

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES OF THE STATE OF MONTANA

Merwin v. Cooney No. COPP 2020-CFP-051	FINDING OF SUFFICIENCY FACTS TO SUPPORT A CAMPAIGN PRACTICE VIOLATION
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On October 28, 2020, Montana Republican Party Executive Director Spenser Merwin filed a campaign practices complaint against Mike Cooney, a candidate for the office of Montana Governor. The complaint alleged that candidate Cooney accepted prohibited in-kind corporate contributions via the provision of legal services to the campaign from an incorporated law firm and/or failed to report campaign expenditures associated with the provision of these legal services.

**SUBSTANTIVE ISSUES ADDRESSED**

Proper and timely disclosure of campaign obligations and debts.

**FINDINGS OF FACT**

The foundational facts necessary for this Decision is as follows:

Finding of Fact No. 1: Mike Cooney filed a C-1 Statement of Candidate as a Democratic candidate for the office of Governor of Montana with the COPP on July 2, 2019. (Commissioner's Records)

Finding of Fact No. 2: The law firm Perkins Coie, LLP represented candidate Cooney in the matters of *Merwin v Cooney*, COPP-2020-CFP-034, filed on August 20, 2020 and *Foundation for Accountability and Civic Trust v. Cooney*, COPP-2020-CFP-036A,

filed on September 3, 2020. Both matters were decided on October 16, 2020.<sup>1</sup> (Commissioner's Records)

Finding of Fact No. 3: On November 2, 2020, Jonathan Berkon of Perkins Coie, LLP emailed the COPP in response to this complaint. Throughout, the response refers to candidate Cooney as "the Committee". This response stated that Perkins Coie:

charges a standard hourly rate to Democratic campaigns for its legal services (the rate differs by attorney) and the Committee was charged these standard hourly rates. Unlike with other contracted services...there is no basis to accurately estimate the amount that a campaign might owe Perkins Coie at the end of a monthly billing period, before the period ends. It would be purely speculative.

Perkins Coie provided legal services to the Committee in the following amounts:

- For the period July 1 to July 31, Perkins Coie provided \$892.50 in legal services to the Committee. Perkins Coie sent the invoice for July legal services to the Committee on August 31, 2020. These legal services were unrelated to Mr. Merwin's complaint and the FACT complaint.
- For the period August 1 to August 31, Perkins Coie provided \$3,257.20 in legal services to the Committee. Perkins Coie sent the invoice for August services to the Committee on September 23, 2020. It was due on October 21, 2020. It was during this period that Perkins Coie drafted the response to Mr. Merwin's complaint.
- For the period September 1 to September 30, Perkins Coie provided \$6,208.82 in legal services to the Committee. Perkins Coie sent the invoice for September services to the Committee on November 2, 2020. It is due on November 30, 2020. It was during this period that Perkins Coie drafted the response to the FACT complaint.

The response noted that candidate Cooney had properly reported payment of the \$892.50 July obligation on campaign financial reports; would amend the relevant financial report to include the \$3,257.20 August obligation as a debt owed; and that the

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[http://politicalpractices.mt.gov/Portals/144/2020%20Decisions/Merwin\\_FACT%20v%20Cooney%20SD.pdf?ver=2020-10-16-150121-893](http://politicalpractices.mt.gov/Portals/144/2020%20Decisions/Merwin_FACT%20v%20Cooney%20SD.pdf?ver=2020-10-16-150121-893)

campaign at that time was not required to report the \$6,208.82 September obligation as a debt owed. (Commissioner's Records)

Finding of Fact No. 4: On August 20, 2020, candidate Cooney filed a Periodic C-5 campaign finance report, dated June 16, 2020 through August 15, 2020. This report did not disclose any expenditures made or debts owed by the campaign to Perkins Coie, LLP. (Commissioner's Records)

Finding of Fact No. 5: On September 20, 2020, candidate Cooney filed a Periodic C-5 campaign finance report, dated August 16, 2020 through September 15, 2020. This report disclosed the campaign as making one (1) expenditure to Perkins Coie, LLP on September 3, 2020 in the amount of \$892.50 for "Legal- 8/7/20 Political Law Advise". (Commissioner's Records)

Finding of Fact No. 6: On October 22, 2020, candidate Cooney filed a Periodic C-5 campaign finance report, dated September 16, 2020 through October 14, 2020. This report did not disclose any expenditures made or debts owed by the campaign to Perkins Coie, LLP. (Commissioner's Records)

Finding of Fact No. 7: On November 2, 2020, candidate Cooney filed an Amended version of his September 16, 2020 through October 14, 2020 C-5 campaign finance report. This amended version of the report included one (1) debt owed by the campaign to Perkins Coie, LLP in the amount of \$3,25.20 for "Legal Services covering 8/1/2020-8/28/2020". (Commissioner's Records)

## **DISCUSSION**

In this matter, complainant Merwin correctly notes that the Cooney campaign utilized the law firm of Perkins Coie, LLP to help prepare its responses to several recent formal Campaign Finance and Practices complaints. The complaint alleges that candidate Cooney either a) accepted in-kind contributions from Perkins Coie, an incorporated entity, in violation of §13-35-227, MCA by accepting these legal services free of charge, or else b) failed to report expenditures associated with the provision of these legal services.

### *Corporate contributions*

Candidate Cooney was billed the applicable rate for all legal services provided (FOF No. 3). Because candidate Cooney was charged for these services, they would not qualify as a contribution received under §13-1-101(9), MCA. The allegation the Cooney campaign accepted a corporate contribution is hereby dismissed.

### *Reporting expenditures*

Based on their response, Perkins Coie provided candidate Cooney with \$892.50 in legal services during the month of July, services unrelated to either the *Merwin* or *Foundation for Accountability and Civic Trust* complaints (FOF No. 3). Similarly, Perkins Coie provided candidate Cooney with \$3,257.00 in legal services during the month of August, including preparing the campaign's response in the *Merwin* complaint (FOF No. 3). The campaign incurred expenses for legal services in July and August, but did not remit payment at that time. Invoices were provided to the campaign by Perkins Coie at a later date.

44.11.502(2), ARM, states that "An obligation to pay for a campaign expenditure is incurred on the date the obligation is made, and shall be reported as a debt of the campaign until the campaign pays the obligation by making an expenditure" (emphasis added) and disclosure required under Mont. Code Ann. §13-37-229(2)(a)(vi), "the amount and nature of debts and obligations owed by a ... candidate". In this matter, candidate Cooney incurred obligations of \$892.50 and \$3,257.00 to Perkins Coie during the June 16, 2020

through August 15, 2020 reporting period. Under the requirements of 44.11.502(2), ARM, candidate Cooney was required to report these obligations as debts owed on that report, as the date each obligation was incurred fell in that window. Candidate Cooney did not report either obligation as a debt owed on the June 16-August 15 campaign finance report. Instead, candidate Cooney reported the \$892.50 July obligation as an expenditure on his August 16, 2020 through September 15, 2020 C-5 report (FOF No. 5). Candidate Cooney did not report his \$3,257.00 August obligation in any fashion prior to receipt of this complaint (FOF Nos. 4-6). The September 16, 2020 through October 14, 2020 campaign finance report was amended by the Cooney campaign to include this obligation as a debt owed by the campaign to Perkins Coie post-complaint (FOF Nos. 3, 7). The Cooney campaign did not properly report its July obligation of \$892.50 or its August obligation of \$3,257.00 as debts owed on the relevant campaign finance report, violations of Mont. Code Ann. § 13-37-229(2)(a)(vi) and 44.11.502(2), ARM.

Perkins Coie also provided the Cooney campaign with \$6,208.82 in legal services in the month of September, including preparing the campaign's response in the *Foundation for Accountability and Civic Trust* complaint (FOF No. 3). As with the July and August legal services, the Cooney campaign was billed for these services but did not immediately provide payment to Perkins Coie.

Under 44.11.502(2), ARM, candidate Cooney was required to report this obligation as a debt owed on either the August 16, 2020 through September

15, 2020 or September 16, 2020 through October 14, 2020 finance report, depending on the exact date in September the obligation to pay for these legal services was incurred. As of November 2, 2020, the Cooney campaign had not disclosed this obligation on any of its campaign finance reports filed (FOF Nos. 4-7).

Under 44.11.502(2), ARM, an obligation is incurred “on the date the obligation is made, and shall be reported as a debt of the campaign”. As this obligation was incurred by the Cooney campaign in September, Montana’s campaign finance rules required it be reported as a debt on a campaign finance report covering the month of September. Despite incurring this obligation in September, Candidate Cooney did not disclose this obligation as a debt owed on either his August 16, 2020 through September 15, 2020 or September 16, 2020 through October 14, 2020 campaign finance reports. The Cooney campaign failed to properly disclose this \$6,208.82 obligation as a debt owed, a violation of Mont. Code Ann. § 13-37-229(2)(a)(vi) and 44.11.502(2), ARM.

In its response, Perkins Coie also argues that the Cooney campaign could not have known the amount owed to Perkins Coie for legal services provided until the moment the invoice was received by the campaign. Montana campaign finance rules require a candidate or political committee to report the estimated amount owed if the full obligation is not yet known. 44.11.506(2), ARM, specifies that “If the exact amount of a debt or obligation is not known, the estimated amount owed shall be reported, and the basis for the estimated amount shall be reduced to writing and retained for inspection”. Perkins Coie

and the Cooney campaign could have agreed on an estimated amount for each obligation and utilized that estimate for reporting purposes, knowing the finance report could always be amended at a later time to reflect the true amount. It appears such an estimate was never determined between Perkins Coie and the campaign, nor reduced for writing and retained for inspection as required. The Cooney campaign had a duty to estimate and report the amount of each obligation and disclose as debts owed on each of its July, August and September reports prior to receipt of the invoices by Perkins Coie.

### **FINDINGS**

Sufficiency Finding No. 1: Candidate Cooney failed to properly report campaign debt on three occasions in the amount of \$10,358.52.

This Commissioner hereby determines that sufficient facts exists to show that Candidate Cooney has, as a matter of law, violated Montana's campaign practice laws, specifically Mont. Code Ann. § 13-37-229(2)(a)(vi). Candidate Cooney amendments of expenditure and debt activity on campaign finance reports following the receipt of the complaint and any subsequent disclosures of campaign debt as described in this matter will be a mitigating factor in any civil penalty assessed by the COPP.

### **DECISION**

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner "shall investigate" any alleged violation of campaign practices law. Mont. Code Ann. § 13-37-111(2)(a). The mandate to investigate is followed by a mandate to take action; where there is "sufficient evidence" of a violation the Commissioner

must (“shall notify,” *see id.*, at § 13-37-124) initiate consideration for prosecution.

Second, having been charged to make a decision, the Commissioner must follow substantive law applicable to a particular campaign practice decision. This Commissioner, having been charged to investigate and decide, hereby determines that there is sufficient evidence to show that Mike Cooney violated Montana’s campaign practice laws, including, but not limited to the laws set out in the Decision. Having determined that sufficient evidence of a campaign practice violation exists, the next step is to determine whether there are circumstances or explanations that may affect prosecution of the violation and/or the amount of the fine.

The failure to fully and timely report and disclose cannot generally be excused by oversight or ignorance. Excusable neglect cannot be applied to oversight or ignorance of the law as it relates to failures to file and report. *See Matters of Vincent*, Nos. COPP-2013-CFP-006, 009 (discussing excusable neglect principles). Likewise, the Commissioner does not normally accept that failures to file or report be excused as *de minimis*. *Id.* (discussing *de minimis* principles).

Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable to the above Sufficiency Findings, a civil fine is justified. Mont. Code Ann. § 13-37-124. The Commissioner hereby issues a “sufficient evidence” Finding and Decision justifying a civil fine or civil prosecution of candidate Cooney. Because of the

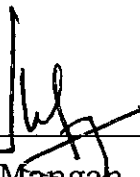


nature of the violation, this matter is referred to the County Attorney of Lewis and Clark County for his consideration as to prosecution. *Id.*, at (1). Should the County Attorney waive the right to prosecute (*id.*, at (2)) or fail to prosecute within 30 days (*id.*, at (1)) this Matter returns to this Commissioner for possible prosecution.

Most of the Matters decided by a Commissioner and referred to the County Attorney are waived back to the Commissioner for his further consideration. Assuming that the Matter is waived back, this Finding and Decision does not necessarily lead to civil prosecution as the Commissioner has discretion (“may then initiate” *see id.*) in regard to a legal action. Instead, most of the Matters decided by a Commissioner are resolved by payment of a negotiated fine. In setting that fine the Commissioner will consider matters affecting mitigation, including the cooperation in correcting the issue when the matter was raised in the Complaint.

While it is expected that a fine amount can be negotiated and paid, in the event that a fine is not negotiated and the Matter resolved, the Commissioner retains statutory authority to bring a complaint in district court against any person who intentionally or negligently violates any requirement of campaign practice law, including those of Mont. Code Ann. § 13-37-229(2)(a)(vi). *See id.*, at § 13-37-128. Full due process is provided to the alleged violator because the district court will consider the matter *de novo*.

DATED this 12<sup>th</sup> day of November 2020.



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Jeffrey A Mangan  
Commissioner of Political Practices  
Of the State of Montana  
P. O. Box 202401  
1209 8<sup>th</sup> Avenue  
Helena, MT 59620  
Phone: (406)-444-3919