

David E. Wanzenried  
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Billings, Montana 59106-2004

February 7, 2020

Jeff Mangan, Montana Commissioner of Political Practices  
Office of the Commissioner of Political Practices  
PO Box 202401  
Helena, Montana 59620-2401

RE: *Wanzenried v. Graybill, COPP-2020-DR-1 (formerly COPP-2020-CFP-2*

Dear Commissioner Mangan:

In an effort assist in your decision-making regarding the qualifications of individuals eligible to appear on the ballot in Montana for the Office of Attorney General, I offer the following information as a supplement to the Complaint filed with your office on Monday, February 3, 2020.

#### Facts

Whatever facts you establish in your decision will serve as the facts in the event I decide to appeal that decision. “A declaratory ruling is binding between the agency and the petitioner concerning the set of facts presented in the petition.” 1.3.229(1).

The Respondent has posted a response online. Comparing the facts he has offered next to mine, the undisputed facts of this matter are as follows:

September 22, 2015 - Respondent was admitted to the practice of law in Montana.

September 22, 2015 until sometime in 2016 - Respondent served as a law clerk for a judge.

*Note: The Respondent was exempt from the requirement of continuing education courses that year. “An active member is exempt from the continuing legal education requirement of these rules during the balance of the reporting year during which he or she is admitted.” MT Rules for Con’t Legal Education 4(F)(3).*

At some point in 2016 – Respondent moved to Washington from Montana to work for Susman Godfrey. Candidate Graybill practiced law in the Eastern District of Texas.

*Note: The Respondent did not practice law in Montana for the entire year. If, as the Respondent argues, he maintained his status as an active member of the Montana Bar while living and practicing outside of Montana, he had to have fulfilled the continuing education requirements of the Montana Bar during that period. It seems appropriate to ask the Respondent to produce documentation of having fulfilled the continuing education requirement during the year he practiced law outside Montana. MT Rules for Con't Legal Education 4(A), Active Member Minimum MCLE Requirements.*

At some point during his residence in the State of Washington, the Respondent registered to vote in Washington State.

## **RAPHAEL JC GRAYBILL**

<b>Registration Status</b>	Inactive
<b>Date of Birth</b>	02/20/1989
<b>Residential Address</b>	800 SENECA ST # 2507, SEATTLE, WA 98101
<b>County</b>	King

February 3, 2017 - The Respondent was licensed to practice law in the State of Washington.

At some point in 2017 - Respondent moved to Helena, Montana and began actively practicing law in Montana.

January 9, 2020 – The Respondent filed to appear on the Democratic Party primary ballot for the office of Attorney General.

March 9, 2020 - The filing period for candidates seeking public office closes.

June 2, 2020 – Montana conducts the 2020 primary election.

November 3, 2020 – Montana conducts the 2020 general election.

## Controversy

The dispute the Office of the Commissioner of Political Practices (COPP) must resolve is whether the Respondent meets the Constitutional requirements to be a candidate for the Office of Attorney General in either the primary election or general election.

### Issues in Need of Resolution before an Election

The COPP Complaint is intended to prevent Montana's electoral process as it applies to the Office of Attorney General from falling into disarray.

1. If the Respondent were to win the primary election in June, the Republican Party might well initiate an identical challenge. If such a challenge was successful, all the votes cast in the Democratic Party candidates in primary election would be nullified.
2. If such a challenge were undertaken just prior to absentee ballots being mailed in October, the election of Respondent's opponent would be all but assured.
3. If such a challenge was initiated after the Respondent was elected but prior to his being sworn into office and was ultimately successful, all the votes cast in the Democratic Party candidates in primary and for him general elections would be nullified.

The COPP Complaint is not about deciding the 2020 primary election through procedural maneuvering. That could have been accomplished by initiating this Complaint *after* the close of filing, *not before*. Instead, the Complaint is about ensuring the individual securing the Democratic Party nomination for Attorney General in the June 2020 primary will not be prevented from assuming the office in 2021 if she or he prevails in the 2020 general election.

### Confusion Arising from the Response to the Complaint

In the Response to the Complaint, the Respondent writes:

“Second, the Complaint argues that Graybill’s time in private practice ... in Seattle, WA does not count toward the “active practice” requirement. This was *literally* the “active practice” of law as defined by the Montana Supreme Court: the “representation of one of more clients in the practice of law.” Graybill maintained

his legal practice as an active member of the Montana Bar the entire time that he worked for Susman Godfrey.”

The Complaint states that working for an out-of-state law firm and practicing law *outside* of Montana does not meet the constitutional requirement of actively practicing law *in Montana*. It in no way addresses the issue of the Respondent’s status as a member of the Montana Bar.

In the Response, the Respondent writes:

“To assume the office of Attorney General, a successful candidate must be ‘an attorney in good standing admitted to practice law in Montana who has engaged in the active practice thereof for at least five years before election.’ Mont. Const., art. VI, sec. 3.”

The Respondent includes a footnote, enclosed with quotation marks around what appears to be a re-wording of the requirements to be eligible to be a candidate for Attorney General:

“Stated more clearly, this section provides that the Attorney General must be ‘an attorney in good standing to practice law in Montana who has engaged in the active practice [of law] for at least five years before election.’”

The re-wording changes the meaning of “engaged in the active practice thereof” without a citation to the source or context of this footnote.

Finally, the Respondent erroneously repeats the Constitutional requirements to be eligible to be a candidate for Attorney General Candidate a second time:

“The Constitution’s requirements are (1) Admission to the Montana Bar and (2) five years of active Montana bar status.”

Again, neither a citation to a source nor context are provided.

The source governing the requirements is Article VI, Section 3 on the Montana Constitution:

***Qualifications.*** (1) *No person shall be eligible to the office of governor, lieutenant governor, secretary of state, attorney general, superintendent of public instruction, or auditor unless he is 25 years of age or older at the time of his*

*election. In addition, each shall be a citizen of the United States who has resided within the state two years next preceding his election.*

*(2) Any person with the foregoing qualifications is eligible to the office of attorney general if an attorney in good standing admitted to practice law in Montana who has engaged in the active practice thereof for at least five years before election.*

### *Cross v. Van Dyke*

At the end of his Response, the Respondent includes a post-script, observing that *Cross v. Van Dyke (Cross)* is “inapplicable because it dealt with a substantively different requirement for Supreme Court Justices.” To the contrary, in that case, the Montana Supreme Court (Court) provided a useful discussion that will assist COPP in arriving at the correct decision on this Complaint.

In *Cross*, the Court provides guidance regarding how to read the Montana Constitution.

“In the construction of the state constitution, the intent of the framers of the constitution is controlling and that intent must first be determined from the plain language of the words used.”

This guidance, if one takes the time to read the entire opinion, goes to the very heart of the issue to be decided by you, namely, what was really intended by the term “admitted to practice law in Montana who has engaged in the active practice thereof for at least five years before election.”

When “interpreting the state constitution, if possible, effect must be given to every section and clause,” the Court continues.

Finally, the Court writes, understanding the Montana Constitution involves a “process of reading relevant statutory schemes in their entireties is what allows the Supreme Court to give true effect to the will of the Legislature.”

The decision in *Cross* also includes an extensive discussion about the qualifications for Attorney General and how dissimilar they are from a Montana Supreme Court Justice. The key to understanding the thrust of the Complaint arises from this part of the decision:

“On February 24, 1972, the delegates debated the Executive Article. When the topic turned to qualifications for Attorney General, Delegate Joyce ... explained

that the Executive Committee's intention was to “put the Attorney General on the same status as the district judge, that he'd have to practice law in Montana for 5 years, learn the procedure of Montana so, therefore—so that he could then be a good, qualified, experienced lawyer when he became Attorney General....” Mont. Const. Conv., Vol. IV, at 895.

*Cross* is applicable to the Complaint.

### Proceedings of the Montana Constitutional Convention

Fortunately for Montanans, the proceedings of the 1972 Constitutional Convention are available online.

The Court's citation in *Cross* of Delegate Joyce's words (cited in the previous section) is clear regarding the intent of the Convention's Executive Committee as far as it goes. However, if one reads the Proceedings just beyond that quote, Delegate Heliker states: “I think Mr. Joyce has now clarified the point that became confused in his conversation with Mr. Studer — that he does mean practice law for 5 years in the State of Montana....” *MT Constitutional Convention*, Vol. IV, at 895-896.

That statement supplements the words of Delegate Joyce.

However, in terms of the intent of the Delegates regarding the qualifications of an individual to serve as Attorney General, there is an invaluable exchange between several Delegates as they discuss what is termed a ‘five year residency requirement’ as they seek to clarify the plain meaning of the words as they now appear in the Montana Constitution:

DELEGATE HELIKER: What is the purpose of the 5-year residency requirement?

DELEGATE JOYCE: Not 5 years' residency, 5 years admitted to practice law.

DELEGATE HELIKER: In Montana?

DELEGATE JOYCE: Yes.

DELEGATE HELIKER: It's the same thing, isn't it?

CHAIRMAN AASHEIM: Will you direct, each question to the Chair?

DELEGATE HELIKER: Mr. Chairman.

CHAIRMAN AASHEIM: Mr. Heliker.

DELEGATE HELIKER: Will Mr. Joyce yield to a question?

CHAIRMAN AASHEIM: Mr. Joyce, will you answer the question?

DELEGATE JOYCE: Mr. Chairman, I will.

DELEGATE HELIKER: Now, as I understand this — as I read it, you're requiring that he be an attorney in good standing, admitted to practice law in the State of Montana and

having engaged in the active practice thereof for 5 years. By 5 — by “thereof” you mean in the State of Montana, don’t you?

DELEGATE JOYCE: Yes.

DELEGATE HELIKER: So you are requiring residency in the State of Montana, aren’t you?

CHAIRMAN AASHEIM: Mr. Joyce.

DELEGATE JOYCE: Yes, I guess we are — by indirection, yes.

*MT Constitutional Convention*, Vol. IV, at 893.

There is no question that the framers of the Constitution intended that an individual seeking the office of Attorney General must have practiced law *in* Montana for five years.

### Conclusion

Unfortunately, the tone of the Respondent’s response to the serious issues raised by the Complaint is dismissive. It suggests a disappointing level of maturity and seasoning.

In the process of responding, the Respondent misstates the candidacy requirement that are at issue. He suggests erroneously that it is “5 years of active Montana Bar status” and ignores the actual standard clearly intended by the drafters, namely, that the requirement be met only by five years of actual practice in Montana.

The word “election” is not defined in the Montana Constitution. However, it is clearly defined by statute in Montana to include a general, special or primary election.

As of June 3, 2020, the date of Montana’s primary election, the Respondent will not have practiced law in Montana for five years pursuant to the clear, Constitutional meaning of that requirement.

Likewise, as of November 3, 2020, the Respondent will not have practiced law in Montana for five years pursuant to the clear, Constitutional meaning of that requirement.

The Respondent does not meet the Constitutional requirements to be a candidate for the Office of Attorney General and his name should not appear on either the primary or general election ballot in Montana in 2020.

Thank you for the opportunity provide supplemental legal arguments and factual evidence.

Respectfully,

David E Wanzenried

A copy of this letter was mailed on February 8, 2020