

COMMISSIONER OF  
POLITICAL PRACTICES



STATE OF MONTANA

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October 18, 2013

Chris Gallus  
Attorney at Law  
1423 East Otter Road  
Helena, MT 59602

Subject: Request for Advisory Opinion Re Montanans for  
Community Development Mailer

Dear Mr. Gallus:

I write in response to your letter of October 4, 2013 (Letter) requesting an advisory opinion regarding: 1) The standard used by the Commissioner in measuring an independent election expenditure; and, 2) The issue advocacy status of a two page flyer (Flyer) that Montanans for Community Development (MCD) intends to distribute in the Billings area this year.

I apologize for the delay in providing this response. As you likely know, this Office was preparing to release five *Bonogofsky* Decisions; See COPP-2010-CFP- 7, 8, 9, 10, and 15, Commissioner's website. Those Decisions are now available for your review and the content of those Decisions adds to the basis of a response to your inquiry. I thought it best to wait so I could respond off the platform of those Decisions.

Given the precedent set by the *Bonogofsky* and predecessor Decisions I am waiving public comment [see ARM 44.10.201(1)(b)] and issuing an advisory opinion on the question of the standard of express advocacy, as posed by your Letter. Accordingly, please consider this letter as an administrative advisory opinion to the effect that the *Bonogofsky v NGOA* Decision (and predecessor Decisions) define the standard of express advocacy that will be applied by the Commissioner:

The Commissioner, consistent with the above precedent, measures the Letter as an independent expenditure if it is a "...communication[s] expressly advocating the success or defeat of a candidate or ballot issue...", ARM 44.10.323(3), emphasis added. It is noted that the last Decisions issued by a Commissioner involving the independent expenditure issue were those of Commissioner Unsworth in the *Matter of Graybill* and Deputy Commissioner Dufrechou in *Main Street Advocacy Fund*. Both Decisions were made in the midst

of, or shortly after, the litigation concerning §13-35-227 MCA. Still, *Graybill* and *Main Street Advocacy Fund* analyzed and applied the express advocacy standard of ARM 44.10.323(3) without consideration of the lesser “anything of value” standard of §13-1-101(11)(a) MCA that the district court discussed in *WTP v. Gallik*, 1<sup>st</sup> Judicial District, Lewis and Clark County No. BDV-2010-1120, 2011 Mont. Dist. Lexis 83, ¶17. This Commissioner continues to measure an independent expenditure under the express advocacy standard of ARM 44.10.323(3).

*Bonogofsky v National Gun Owners Alliance* COPP-2010-CFP-0008 at pp. 7-8.

This Commissioner will continue to apply the ARM 44.10.323(3) express advocacy standard until such time as there is statutory or regulatory change to the “anything of value” standard mentioned by the Court in *WTP v Gallik*. Express advocacy, in turn, is defined in a number of Decisions, including the *Bonogofsky v National Gun Owners Alliance* Decision: COPP-2010-CFP-0008.

The Commissioner declines to provide an administrative advisory opinion as to the issue advocacy election expense status of the Flyer attached to the Letter. The Commissioner takes this stance on the basis that the facts presented are inadequate for a determination. ARM 44.10.201(1)(b)(i).

In way of explanation, the Letter appears to accept that the MCD Flyer will be an election related expense. As an election expense the Flyer will be classified as a candidate contribution, independent expenditure or issue advocacy expenditure. See *Bonogofsky* Decisions. The Letter proposes the MCD flyer expense as an issue advocacy expenditure, but does not provide sufficient facts for the Commissioner to also make this determination. For example, the Letter does not provide sufficient facts describing: MCD and its election related campaign; any inter-relationship between MCD and any candidate whose name is mentioned in the Flyer; the timing of the use of the Flyer; the knowledge of a candidate that a Flyer is being prepared; the replication of Flyer use in other venues; or other information of the type considered by the Commissioner in the *Bonogofsky* Decisions. The additional facts may trigger classification of the Flyer as coordination (making the Flyer expense a candidate contribution) or as an independent expenditure. Or, the facts, when fully identified, may be such that the Commissioner agrees that the Flyer is an issue advocacy expense. See *Wittich v Main Street Advocacy Fund* COPP 2010-CFP-18.

It appears from the Letter that the Flyer wording is mindful of the analysis set out in the *Main Street Advocacy Fund* Decision. There is considerable guidance as to other factors, including coordination, in the *Bongofsky, Main Street Advocacy Fund* and other Decisions cited therein. You and your client should look to those Decisions and design election related activity, including the Flyer, that genuinely serves issue advocacy and does not trigger coordination or express advocacy concerns.

This letter is an advisory opinion based on the specific written facts and questions presented in your letter October 4, 2013. This advisory opinion may be superseded, amended, or overruled by subsequent opinions or decisions of the Commissioner of Political Practices or changes in applicable statutes or rules. This advisory opinion is not a waiver of any power or authority the Commissioner of Political Practices has to investigate and prosecute alleged violations of the Montana laws and rules over which the Commissioner has jurisdiction, including alleged violations involving all or some of the written facts presented in your letter of October 4, 2013.

Sincerely,

A handwritten signature in black ink, appearing to read 'J Motl', is positioned above the printed name.

Jonathan R. Motl  
Commissioner of Political Practices