must be reported and nothing in the Act suggests that reporting of lobbying payments can be conditioned on a “primary purpose” test.

Third, the rule as presently written conflicts with MCA §5-7-102(10)(b) that clearly requires that payments “in support of or assistance to a lobbyist or a lobbying activity” be reported. Chief Justice Earl Warren correctly determined in Harriss, supra, at pp. 623 and 625, that a “primary purpose” test cannot be used to “seriously impair the effectiveness” of a lobbyist disclosure act that has been enacted to maintain the integrity of a basic governmental process. ARM 44.12.207 must be reexamined in a public process that will require that miscellaneous office expenses be uniformly and fairly reported by all principals and lobbyists.

A comprehensive examination of BCBSMT’s records relating to its legislative lobbying efforts during the 1999 session of the Montana Legislature and interviews with BCBSMT’s officials and employees revealed instances in which an activity of one of its lobbyists should have been reported as lobbying but was not.

Chuck Butler wrote a letter to Representative John Witt urging his consideration of an appropriation from tobacco settlement funds of \$1 million per year during the next biennium to fund MCHA. Summary Facts 14 and 15. Butler’s letter specifically referenced HB 131, which would have allocated money recovered by the State of Montana as a result of claims against the tobacco companies to certain designated accounts, including an account for the benefit of MCHA. The letter drafted and sent by Butler constitutes lobbying under Montana’s statutes and rules since it was direct communication with a legislator to promote legislative action. See MCA §5-7-102(6)(a); and ARM 44.12.102(1)(b) and 44.12.102(2)(a).

BCBSMT also under-reported some of the time devoted to legislative lobbying, as reflected on its internal worksheets referenced in footnote 2. ARM 44.12.203(1)(b)

provides that if a lobbyist “is a full-time employee or officer of the principal, and his duties include lobbying, the salary may be allocated on a daily basis or on an hourly basis.” BCBSMT chose to allocate and report the salaries of its employee-lobbyists on an hourly basis, which is permissible under the rule; however, ARM 44.12.203(1)(b) provides that if an employee-lobbyist’s salary is computed on an hourly basis, “a fraction of an hour shall be counted as an hour.”

On its L-5 covering the period February 1 to February 28, 1999, BCBSMT reported the following hours and hourly salaries:

|        |                         |
|--------|-------------------------|
| Ask    | 3. hrs. @ \$46.00/hr.   |
| Becker | 11.1 hrs. @ \$65.00/hr. |
| Butler | 25.5 hrs. @ \$70.50/hr. |
| Jensen | 12.1 hrs. @ \$65.00/hr. |
| Witte  | 16.5 hrs. @ \$35.00/hr. |

On its L-5 covering the period March 1 to March 31, 1999, BCBSMT reported the following hours and hourly salaries:

|        |                     |
|--------|---------------------|
| Ask    | 9.5 hrs. @ \$46/hr. |
| Becker | 7. hrs. @ \$65/hr.  |
| Butler | 18. hrs. @ \$70/hr. |
| Jensen | 3. hrs. @ \$65/hr.  |
| Witte  | 8.5 hrs. @ \$35/hr. |

The fractional hours should have been reported as whole hours. Thus, the lobbying payments reported for salaries for these two reporting periods should have been increased as follows:

|        |                                   |               |
|--------|-----------------------------------|---------------|
| Ask    | .5 additional hour @ \$46.00/hr.: | total \$23    |
| Becker | .9 additional hour @ \$65.00/hr.: | total \$58.50 |
| Butler | .5 additional hour @ \$70.50/hr.: | total \$35.25 |
| Jensen | .9 additional hour @ \$65.00/hr.: | total \$58.50 |
| Witte  | 1. additional hour @ \$35.00/hr.: | total \$35    |

TOTAL UNDER-REPORTED: \$210.25

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BCBSMT's meeting with the Attorney General and his Chief Counsel regarding SB 322 could be construed as both legislative and non-legislative lobbying.<sup>7</sup> Senator Mignon Waterman, sponsor of SB 322, attended the meeting. The meeting consisted of an exchange of information regarding SB 322. Summary Fact 13. It is unclear whether BCBSMT used the meeting to lobby Senator Waterman by expressing its opposition to SB 322, but there is no need to make that determination under the facts of this matter. The BCBSMT lobbyists who attended the meeting reported the time spent at the SB 322 meeting as a legislative lobbying expense.

Michael Becker reported time he spent in a meeting with Butler and attorney and lobbyist Tom Ebzery as a legislative lobbying expense. Summary Fact 12. BCBSMT's reporting of Becker's time in this meeting as a legislative lobbying expense constitutes over-reporting and is not necessary because meetings between a principal and its lobbyist or between lobbyists representing different principals to determine whether to support or oppose legislative or administrative action are not reportable lobbying expenditures under the rationale of Montana Automobile Association, supra.

I-85, as enacted, required principals and lobbyists to report "original and derivative research" as a lobbying expense. The Montana Supreme Court determined that this reporting requirement was "too indefinite for a principal to ever be assured that he or she has fully complied with this section." Id., at p. 395. The "indefiniteness" of the original and derivative research reporting requirement was reflected in the I-85 language allowing such lobbying costs to be "estimated if necessary." Id. This provision of I-85 was declared "void for vagueness" and the Court recognized the right

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<sup>7</sup> The question of whether BCBSMT's meeting with the Attorney General and his Chief Counsel constituted non-legislative lobbying is discussed on pp. 32 and 33 of this decision.

of a principal and its lobbyist to acquire information and internally consider that information for the purpose of developing a lobbying position. Such position development and research activities are not reportable lobbying activities under Montana Automobile Association; however, once a lobbying position is taken and internal organizational expenditures are made to support or assist a lobbyist or a lobbying activity, see MCA §5-7-102(10)(b), such expenditures must be reported under MCA §5-7-208(5).

This same distinction is reflected in the Montana Supreme Court's analysis of the "news media" lobbyist reporting requirement in I-85. The Court voided an I-85 requirement that a principal must report payment for "news media." Id. Montana Automobile Association concluded that lobbying expenditures for newsletters, leaflets, other printing and advertising, including production costs, had to be reported under other provisions of I-85. Id. and MCA §5-7-208(5). The Court said it could not determine what additional information had to be reported under "news media" costs and rejected the notion that "news-worthy" activities of a principal or lobbyist were reportable. Id. Montana's highest court reaffirmed, however, that newsletter, printing, leaflet, and advertising expenditures made to support a lobbyist or a lobbying activity are reportable under MCA §5-7-208(5). Id.

### **Non-Legislative Lobbying**

The complaint alleges that BCBSMT failed to report expenditures related to involvement in DPHHS's adoption of quality assurance rules. In order to address this allegation, it is first important to define what constitutes non-legislative lobbying. MCA §5-7-102(6) defines two types of lobbying:

(a) the practice of promoting or opposing the introduction or enactment of legislation before the legislature by a person other than a member of the legislature or a public official; and

(b) the practice of promoting or opposing official action by any public official.

§(b) defines what has commonly been referred to as “non-legislative lobbying.” See State Bar of Montana v. Krivec, 193 Mont. 477, 480, 632 P.2d 707, 709 (1981). The rules implementing the statutes governing lobbying provide some guidance regarding the concept of non-legislative lobbying. “Official action” is defined as “legislative action or administrative action, or both, depending on the context in which the phrase is used.”

ARM 44.12.102(1)(e). “Administrative action” means:

any action taken by a public official in any agency, department, division, office, board, or commission of state government with regard to any proposal for or drafting, development, or consideration of a policy, practice, or rule to be published and used by the official or agency. “Administrative action” does not include actions that are judicial, quasi-judicial, or ministerial in nature.

ARM 44.12.102(1)(a).

Applying these definitions, one who is paid, reimbursed, or retained by a principal to promote or oppose “administrative action” is engaging in lobbying. “Administrative action” includes the drafting, development, or consideration of rules to be published and used by an agency. In 1999 DPHHS invited BCBSMT and other interested parties to participate in work sessions to develop rules regarding network adequacy in managed care. DPHHS then issued a formal Notice of Public Hearing on the proposed adoption of rules addressing that subject matter, with a written invitation permitting interested parties to submit their “data, views, or arguments” concerning the proposed rules.

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BCBSMT's participation in work sessions to develop the rules, and its subsequent submission of comments and information during the formal rulemaking process, could be interpreted as "non-legislative lobbying." Two issues arise in determining whether BCBSMT's rule development and MAPA testimony constitute non-legislative lobbying.

First, ARM 44.12.101(2) exempts responses "to a public invitation for comment" from the definition of lobbying. See pp. 23 and 24 of this decision for a discussion of general issues involving this rule. BCBSMT was clearly responding to DPHHS's invitation to participate in the formulation of rules that would ultimately be noticed to the public for adoption under MAPA. BCBSMT subsequently testified at the rulemaking hearing held under MAPA. BCBSMT's participation in rule development at the invitation of DPHHS and testimony at the MAPA rulemaking hearing fall under the public invitation for comment exemption in 44.12.101(2).

A second and related issue is whether the quasi-judicial function exemption in the definition of "administrative action" applies to BCBSMT's 1999 rule development and MAPA testimony. See ARM 44.12.102(1)(a) and MCA §5-7-102(13). The term "administrative action" exempts "actions that are judicial, quasi-judicial, or ministerial in nature" from the lobbyist reporting requirements of the Act. The term "quasi-judicial" is not defined in the Act, but Montana's Supreme Court adopted the following definition in Krivec, supra:

Quasi-judicial functions are those which lie midway between the judicial and ministerial ones. The line separating them from such as are thus on their two sides are 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....  
(Citation omitted.)

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 p. 483.

Although the adoption of rules under MAPA might be more appropriately classified as a "quasi-legislative" function, the Krivec definition of "quasi-judicial" encompasses rulemaking under MAPA. A public official's ultimate decision to propose, adopt, amend, or reject proposed rules under MAPA is a duty involving the consideration of facts and law, constituting an exercise of discretion akin to the exercise of a judicial function. The judicial nature of rule hearings is reflected in the Attorney General's model rules, which give the presiding officer or the rule maker the right to "question or examine" witnesses. ARM 1.3.207(2)(a)(v). The presiding officer may also allow other persons to question witnesses at rulemaking hearings. Participation in MAPA-related rule proceedings falls within the Krivec definition of a quasi-judicial function and is exempt from the reporting requirements of the Montana Lobbyist Disclosure Act.

BCBSMT's meeting with the Attorney General and his Chief Counsel to discuss SB 322 may fall within the definition of administrative action in ARM 44.12.102(1)(a). Both the Attorney General and his Chief Counsel are "public officials" under MCA §5-7-102(13), and the subject of the meeting does not appear to fall within the quasi-judicial exemption of the Act; however, the issue of whether BCBSMT should have reported the meeting as a non-legislative lobbying expenditure does not have to be resolved because BCBSMT's lobbyists reported the meeting as a legislative lobbying

expenditure. See p. 28 of this decision. Nothing in the Act or rules requires that a lobbyist and principal double-report such meetings as both a legislative and non-legislative lobbying expenditure.

The preceding discussion of BCBSMT's meeting with the Attorney General illustrates the fact that non-legislative lobbying requirements have been virtually ignored since the enactment of I-85. A cursory review of lobbying reports filed over the past two decades indicates that very few principals, if any, report non-legislative lobbying payments and expenditures. It is a subject that should receive a thorough public discussion and consideration of rules defining what constitutes reportable non-legislative lobbying activities. The Krivec Court expressed great confidence that the Commissioner of Political Practices would adopt rules "properly applying to lobbying activities covered by....[I-85]." Krivec, at p. 485. I pledge my best effort to explore rulemaking proposals that will address and define non-legislative lobbying.

### **Conclusion**

Based on the preceding, BCBSMT failed to report the following lobbying payments/expenditures:

1. \$70.00 of Butler's time to prepare a letter supporting HB 131;
2. \$210.25 of under-reported lobbying time based on improper application of the hourly fee requirements in ARM 44.12.203(1)(b);
3. An undetermined amount of expenditures for grassroots lobbying actions on SB 322 and HB 607; however, BCBSMT's obligation to report grassroots lobbying actions described in this decision is mitigated, if not eliminated, by the conflicting miscellaneous office expense exclusion in ARM 44.12.207, see pp. 24-26 of this decision; and
4. Approximately \$175.00 for time spent by BCBSMT's lobbyists opposing the Children, Families, Health and Human Services Legislative Interim Committee proposed action described in Summary Fact 24.

Despite the finding that BCBSMT violated several lobbyist reporting requirements, I have concluded that a civil or criminal action against BCBSMT is not warranted for the following reasons:

1. My investigation leads me to believe that BCBSMT made a good faith effort to comply with Montana's Lobbyist Disclosure Act and rules. In several instances, BCBSMT reported activities that did not have to be reported.

2. There are significant ambiguities and inconsistencies in existing rules that make it unlikely that a civil or criminal enforcement action would be successful.

As an alternative to pursuing civil or criminal enforcement action, I will commit the available but finite resources of my office to a public resolution of the present ambiguities, inconsistencies, and problems with Montana's Lobbyist Disclosure Act and rules. It is my sincere desire that lobbyists, principals, and the public can come to a meaningful resolution of fundamental issues and that the Montana electorate's desire for public disclosure of lobbying expenditures can be fulfilled.

This decision is issued this \_\_\_\_\_ day of April, 2001.

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Linda L. Vaughey  
Commissioner

NOTICE: MCA §5-7-305(3) confers concurrent jurisdiction to prosecute violations of the Montana Lobbyist Disclosure Act on the Attorney General or the County Attorney of the county in which a violation takes place. A copy of this decision is being sent on this date to the Honorable Mike McGrath, Attorney General, and Mr. Leo Gallagher, Lewis and Clark County Attorney.