

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Clark v. Datsopoulos, MacDonald and Lind, P.C. and T.J. McDermott No. COPP 2014-CFP-033B	Summary of Facts and Findings of Sufficient Evidence to Show a Campaign Practice Violation by T.J. McDermott Please See Companion Decision 033A for a Decision regarding Datsopoulos, MacDonald and Lind, P.C.
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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 the 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.

The companion Decision (*Clark v. DM&L*) made several relevant factual findings that are repeated as follows for the purposes of this Decision:

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 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).¹

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 caterer, 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).

Finding of Fact No. 11: The Commissioner determines that DM&L paid \$122.02 in invitation costs and \$1,216.80 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. (McDermott response, McDermott campaign Facebook page).

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

¹ 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.

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, coming from 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 were applied in the DM&L Decision (033A) to make 5 sufficiency findings showing campaign practice violations by DM&L. These same facts serve as the basis for 2 of the 3 following sufficiency findings of campaign practice violations determined by the Commissioner in regard to the actions of Candidate McDermott.

Sufficiency Finding No. 6:² The Commissioner determines that sufficient facts exist to show that DM&L provided more than \$1338.02 in corporate in-kind expenditures in support of Candidate McDermott. Those corporate expenditures became an unreported, in-kind contribution that Candidate McDermott accepted in violation of §13-35-227 MCA.

The McDermott campaign responded to the complaint with a denial that the facts or law showed any value to the in-kind actions engaged in by DM&L that

² The DM&L Decision made 5 sufficiency findings and this Decision begins with the next number.

triggered reporting obligations by the McDermott campaign.³ Specifically, the McDermott campaign argued that no value could be assigned to the DM&L fundraising actions or to the campaign's use of DM&L office space for campaign phone calling.

The Commissioner, however, has determined that as a matter of fact DM&L expended \$1338.02 of objectively measured in-kind value on the fundraising event (FOF No. 11) and another as yet undetermined amount of value in providing office use for campaigning (FOF No. 12). The facts do not support the McDermott campaign's denial.

The applicable law is likewise clear. The COPP accounting manual for candidates and campaign treasurers, at page 10, directs candidates to report in-kind fundraising costs, using as an example the directive that the fair market value of beef donated to a fundraiser must be reported as an in-kind contribution. Further, for 20 years successive Commissioners have required reporting of the in-kind value of time spent by paid staff and the in-kind value of office overhead associated with non-trivial use of office space.

In *Daubert v. Montanans for Clean Water*, February 27, 1997 (Commissioner Argenbright) the COPP found the amount paid for staff time used to draft a letter must be reported as an in-kind contribution by the corporation paying the staff person.⁴ In *Griffin v. MontPIRG*, August, 2002

³ The Commissioner notes that the McDermott campaign understands fundraising events involve costs as the campaign's own finance reports show \$420 paid to the Double Tree Hotel for an earlier fundraiser event.

⁴ The COPP regularly measures office overhead as part of its analysis of the completeness of in-kind reporting. *Harrington v. Cap the Rate*, July 3, 2012 (Commissioner Murry).

(Commissioner Vaughey at pages 47-48, as modified by the accompanying settlement agreement), the COPP extensively discussed the requirement that a campaign report in-kind value stemming from off-hours office use of law firm office space by a campaign.

The Commissioner determines that McDermott campaign had first-hand knowledge, by direct participation, of the in-kind activity engaged in by DM&L. Still further, the Commissioner determines that precedent and instruction, in the form of the accounting manual and past Decisions, directed the McDermott campaign to consider, report, and disclose the value of the in-kind activities engaged in by DM&L. Because of these duties the McDermott campaign could not ignore the DM&L actions and therefore accepted an illegal corporate contribution and also violated §13-35-227 MCA.

Sufficiency Finding No. 7: 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 the McDermott campaign on its campaign finance reports. (Commissioner's records).

The Commissioner notes that candidates frequently report contributions that are over-the-limit or come from corporations. These inadvertent violations of law are generally picked up by the COPP staff who are mandated by law to inspect campaign finance reports. These staff then contact the candidate who corrects the error (by returning or refunding the corporate donation check) and files an amended report reflecting a proper handling of campaign funds. The McDermott campaign has a second campaign practice violation (in addition to accepting an illegal corporate contribution) in its failure to report and disclose

in-kind value contributed to the campaign. This failure to report and disclose shows actions contrary to §§13-35-201, 225 and 226 MCA.

Sufficiency Finding No. 8: The Commissioner determines that sufficient facts exist to show that the McDermott campaign failed to disclose and report expenses in the detail required by §13-37-230(2) MCA.

The McDermott campaign's pre-primary (May 22) campaign finance report included the report of an expense payment to WestRidge Creative in the amount of \$11,105. The expense report lists the purpose of the payment as being for "large and small yard signs, campaign cards." No other purpose or description is listed on the campaign finance report.

WestRidge Creative was (and likely is) a consultant to, and campaign manager of, the McDermott campaign. (See Ex. 1, this Decision). WestRidge Creative charged the McDermott campaign \$40 an hour for its services. *Id.* Section §13-37-230(2) MCA defines the reporting and disclosure obligations of the McDermott campaign as to campaign expenditures made to such a consultant:

Reports [campaign finance reports] of expenditures to a consultant...that performs services for or on behalf of a candidate ...must be itemized and described in sufficient detail to disclose the specific services performed by the entity to which payment or reimbursement was made.

WestRidge Creative submitted its detailed invoice to the McDermott campaign on April 23, 2014 (Ex. 1), about a month in advance of the May 22 campaign finance report filed by the McDermott campaign. Despite the explicit information set out in the invoice the McDermott campaign chose

to omit disclosure and reporting of the mailing, printing, radio and management services listed in the invoice. This detail, of course, is the transparency and disclosure required by §13-37-230(2). The failure to list this detail deprived the public and the opposing candidates of required information and placed the McDermott campaign in violation of §13-37-230(2) for this specific and, perhaps, later reports and disclosures.

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 Candidate McDermott has violated several 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 in this Matter because the McDermott campaign, through the Candidate or campaign manager, was directly involved in the actions discussed in this Decision. 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 *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 Candidate McDermott. Because of nature of violations (the failures to report and disclose contributions and expenses 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. The other option the Commissioner has to litigation is to attempt resolution through settlement.

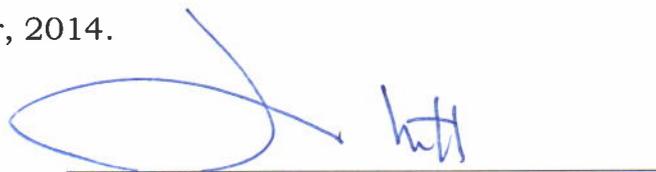
Indeed, the Missoula community may be better served by the standards set and applied in a Settlement that is reached between the Commissioner and Candidate McDermott.⁵ The Commissioner expects that settlement of this Matter will involve discussion of some or all of the following: an apology to the Missoula community; an apology to the opposing candidates; the filing of amended campaign finance reports; the articulation of a proposed Sheriff’s protocol for a “revolving door” type period of time wherein the Sheriff’s office will operate with a fixed arms-length relationship to DM&L lawyers, should Candidate McDermott be elected Sheriff; and payment of a fine for the infractions that have occurred.

⁵ This Matter is eligible for normal settlement because it 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. In this Matter illegal corporate contributions are largely based on a one-time event (the fundraiser) and the corporate entity that made the contribution is cooperating by providing information. Accordingly, this Matter lends itself to settlement even though it involves sufficiency findings of illegal use of corporate funds for candidate campaign purposes.

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

WestRidge Creative

Post Office Box 8492
Missoula, Montana 59807
(406) 396-0985

Invoice No. TJ 042314

INVOICE

Customer

Name TJ McDermott for Sheriff Campaign
PO Box 4273
City Missoula State MT ZIP 59806
Phone (406) 214-7785

Date 04/23/2014
Order No.
Rep TJ
FOB

Qty	Description	Unit Price	TOTAL
	WRC Campaign Management Services (April 4-23, 2014)		
1	Campaign Project Management Work (48 hrs @ \$40/hr)	\$1,920.00	\$1,920.00
1	YARD SIGNS: BIG (additional) 15 (\$450) + 50 (\$1305) = 65	\$1,755.00	\$1,755.00
1	DESIGN: Letter & Endorsement (\$275); Campaign Card (\$450)	\$725.00	\$725.00
1	PRINTING: Busin. Cards (1500) \$130; Campaign Card (15,000) \$1650	\$1,780.00	\$1,780.00
1	MAILING: Letter & Endorsements (10,201)	\$4,325.00	\$4,325.00
1	RADIO: Radio Ad Production (2) and Voice-Over Talent (1)	\$375.00	\$375.00
1	Misc: Printing, materials, etc.	\$75.00	\$75.00
1	ADMIN.	\$150.00	\$150.00
	<i>Thank you very much. WRC Tax ID#: 81-0531345</i>		
	SubTotal		\$11,105.00
	Downpayment		
	TOTAL		\$11,105.00

Office Use Only

Due upon receipt to: WestRidge Creative

Thank You!

