

COMMISSIONER OF
POLITICAL PRACTICES



STATE OF MONTANA

JONATHAN R. MOTL
COMMISSIONER
TELEPHONE (406) 444-2942
FAX (406) 444-1643

1205 EIGHTH AVENUE
PO BOX 202401
HELENA, MONTANA 59620-2401
www.politicalpractices.mt.gov

September 3, 2014

Rob Cameron
Attorney at Law
Gough, Shanahan, Johnson and Waterman
33 South Last Chance Gulch
Helena, MT 59601

COPP-2014-AO-012

Re: Legal Service Costs as Election Costs

Dear Mr. Cameron:

I write in response to your letter dated May 5, 2014 asking for an advisory opinion on the issues set out below. This letter constitutes that advisory opinion.

Background and Issue Posed

Lawrence VanDyke is a Montana attorney who was recently afforded candidate status on the November 2014 ballot for election as a Justice on the Montana Supreme Court. Mr. VanDyke secured this candidate status after litigation at the Montana district court and Supreme Court. See *Cross v. VanDyke*, 2014 MT 193, 2014 Mont. LEXIS 452.

Mr. VanDyke's attorney now poses the following two questions for consideration and answer in the form of an advisory opinion:

- (1) May Mr. VanDyke properly establish an independent "legal fund" to accept donations for and pay his legal expenses associated with the *Cross v. VanDyke*, 2014 MT 193, litigation with the donations to and payments from the "legal fund" constituting neither "contributions" or "expenditures" under Mont. Code Ann. §§13-1-101(7), (11)?

- (2) Have the plaintiffs in *Cross v. VanDyke*, 2014 MT 193, and/or their attorneys formed an unreported “political committee” by making “contributions[s] or expenditure[s] ... to support or oppose a candidate.

ADVISORY OPINION

This Advisory Opinion gives the Answer to question Number 1 is YES and the Answer to question Number 2 is NO. These answers are explained below.

1. A Sole Purpose Candidate Qualification Legal Fund Does Not Create An Election Expense or Contribution

The VanDyke legal fund is represented by counsel as having been created for the sole purpose of funding pre-election litigation necessary to place VanDyke’s name on the ballot. Based upon, and limited to, those represented facts the Commissioner hereby determines that the contributions to, and expenditures from, the sole purpose candidate qualification legal fund are not contributions and expenditures under Montana Campaign Practices Act.

The Commissioner notes that there is limited legal authority directly contrary to this Advisory Opinion. In *O’Connor v. City of Philadelphia*, 71 A.3d 407; 2013 Pa. Commw. LEXIS 213 (on appeal), the Commonwealth Court of Philadelphia held that “legal fees incurred by a campaign committee to keep a candidate on the ballot are incurred for the purpose of influencing the outcome of an election.” The Court reasoned “[a] candidate’s placement on or removal from the ballot certainly influences the outcome of the election, as it directly impacts the choices voters will have when they cast their votes on Election day”, *id.*

Montana law defining a campaign contribution or expenditure is centered around the same ‘influence’ language addressed in the Pennsylvania decision: “anything of value to influence an election” [§13-1-101(7)(a)(i) MCA] and “anything of value made for the purpose of influencing the results of an election.” [§13-1-101(11)(a) MCA.] The above Pennsylvania legal authority, however, is not binding on a Montana official and there is no comparable legal authority by a Montana court. The Pennsylvania authority is set out in this Advisory Opinion so that Mr. VanDyke (and any reader) is fully informed that this Opinion addresses a nuanced issue that may be interpreted differently by a Montana court.

This Commissioner’s determination is that a sole purpose election qualification litigation fund does not trigger contribution or expense

consideration. This determination, one that is opposite to that of the Pennsylvania court, is based on two principles. First, the Commissioner considers the constitutional implications of the determination. The Commissioner understands that only courts, not administrative agencies, have jurisdiction to decide issues requiring determinations of constitutionality. *Brisendine v. Dep't of Commerce*, 253 Mont. 361, 366, 833 P. 2d 1019, 1021-22 (1992). Agencies, however, are required to construe statutes or regulations in a manner that affords recognition of constitutional issues so as to interpret law in a manner that would render its use constitutional. *City of Great Falls v. Morris*, 2006 MT 93, ¶19, 332 Mont. 85, 134 P. 3d 692.

Accordingly, Montana's Commissioner makes an interpretation of §§13-1-101(7)(a)(i) & 11(a) MCA that preserves for contributors and the candidate the full campaign use of contribution limits (\$320, See 44.10.338 ARM) for any individual who wishes to contribute to Mr. VanDyke's election campaign. Including the election qualification litigation costs as part of the election campaign contributions/expenses would mean that the contributions of many individuals would be absorbed in paying for election qualification litigation and not be available for the type of candidate promotion or advocacy that marks an election campaign. A determination that preserves the involvement of people in political campaigns, through contributions, serves constitutional purposes. *Randall v. Sorrell*, 548 U. S. 230 (2006); See also COPP 2014-AO-009.

Second, the Commissioner considers the policy implications of the determination. Montana law excepts out as campaign contributions/expenditures certain costs that are necessary to establish candidate status (filing fee) or value that flows naturally to a candidate during a campaign (bona fide news story). See §13-1-101(11)(b) MCA. Commissioner Murry, faced with a comparable issue of post-election litigation expenses, defined an election as the "procedure by which members of the public select an individual to hold public office, by casting votes for a particular candidate." (Welch Advisory Opinion dated November 27, 2012.)¹ Commissioner Murry went on to determine that post-election (recount) litigation is not part of an "election." *Id.*

The Commissioner hereby determines that qualification begins the election process, in the same manner the vote ends the election process. Accordingly, litigation necessary for election qualification falls outside of the election process, just as does litigation following the vote. This policy distinction is

¹ A copy of the Welch Advisory Opinion is attached and incorporated by reference. The additional questions posed and answered in the Welch Advisory Opinion also apply to this Opinion.

limited by facts and does not apply to litigation after qualification and during an election, such as litigation over allowable campaign practice acts.

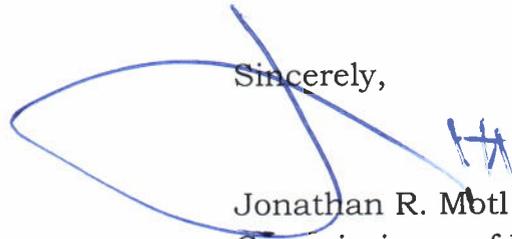
2. The Plaintiffs in *Cross v. VanDyke*

The Plaintiffs in *Cross v. VanDyke*, to any extent necessary, fall under the above analysis and therefore do not have litigation cost issues that invoke Montana's Campaign Practice Act.

LIMITATIONS ON ADVISORY OPINION

This letter is an advisory opinion based on the specific written facts and questions as presented above. 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 matters discussed above.

Sincerely,



Jonathan R. Motl
Commissioner of Political Practices

COMMISSIONER OF
POLITICAL PRACTICES



STATE OF MONTANA

JAMES W "JIM" MURRY
COMMISSIONER
TELEPHONE (406) 444-2942
FAX (406) 444-1643

1205 Eighth Avenue
PO BOX 202401
HELENA, MONTANA 59620-2401
www.politicalpractices.mt.gov

November 27, 2012

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

Dear Mr. Gallus:

You have submitted a letter seeking an advisory opinion on behalf of Sandy Welch, a candidate in the 2012 election for the office of Superintendent of Public Instruction. Your letter asks a number of questions related to a potential recount of the election results. According to the vote totals on the Secretary of State's website, Welch was defeated in the election by 2,264 votes out of 468,672 votes cast – just under ½ of 1% of the total votes.

Your letter notes that Welch is considering requesting a recount. Under Montana law an unsuccessful candidate for a statewide office may request a recount by filing a petition with the Secretary of State within five days after the official statewide canvass, when the margin of defeat exceeds ¼ of 1% but does not exceed ½ of 1% of the total votes cast. When the vote differential falls within these parameters the unsuccessful candidate requesting a recount must post a bond with the clerk and recorder of the county in which the candidate resides. The bond must be in an amount sufficient to cover all costs of the recount incurred by each county. Mont. Code Ann. § 13-16-211.

Your letter notes that Welch is considering creating a legal fund to pay for the recount and any related legal defense costs. According to your letter Welch intends to report all donations to and disbursements from the fund regardless of whether she is legally obligated to do so. Your letter also states that Welch intends to ensure that no funds raised for the above purposes will be used to meet the financial obligations of her general election campaign. She seeks guidance from this office as to the legal requirements associated with raising money for the recount fund and disbursing those funds.

As noted, Mont. Code Ann. § 13-16-211 provides that “the unsuccessful candidate” shall post a bond to cover the costs of the recount. The Montana Democratic Party has raised the issue of whether this language requires *Welch* to post the bond, rather than soliciting donations from others to cover those costs. I decline to address this question because I do not have jurisdiction over Mont. Code Ann. § 13-16-211. My jurisdiction with respect to the election laws is limited to the provisions of Title 13, chapters 35 and 37, Montana Code Annotated. See Mont. Code Ann. § 13-37-111. Thus, I express no opinion on the question whether Welch must use her own money to post a bond under Mont. Code Ann. § 13-16-211.

Your request seeks an advisory opinion on the following questions:

1. Whether a recount is an election.
2. What limits and prohibitions apply with respect to the payment of the costs of a recount?
3. How should activity related to the payment of these costs be reported?
4. May a candidate interact with party organizations?
5. May a political committee, such as the Montana Republican or Democratic Party, pay for expenses associated with a recount without making contributions or expenditures under Montana law?
6. Does the rationale of the advisory opinion apply to related expenses, such as bonding, judicial proceedings, election contests, attorneys, and staffing?

I will attempt to address each of your questions within the context of my limited jurisdiction as noted above.

1. Is a recount an “election”?

An “election” is defined as “a general, regular, special, or primary election held pursuant to the requirements of state law, regardless of the time or purpose.” Mont. Code Ann. § 13-1-101(8). Although this definition does not describe the process, it is commonly understood that in the case of a candidate an election is the procedure by which members of the public select an individual to hold public office, by casting votes for a particular candidate. In any event, the statutory definition of the term does not encompass a “recount.” While the term “recount” is not defined in Montana law, the Secretary of State’s website describes a recount as the manual recounting of the ballots validly cast for an office, and the declaration of the results. See http://sos.mt.gov/Elections/2012/2012_Recount_Guide.pdf (Montana State Recount Guide) at 3. This is consistent with the conclusion that a recount is a process that occurs *after* the election has been held, in order to ascertain the *correct results* of the election.

The Montana Democratic Party has called my attention to Michigan Education Association Political Action Committee v. Secretary of State, 616 N.W.2d 234 (Mich. Ct. App. 2000), a decision issued by Michigan's intermediate appellate court. The court determined that although the term "recount" is not included in Michigan's definition of the term "election," a recount is essentially a *part* of an election. Therefore, according to the court, exclusion of the term "recount" from Michigan's statutory definition of "election" does not indicate an intent by the legislature to exclude monetary donations to pay for recounts from the provisions of the statutes regulating campaign contributions and expenditures. *Id.* at 239. The Michigan Supreme Court declined to review the lower court's decision, noting only that it was "not persuaded that the questions presented should be reviewed" by the court. Michigan Education Association Political Action Committee v. Secretary of State, 625 N.W.2d 785 (Mich. 2001).

I disagree with the decision of the Michigan Court of Appeals, which is not binding in Montana. Basic rules of statutory construction require that the language of a statute be construed according to its plain meaning, if possible. If the language is clear and unambiguous, no further interpretation is necessary. Rausch v. State Comp. Ins. Fund, 2002 MT 203, ¶ 33, 311 Mont. 210, ¶ 33, 54 P.3d 25, ¶ 33. When construing a statute the intent of the Legislature should be pursued by reasonably and logically interpreting the statute as a whole, giving words their usual and ordinary meaning, without omitting or inserting anything, and without focusing on only part of the statute. Gaub v. Milbank Ins. Co., 220 Mont. 424, 427-28, 715 P.2d 443, 444-45 (1986).

Montana's definition of the term "election" is clear and unambiguous, and does not include a recount. Basic rules of statutory construction prohibit me from inserting words into the statute, therefore I am compelled to conclude that Montana's statutory definition of "election" does not include a recount.

2. What limits and prohibitions apply with respect to the payment of costs of a recount?

Montana's campaign finance and reporting laws were enacted "to establish clear and consistent requirements for the full disclosure and reporting of funds used in Montana to support or oppose candidates, political committees, or issues . . ." Section 1, Chapter 480, Laws of 1975. To accomplish this goal candidates and political committees are required to file periodic reports of contributions and expenditures with this office. Mont. Code Ann. §§ 13-37-225, 13-37-229, and 13-37-230.

The definition of "contribution" requires that money or something of value be conveyed or paid "to influence an election." Mont. Code Ann. §§ 13-1-101(7)(a)(i). The definition of "expenditure" requires that a payment of money or something of value be made "with the purpose of influencing the results of an election." Mont. Code Ann. § 13-1-101(11)(a).

Payment of money to fund a bond posted to cover the costs of conducting a recount is not for the purpose of influencing an election, or the results of an election. The election has already been held and all votes have been cast. A recount involves the manual recounting of all ballots that were validly cast for the office with the purpose of making an accurate determination of how many votes were cast for each candidate. Therefore, money received and disbursed in connection with a recount does not result in contributions or expenditures under Montana law.

The Montana Democratic Party again cites the Michigan Court of Appeals decision, discussed above, noting that the court in that case found that monetary donations to pay for the expenses of a recount are for the purpose of influencing an election, and are therefore encompassed within Michigan's definition of the term "contribution."

Michigan Education Association Political Action Committee v. Secretary of State, 616 N.W.2d at 240. Again, I disagree with the analysis of the Michigan Court of Appeals, for the reasons explained above. A dissenting judge in that case summarized the view of recounts that I have adopted herein:

A recount merely ensures the accurate count of votes previously cast. While it may change the outcome of the election where an inaccuracy is corrected during the recount process, a recount does not influence any individual vote.

Id. at 242 (McDonald, J. dissenting). Because a recount cannot influence any of the votes already cast during the election, donations to cover the costs of a bond for the recount do not constitute contributions under Montana law. And, since money for a bond to cover the costs of a recount does not result in a contribution, the statute establishing limits on contributions to a candidate does not apply. Mont. Code Ann. § 13-37-216.

3. How should activity related to the payment of these costs be reported?

Your letter states that candidate Welch intends to report all donations to and disbursements from any recount fund regardless of whether she is legally required to do so. Specifically, your letter states:

In order to properly account for all financial activity the candidate will set up a separate recount fund to collect donations and make disbursements, and will not use proceeds from that fund to meet any obligations of the general election campaign. Some staff that worked on the campaign will work on the recount. Additional staff may be required and be compensated for services relating to the recount from the recount fund. Other services and expenses are required. A report of fund activity will be provided to show that no disbursements were made to meet obligations for the general

election. We request that such matters be reported as “other receipts” and “other expenses.” The committee wants to efficiently and effectively participate in the legal recount while maintaining transparency and providing assurances that money raised and spent goes only toward the recount effort.

(Letter requesting advisory opinion at 3-4). While I agree that it is necessary to account for all funds received and disbursed for recount purposes, since I have determined that these receipts and payments do not constitute contributions and expenditures it is not appropriate to report them on a candidate campaign finance report (form C-5). Instead, please file a separate report of financial activities related to the funding of the recount efforts, in whatever format you deem to be most effective. I agree that none of the money received for the recount effort may be used to meet any remaining obligations of Welch’s campaign. Therefore, your accounting of financial activities related to the recount effort should be based on the establishment of an account that is separate and distinct from Welch’s campaign account. Although there is nothing that would prohibit an account from being set up in the same depository as Welch’s campaign account, precautions should be taken to ensure complete segregation of funds in the accounts at all times.

In addition, if there are surplus funds in the recount account when activities related to the recount effort are completed, such funds may not be contributed to or used to pay for any costs associated with any other campaign, including but not limited to any future political campaign of Welch.

4. May a candidate interact with party organizations?

Because I have determined that money received and disbursed in connection with a recount does not result in contributions or expenditures under Montana law, there is nothing in the statutes within my jurisdiction that prohibits a candidate involved in a recount effort from interacting with party organizations.

5. May a political committee, such as the Montana Republican or Democratic Party, pay for expenses associated with a recount without making contributions or expenditures under Montana law?

As noted above, I express no opinion on the question whether Welch must use her own money to post a bond under Mont. Code Ann. § 13-16-211. If it is determined that Welch may accept money from a political committee such as the Montana Republican Party to pay for those costs, this would not result in contributions or expenditures under Montana law. See discussion under question 2 above.

6. Does the rationale of the advisory opinion apply to related expenses, such as bonding, judicial proceedings, election contests, attorneys, and staffing?

Assuming that the “related expenses” are those described in the excerpt of your letter set out in the discussion under question 3, above, payment for those expenses would not result in contributions or expenditures under Montana law. To that extent the rationale of the matters discussed in this advisory opinion would apply to those expenses. See discussion under question 2 above.

This advisory opinion is limited to specific facts and questions submitted in your letter of inquiry received in this office on November 12, 2012. This advisory opinion may be superseded, amended, or overruled by subsequent opinions or decisions of the Commissioner of Political Practices, changes in applicable statutes or rules, or other changes in circumstances. 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 but not limited to alleged violations involving all or some of the written facts presented in your letter, as well as the other facts described herein.

Sincerely,

James W. Murry

James W. Murry
Commissioner