

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES OF THE STATE OF MONTANA

Lourie v. Rogan No. COPP 2014-CFP-045	<u>Dismissal of Complaint</u>
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On October 16, 2014, Daniel Lourie, a resident of Bozeman, MT filed a complaint against Bryan Rogan, a candidate for 2014 election to the Montana legislature from Senate District 33 (Gallatin County) and also a Bozeman, MT resident. Mr. Lourie alleged in his complaint that Mr. Rogan violated campaign practice laws by failing to display a political party identifier on a campaign flyer that Mr. Rogan's campaign sent to Senate District 33 area residents.

**SUBSTANTIVE ISSUES ADDRESSED**

The substantive area of campaign finance law addressed by this decision is that of attribution of campaign materials by inclusion of the candidate's party affiliation or party symbol.

**COMPANION DECISION**

The Decision in this Matter is accompanied by a Decision in *Marbut v. Dudik*, COPP-2014-CFP-042, released simultaneously with this Decision. The

*Marbut v. Dudik* Decision also addresses the issue of a proper party identification set out in a candidate's campaign material.

### **FINDING OF FACTS**

The foundational fact necessary for this Decision is as follows:

Finding of Fact No. 1: On June 3, 2014, a primary election was held. Bryan Rogan qualified as the Republican nominee for general election to the Montana legislature from Senate District 33. (Montana Secretary of State's Office).

### **DISCUSSION**

The complaint alleges that Candidate Rogan distributed campaign literature in the 2014 SD 33 election that lacked the appropriate party designation. Under Montana law all election materials prepared by Candidate Rogan "...must state the candidate's party affiliation or include the party symbol." §13-35-225(2) MCA.

The Complaint included a copy of a campaign flyer (hereafter Flyer) distributed by Candidate Rogan. The Flyer does not state the word "Republican" anywhere, but does list the symbol (R) at the end of the attribution statement appearing on the Flyer. Candidate Rogan was interviewed by the Commissioner's Investigator and claimed the use of the (R) as the required symbol of the Republican Party.

Finding of Fact No. 2: On October 16, 2014, the Commissioner's investigator contacted Mr. Rogan and informed him of the complaint. Mr. Rogan explained that he chose to use a capital R in parenthesis "(R)" as a symbol of the Republican Party, pointing out that "R" and "D" are commonly used to denote the competing parties. (Investigator's notes).

Candidate Rogan is the Republican Party nominee for election to the legislature from SD 33. Candidate Rogan prepared the Flyer and under Montana law the Flyer "...must state [Candidate Rogan's] party affiliation or include the party symbol." §13-35-225(2) MCA. This required disclosure is known as an attribution. §13-35-225 MCA. The complaint asserts that such attribution is lacking.

This Matter thus presents for resolution the sole issue of whether or not the (R) symbol used by Candidate Rogan is sufficient to meet the "party symbol" disclosure requirement of §13-35-225(2) MCA. Resolution of this issue turns on an examination of the language of subpart 2 of the pertinent statute [§13-35-225(2) MCA]. In turn, this examination first requires a review and discussion of subpart 1 of the pertinent statute.

Subpart 1, or §13-35-225(1) MCA, sets out the general and broader attribution requirements, specifying that election communication "must clearly and conspicuously include the attribution 'paid for by' followed by the name and address of the person who made or financed the expenditure for the communication." Subpart 1 is the most commonly invoked attribution measure as most COPP attribution complaints are filed because an election communication (in the form or sign, advertisement or flyer) appears without some or all of the information required by subpart 1. Generally, complaints of missing attribution information are made through informal phone calls to the Commissioner's office. COPP staff responds to these informal complaints by

promptly contacting the errant campaign to instruct that any missing attribution information be added.

Complaints about inadequate attribution can also take the form of formal written complaints filed with the COPP.<sup>1</sup> Commissioner Unsworth discussed the circumstances of subpart 1 attribution enforcement in *Campbell v. Brown*, May 9, 2008. Commissioner Unsworth noted the first response of the COPP was to promptly work to bring deficient election communication into compliance.<sup>2</sup> Commissioner Unsworth then used the “clearly and conspicuously” language of subpart 1 to adopt the five size, location and color attribution requirements (adopted from federal law), but declined to pursue a violation for a limited non-compliance (applying the *de minimis* principle without calling it such). *Id.*

The subpart 1 discussion, above, sets the stage for discussion of subpart 2. Section 13-35-225(2) is a stand-alone subpart in that it does not depend on or refer to subpart 1. Subpart 2 reads in its entirety: “[c]ommunications in a partisan election financed by a candidate or a political committee organized on a candidate’s behalf must state the candidate’s party affiliation or include the party symbol.” Notably there is no requirement of “clearly and conspicuously” in subpart (2), that language appearing only in subpart (1).

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<sup>1</sup> In the 2014 election cycle alone three formal complaints of subpart 1 violations have been filed: *Strizich v. Loney*, No. COPP 2014-CFP-034; *Cohenour v. Dooling*, No. COPP 2014-CFP-043; and, *Brastrup v. Ravndal*, COPP 2014-CFP-0040.

<sup>2</sup> The 2013 legislature amended §13-35-225 by adding subsections (6) and (7) requiring that a prompt formal notice of the need for corrective action be made by the COPP once a formal complaint is filed.

Montana's rules of statutory construction do not allow the "...insert[ion of] what has been omitted..." §1-2-201 MCA. The Montana supreme court repeatedly cites this legislative directive in interpreting a statute: "[i]n interpreting statutes, our role is "simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted . ..."Section 1-2-101, MCA." *Lewis and Clark County v. Hampton*, 2014, MT 207, 376 Mont. 137, 333 P3d 205.

Applying, then, the standard statutory construction required by §1-2-201 MCA, the Commissioner determines that there is no subpart 2 attribution requirement that the party symbol or statement of party affiliation be clear and conspicuous. Instead, the only requirement is that there actually be a party symbol or statement of party affiliation included in the communication.

A complainant may wish a larger and different symbol of the Republican Party, but a particular symbol is not required by statute. The Commissioner determines that the only requirements are that: 1) the symbol or statement chosen by a candidate actually be in or on the communication; and, 2) there is some objective basis to claim the symbol or statement designates party affiliation. It is therefore within a candidate's discretion to choose the size, manner, design and location of the statement or symbol of party affiliation.

Candidate Rogan's choice of use of the (R) symbol passes the "be there" and objective designation test. The (R) symbol is imprinted on the front of the Flyer. The image is "there." Further, the (R) symbol has "some objective basis" as it is commonly used to designate the Republican Party.

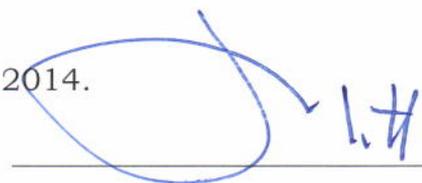
The Commissioner notes that complainant Lourie should be thanked and not faulted for bringing this complaint. A discussion of this issue is important to both parties and long overdue. The Lourie complaint is brought against the party affiliation attribution made by a Republican candidate for public office. However, the Commissioner notes that there is a companion complaint, *Marbut v. Dudik*, claiming an inadequate political party attribution by a Democratic candidate for public office.

Indeed, the issue of proper attribution of party affiliation has long been troublesome to candidates because of perceived unfairness by the opposing candidate in the manner in which a candidate chooses to emphasize or diminish the display the party affiliation. Much of this perception of unfairness has stemmed from an understandable linkage of the “clear and conspicuous” attribution requirement of subpart 1 as also being a requirement of subpart 2. The Decision severs that linkage. A candidate can chose to emphasize or diminish the required attribution of party affiliation as he or she wishes, subject to the two requirements discussed above.

### **DECISION**

This Commissioner hereby dismisses this complaint under analysis and for the reasons set out above.

DATED this 20th day of October, 2014.



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