

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

<p>Clark v. Datsopoulos, MacDonald and Lind, P.C. and T.J. McDermott</p> <p>No. COPP 2014-CFP-033A</p>	<p style="text-align: center;">Summary of Facts and Findings of Sufficient Evidence to Show a Campaign Practice Violation by Datsopoulos, MacDonald and Lind, PC</p> <p style="text-align: center;">Please See Companion Decision 033B for a Decision regarding T.J. McDermott</p>
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On August 20, 2014, Joshua Clark, a resident of Missoula, MT filed a complaint against the law firm of Dastopoulos, MacDonald and Lind, P.C. (DM&L) and Terry (T.J.) McDermott, also a resident of Missoula, MT and the current Democratic nominee for Missoula County Sheriff . Mr. Clark's complaint alleged that DM&L and Candidate McDermott carried out separate but related actions that resulted in violations of Montana's campaign practice laws. The Commissioner, because of the partly disparate activities of DM&L and Candidate McDermott, split the complaint (33A and 33B) between the two entities and is issuing a separate Decision for each.

Foundational Facts

The foundational facts necessary for this Decision are as follows:

Finding of Fact No. 1: The Missoula County Sheriff/Coroner position is a partisan position with a term of 4 years. Carl Ibsen, current Missoula County Sheriff since November of 2010, did not run for re-election in 2014. (Commissioner's records, Missoula County Election's Office).

Finding of Fact No. 2: Three candidates ran for the position of Missoula County Sheriff in the 2014 Democratic primary election: Joshua Clark, Terry (T.J.) McDermott and Robert Parcell. There were no Republican Party candidates. (Commissioner's records, Missoula County Elections Office).

Finding of Fact No. 3: On June 3, 2014, a primary election was held. Candidate Parcell received 2,409 votes, Candidate Clark received 4,153 votes and Candidate McDermott received 7,139 votes. Because there was no Republican candidate, Candidate McDermott became the elected Democratic nominee and, as such, the only candidate for Missoula County Sheriff listed on the November 4, 2014 ballot. (Commissioner's records).

Finding of Fact No. 4: On September 26, 2014 Joshua Clark filed to be a "write in" candidate in the November 4, 2014 election for Missoula County Sheriff. (Secretary of State's Office).

Finding of Fact No. 5: The law firm of Datsopoulos, MacDonald & Lind, P.C. is a corporation with Articles of Incorporation certified by the Secretary of State's Office since December 22, 1989. There is no current and active alternative organization, such as a partnership, operating under the name "DM&L" or other variation. (Secretary of State's Office).

Finding of Fact No. 6: DM&L became involved in McDermott primary election campaign contributing both cash and in-kind value in the manner described below. (Baseline fact, Commissioner's records).

DISCUSSION

Mr. McDermott was a candidate for elected office in the 2014 Missoula County primary election. (FOF No. 2). Montana law required that Candidate

McDermott file campaign finance reports “on the 12th day preceding the date on which an election is held...” and on 20th day after the election (§13-37-226(3) MCA). In 2014 the 12th day preceding the June 3 primary election was May 22, 2014 and 20th day after the election was June 23, 2014. (Commissioner’s 2014 filing schedule).

Candidate McDermott’s campaign finance reports must include “all contributions received and all expenditures made...” (§13-37-208 MCA) within the reporting period. Still further, Candidate McDermott’s campaign treasurer “shall keep detailed accounts of all contributions received...” (§13-37-208(1)(a) MCA). Candidate McDermott then “shall file periodic reports of contributions...” (§13-37-225(1) MCA), according to the schedules set out above. This system, if followed, provides transparency and fairness to the public, voters and the opposing candidate.

Montana law affects DM&L in two ways. First, DM&L is a corporation (FOF No. 5) and, as a corporation, is prohibited from directly using corporate funds in support of Candidate McDermott (§13-35-227 MCA). Second, the people of DM&L may act individually¹ or together in support of Candidate McDermott. If DM&L people act together they must register with the COPP as a political committee as Montana law requires registration as a political committee once two or more people act together to make a contribution or expenditure in support of a candidate. (§13-1-101(22) MCA).

¹ An individual is subject to a limit to the amount of contributions he or she can make to a candidate. §13-37-216 MCA, adjusted by inflation to the amounts published at 44.10.338 ARM.

A political committee, whether in the form of an independent or incidental committee, is required to timely register (§13-37-201 MCA) and timely file reports of campaign contributions and/or expenditures (§§13-37-225, 226 MCA).² This system, if followed, provides transparency and fairness to the public, voters and the opposing candidate.

DM&L's Contributions to Candidate McDermott

As explained above, there are reporting, disclosure, prohibition and amount limitations that may apply to any contributions going from DM&L people to the 2014 campaign of Candidate McDermott. DM&L, as a corporate entity, is prohibited by law from making any direct contribution, whether cash or in-kind, to Candidate McDermott.³ The Commissioner determines the following facts in regard to the contributions, both legal and illegal, by DM&L people and DM&L to the 2014 campaign of Candidate McDermott.

Finding of Fact No. 7: On May 5, 2014, the McDermott campaign created an event notification on Candidate McDermott's campaign Facebook page. Below Candidate McDermott's signature yellow and black banner it read, "Vote for TJ Missoula County – McDermott for Sheriff" the event posting read: "MEET & GREET – TJ MCDERMOTT FOR SHERIFF Thursday, May 8 at 5:30 pm in MDT, Datsopoulos, MacDonald & Lind P.C. in Missoula, Montana." When a member of the public double clicks on the bolded event link titled "Meet & Greet – TJ McDermott for Sheriff" it will take them to another page with further details that reads, "Thursday May 8 at 5:30 pm – 8:00 pm in MDT, Datsopoulos MacDonald & Lind, P.C., 201 W. Main St, Ste. 201, Missoula, Montana 59802. Hosted by Datsopoulos [sic] MacDonald & Lind

² A political committee is also subject to a limit to the amount of contributions it can make to a candidate. §13-37-216 MCA, adjusted by inflation to the amounts published at 44.10.338 ARM.

³ DM&L could have made an unlimited amount of independent expenditures, subject only to reporting and disclosure. DM&L, however, worked with and was not independent of the McDermott campaign thus subjecting the value of its actions to prohibitions and contribution limits.

P.C., Sheriff's Candidate TJ McDermott.” As of the date of this Decision, the posting still remains on Candidate McDermott’s campaign Facebook page. (T.J. McDermott campaign Facebook page: <https://www.facebook.com/pages/TJ-McDermott-for-Sheriff/366672136769412>).

Finding of Fact No. 8: On May 8, 2014, a fundraiser for Candidate McDermott was held at the DM&L offices. The McDermott fundraiser invitations were black in color on the outside with the initials “DM&L” embossed in gold. The invitations were designed by Darla Keck, a shareholder/attorney at DM&L. The invitations were printed at the DM&L offices using existing materials (cardstock) and were prepared by volunteers. Approximately 100 invitations were prepared - 52 invitations were delivered by hand (by Milt Datsopoulos, Darla Keck “and others”) and 48 were sent by U.S. Mail. The text inside the invitation read, “I am excited about the opportunity to support a uniquely qualified candidate T.J. McDermott for the office of sheriff of Missoula County. Please join me in supporting T.J. in this crucial election by meeting him at my offices on May 8, 2014, at 5:30 p.m. Milt Datsopoulos, Datsopoulos, MacDonald & Lind, 201 West Main, Suite 201, Missoula, MT 59802. Questions? Please call 406.728.0810 and ask for Darla Keck.” There is no attribution stating who paid for the invitation. (Investigative notes, DM&L’s response to the complaint).

Finding of Fact No. 9: Documentation provided in DM&L’s response to the complaint listed the material costs to DM&L for the May 8 McDermott fundraising as: \$83.70 for card stock, \$4.80 for 48 envelopes, \$10 ink for printing and use of equipment and \$23.52 for postage (“48 first class postage @.49). (Commissioner’s records).⁴

Finding of Fact No. 10: In addition to the above material costs DM&L estimated paid DM&L staff time used in hosting the event and the cost of the liquor and food used at the event. DM&L stated it wrote a check for \$1,575 to the food caterer⁵, but used the amount of \$430.90 as the reasonable estimate of the cost of food and alcohol actually used at the McDermott fundraiser. DM&L stated that the remaining food and alcohol was kept and used by DM&L for other events or by its employees. DM&L further stated that \$785.90 of paid DM&L staff time was used in hosting the McDermott fundraiser. (Commissioner’s records).

⁴ DM&L also produced an undated invoice from Milton Datsopoulos to the McDermott Campaign purporting to bill the campaign \$72.50 for invitation postage and printing. The Commissioner determines that the cost list is the more accurate summary of McDermott fundraiser postage and printing costs.

⁵ A corporate DM&L check dated May 21, 2014 was used to pay the \$1575 caterer bill. Four months later (September 29, 2014) the DM&L “partnership account” repaid the corporation using a non-corporate check.

Finding of Fact No. 11: The Commissioner determines that DM&L paid \$122.02 in invitation costs and \$1216.80 for a total of \$1338.02 in event costs associated with the McDermott fundraiser.

Finding of Fact No. 12. The Commissioner determines that Candidate McDermott's campaign also made campaign phone calls from the DM&L offices on other occasions, using items of value (office space, electricity, equipment) when it did so. There has been no estimated value provided by DM&L for this use.

Finding of Fact No. 13: The Commissioner determines that DM&L did not register (and has not registered) as a political committee. The Commissioner further determines that the values provided by DM&L to the McDermott campaign (FOF Nos. 11 and 12) were not otherwise reported by any DM&L person. (Commissioner's records).

Finding of Fact No. 14: The Commissioner determines that Candidate McDermott did not report the values provided by DM&L to the McDermott campaign (FOF Nos. 11 and 12). Those values, part of which were incurred for a May 8 event, should have been reported as an in-kind contribution on the McDermott campaign's pre-primary (or May 22) campaign finance report. (Commissioner's records).

Finding of Fact No. 15: The McDermott campaign's May 22, 2014 campaign finance report listed the following contributions from 10 attorneys working at DM&L : Milt Datsopoulos, \$170; Dennis Lind, \$170; Peter Lacny, \$170; Bill VanCanagan, \$170; Becky Summerville, \$170; Dave Cotner, \$170; Darla Keck, \$170; Terance Perry, \$170; J.R. Casillas, \$170; and Phillip McCreedy - \$170. (Commissioner's records).

Finding of Fact No. 16: DM&L's response to the complaint disclosed that 9 of the contributions listed in FOF No. 15 were made in a single check drawn on separate, non-corporate checking account managed for the benefit of DM&L lawyers. (Commissioner's records).

The above facts are interpreted within two guiding principles. First, DM&L argues consideration of civic purpose despite error, pointing out that it regularly provides its law office facility for use by the Missoula community, including use by candidates running for public office. In that vein, the Commissioner notes that DM&L has demonstrated civic purpose by its

cooperation and frankness during the investigation of this complaint as well as by stating its intent to cooperate in resolving the social debt for any errors on their part.

The second guiding principle is that of appropriate remediation of error thereby providing assurance to voters that the election of Missoula County's Sheriff is not coming with inappropriate favors owed to a group of lawyers. In that regard, Candidate McDermott was and is a candidate for a major position within the Missoula County justice system. With that in mind, voters will expect that DM&L, as a law firm, demonstrate it has remediated any appearance of indiscrete campaign actions by which it would appear to gain unfair leverage within the justice system.

Sufficiency Finding No. 1 The Commissioner determines that sufficient facts exist to show that DM&L expended more than \$1,338.82 through in-kind payments made by corporate funds in support of Candidate McDermott in violation of §13-35-227 MCA.

The Commissioner determines that the facts show that in-kind value was expended by DM&L, acting as corporation, in support of Candidate McDermott. This action is contrary to §13-35-227 MCA. The Commissioner understands that DM&L has already acted to have some of these payments, originally made by the corporation, reimbursed by the McDermott campaign. These actions, however, are after the fact and cannot excuse the finding of illegal corporate contributions. The corrective actions, however, will be a factor in settlement mitigation.

Sufficiency Finding No. 2: The Commissioner determines that sufficient facts exist to show that in-kind value provided by DM&L to the McDermott campaign was not reported or disclosed by any entity or person associated with DM&L.

The Commissioner determines that the facts show that the in-kind value expended by DM&L in support of Candidate McDermott was not and has not been reported or disclosed by any entity or person. The Commissioner has further determined that the group action involved in this in-kind value required the formation of a political committee. This failure to report action is contrary to §§13-37-201, 225 and 226 MCA. The Commissioner expects that any necessary registration and report filing will be made as part of the settlement of this Matter.

Sufficiency Finding No. 3: The Commissioner determines that sufficient facts exist to show that DM&L people acted as a group such that they became a political committee that failed to register and report as required by Montana law.

The Commissioner understands that DM&L has a non-corporate checking account that DM&L attorneys use to carry out civic purpose activities on behalf of the corporation through draws on the accounts of law firm shareholders. That checking account was used to make (via a single check) campaign contributions for 9 DM&L lawyers.⁶ This action met the political committee definition of §13-1-101(22) MCA, thereby triggering the registration

⁶ In this instance this method of single check payment for 9 individuals is suspect as political committees are subject to a single contribution limit. Individuals contributing individually need to do so with a check that does not implicate political committee formation. The political committee can make its contribution, in the amount allowed by law, via its own check. While earmarking can come into play, the method of payment used in this instance does not lend itself to that concept since the funds used for the contribution were placed in the partnership account by the DM&L corporation with reimbursement to occur later from shareholders.

requirements of §13-37-201 MCA. The failure of DM&L people to so register as a political committee is contrary to the law listed. The Commissioner expects that any necessary registration will be made as part of the settlement of this Matter.

Sufficiency Finding No. 4: The Commissioner determines that sufficient facts exist to show that the people of DM&L exceeded contribution limits in their support of Candidate McDermott.

The DM&L attorneys have given the full amount allowed by law in a monetary contribution (FOF No. 15). The responses of DM&L and Candidate McDermott there cannot avoid excess contribution issues by assigning in-kind contributions to individuals who have already contributed the maximum allowed by law. Excess contributions violate §13-37-216 MCA, adjusted by inflation to the amounts published at 44.10.338 ARM. The Commissioner expects that there will need to be some reimbursement made as part of the settlement of this Matter.

Sufficiency Finding No. 5: The Commissioner determines that sufficient facts exist to show that the DM&L event invitations were not attributed as required by Montana law.

There was no attribution on the invitations to the DM&L event. That is a violation of §13-35-225MCA. That, too, will need to be dealt with as part of the settlement of this Matter.

ENFORCEMENT OF SUFFICIENCY FINDINGS

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner cannot avoid, but must act on, an alleged campaign practice violation as the law mandates

that the Commissioner (“shall investigate,” *see*, §13-37-111(2)(a) MCA) investigate any alleged violation of campaign practices law. The mandate to investigate is followed by a mandate to take action as the law requires that if there is “sufficient evidence” of a violation the Commissioner must (“shall notify”, *see* §13-37-124 MCA) 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 (*see* Sufficiency Findings, as set out in this Decision) to show that DM&L has violated a number of Montana’s campaign practice laws, as listed in the Decision, above. 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.

Excusable neglect cannot be applied to oversight or ignorance of the law. In particular excusable neglect cannot be applied to DM&L. If anything DM&L people, being lawyers with campaign practice experience, are held to a higher standard.⁷ *See* discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009. Likewise the violations are too pervasive and potentially impact confidence of the public in governance such that they cannot be excused as *de minimis*. *See* discussion of *de minimis* principles in

⁷ The Commissioner recognizes that past and existing Missoula political culture may be somewhat out of step with campaign practice standards established by past COPP Decisions and Montana’s campaign practice laws. This Decision requires an adjustment of that political culture to conform, as need be, with Montana’s campaign practice standards.

Matters of Vincent, Nos. COPP-2013-CFP-006 and 009.

Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable, civil/criminal prosecution and/or a civil fine is justified (*See* §13-37-124 MCA). The Commissioner hereby, through this Decision, issues a “sufficient evidence” Finding and Decision justifying civil prosecution of DM&L. Because of nature of violations (the failures to register, disclose and timely file all occurred in Lewis and Clark County) this matter is referred to the County Attorney of Lewis and Clark County for his consideration as to prosecution. §13-37-124(1) MCA. Should the County Attorney waive the right to prosecute [§13-37-124(2) MCA] or fail to prosecute within 30 days [§13-37-124(1) MCA] this Matter returns to this Commissioner for possible prosecution. *Id.*

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 this Matter is waived back, the Finding and Decision in this Matter does not necessarily lead to civil or criminal prosecution as the Commissioner has discretion [“may then initiate” *See* §13-37-124(1) MCA] in regard to a legal action.⁸ Indeed, the Missoula community may be better served by the articulation of expected campaign practice standards defined and

⁸ This Matter lacks the systemic, planned, unreported illegal corporate money scheme that was identified in *Bonogofsky v. Kennedy*, COPP 2010-CFP-015; *Washburn v. Murray*, COPP 2010-CFP-019; *Ward v. Miller*, COPP 2010-CFP-021; *Clark v. Bannan*, COPP 2010-CFP-023; *Bonogofsky v. Boniek*, COPP-2010-CFP-027; *Bonogofsky v. Wittich*, COPP-2010-CFP-031; *Madin v. Sales*, COPP-2010-CFP-029; *Bonogofsky v. Prouse*, COPP-2010-CFP-033, and *Bonogofsky v. Wagman*, COPP-2010-CFP-035. Accordingly, this Matter lends itself to settlement even though it involves sufficiency findings of illegal use of corporate funds for candidate campaign purposes.

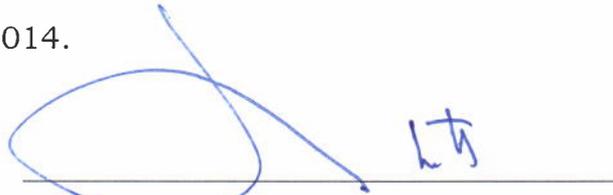
applied in a Settlement between the Commissioner and DM&L. The civic purpose DM&L intended is important but that purpose does not excuse the requirements of law. An appropriate settlement can preserve both the civic purpose actions and assure Missoula voters that indices of election impropriety have been addressed and mitigated. Accordingly, the Commissioner expects that discussion of settlement of this Matter will involve, at a minimum, some or all of the following: an apology to the Missoula community; an apology to the other primary election candidates; registration of a DM&L political committee; filing of appropriate campaign finance reports; collection from the candidate's committee of any corporate costs associated with the McDermott campaign; establishment of a "revolving door" type period of time where DM&L lawyers will not interact with the Sheriff's office, should Candidate McDermott be elected Sheriff; and payment of a fine for the infractions that have occurred.

In the event that a settlement, along the lines set out above, is not negotiated and the Matter is not resolved, the Commissioner retains statutory authority to bring a complaint in district court against any person who intentionally or negligently violates any requirement of law, including those of §13-37-226 MCA. (See 13-37-128 MCA). Full due process is provided to the alleged violator because the district court will consider the matter *de novo*.

Should this Matter not settle the Commissioner reserves his right, upon return of the Finding by the County Attorney, to instigate an enforcement

action on behalf of the people of Montana.

DATED this 8th day of October, 2014.



Jonathan R. Motl
Commissioner of Political Practices
Of the State of Montana