

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

McCulloch v. Stanford and Dartmouth No. COPP 2014-CFP-046	<u>Partial Decision</u>
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On October 24, 2014, Linda McCulloch¹, a resident of Helena, Montana filed a complaint against Stanford and Dartmouth Universities alleging that a certain document (*see* Flyer attached to complaint) violated Montana campaign practice laws. This partial Decision records certain pre-election mitigation actions taken by agreement between the Office of the Montana Commissioner of Political Practices (COPP) and the academic institutions of Stanford and Dartmouth, while also framing the issues left for future Decision.

INTRODUCTION

The Stanford/Dartmouth Flyer started to show up in the mailboxes of Montanans on October 22, 2014. Informal complaints by Montanans to the COPP about the Flyer started immediately. On October 24 a formal complaint lodged with the COPP by Ms. McCulloch (*see* above).

¹ The complaint was filed by Linda McCulloch, individually. Ms. McCulloch is the elected Secretary of the State of Montana.

The Flyer has been explained as the field implementation of an academic research project by Standard/Dartmouth professors. That is not how the Montanans complaining to the COPP saw the Flyer. They saw the flyer as wrongfully appropriating use of the Great Seal of the State of Montana and wrongfully injecting partisanship into Montana's non-partisan Supreme Court election. The Commissioner knows from personal interaction with their representatives that the institutions of Stanford and Dartmouth accepted the genuineness of the concern of Montana voters.

The Flyer, converted by the Complaint to a potential campaign practice act violation, created two, somewhat conflicting, demands for action by the COPP. First, the Flyer created a demand for government (acting through the COPP) to take immediate (pre-election) action in response to widespread concern about a perceived election irregularity. Second, it created a demand for a longer, more reasoned investigation of the entire circumstances of the funding, design, and production of the Flyer in order to issue a Decision that explained how it was that 100,000 Montanans came home to find this Flyer in their mailboxes.

This partial Decision addresses the actions taken in regard to the first demand for pre-election action. It further explains what is reserved for future consideration and Decision by the COPP.

1. The Pre-Election Letter of Apology

The COPP people² quickly realized that some governmental response was

² While the COPP acts through the authority of the Commissioner, the actions herein were taken after consultation and input from Jonathan Motl, Mary Baker, Vanessa Sanddal, Jaime MacNaughton and the deputy attorney general assigned to assist the COPP.

needed prior to the election. While it was possible for the Commissioner to issue some sort of preliminary Decision, it seemed more appropriate and useful if any partial Decision reflected mitigating action taken by the Universities.

The COPP initiated contact with Stanford and Dartmouth on Thursday October 23, 2014. The Dartmouth contact began with the professor identified within the Flyer. The Stanford contact began with a public relations officer listed in news reports. By October 24, 2014 Dartmouth was engaged through direct contact with University General Counsel. Stanford was also engaged at the level of inside (General Counsel) and outside Counsel by October 27, 2014.³ The significance for Montanans is that this assignment to the highest level of internal authority showed that both Universities regarded the Flyer as a serious issue that needed serious attention.

In the morning of Monday, October 27, 2014 the Commissioner provided both Universities with the idea of a letter of apology sent to the same 100,000 Montanans who received the Flyer.⁴ Stanford people checked and determined that such action was possible, if the letter was completed and delivered to the mail house no later than 10:30 PM MST that same day (October 27). With that deadline in mind, Stanford General Counsel, Debra Zumwalt, drafted an apology letter and vetted that letter through both Universities. The letter arrived in draft form to the COPP at approximately 5:00 PM MST and the Commissioner reviewed the letter himself and vetted the letter with the

³ Stanford also engaged the services Montana attorney G. Steven Brown of Helena, Montana who appeared with other Stanford counsel during one telephone conference.

⁴ Stanford counsel responded that they were thinking along the same line.

Montana Secretary of State.⁵ At about 8:00 PM MST on October 27 the Commissioner and Ms. Zumwalt agreed on the final language of the apology letter. Ms. Zumwalt confirmed shortly thereafter that the University Presidents had signed the letter and the letter was delivered to the mail house. Stanford represented the cost of mailing the letter to be about \$52,000 and stated it would cover that cost, perhaps in partnership with Dartmouth.

The Stanford/Dartmouth apology letters should start arriving in the mailboxes of Montanans on Thursday, October 30, 2014 (some will come later, as was the case with the Flyer), with all 100,000 letters to arrive before election day, November 4, 2014.

The above explanation of events and actions is offered to the people of Montana so that they can follow the acts and circumstances that led to the production of the apology letter. Copies of the October 27, 2014 letter to Stanford/Dartmouth, the October 28, 2014 apology letter and the Flyer are attached to this partial Decision.

2. The Remaining Issues for Decision

The Commissioner retains for investigation and Decision the entire range of issues raised by and related to (see §13-37-111 MCA) the Complaint filed in this Matter. The Commissioner will issue a Decision when the investigation of this Matter is complete.

⁵ The Commissioner wanted to confirm that a pre-election response in the form of the letter was satisfactory to the complainant as it would be the only pre-election response. Eric Stern, Chief Deputy to the Montana Secretary of State reviewed and approved the letter.

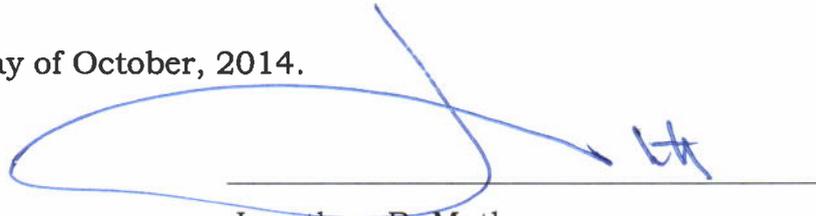
The Commissioner relates to the people of Montana the representation by counsel of Stanford (and by Dartmouth) to the effect that the University has launched an outside counsel investigation that will review the facts and circumstances that lead to the production and mailing of the Flyer. The Commissioner will consider the results of those investigations as part of any Decision in this Matter.

The Commissioner further states that the COPP appreciates the actions of Stanford/Dartmouth taken in regard to the letter of apology. Institutions generally require considerable time to take an action such as issuing a letter of apology. The fact that both institutions assigned senior staff with the authority and ability to take such prompt action is appreciated and respected. The apology letter will be considered as a mitigation factor in the event of any future sufficiency Decision that may be made in this Matter.

DIRECTIVE

Counsel for Dartmouth and Stanford are each directed to provide the COPP with a timeline for a response to the Complaint in this matter. The timeline should include time for the outside counsel investigation and report to be concluded so that this report can be included in the response to the Complaint.

DATED this 29th day of October, 2014.



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Of the State of Montana
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October 27, 2014

Email and U.S. Mail

John L. Hennessy, President
Building 10
Stanford University
Stanford, CA 94-305-2601

Philip J. Hanlon, President
Dartmouth College
207 Parkhurst Hall
Hanover, NH 03755

Subject: Complaint received October 24, 2014; *McCulloch v. Stanford and Dartmouth*, COPP-2014-CFP-046

Dear Presidents Hennessy and Hanlon:

I write regarding the above complaint addressing the objectionable actions of Stanford and Dartmouth researchers taken in regard to a particular 2014 campaign flyer. I have been copied on some of the correspondence you have each received from Montanans on this issue so I know the Flyer is familiar to each of you.

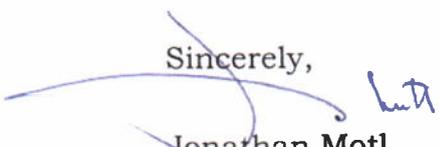
The Flyer addressed a non-partisan Montana Supreme Court election that will occur in one week on Tuesday, November 4. I write now to suggest that Stanford and Dartmouth act immediately to address the concerns about harm stemming from this Flyer. The Flyer was mailed to 100,000 Montana voters by Stanford/Dartmouth researchers through a mailhouse facility located in Salt Lake City, Utah. I suggest that Stanford and Dartmouth immediately prepare, pay for and mail a new letter under the joint signatures of your Offices to the same 100,000 Montana voters. The mailing transaction, including addressing, has already been done once such that application to a new mailing is a reasonable task. Further, if mailed by Thursday, October 30, 2014 under a first class stamp the letter will arrive to the voters prior to November 4, meaning that that letter will be a legitimate attempt to mitigate any harm caused by the Flyer.

I realize that Stanford has already generally apologized (Dartmouth has not yet apologized) for the objections and concerns generated by the Flyer. I suggest that any new Letter specifically apologize for the Flyer's inappropriate representation of partisanship and official approval, disavow the support of each University for the content of the Flyer and instruct voters to ignore the Flyer.

As you likely know, an agency-level complaint has been filed with Montana's Commissioner of Political Practices concerning the Flyer (see above complaint number). Our office is working with Dartmouth and Stanford General Counsel (copied below) on this issue. The COPP may, and often does, suggest corrective action possibilities at the outset of complaint filing. The COPP administrative process is flexible as it does not invoke a contested case hearing and will result in a finding of sufficient or insufficient facts to show a campaign practice violation. If a sufficient facts finding is made, an action by a party, such as using a corrective letter to lessen the harm caused by the offending practice, becomes a factor in lessening or mitigating any fine assessed to the offending party.

I realize that one or both of your Universities may not be able to prepare and send a letter, as suggested above. However, I think the interest of a fairer election is served if such a letter is prepared and sent prior to the election. I trust you will respond in a manner that serves the interests of your institution and the public.

Sincerely,



Jonathan Motl

Commissioner of Political Practices

406-444-4622

C

Robert Donin, Dartmouth General Counsel

Frederick Lowell, Thomas Fenner, Stanford General Counsel

Dartmouth



Stanford

October 28, 2014

An open letter to the voters and citizens of Montana

On behalf of Stanford and Dartmouth universities, we sincerely apologize for the confusion and concern caused by an election mailer recently sent as part of an academic research study. It should have been much more clearly presented as the research tool it was intended to be, leaving no ambiguity about its purpose or origin. We recognize that the purpose of elections is to enable our democratic systems to operate, and that no research study should risk disrupting an election. **We genuinely regret that it was sent and we ask Montana voters to ignore the mailer.**

The informational mailer was part of an independent study by political science professors to determine whether voters who are given more information are more likely to vote. The mailer was not affiliated with any political party, candidate or organization, and was not intended to influence any race. The mailer was in no way affiliated with or approved by the State of Montana, and we are very sorry that it created the impression that it was.

The mailer included a graph that ranked judicial candidates in a nonpartisan race on a scale from liberal to conservative. That ranking was not based on the candidates' decisions or public positions, instead it relied upon public information about who had donated to each of the campaigns. Unfortunately, even though the mailer contained a statement that it "is non-partisan and does not endorse any candidate or party," many people felt that the graph appeared to create a partisan alignment of the candidates. That was certainly not the intent.

Both of our campuses are investigating all aspects of the matter, including whether Stanford and Dartmouth research rules and standards have been appropriately followed. We are also fully cooperating with the inquiry being undertaken by election officials in the State of Montana. We do know that the research proposal was not submitted to Stanford's Institutional Review Board for approval, which is a clear violation of university policy.

We are sorry that this mailer has been disconcerting and disruptive to many Montanans. We take very seriously our responsibility to conduct research and provide education that contributes to, but does not hinder, an informed citizenry.

Sincerely,

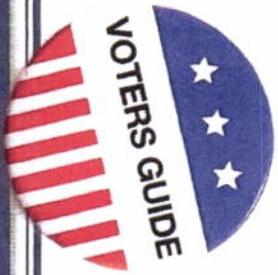
Handwritten signature of Philip Hanlon in black ink.

Philip Hanlon
President
Dartmouth College

Handwritten signature of John Hennessy in black ink.

John Hennessy
President
Stanford University

cc: Linda McCulloch, Montana Secretary of State
Jonathan Motl, Montana Commissioner of Political Practices

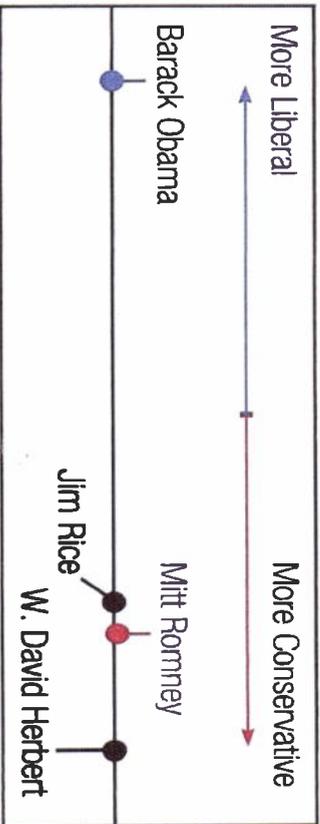


2014 Montana General Election Voter Information Guide

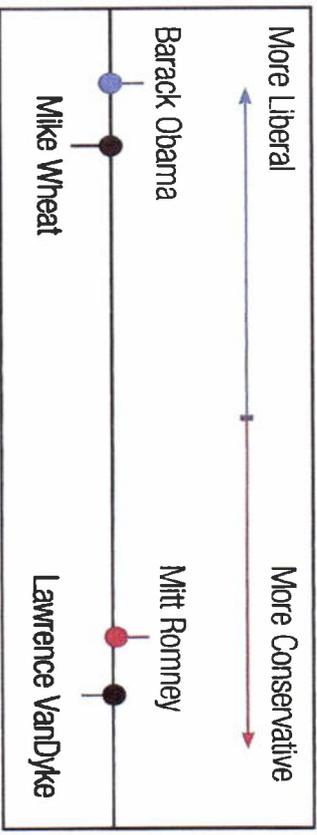
Election Date: November 4, 2014



Nonpartisan Supreme Court Justice #1 Race



Nonpartisan Supreme Court Justice #2 Race



For more information on how these figures were created, please see <http://data.stanford.edu/dime>. Please note that this guide is non-partisan and does not endorse any candidate or party. This guide was created as part of a joint research project at Stanford and Dartmouth.

Paid for by researchers at Stanford University and Dartmouth College, 616 Serra Street, Stanford, CA 94305

Take this to the polls!



2014 Montana General Election Voter Information Guide



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