

LEGAL REVIEW NOTE

Bill No.: HB 484

LC#: LC2010, To Legal Review Copy, as of February 6, 2019

Short Title: Revise laws related to the voter information pamphlet and judicial candidates

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Date: February 7, 2019

CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review IS NOT dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See Alexander v. Bozeman Motors, Inc., 356 Mont. 439, 234 P.3d 880 (2010); Eklund v. Wheatland County, 351 Mont. 370, 212 P.3d 297 (2009); St. v. Pyette, 337 Mont. 265, 159 P.3d 232 (2007); and Elliott v. Dept. of Revenue, 334 Mont. 195, 146 P.3d 741 (2006).

Legal Reviewer Comments:

LC2010, as drafted, may raise potential constitutional conformity issues associated with Article VII, section 2, of the Montana Constitution and with the separation of powers doctrine under Article III, section 1.

Article VII, section 2, provides:

Section 2. Supreme court jurisdiction. (1) The supreme court has appellate jurisdiction and may issue, hear, and determine writs appropriate thereto. It has original jurisdiction to issue, hear, and determine writs of habeas corpus and such other writs as may be provided by law.

(2) It has general supervisory control over all other courts.

(3) *It may make rules governing appellate procedure, practice and procedure for all other courts, admission to the bar and the conduct of its members. Rules of procedure shall be subject to disapproval by the legislature in either of the two sessions following promulgation.*

(4) Supreme court process shall extend to all parts of the state. (*Emphasis added*)

Section 5(2) of LC2010 prohibits a finding that an attorney has violated the Montana Rules of Professional Conduct if the violation is based "solely on statements contained in an argument or rebuttal" prepared by a committee writing arguments for retention or against retention of a sitting Supreme Court Justice.

Pursuant to Article VII, section 2, of the Montana Constitution, the Montana Supreme Court is constitutionally charged with adopting rules of conduct for its members. The Montana Supreme Court "declares that it possesses original and exclusive jurisdiction and responsibility under Article VII, Section 2(3) of the 1972 Montana Constitution and the provisions of Chapter 61, Title 37, Montana Code Annotated, in addition to its inherent jurisdiction, in all matters involving . . . the conduct and disciplining of [persons who practice law]." Rules for Lawyer Disciplinary Enforcement (2002). The Supreme Court has adopted certain rules such as Rules 1.6, 1.9, and 1.20 of the Montana Rules of Professional Conduct (2004, revised 2016) concerning prohibitions against the unauthorized disclosure of confidential information. Rule 8.2 provides that a lawyer may not "make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge" An attorney's statements, whether or not they are published in the statewide voter information pamphlet, may be construed to be violations of these rules, depending on the content of the statements.

As drafted, LC 2010 would prohibit the Commission on Practice from making findings that an attorney had violated the Montana Rules of Professional Conduct and thereby preventing the Supreme Court from disciplining an attorney based on those findings, even if that conduct would otherwise violate the rules. This raises a potential issue of whether Section 5(2) of LC 2010 conforms to the provisions of Article VII, section 2, of the Montana Constitution, which limits the Legislature's authority to provide for rules concerning attorney conduct.

LC1020, as drafted, also raises potential separation of powers issues. The separation of powers clause of the Montana Constitution is found at Article III, section 1, and provides:

Section 1. Separation of powers. The power of the government of this state is divided into three distinct branches--legislative, executive, and judicial. No person

or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

LC2010, as drafted, may raise a potential conformity issue as to whether a legislative revision of the Montana Rules of Professional Conduct conflicts with Article III, section 1, of the Montana Constitution and the constitutional authority granted to the Supreme Court under Article VII, section 2.

Requester Comments: