

VOLUME NO. 33

Opinion No. 20

ELECTIONS - Judicial candidates - Right to withdraw - Removal of name from ballot. Title 23, chapters 33 and 45, R.C.M. 1947.

- HELD:**
- 1. A candidate for nomination to a judicial office may withdraw after the deadline for filing a declaration for nomination and before the primary nominating election by filing a statement of withdrawal with the secretary of state's office.**
 - 2. Upon such withdrawal, the former candidate's name is removed from the judicial primary ballot at the direction of the secretary of state.**

May 21, 1970

Honorable Frank Murray
Secretary of State
State Capitol
Helena, Montana 59601

Dear Mr. Murray:

You have requested my opinion on the following questions:

1. May a candidate for nomination to a judicial office withdraw after the deadline for filing declaration for nomination and before the primary nominating election, and may I accept and

file the statement of withdrawal here tendered by Mr. John P. Acher?

2. If the answers to the foregoing questions are affirmative, is the candidate's name to be removed from the judicial primary ballot, and is my office authorized by law to direct the several county clerks and recorders to delete the candidate's name from the ballot?

1. Montana's laws concerning party nominations by the direct primary were originally enacted by initiative measure in 1912 and at the time of their repeal by the 1969 legislative assembly, they were substantially the same laws as when they were originally enacted. Nowhere in the pre-1969 law was there a provision specifically allowing or disallowing a candidate for any public office to withdraw from the race before the primary election. However, the question concerning the right of a candidate to withdraw was posed to Attorney General Foot in 1928 and, after studying a prior opinion that held a candidate may not withdraw before the primary (7 **Opinions of the Attorney General** 253) Attorney General Foot stated:

"I have studied that opinion and the statutes therein cited and must say that I am not able to agree with the conclusion therein stated under our present system of nominating candidates for office. I do not find any statutory provision that in any way attempts to prohibit a candidate from withdrawing before the primary election . . .

"It is therefore my opinion that a **candidate has the right to withdraw at any time before the primary elections.**" (12 **Opinions of the Attorney General** 311) (Emphasis supplied.)

The right of a candidate to withdraw from a primary election under our old election laws was also indirectly recognized in 10 **Opinions of the Attorney General** 352 and 20 **Opinions of the Attorney General** 299.

Our new election laws were passed by the 1969 legislative assembly. The statutes dealing with primary elections and nominations are contained in chapter 33 of Title 23, R.C.M. 1947. As before, there is no specific provision in the new law regarding a candidate's withdrawal from a primary election race. However, in light of the above-mentioned attorneys' general opinions dealing with the old law and the basic substantive similarity between the old and new election laws, it is my opinion that under our new law a candidate for office may withdraw after the deadline for filing a declaration and before the primary nominating election. The fact that the candidate in the instant

case was running for a nonpartisan judicial office under section 23-4501, R.C.M. 1947, et seq., does not alter the effect of this opinion in any way. Under section 23-4502, R.C.M. 1947, nonpartisan candidates, like other election candidates, are nominated according to the same above-mentioned primary election laws so far as these laws are consistent with the provisions of chapter 45 of Title 23, R.C.M. 1947, dealing with the nonpartisan election of judges.

2. The fundamental purpose of all election laws is to enable the voters to exercise a free, orderly, and intelligent choice. There can be no good reason why a ballot should contain the name of a person who is not in fact a candidate for nomination (e.g., one who lawfully withdraws), even though the candidate may once have taken the steps which entitle him to become a candidate. The presence of a withdrawn candidate's name could only operate to deprive uninformed electors of their votes, to the injury of one or more of the actual candidates, and to the possible perversion of the true populace will. To allow the ballot to go before the voters with the name of a withdrawn candidate would be to elevate form above substance. It seems the election statutes contemplate a submission to the electors of a choice between persons who are candidates in fact. **Bordwell v. Williams**, 159 Pac. 869 (Cal.), and **Felt v. Waughop**, 225 Pac. 862 (Cal.).

The declaration of nomination for judicial officers of the state supreme and district courts must be filed with the secretary of state pursuant to section 23-3304, R.C.M. 1947, and section 23-4503, R.C.M. 1947. The secretary of state then arranges the names and other information concerning the candidates and transmits the same to each registrar. See sections 23-3307 and 23-4504, R.C.M. 1947. Therefore, the secretary of state's general powers with regard to elections allow him to notify and direct the clerks and recorders to eliminate a withdrawn candidate's name from the primary election ballot.

The third question you present in your letter requires an administrative rather than a legal definition. The most effective means of removing a withdrawn candidate's name from the ballot should be used. The particular method of removal for different counties and factual situations may be determined by your office.

THEREFORE, IT IS MY OPINION that:

1. A candidate for nomination to a judicial office may withdraw after the deadline date for filing a declaration for nomination and before the date of the primary nominating election by filing a statement of withdrawal with the secretary of state's office.

2. Upon the withdrawal by the said candidate, his name is removed from the judicial primary ballot at the direction of the secretary of state.

Very truly ours,

ROBERT L. WOODAHL
Attorney General