November 2, 2005

Mr. Steven J. Shapiro
Boulder City Attorney
9 Friendship Lane, Suite 100
Montana City, MT 59634

Re: Official Misconduct Statute

Dear Mr. Shapiro:

You have requested an opinion from the Attorney General regarding questions arising from the Montana Supreme Court's decision in State v. Conrad, 197 Mont. 406, 643 P.2d 239 (1982). In Conrad, the Court held that Mont. Code Ann. § 45-7-401(1)(e), which defines the offense of official misconduct to include "knowingly conduct[ing] a meeting of a public agency in violation of Mont. Code Ann. 2-3-203," was unconstitutionally vague as applied to the facts of that case. Because the uncertainty that gave rise to the Conrad decision has been alleviated by subsequent action of the legislature, it has been determined that a letter of advice rather than a formal opinion is appropriate in response to your questions.

You inquire whether the decision voids Mont. Code Ann. § 45-7-401(1)(e) on its face or only as applied to the facts of the Conrad case. A determination that a statute is facially unconstitutional constitutes a holding that the statute is incapable of constitutional application to any set of facts. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982) ("A law . . . may . . . be challenged on its face as unduly vague, in violation of due process. To succeed, however, the complainant must demonstrate that the law is impermissibly vague in all of its applications."). Put another way, if the statute could be applied constitutionally to any conceivable state of facts, it cannot be declared facially invalid and its constitutionality can only be considered as applied. See Monroe v. State, 265 Mont. 1, 5, 873 P.2d 230, 232 (1994) (rejecting facial vagueness challenge to non-resident hunting statute on ground that "at least some applicants could determine whether they qualified as residents of Montana").

Judged by this standard, it seems clear that Conrad considered the constitutional issue only as applied to the facts of that case. The case arose in 1981 and involved an allegation that two county commissioners violated the statute by conducting a meeting to discuss, but not to act upon, a reorganization plan without notice to the third county commissioner. The timing of the case proved to be controlling of the outcome.

It appears that the official misconduct statute was amended in 1975 to add subsection (1)(e) punishing as official misconduct "knowingly conduct[ing] a meeting in violation of" Mont. Rev. Code Ann. § 82-3402, the predecessor to Mont. Code Ann. § 2-3-203. In 1975, that statute defined a "meeting" to include only gatherings of public officials "at which any action is taken." In 1977, the legislature amended Mont. Code Ann. § 2-3-203 by deleting the last-quoted words from the statute.

Thus, when Mont. Code Ann. § 45-7-401(1)(e) was adopted, a gathering at which no action was taken could not have been the subject of an official misconduct charge, since such an action was not within the scope of the open meeting statute. The Court held in Conrad that the 1977 amendment could not be applied to the 1975 statute absent express legislative incorporation. It applied this holding to conclude that the statute was unconstitutionally vague in that instance because it did not give fair warning that the conduct at issue in that case--holding a meeting at which no action was taken--would subject the officials to criminal sanction.

The reasoning in Conrad certainly does not exclude other constitutional applications of the statute. One obvious example would be the situation covered by the statute when it was enacted in 1975--the clandestine meeting at which some official action was taken. A party cannot complain about the vagueness of a statute that clearly applies to his own conduct. State v. Stubblefield, 283 Mont. 292, 295-6, 940 P.2d 444, 446 (1997); State v. Lilburn, 265 Mont. 258, 270, 875 P.2d 1036, 1043 (1994). It therefore would be my opinion that Conrad did not void the statute on its face.

Since Conrad did not exclude other constitutional applications of the statute, it is not necessarily surprising that the legislature did not immediately strike the statute from the code. In fact, it appears that the legislature took the contrary action by adopting legislation designed to correct the constitutional infirmity identified in the Conrad case. That action has been described in the September 28, 2004 letter you received from Gregory Petesch, Code Commissioner for the State of Montana, that was included with your request. I have reviewed Mr. Petesch's letter and agree with his analysis.

Therefore, it would be my opinion that Mont. Code Ann. § 45-7-401(1)(e) was not invalidated on its face by the decision in Conrad, and that the corrective action taken by the legislature in 1983 has cured the constitutional defect identified in that decision.

This letter of advice may not be viewed as a formal opinion of the Attorney General.

Sincerely,

CHRIS D. TWEETEN
Chief Civil Counsel

cdt/jym
c: Code Commissioner Gregory Petesch
Mr. Alec Hanson