March 20, 2002

Mr. Marty Lambert
Gallatin County Attorney
615 South 16th Avenue, Room 202
Bozeman, MT 59715-4107

Dear Mr. Lambert:

You have requested an Attorney General's Opinion on the following question:

> Does the reference to "A.D." (Anno Domini) or "year of our Lord" on a marriage license and certificate of marriage violate any of Montana's constitutional provisions regarding the free exercise of religion or the establishment of a religion?

It has been determined that a letter of advice, rather than a formal Attorney General's Opinion, provides the appropriate response to your request.

You note that your opinion request arose out of the concerns of a Jewish Rabbinical Aide who thought the reference to "A.D." or "year of our Lord" on a marriage license or certificate of marriage to be of questionable constitutionality.

Mont. Code Ann. § 40-1-107 sets forth the requirements for marriage licenses and certificates. It provides:

> **Form of application, license, marriage certificate, and consent.** (1) The director of the department of public health and human services shall prescribe the form for an application for a marriage license, which must include the following information:
>
> (a) name, sex, address, [social security number,] and date and place of birth of each party to the proposed marriage;
>
> (b) if either party was previously married, the party's name and the date, place, and court in which the marriage was dissolved or declared invalid or the date and place of death of the former spouse;
>
> (c) name and address of the parents or guardian of each party; and

> (d) whether the parties are related to each other and, if so, their relationship.
>
> (2) The director of the department of public health and human services shall prescribe the forms for the marriage license, the marriage certificate, and the consent to marriage.
>
> [(3) The license, certificate, or consent may not contain the social security number, and the department shall keep the number from this source confidential, except that the department may use the number in administering Title IV-D of the Social Security Act.]
>
> (4) The information contained in the marriage license application is subject to the disclosure restrictions provided in 50-15-122(5). (*Bracketed language terminates on occurrence of contingency—sec. 1, Ch. 27, L. 1999.)*

Thus, the director of the department of public health and human services is charged with providing the forms for application of a marriage license, the marriage license, the marriage certificate and the consent to marriage. Name and date are required on the application form and presumably are also found on most marriage licenses and certificates. With your opinion request, you included a copy of the marriage license form and marriage certificate used in Gallatin County. Both forms use the expression "A.D." and the certificate of marriage uses the phrase "in the year of our Lord." It is the government-sanctioned use of these expressions and phrases that gives rise to your opinion request.

Generally, it has been the policy of the Attorney General's Office to refrain from issuing opinions regarding the constitutionality of statutes. 48 Op. Att'y Gen. No. 12 at 17 (Mont. 2000). However, because you question not the constitutionality of a statute, but whether a specific government action violates the Establishment Clause, I provide the following discussion.

The constitutions of the United States and of Montana have identical clauses that prohibit the establishment of religion. The United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting free exercise thereof." U.S. Const. amend. I. And, the Montana Constitution provides: "The state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." Mont. Const. art. II, § 5.

The Montana Supreme Court's Establishment Clause jurisprudence does not shed much light on your question. And while the Montana Supreme Court has, in certain instances, stated it will not march "lockstep" with the United States Supreme Court, the Montana Court has looked to the United States Supreme Court in its Establishment Clause cases.[1]

Montana Supreme Court case law regarding Montana's Free Exercise or Establishment Clause has dealt primarily with issues concerning education and employment. See Davis v. Church of Jesus Christ of Latter Day Saints, 258 Mont. 286, 852 P.2d 640 (1993); Wolfe v. Department of Labor & Indus., Bd. of Personnel Appeals, 255 Mont. 336, 843 P.2d 338 (1992); In re S.P., 241 Mont. 190, 786 P.2d 642 (1990); Miller v. Catholic Diocese, 224 Mont. 113, 728 P.2d 794 (1986); and State ex rel. Chambers v. School Dist., 155 Mont. 422, 472 P.2d 1013 (1970). The Montana Supreme Court has not heard a challenge, such as the question you have posed, regarding ceremonial deism, a term coined by former Yale Law School Dean Walter Rostow in 1962 and since used by the United States Supreme Court. See Steven B. Epstein, Article: Rethinking the Constitutionality of Ceremonial Deism, 96 Colum. L. Rev. 2083, 2091 (1996) (hereafter "Epstein"); County of Allegheny v. ACLU, 492 U.S. 573, 595 (1989). Thus, in order to answer your question, I must turn to the Supreme Court for guidance.

The term "ceremonial deism" has been used by the Supreme Court to signify practices like the designation of "In God We Trust" as our national motto, or the references to God contained in the Pledge of Allegiance, and the Court has concluded that such practices survive Establishment Clause scrutiny because they have lost through rote repetition any significant religious content. Epstein, 96 Colum. L. Rev. at 2091.

I would characterize the use of the expression "A.D." or the phrase "in the year of our Lord" as a form of ceremonial deism. The United States Supreme Court's decisions in Lynch v. Donelly, 465 U.S. 668 (1984), and County of Allegheny v. ACLU, 492 U.S. 573 (1989), indicate that it is the type of religious reference that will be considered to be constitutional under the Establishment Clause because it does not serve as an endorsement of religion.

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[1] See In re S.P., 241 Mont. 190, 786 P.2d 642 (1990); and Miller v. Catholic Diocese, 224 Mont. 113, 728 P.2d 794 (1986), in which the Montana Supreme Court incorporates by reference the Lemon test used by the United States Supreme Court for determining whether government conduct or aid violates the Establishment Clause: (1) does the conduct or aid have a secular purpose, (2) is the primary effect of the conduct or aid to advance or inhibit religion, and (3) does the conduct or aid foster excessive government entanglement in religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

In Lynch, residents of Pawtucket, Rhode Island and the ACLU brought an action challenging the city's inclusion of a crèche in its annual Christmas display. The display also included a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, and carolers. Id. at 670. The Supreme Court ruled that inclusion of the crèche was not a violation of the Establishment Clause. 456 U.S. at 687. The Court began its analysis by noting that "total separation [between church and state] is not possible in an absolute sense" and that in every Establishment Clause case the Court must reconcile "the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has so often noted, total separation of the two is not possible." Id. at 672.

The Court looked to whether a secular purpose existed for display of the crèche and found that legitimate secular purposes did in fact exist. Id. at 681. The Court noted that the display was sponsored by the city to celebrate the holiday season and to depict the origins of that holiday. Id. Based upon that finding, the Court held that the City of Pawtucket had not impermissibly advanced religion and that the inclusion of the crèche did not create an excessive entanglement between religion and government, and was therefore constitutional. Id. at 687.

In her concurring opinion, Justice O'Connor elaborated on the Court's Establishment Clause analysis. Noting that the crèche was part of a display that celebrated a public holiday with strong secular components and traditions, Justice O'Connor stated:

> These features combine to make the government's display of the crèche in this particular physical setting no more an endorsement of religion than such governmental "acknowledgments" of religion as legislative prayers of the type approved in Marsh v. Chambers, 463 U.S. 783 (1983), government declaration of Thanksgiving as a public holiday, printing of "in God We Trust" on coins, and opening court sessions with "God save the United States and this honorable court." Those government acknowledgements of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. **For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs.**

456 U.S. at 692-93 (O'Connor, J., concurring) (emphasis added).

In County of Allegheny v. ACLU, 492 U.S. 573 (1989), the Court essentially adopted the "endorsement analysis" set forth by Justice O'Connor in her concurring opinion in Lynch. The Court noted that while there was a divergence among the members of the Court in Lynch, the Justices did agree with the basic constitutional principle that "the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context." Id. at 597.

The context of the religious symbols on display in Allegheny was central to the Court's decision. At issue was the display of a crèche and a Chanukah menorah in two separate holiday displays at the Allegheny County Courthouse. Applying the endorsement analysis articulated by Justice O'Connor, the Court concluded that because of the prominent placement of the crèche and the overriding Christian message of the display (Glory to God for the birth of Jesus Christ), unlike the crèche in Lynch, the Allegheny display was in fact a violation of the Establishment Clause and thus unconstitutional. 492 U.S. at 601.

The Court, however, reached the opposite conclusion when considering the display of the menorah. Id. at 620-21, 109 S. Ct. at 3115. The Court noted that because the government may celebrate Christmas as a secular holiday, it necessarily may also celebrate Chanukah as a secular holiday. 492 at 615. The Court found the display of the menorah, which stood next to a Christmas tree and a sign saluting liberty, to be more analogous to the holiday display in Lynch. Id. at 620. Thus, the Court found that because the display of the menorah did not constitute an endorsement of religion, it did not violate the Establishment Clause and was constitutional.

Based upon the endorsement analysis set forth by the Supreme Court, it is my opinion that the use of the expression "A.D" or the phrase "in the year of our Lord" on a marriage license or certificate of marriage does not violate the Establishment Clauses of either the United States or Montana Constitution. The religious reference to "A.D." or "in the year of our Lord" to signify the calendar year on marriage licenses and certificates of marriage is more in line with such governmental "acknowledgments" of religion as legislative prayers, the reference to a deity in orders of the Chief Executive, the governmental declaration of Thanksgiving as a public holiday, printing of "in God We Trust" on coins, the Supreme Court opening its sessions with "God save the United States and this honorable court," and the reference to God in the Preamble of the Montana Constitution.

In this case, the use of the words in question also has a purely secular purpose that goes beyond these ceremonial usages. The Montana legislature adopted the Gregorian

calendar as the official calendar for the state in 1895. Mont. Code. Ann. § 1-1-302. It is not an exaggeration to say that every action taken by the State in some ways refers to a calendar using the reference "A.D." No other calendar is in wide use in the western world, and it is inevitable that public documents will contain references such as A.D. or "year of our lord." When the State uses such references, it does not endorse any religious belief, but rather merely makes use of the existing and virtually universally acknowledged calendar by which time is measured in our world.

For the above stated reasons, I would conclude that the use of the expression "A.D" (Anno Domini) or the phrase "in the year of our Lord" on a marriage license or certificate of marriage does not violate the Establishment or Free Exercise Clause of either the United States or Montana Constitution.

This letter should not be construed as a formal Opinion of the Attorney General.

Sincerely,

CIVIL SERVICES BUREAU

ALI SHEPPARD
Assistant Attorney General

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