

BEFORE THE COMMISSIONER  
OF POLITICAL PRACTICES OF THE STATE OF MONTANA

<b>Clark v Bannan</b>  No. COPP-2010-CFP-023	Summary of Facts and Findings of Sufficient Evidence to Show a Violation of Montana's Campaign Practices Act
--	---

Terry Bannan of Belgrade and Kelly Flynn of Townsend were candidates for the Montana House of Representatives, House District 68, (HD 68) in the 2010 Republican primary election. In July of 2010 Linda Clark of Belgrade filed a complaint with this Office against Assembly Action Fund (*Clark v. Assembly Action Fund* No. COPP-2010-CFP-013) asserting impropriety in its use of attack flyers in the 2010 HD 68 Republican primary election. On November 12, 2013 the earlier Clark complaint was extended to Candidate Bannan and Western Tradition Partnership, with the extended complaint including review of coordination and corporate contribution issues. The extended complaint referenced and incorporated the issues identified in *Bonogofsky v. Kennedy*, COPP 2010-CFP-15.

**I. INTRODUCTION**

This Decision presents and decides several issues dealing with non-candidate expenditures in a Montana election, in this case a primary election

in a single legislative district (HD 68).<sup>1</sup> These expenditure issues have confounded Montana political candidates and this Office for the past three election cycles.

The 2010 HD 68 primary election involved two candidates, Kelly Flynn and Terry Bannan. Candidate Flynn defeated Candidate Bannan in the June 8, 2010 primary election by a vote of 1,473 to 654. Candidate Flynn went on to win the general election and became a representative to the 2010 Montana legislature from HD 68.<sup>2</sup> (SOS website).

Candidate Flynn reported 2010 primary contributions of over \$22,000 disclosing 210 individual and 8 PAC contributors. (Commissioner's records). Candidate Bannan reported 2010 primary contributions of less than \$5,000, disclosing 22 individual and 2 PAC contributors.

Candidate Flynn reported fifty 2010 primary election expenditures totaling \$14,000, transferring about \$8,000 to a general election account. (Commissioner's records). Candidate Bannan reported seven 2010 primary election expenditures totaling slightly over \$5,000. (Commissioner's records).

House District 68 is a large district, there being over 50 miles between Belgrade and Townsend. Candidate Kelly reported expenses consistent with placing signs and traveling throughout a large district. Candidate Bannan, in contrast, reported about \$2,700 (a majority of his 2010 primary expenses) as payments to "General Consulting" of Billings, MT for direct mail services.

---

<sup>1</sup> The Montana Legislature has 100 house districts.

<sup>2</sup> House District 68, as created by the 2000 redistricting commission, is a solid Republican district. The electoral contest of note is the Republican primary.

General Consulting provided Candidate Bannan 8 letters (written, stamped, and mailed) for its payments (*see*, this Decision, below).

Candidate Flynn reported campaign expenses consistent with disclosed election activity favorable to his candidacy. Candidate Bannan did not. As set out in this Decision there was far more election activity favorable to Candidate Bannan and/or against Candidate Flynn than reported in Candidate Bannan's campaign reports or by any third party (*see*, this Decision, below). This unreported, undisclosed 2010 HD 68 election activity is the focus of this Decision.

## **II. ELECTION EXPENSES**

This Decision identifies and discusses a number of 2010 HD 68 election expenses that were not reported or disclosed by a candidate or third party. The Commissioner was able to identify election expenses, in part, based on documents supplied by members of the public.<sup>3</sup> Further, the Commissioner reviewed records of Western Tradition Partnership (WTP),<sup>4</sup> a non-profit corporation organized in the state of Colorado. WTP's records, at one time in the possession of the Commissioner's Office, are now in the possession of the Federal Bureau of Investigation (FBI). These "WTP records" and the documents

---

<sup>3</sup> For an example of documents supplied by the public, please *see* detailed summary of election activity in the 2010 HD 61 election, attached as Exhibit 1 to this Decision. John Esp was a candidate in the Republican primary in HD 61. The documents listed in this summary were received and saved by members of the Esp extended family during the 2010 HD 61 election.

<sup>4</sup> WTP was involved in 2008 and 2010 candidate elections in Montana. Commissioner Unsworth determined that some WTP 2008 election activities violated Montana campaign practice law as unreported independent expenditures. *Graybill v. WTP*, COPP-2010-CFP-0016. WTP challenged that decision in a Montana District Court. *WTP et. al. v. COPP*, No. BDV-2010-1120, 1<sup>st</sup> Judicial District, Lewis and Clark County. WTP's challenge has been dismissed by the Court, which also awarded sanctions and fines against WTP.

provided by citizens, allowed the Commissioner to identify otherwise undisclosed and unreported HD 68 2010 election expenses, as set out in this Decision.<sup>5</sup>

The expenditure of money in an election creates a visible election activity. That election activity is elemental in nature in that it cannot be reduced, excused, or made to disappear. An election activity, once identified, falls into one of three types of election expense.

The first type is that of a candidate election expense. A candidate election expense includes money spent in an election that is contributed to and expended by a candidate. Candidate election activity, of course, is subject to contribution limits and must be attributed, disclosed, and reported by the candidate. A candidate election expense includes a third party election expense coordinated with a candidate, as a coordinated expense is deemed to be an in-kind contribution to a candidate (*see below*).

The second type of election expense is that of a third party entity independent of a candidate, but focused on a candidate in the election. This election expense is called an "independent expenditure" and it too must be disclosed, reported, and attributed, albeit by the third party rather than the candidate. This expense, however, is not attributed as a contribution to a

---

<sup>5</sup> There are 5 boxes of documents, formerly held by the Commissioner, now in the possession of the FBI, with federal possession of these documents taken through the power of a grand jury subpoena issued by a Federal Court. Two of these boxes of documents are the records and work product of the Commissioner's Office that were deemed to be covered by the subpoena. The other three boxes consist of internal WTP documents showing WTP activity in elections held in Montana and Colorado. The WTP Records were delivered to the Commissioner by a third party who found them in a house in Colorado.

candidate and therefore it is not subject to contribution limits or to reporting by a candidate.

The third type of election expense is that made coincident to the election by a third party entity independent of a candidate, but with the use of the money focused on an issue and not on a candidate. This election expense is called "issue advocacy." This issue advocacy expense is not considered to be a candidate expense and therefore is not subject to campaign practice requirements. Specifically, Montana law does not require that an issue advocacy expense be attributed, reported, or disclosed.<sup>6</sup>

A limited discussion of the distinction between candidate, independent and issue advocacy election expenditures was made by the Commissioner in an earlier Decision: *MacLaren v. Montana Conservative Coalition*, COPP-2012-CFP-0027. The distinction between these election expenditures, with particular focus on an independent expenditure, is also discussed in: *Bonogofsky v. Western Tradition Partnership*, COPP-2010-CFP-0007, *Bonogofsky v. National Gun Owners Alliance*, COPP-2010-CFP-0008, *Bonogofsky v. Assembly Action Fund*, COPP-2010-CFP-0009, and *Bonogofsky v. Montana Citizens for Right to Work*, COPP-2010-CFP-0010.

There is much of Montana's election and candidate culture at stake in the distinctions in expenditures made during the time of an election, as defined by the above listed Decisions and by those that will shortly follow. We are a

---

<sup>6</sup> The 2012 Montana Legislative session considered several bills that would have required reporting and disclosure of any election expense, including issue advocacy, made within 60 days of the date of an election. None of these bills passed into law. A 2014 ballot initiative has been proposed to address this issue.

nation of laws. Montanans have long expressed their majoritarian view for open and fair elections with maximum reporting and disclosure of money spent in elections. Candidates run with the expectation that they will not be bushwhacked by late, undisclosed, and unreported expenditures. This Decision, and the companion Decisions dealing with other 2010 legislative candidates, provide guidance to candidates and the public on coordination and the involvement of corporations in a candidate election.

### **III. SUBSTANTIVE ISSUES ADDRESSED**

The substantive areas of campaign finance law addressed by this decision are: 1) Coordinated Expenditures; 2) Reporting and Disclosure; 3) Retention and Production of Campaign Accounts and Records; and 4) Attribution.

### **IV. DISCUSSION AND FINDINGS**

The following are the foundational relevant facts for a Decision in this Matter:

Finding of Fact No. 1: Terry Bannan was a 2010 candidate for the Republican Party nomination to the Montana legislature from HD 68, Montana. Another candidate, Kelly Flynn, also sought the 2010 nomination by the Republican Party from HD 68. (Secretary of State (SOS) Website).

Finding of Fact No. 2: Neither candidate was an incumbent as HD 68 was an open seat in 2010. (SOS Website).

Finding of Fact No. 3: The primary vote in Montana took place on Tuesday, June 8, 2010. Candidate Flynn won the Republican primary election in HD 68 by a vote of 1,473 to 654. (SOS Website).

Mr. Flynn and Mr. Bannan, as candidates in the 2010 HD 68 Republican primary election, were required by law to disclose, report, and attribute all contributions to, and expenses by, their campaigns. The Commissioner notes that there are no offsetting constitutional speech issues to these campaign practice requirements. The holding of public office in Montana is a “public trust” (§ 2-2-103 MCA) and Montana’s interest in preventing corruption of this public trust allows it to impose campaign practice requirements on a candidate for public office.

**A. WTP Entities Involved in Candidate Bannan’s Campaign**

Candidate Bannan, as detailed in this Decision, accepted in-kind services from third party entities. Those third party entities are connected to WTP in such a way that they became agents of or the same as WTP.

WTP’s internal documents show that in early 2009 it began to seek funding, based on its claims of election success in 2008 Montana legislative campaigns, for election activities in 2010 Montana legislative races. (WTP “Confidential Overview,” March 1, 2009).<sup>7</sup> WTP identified the HD 68 Republican primary election, along with a number of other races, as targeted 2010 Montana legislative races. (WTP records).

WTP’s “Confidential Overview” describes its planned use of documents in election activity forecast for a 2010 Montana legislative race, such as HD 68:

---

<sup>7</sup> The WTP “Confidential Overview” was delivered to the Commissioner independent of the “WTP Records” as it was provided to the Commissioner by former WTP staffer Karolyn Loendorf.

1. “Our ambitious Candidate survey program –the backbone of our election year lobbying program—was designed to mobilize the voters...”
2. “Surveys were first sent to candidates in the targeted primaries...”
3. The survey information was combined with other information to choose the pro-development candidate.
4. “In the final weeks of the election, letters and glossy postcards were sent to tens of thousands of likely voters and issue ID’d lists in our targeted races...”

A separate WTP document, the WTP 2010 Election year power point presentation,<sup>8</sup> illustrates the tenor or some of these letters and postcards by showing 5 such WTP documents attacking candidates.

The campaign actions for which WTP claimed credit, including candidate letters, WIFE letters, issue ID’d letters, attack slicks, and surveys, were taken through several related entities and people, including Direct Mail and Communications, Inc., a Colorado for-profit corporation (see below, in Candidate Bannan’s case, WTP also used a fictitious entity, General Consulting). In 2010 Direct Mail operated a print shop in Livingston, Montana under the direction of Allison LeFer. The Commissioner determines that Direct Mail and Allison LeFer are agents of and part of WTP as to any Candidate Bannan election activity. There is a direct relationship between Direct Mail and WTP, making the two indistinguishable for the purposes of this Decision. Allison LeFer (aka Allison Andrews) was the President of Direct Mail in 2010.<sup>9</sup>

---

<sup>8</sup> Also produced to the Commissioner by Ms. Loendorf.

<sup>9</sup> Direct Mail and Communications, Inc. corporate documents list Allison Andrews as Director and President. Her address is listed as 1237 E. Amherst Circle, Aurora, CO.



Allison LeFer was also directly involved in WTP, signing the majority of WTP's checks at the same time. Allison LeFer is married to Christian LeFer.

(Commissioner's records).

Likewise, Christian LeFer is an agent of and the same as WTP as to any Candidate Bannan election activity. Christian LeFer is currently listed as one of 5 board members of American Tradition Institute, the 501(c)(3) adjunct to WTP. (Commissioner's records). A March 1, 2009 internal WTP memorandum laying out an agenda for the 2010 Montana legislative elections lists Christian LeFer as WTP's "Director of Strategic Programming." (Commissioner's records). Karolyn Loendorf, a former WTP staffer, reported that it was Christian LeFer who hired her as a WTP staffer to work on 2010 legislative campaigns.

(Investigator Notes). Christian LeFer's name regularly appears in 2010 WTP election activity, including his April 2010 attempt to convince John Esp to withdraw as a candidate in the 2010 HD 61 Republican primary election against WTP's chosen candidate, Joel Boniek (see Ex. 1). Candidate Washburn (2010 HD 69) also reports that he received a phone call from Christian LeFer speaking on behalf of WTP after Candidate Washburn criticized WTP at a political event. (Investigative conversation with Candidate Washburn).

Assembly Action Fund, Inc. is a Colorado not-for-profit corporation listed as the author of flyers attacking Candidate Bannan. The Commissioner determines that Assembly Action Fund is also an agent of and the same as WTP as to any Candidate Bannan election activity. The Assembly Action Fund was, for all practical purposes, unorganized in regard to the 2010 elections.

The Assembly Action Fund was incorporated as a non-profit corporation in Colorado on May 25, 2010, two weeks before the June 8, 2010 election. (Commissioner's records).

The Assembly Action Fund's presence in Montana is limited to use of its name on attack Slicks used in the 2010 legislative elections. The people who can be connected with the Assembly Action Fund have WTP connections. (Commissioner's records). Christian LeFer registered the Assembly Action Fund domain name. (Commissioner's records). Direct Mail operative, Jeremy Hofer, signed the purchase order for the radio ads against Candidate Bonogofsky and signed the Assembly Action Fund check paying for ads. (Commissioner's records).<sup>10</sup> The Commissioner's Investigator was unable to locate any people who would admit to connections with the Assembly Action Fund.

In the 2008 elections WTP created a front organization, the Coalition for Energy and the Environment, for use as the source of Slicks (*see Graybill v. WTP*, COPP-2010-CFP-0016).<sup>11</sup> The Commissioner finds that the Assembly Action Fund is another such artifice created by WTP for use in the 2010 elections. The Commissioner determines that the Assembly Action Fund Flyer was part of WTP's "backbone" of candidate attacks mounted in a "shock and awe electoral bombing campaign." (Commissioner's records).

---

<sup>10</sup> Jeremy Hofer was listed in the 2010 Direct Mail corporate documents as a Director and Corporate Secretary. Hofer's address was listed as 1237 East Amherst Circle, Aurora, CO, the same address used by Allison LeFer.

<sup>11</sup> WTP challenged the *Graybill* decision in district court. As part of that litigation a January 4, 2013 Order found that "WTP funded, controlled, and directed CEE during the 2008 election cycle in Montana". *WTP v. Murry*, No. BDV-2010-1120, 1<sup>st</sup> Judicial District, Lewis and Clark County.

Finally, it is noted that Candidate Bannan contracted for WTP/Direct Mail work through "General Consulting." General Consulting is an unorganized entity that was not and is not registered with the Montana Secretary of State. An invoice delivered to Candidate Bannan by General Consulting lists its address as 1302 24<sup>th</sup> St. W. #297, Billings, MT. That location is a post office box located at a UPS office in Billings, Montana, with that box no longer held by General Consulting. (Commissioner's Records). General Consulting has no current existence anywhere in business in Montana. The General Consulting campaign bill to Candidate Bannan is comparable to the billing record listed by WTP/Direct Mail in the WTP Bannan HD 68 folder. The final General Consulting invoice came under a note from "Allie" (Allison LeFer).<sup>12</sup> (Commissioner's records).

As with Assembly Action Fund and with Smart and Simple Campaigns, (*see Washburn v. Murray* COPP-2010-CFP-019) the Commissioner finds that General Consulting is an artifice created by WTP/Direct Mail. Accordingly, the Commissioner determines that General Consulting is the same as, or an agent of, WTP/Direct Mail.

### **B. Coordinated Expenses**

Complainant Linda Clark, by the November 12, 2013 Complaint Notice, expanded her 2010 complaint to that of this separate complaint against Candidate Bannan. The complaint against Candidate Bannan incorporated the

---

<sup>12</sup> On April 29, 2010 Allison Andrew (AKA Allison LeFer) ordered the paper stock used to prepare the Bannan records. (Commissioner's records.)

coordination and corporate contribution issues discussed in the *Bonogofsky v. Kennedy* Decision.

Candidate Bannan is responsible for a failure to properly disclose, report, and/or attribute any in-kind (non-monetary) third party election contribution to his campaign, including those coordinated with Candidate Bannan by a third party (see principles and reasoning set out in *Bonogofsky v. Kennedy*). As defined by 44.10.323 (2) ARM an in-kind expenditure "...means the furnishing of services, property or rights without charge or at a charge which is less than fair market value to a ...candidate..." Such in-kind services include the value of "staff time to draft the letter" (Commissioner Argenbright, *Daubert v. MCW/Orvis*, February 27, 1997 at p. 6).

COPP regulations define a coordinated expenditure as "an expenditure made in cooperation with, consultation with, at the request or suggestion of, or the prior consent of a candidate..." 44.10.323(4) ARM. Commissioner Vaughey found such coordination based on a showing of "...prior knowledge, consent and encouragement ..." of the third party expense by the candidate. *Little v. Progressive Missoula*, July 22, 2004; See also *Friede v Rice/Hill County Republican Central Committee*, May 2002, (Commissioner Vaughey). A more detailed discussion of the legal elements of coordination, including a review of past coordination decisions by Commissioners, accompanies this Decision as Exhibit 2.

### **i. The 8 Direct Mail Letters**

Candidate Bannan's campaign finance reports show payment of \$2,666.40 to General Consulting (WTP/Direct Mail). General Consulting's invoice (and the comparable WTP/Direct Mail ledger) to Candidate Bannan shows that amount was billed for cost of the 8 letters signed by Candidate Bannan or his daughter-in-law (hereafter "8 Letters").<sup>13</sup> A copy of the General Consulting invoice and the comparable WTP/Direct Mail ledger is attached to this Decision as Exhibit 3.

The Commissioner's review of WTP records has determined that the 8 Letters consisted of two introduction or "Intro letters" with survey, a "WIFE" letter,<sup>14</sup> four issue ID'd letters (gun, life, tax, spend/Right to Work) and a closing letter. The General Consulting bill shows that Candidate Bannan paid for 5,166 such letters, (*see*, Ex. 3). In particular, the bill shows Candidate Bannan paid for 1,638 Intro letters, 1,528 issue ID'd letters (consisting of 4 separate letters directed to each of 4 issue groups), 799 WIFE letters, and 1,201 final letters.

The 8 Letters are an election expense, with partial payment of \$2,666.40 reported by Candidate Bannan. This Decision determines whether or not the complete expense of the 8 Letters was reported and disclosed by Candidate

---

<sup>13</sup> Candidate Bannan produced some campaign documents, including a copy of the invoice from General Consulting. Candidate Bannan produced a copy of one of the 8 letters shown by the bill.

<sup>14</sup> The Commissioner's review determined that WTP identified a letter from a candidate's wife as a "WIFE" letter. Candidate Bannan's comparable letter was signed by his daughter-in-law.

Bannan, including value of services. See 44.10.323 (2) ARM and above.<sup>15</sup>

Under COPP regulations, Candidate Bannan was required to report as an in-kind contribution the “total value of the services” received as part of the preparation of these 8 Letters (44.10.513 ARM), including the value of “staff time to draft the letter.” See *Daubert v. MCW/Orvis, supra*.

This requirement of disclosure of “total value” makes sense as Montana law dictates that “anything of value” (§13-1-101(7)(a) MCA) provided to a candidate is a contribution. In turn, all contributions must be reported and disclosed by the candidate (§13-37-225 MCA) so that voters and the opposing candidate know who is supporting a particular candidate for public office. If WTP or another entity was providing in-kind services in connection with any one of the letters and those services can be identified, then the value of those services must be reported. *Daubert v. MCC/Orvis, supra*. Valuation of any such identified services for reporting purposes is defined by 44.10.533 ARM as “fair market value.”<sup>16</sup>

### **1. The WIFE LETTER**

One of the 8 Letters was a letter signed by Rosie Bannan, Candidate Bannan’s daughter-in-law, and mailed to an identified group of HD 68 voters

---

<sup>15</sup> The Commissioner identified 9 documents constituting an election expense that were mailed to 2010 HD 68 voters. These documents either promoted Candidate Bannan’s campaign or attacked Candidate Flynn’s campaign. Those 9 documents consist of: 8 candidate letters printed by WTP/Direct Mail and 1 attack Slick. This same pattern of large scale election use of documents was employed in a number of 2010 legislative campaigns. Attached as Exhibit 1 is a summary of the most complete 2010 election document record reviewed by the Commissioner, that being the documents attacking Candidate Esp or promoting Candidate Boniek in the 2010 HD 61 Republican primary race. This summary is useful to acquaint the reader with the pattern of election document use as well as the role played by WTP and its aligned groups.

<sup>16</sup> The Commissioner has retained an expert to set the fair market value, should it be necessary to do so in any enforcement action of this Matter.

("WIFE letter")<sup>17</sup>. As part of the charges listed in the Direct Mail bill Candidate Bannan is listed as paying 65 cents for each of the 799 WIFE letters (including postage) for a cost of \$519.35 (Ex. 3, bill). The WTP Records included a copy of the handwritten Rosie Bannan WIFE letter. Candidate Bannan did not produce a copy of the letter, but he did produce a copy of the questionnaire response wherein Rosie Bannan gave WTP staff the information used to prepare the final WIFE letter.

The Commissioner takes administrative notice, based on the practice of WTP in preparing WIFE letters in other 2010 Montana primary elections, that the Rosie Bannan's handwritten WIFE letter was printed comparably to other legislative candidate's WIFE letters. The WTP documents included a Rosie Bannan letter and it was printed with black ink on blue, off-size (10" by 8") paper. The Commissioner takes administrative notice based on review of a number of comparable WIFE letters that the Rosie Bannan WIFE letter was placed in a blue or pink envelope, hand addressed, and mailed with a 44 cent stamp.<sup>18</sup>

The Commissioner's review determined that, as was done with Rosie Bannan, WTP interviewed each letter signer (using a survey form) to gain the information to draft the content of a WIFE letter. The draft was written and edited by WTP into the final WIFE letter text. A scribe was then engaged to

---

<sup>17</sup> In the Bannan campaign WTP used a daughter-in-law letter in lieu of its standard WIFE letter. The letter, however, used the same format and style as a WIFE letter and to allow comparison with other comparable Decisions will be referred to in this Decision as a WIFE letter.

<sup>18</sup> For example, a copy of the Maria Wagman WIFE letter was received as part of the Esp family document archive. See Ex. 1. Wagman was also a candidate chosen for support by WTP.

carefully write out the final handwritten text and that text was cut, pasted, and mocked up to fit the size of letter paper used for the candidate. A wife signature was added to each WIFE letter.<sup>19</sup> After mock-up, the Rosie Bannan WIFE letter was printed, inserted into a hand addressed pink or blue envelope and a 44 cent stamp was used to mail the envelope. The Commissioner determines that the 65 cents Candidate Bannan paid for each such WIFE letter, at most, paid for the stamp, envelope, paper, and ink.

In making the above determination the Commissioner takes administrative notice that minimum cost of printing and handling a mailer is 56 cents, exclusive of postage. The Commissioner takes administrative notice of the information in the *Bonogofsky v. Kennedy* Decision from Allegra invoice No. 80910. Allegra's invoice, dated May 4, 2010, showed a charge to Candidate Kennedy of \$1,103.72 to print, fold, and inkjet address 1,959 mailers. This comes to a charge of 56 cents per mailer, not including postage.<sup>20</sup>

The Commissioner's administrative notice recognizes that Allegra is an operating Montana business that offered services to the public in 2010 at rates

---

<sup>19</sup> The Commissioner's investigator determined, looking to mock-ups and notations on WIFE letter drafts, that there is a common theme and carry-over phrases between WIFE letters. Further, the investigator observed that the wife's signature is generally added by the scribe, based on a sample signature from the wife. For example, the Investigator determined that the 2008 Susan Boniek HD 61 WIFE letters (primary and general elections) signatures appear to have been made by the scribe. This is in contrast to the 2010 HD 61 primary election where the Susan Boniek WIFE letter mock-ups in the WTP records show there was direction "to PDF to CL [Christian LeFer] rewrite 1<sup>st</sup> page not even/neat as other pages," indicating WTP had difficulty getting the scribe to prepare the letter as directed. The WTP records show that the 2010 HD 61 Susan Boniek WIFE letter was eventually computer generated with a scripted font. Susan Boniek then likely signed the computer generated 2010 WIFE letter and added a post-script in her own handwriting.

<sup>20</sup> Postage or "shipping" was separately charged by Allegra at \$470.16, or 24 cents per mailer. This is comparable to the 22 cents bulk stamp rate paid by Direct Mail.



it designed to be competitive. Being competitive, the 56 cents of cost per mailer sets fair market value for a comparable service.

In regard to the WIFE letter, Allegra charged 56 cents to print, fold, and address a one page mailer. The Commissioner determines that the Direct Mail services provided to Candidate Bannan in the production of the WIFE letter involved printing, folding, and inserting multiple pages into an envelope as well as sealing and addressing the envelope. The Direct Mail services provided for each of the 8 Letters were therefore greater than the Allegra services provided for the less complicated mailer.

The Commissioner, based on the above analysis and common sense, determines that Direct Mail's after postage charge of 21 cents (WIFE letter) to 23 cents for the remaining 7 Letters does not cover the envelope, paper, and ink costs of the 8 Letters. The Commissioner also determines, based on the above information, that there were writing, editing, layout, and production services of substantial value provided by WTP to Candidate Bannan in connection with the Rosie Bannan WIFE letter (*see Daubert v MCC/Orvis*).<sup>21</sup> The value of these services was not covered by any payment to Direct Mail by Candidate Bannan. The Commissioner determines Candidate Bannan paid nothing to WTP for its services in writing, editing, layout, and processing the Candidate Bannan WIFE letter.

---

<sup>21</sup> Montana law, at ARM 44.10.513(1)(b)(ii) requires that WTP/Direct Mail report as an in-kind contribution "...the difference between the fair market value at the time of the contribution and the amount charged the contribute...". Candidates routinely engage businesses, such as Allegra, to provide goods or services for the candidate's campaign. There is no contribution involved so long as the candidate pays fair market value for the goods or services. If fair market value is not charged then the difference becomes an in-kind contribution to the candidate.

The Commissioner further determines that Candidate Bannan cooperated with, knew of, and approved of the WTP services involved in the Rosie Bannan WIFE letter. Candidate Bannan was directly involved through his daughter-in-law in the WIFE letter production. The content was approved by signature and Candidate Bannan partially paid for the letter. The Commissioner determines that candidate coordination lies under 44.10.323(4) ARM and *Little v. Progressive Missoula, supra*. These unpaid, unreported, and undisclosed services provided by WTP in regard to the WIFE letter met the definition of coordination and should have, but were not, reported as an in-kind contribution/expense to and by Candidate Bannan.

Finding of Fact No. 4: The 65 cents Candidate Bannan reported he paid to Direct Mail per WIFE letter leaves 21 cents, after the 44 cent stamp cost is deducted. The 21 cents does not cover the cost of the paper, ink and envelope of each WIFE letter.

Finding of Fact No. 5: Candidate Bannan received WIFE letter services in his 2010 HD 68 election, including preparation, design, layout, editing, and handling of the WIFE letter.

Finding of Fact No. 6: Candidate Bannan did not pay for, disclose, or report the expense of services involved preparation, design, layout editing, or handling of the WIFE letter.

Finding of Fact No. 7: The WIFE letter services provided to Candidate Bannan were provided by a corporation, whether through the WTP corporation or the Direct Mail corporation.

Finding of Fact No. 8: Candidate Bannan knew of, consulted on, and consented to the full range of WIFE letter services and therefore coordinated this activity with WTP and/or Direct Mail.

Sufficiency Finding No. 1: As shown by Findings of Fact 1 through 8, there is sufficient evidence to justify civil prosecution of Candidate Bannan for accepting illegal corporate contributions to his 2010 HD 68

campaign in the form of coordinated in-kind expenses made by a corporation in connection with the WIFE letter.

Sufficiency Finding No. 2: As shown by Findings of Fact 1 through 8, there is sufficient evidence to justify civil prosecution of Candidate Bannan for failing to disclose and report as in-kind contributions election related expenses associated with the WIFE letter.

The Commissioner recognizes that Candidate Bannan does not admit any coordination with WTP. (Commissioner's records). The records listed above, however, are sufficient to show that Candidate Bannan coordinated in the production of the WIFE letter and violated Montana law as set out in the sufficiency findings. While *Citizens United* allows a corporation to make independent expenditures in candidate elections, it did not strike the prohibition on corporate contributions to candidates. Campaign contribution by a corporation and/or acceptance of a corporate contribution by a Montana candidate, whether in cash or in-kind services, is illegal in any amount. See §13-35-227(2) MCA.

## **2. The 2 Intro and Closing letters**

Candidate Bannan also engaged Direct Mail for two introduction (Intro) letters and a closing letter (Ex. 3, bill). Direct Mail produced 1,638 Intro letters (50 cents each for \$819 cost) and 1,201 closing letters (45 cents each for \$540.45 cost) for Candidate Bannan. Each Intro letter mailing included the outgoing envelope, the letter, a survey, and return envelope the HD 68 voter could use to return the survey. (WTP records).

The Commissioner determined the services provided by WTP through an examination of WTP Intro and closing letter records comparable to that set out

above in regard to the WIFE letter. In particular, the Commissioner found that the WTP used a standard practice of cutting and pasting information specific to a candidate, including Candidate Bannan, into pages of a "master" letter used by WTP for multiple legislative candidates. A masthead for Candidate Bannan was then pasted on the final text. (WTP records).

The Commissioner's review determines that Candidate Bannan gave multiple samples of his signature to WTP. One of those signatures was selected by WTP and scanned into a printer menu. The Intro letter was then printed in ink on 8 ½ by 11 paper (Candidate Bannan's chosen signature was scan printed on the letter), folded, and inserted into an envelope along with survey and return envelope and then mailed, engaging Direct Mail's rapid fire printing capacity. The Commissioner found a Direct Mail flyer in the WTP records wherein Direct Mail described itself as a "grassroots direct mail fortress" whose equipment included "computer controlled automated insertion technology" capable of printing, inserting, and sealing letters at rate of over 1,000 per hour. (WTP records). The closing letter was prepared using a similar approach. (WTP records).

The Direct Mail flyer also described its equipment as including a rapid fire "stamp affixer" machine. (WTP records). The Commissioner's review of WTP records determined that, except for special letters like the WIFE letter, 2010 Montana legislative election documents were mailed by Direct Mail under a presort standard rate stamp called the Patriotic Banner stamp which can be

used by mailers of bulk quantities of items such as newsletters or notices.<sup>22</sup> The postage charge was 22 cents per document mailed when this stamp is used. (WTP records, Investigator's Notes).

The Commissioner determined that the Candidate Bannan Intro and closing letters were mailed using the Patriotic Banner stamp. The Commissioner, under the reasoning set out in regard to the WIFE letter, determines that the 50 or 45 cents Candidate Bannan paid for each for each such letter did not cover even the cost of the stamp, envelope, paper, and ink. Further, the Commissioner determined that Candidate Bannan paid nothing to WTP for its services in writing, editing, layout, and processing the Intro or closing letters.

The Commissioner finds that Candidate Bannan cooperated with, knew of, and approved of the services involved in the Intro and closing letters. Candidate Bannan signed the letters and partially paid for the letter. The Commissioner determines that candidate coordination lies under 44.10.323(4) ARM and *Little v. Progressive Missoula, supra*. These services provided by WTP in regard to the Intro and closing letters met the definition of coordination and should have, but were not, reported as an in-kind contribution/expense to and by Candidate Bannan.

Finding of Fact No. 9: Candidate Bannan received Intro and closing letter services in his 2010 HD 68 election, including preparation, design, layout, editing and handling of the letters.

---

<sup>22</sup> WTP records and the Esp records show a systemic use by WTP and/or Direct Mail of the Patriotic Banner bulk rate stamp on documents that WTP/Direct Mail prepared, printed, and mailed for candidates.

Finding of Fact No. 10: Candidate Bannan did not pay for, disclose or report the expense of services involved preparation, design, layout, editing, or handling of the Intro and closing letters.

Finding of Fact No. 11: The Intro and closing letter services provided to Candidate Bannan were provided by a corporation, whether through the WTP corporation or the Direct Mail corporation.

Finding of Fact No. 12: Candidate Bannan knew of, consulted on and consented to the full range of Intro and closing letter services and therefore coordinated this activity with WTP and/or Direct Mail.

Sufficiency Finding No. 3: As shown by Findings of Fact 1 through 12, there is sufficient evidence to justify civil prosecution of Candidate Bannan for accepting illegal corporate contributions to his 2010 HD 68 campaign in the form of coordinated in-kind expenses made by a corporation in connection with the Intro and closing letters.

Sufficiency Finding No. 4: As shown by Findings of Fact 1 through 12, there is sufficient evidence to justify civil prosecution of Candidate Bannan for failing to disclose and report as in-kind contributions election related expenses associated with the Intro and closing letters.

The Commissioner recognizes that Candidate Bannan does not admit any coordination with WTP. The records listed above, however, are sufficient to show that Candidate Bannan coordinated in the production of the Intro and closing letters and violated Montana law as set out in the sufficiency findings. While *Citizens United* allows a corporation to make independent expenditures in candidate elections, it did not strike the prohibition on corporate contributions to candidates. Campaign contribution by a corporation and/or acceptance of a corporate contribution by a Montana candidate, whether in cash or in-kind services, is illegal in any amount. See §13-35-227(2) MCA.

### 3. Issue ID'd letters

The Candidate Bannan Intro, WIFE, and closing letters discussed above, this Decision, did not go to all HD 68 primary voters. The SOS website reports that 2,127 people voted in the 2010 HD 68 Republican primary (see Finding of Fact 3). WTP planned a mass mailing of “letters and glossy postcards to ...tens of thousands of likely voters and issue ID'd lists” (see this Decision, page 7) in selected legislative districts, including HD 68. Direct Mail described this mass mailing approach as a “shock and awe electoral bombing campaign.” (Commissioner's records).

The issue ID'd letters present the issue of just which voters were being “bombed” with the combined mailings from Candidate Bannan and third parties. The Direct Mail (General Consulting) bill to Candidate Bannan states he was billed 45 cents each for 1,528 “issue” letters for a cost of \$687.50. The cover sheets to WTP's candidate files divided “issue ID'd voters” into four groups, those being: “gun” voters, “life” voters, “tax” voters, and “tax/right to work” voters.

The Commissioner, by review of WTP records, has determined that WTP provided each candidate it chose to support, including Candidate Bannan, with an identified list of issue ID'd voters in their legislative district.<sup>23</sup> The Commissioner takes administrative notice that any such list of identified voters has value (see *Wittich v. Campbell*, November 17, 2009). This applies to each Candidate Bannan mailing, but particularly in this issue ID'd mailing. The

---

<sup>23</sup> Please See Ex. 1 for a listing of the comparable approach in the 2010 HD 61 election.

Commissioner finds that provision of likely voter lists, in particular issue ID'd lists, is an additional service value provided by WTP to Candidate Bannan.

A review of WTP records relating to issue ID'd letters was conducted by the Commissioner comparable to that set out in regard to the WIFE letter. Based on that review the Commissioner determined that the Candidate Bannan issue ID'd letters were two pages in length, printed on standard 8 1/2 by 11 inch paper stock with use of a scanned blue ink Candidate Bannan signature. The Terry Bannan masthead and the text of the letter were created by cutting and pasting "Terry Bannan" onto the master letter used as a template for all such issue ID'd letters prepared by WTP for the 2010 Montana legislative candidates it supported.<sup>24</sup> As was the case with the Intro and closing letters the Candidate Bannan issue ID'd letters were mailed using the bulk rate Patriotic Banner stamp. Specifically, four separate Candidate Bannan issue ID'd letters were created (one for each group of ID'd voters) and mailed to each issue ID'd group of HD 68 voters. For example, the "gun" issue ID'd voters received a Candidate Bannan letter stating his support of the 2<sup>nd</sup> amendment.

The Commissioner adopts and applies the reasoning set out in the WIFE letter determination (*see above*) and determines that writing, editing, layout, and production services of substantial value were provided by WTP to Candidate Bannan in connection with the four issue ID'd letters. The Commissioner further determines that Candidate Bannan paid nothing to

---

<sup>24</sup> WTP used this issue ID's letter approach for multiple candidates in 2010 elections.



WTP/Direct Mail for the services in writing, editing, layout, and processing the Candidate Bannan issue ID'd letters.

Finding of Fact No. 13: Candidate Bannan received issue ID'd letter services in his 2010 HD 68 election, including preparation, design, layout, editing, and handling of the letters.

Finding of Fact No. 14: Candidate Bannan did not pay for, disclose, or report the expense of services involved preparation, design, layout, editing or handling of the issue ID'd letters.

Finding of Fact No. 15: The issue ID'd letter services provided to Candidate Bannan were provided by a corporation, whether through the WTP corporation or the Direct Mail corporation.

Finding of Fact No. 16: Candidate Bannan knew of, consulted on, and consented to the full range of issue ID'd services and therefore coordinated this activity with WTP and/or Direct Mail.

Sufficiency Finding No. 5: As shown by Findings of Fact 1 through 16, there is sufficient evidence to justify civil prosecution of Candidate Bannan for accepting illegal corporate in-kind contributions to his 2010 HD 68 campaign in the form of coordinated in-kind expenses made by a corporation in connection with the issue ID'd letters.

Sufficiency Finding No. 6: As shown by Findings of Fact 1 through 16, there is sufficient evidence to justify civil prosecution of Candidate Bannan for failing to disclose and report as in-kind contributions election related expenses associated with the issue ID'd letters.

The Commissioner recognizes that Candidate Bannan does not admit any coordination with WTP. The records listed above, however, are sufficient to show that Candidate Bannan coordinated in the production of the issue ID'd letter and violated Montana law as set out in the sufficiency findings. While *Citizens United* allows a corporation to make independent expenditures in candidate elections, it did not strike the prohibition on corporate contributions

to candidates. Campaign contribution by a corporation and/or acceptance of a corporate contribution by a Montana candidate, whether in cash or in-kind services, is illegal in any amount. See §13-35-227(2) MCA.

## **ii. Third Party Slicks and Letters**

The Commissioner determined, above, that Candidate Bannan signed (thereby accepting content) and partially paid for the 8 Letters discussed above. By so acting Candidate Bannan was directly involved with the 8 Letters such that he directly showed coordination with WTP (see 44.10.323(4) ARM and *Little v. Progressive Missoula*) such that the fair market value of the accompanying letter services became an in-kind contribution to Candidate Bannan's campaign.<sup>25</sup>

The Commissioner notes that Candidate Bannan paid for 4 issue letters to voters ID'd to respond favorably on the issue. WTP orchestrated third party attack letters to precede these issue ID'd letters in other 2010 Montana legislative elections (see Ex. 1). The Commissioner, however, did not view such a third party attack letter in the HD 68 race. The Commissioner reserves and expects to add violations based on use of attack letters and additional Slicks (see below) should adjudication, with accompanying discovery, be necessary in this Matter.

The Commissioner, by direct observation, has identified an additional document that is an election expenses in the 2010 HD 68 election in that the document attacked Candidate Flynn. This document was a glossy attack flyer

---

<sup>25</sup> The Commissioner reserves his right to claim further fair market value deficiency as to the production costs Direct Mail charged Candidate Bannan.

called a "Slick" by WTP.<sup>26</sup> The Commissioner must now determine who, if anyone, is responsible to attribute, report, and disclose the value (i.e. "election expense") of these documents.

The Commissioner has, above, determined that the Assembly Action Fund is an agent of or the same as WTP. The WTP records include invoice No. 473 showing the cost of 13 Slicks used in ten 2010 Montana legislative races (Ex. 4, this Decision). The Commissioner found copies of each of the 13 Slicks in the WTP records and each of the Slicks was mailed under the Patriotic Banner bulk rate stamp. The Commissioner determines that Assembly Action Fund Slicks were printed and mailed by Direct Mail. Invoice No. 473 shows 1,499 Slicks were printed and mailed attacking Candidate Flynn on "Main Street."<sup>27</sup> Additional Slicks listed on the invoice attacked candidates: Washburn, HD 69; Bonogofsky, HD 57; Dooling, HD 84; Moran, SD 35; Welch, HD 3; Esp, HD 61; Barnhardt, HD 4; Gilman, HD 71; Flynn, HD 68; and, Arthun, SD 31.

The expense of the 1,499 Slicks attacking Candidate Flynn (the Main Street Slicks) was not reported or disclosed by any entity, including Candidate Bannan. (Commissioner's records).

### **1. The Slick Was Coordinated**

The Commissioner determines that the AAF attack slicks exist, have value, and are an election expense made by WTP and/or AAF in the 2010 HD

---

<sup>26</sup> This document was identified by direct observation. There may be more such documents that have not yet been identified.

<sup>27</sup> The Candidate Flynn "Main Street Slicks" were charged at 43 cent cost per unit, including the 22 cent stamp, making the total invoice amount \$646.29 for the Flynn Slicks.

68 legislative race. As an election expense, Candidate Bannan will be deemed to accept the letters as a coordinated in-kind contribution if it is “an expenditure made in cooperation with, consultation with, at the request or suggestion of, or the prior consent of a candidate...” 44.10.323(4) ARM.

Commissioner Vaughey found such coordination based on a showing of “...prior knowledge, consent and encouragement ...” of the third party expense by the candidate, *Little v. Progressive Missoula, supra*.

The 2010 elections, including the HD 68 elections, were the second election cycle for WTP involvement in Montana’s legislative races. By far the most visible and controversial part of WTP’s 2008 election activity had been its use of attack letters and slicks in 2008 legislative elections (*see Graybill v. WTP, 2010-COPP-CFP-0016*). The Commissioner takes administrative notice that a candidate endorsed by WTP in the 2010 elections would have to know of and consented to the use of attack slicks, as such use was WTP’s signature electioneering brand. Further, the Commissioner interviewed two Republican primary candidates, John Ward (2008, HD 84) and John Esp (2010, HD 61). Both Ward and Esp told the Commissioner that any 2010 legislative candidate accepting WTP’s endorsement had to know of or give consent to WTP’s use of attack letters and Slicks.

Finally, the Commissioner notes that Candidate Bannan literally turned his campaign over to WTP/Direct Mail with his expense reports showing limited campaign activity other than the activity carried out by WTP through Direct Mail. The Commissioner further determines that Candidate Bannan’s principal

demonstrated personal campaign activity was the production of several rhetorical position papers. Candidate Bannan campaign presence primarily came from a direct mail campaign and in that he improperly benefited from accepting the fruits of an undisclosed, shadow campaign that produced 8 direct mail letters as well as at least 1 set of attack Slicks. Candidate Bannan did not report or disclose the major expenses of his campaign and, given the coordination and complexity that he consented to or was part of, the Commissioner determines that the Slicks were an integral part of Candidate Bannan's campaign for which he must take responsibility.

Finding of Fact No. 17: The set of WTP/Assembly Action Fund attack Slicks were election expenses in the 2010 HD 68 election.

Finding of Fact No. 18: The in-kind election expenses involved in the Slicks identified in FOF No. 17 were not disclosed or reported as election expenses by any entity, including Candidate Bannan.

Finding of Fact No. 19: The election expenses identified in FOF No. 18 were coordinated with Candidate Bannan and became in-kind contributions to Candidate Bannan's campaign.

Finding of Fact No. 20: The election expenses of FOF No. 18 were made by a corporation.

Sufficiency Finding No. 7: As shown by Findings of Fact 1 through 20, there is sufficient evidence to justify civil prosecution of Candidate Bannan for accepting illegal in-kind corporate contributions to his 2010 HD 68 campaign in the form of in-kind coordinated expenses made by a corporation in connection with the documents discussed in FOF No. 18.

Sufficiency Finding No. 8: As shown by Findings of Fact 1 through 20, there is sufficient evidence to justify civil prosecution of Candidate Bannan for failing to disclose and report as in-kind contributions election related expenses in connection with the documents discussed in FOF No. 18.

The Commissioner recognizes that Candidate Bannan does not admit any coordination with WTP. The records listed above, however, are sufficient to show that Candidate Bannan coordinated in the production of the Slicks and violated Montana law as set out in the sufficiency findings. While *Citizens United* allows a corporation to make independent expenditures in candidate elections, it did not strike the prohibition on corporate contributions to candidates. Campaign contribution by a corporation and/or acceptance of a corporate contribution by a Montana candidate, whether in cash or in-kind services, is illegal in any amount. See §13-35-227(2) MCA.

### **C. Campaign Attribution, Reporting and Documents**

There are further issues involved with the attribution, reporting, and document retention by Candidate Bannan's campaign.

#### **i. Attribution of Expenditures**

Under Montana law Candidate Bannan was required to "attribute" or place the "name and the address of the candidate or the candidate's campaign" on any such election communication, §13-35-225(1) MCA. The Commissioner was able to directly view 5 of the 8 Bannan letters (Intro, WIFE, and 3 issue letters), none of which had any attribution.

An attribution is an objective item. The required attribution is either printed or not printed on a campaign document. The Commissioner's objective review of the above listed documents and photos determined that the required

attribution was lacking on at least 5 of the 9 election communications made by candidate Bannan.

Finding of Fact No. 21: Candidate Bannan did not place the required attribution on thousands of campaign letters<sup>28</sup> and other communications including signs and stickers.

Sufficiency Finding No. 9: There is sufficient evidence to justify a civil prosecution of Candidate Bannan for failing to attribute those certain campaign communications described Finding of Fact 21.

### **ii. Reporting of Expenditures**

Candidate Bannan is required to report expenditures by §13-37-225 MCA. Candidate Bannan received undisclosed and unreported in-kind expenditures as set out in findings of fact and sufficiency findings, above.

### **iii. Campaign Document Retention and Production**

By law the Candidate Bannan's campaign, through its treasurer,<sup>29</sup> is required to preserve "detailed accounts" of all expenses made for a period of 4 years. §13-37-208 MCA. The detail in the accounts must be sufficient to determine the "purpose of each expenditure" §13-37-230(1)(a) MCA. The detail is that required to prepare "...directly from the accounting records, the reports required by Title 13." ARM44.10.501. Commissioner Vaughey applied that standard to require that invoices must "...describe the work performed..." so that a value can be set for in-kind services. *Motl v. Citizens for More Responsive Govt.* Decided April 20, 2004, p. 15.

---

<sup>28</sup> Direct Mail alone printed 5,166 candidate letters, none of which had a complete attribution.

<sup>29</sup> Terry Bannan served as the treasurer of his own campaign. (Commissioner's records).

Candidate Bannan was asked to provide copies of all campaign documents concerning those expenses. Candidate Bannan produced a number of pages of documents, but only produced a copy of 1 of the 8 letters.

Sufficiency Finding No. 10: The Commissioner determines that there is sufficient evidence to justify civil prosecution of Candidate Bannan and his treasurer, for failing to maintain campaign records for the four year period of time set out in Title 13 of the Montana Code.

#### **V. SUMMARY OF CAMPAIGN PRACTICE VIOLATIONS**

The Commissioner issued 10 sufficiency findings in this Matter. These included: failure to attribute (Sufficiency Finding No. 9); failure to report or disclose (Sufficiency Findings Nos. 2,4,6,8); acceptance of illegal corporate contributions through coordination (Sufficiency Findings Nos. 1,3,5,7); and failure to maintain campaign finance records for the required time period. (Sufficiency Finding No. 10).

The sufficiency findings of failures to attribute, report, and disclose as well as the finding of acceptance, through coordination, of illegal corporate contributions are substantial and significant. While each of these findings raise caution flags, the coordination and failure to maintain records findings are a flashing red light to 2014 candidates and their treasurers.

There have been five prior coordination findings by a Montana Commissioner of Political Practices, those being in *Little v. Progressive Missoula* (Commissioner Vaughey); *Friede v. Rice/Hill County Republican Central Committee*, May 2002 (Commissioner Vaughey); *Bonogofsky v. Kennedy* COPP-2010-CFP-015 (Commissioner Motl); *Ward v. Miller* COPP-2010-CFP-021



(Commissioner Motl); and *Washburn v. Murray* COPP-2010-CFP-019

Commissioner Motl). Notably The *Progressive Missoula* and *Friede* matters involved far less services than are involved in this matter and the coordinating third party was a political committee, not a corporation. A political committee can contribute, subject to limits, to a candidate.

This Decision (as did *Bonogofsky v. Kennedy*, *Ward v. Miller*, and *Washburn v. Murray*) finds coordination by a corporation. While *Citizens United* allows a corporation to make independent expenditures in candidate elections, it did not strike the prohibition on corporate contributions to candidates. Acceptance of a corporate contribution by a Montana candidate, whether in cash or in-kind services, is illegal in any amount. See §13-35-227(2) MCA.

There is lag time in social adjustment when major changes occur in permissible activity, such as the changes made by the *Citizens United* decision. During that lag time opportunistic people and groups may emerge and promote activity such as corporate involvement in candidate campaigns that is risky or down right illegal. This Decision cautions candidates and treasurers that their agreement to partake in such behavior may leave them to pay the societal debt based on determination of error in behavior. In particular, the sufficiency findings in this matter mean that Candidate Bannan faces potentially significant enforcement consequences. There may be similar enforcement consequences in any determination of a similarly postured candidate in other 2010 and 2012 elections.

The Commissioner hereby cautions 2014 candidates in Montana elections to avoid the sort of election entanglement or involvement with a non-profit or for-profit corporation that Candidate Bannan had with WTP and/or Direct Mail. While a corporation may independently make election expenditures (as independent expenditures or issue advocacy), the best protection a candidate has from consequences like those of this Decision is to avoid election contact, interaction or interplay with a corporation unless that contact is fully paid for. That is what the law requires and it is what fair play with an opponent should dictate.

#### **VI. 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 make, a decision 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, as set out in this Decision,

to show that Candidate Bannan has, as a matter of law, violated Montana's campaign practice laws, including, but not limited to §13-35-225, §13-35-227, §13-37-225, §13-37-226, §13-37-229, §13-37-230, MCA and all associated ARMs. 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.

The many decisions to act or to not act made by Candidate Bannan in this matter were choices. Excusable neglect cannot be applied to such choices. See discussion of excusable neglect principles in *Matters of Vincent*, Nos. CPP-2013-CFP-006 and 009. Montana has determined that political discourse is more fairly advanced when election funding is kept fair and, through disclosure, the public is informed as to the identity of those who seek to influence elections. There can be no excuse for instances of failing to attribute, report, and disclose, or for acceptance of corporate in-kind contributions, such as are involved in this matter.

Likewise, the amounts of money are too significant to be excused as *de minimis*. See discussion of *de minimis* principles in *Matters of Vincent*, Nos. CPP-2013-CFP-006 and 0009. With the above analysis in mind, this Matter is also not appropriate for application of the *de minimis* theory.

Because there is a finding of sufficient showing of violation and a determination that *de minimis* and excusable neglect theories are not applicable, civil adjudication and/or a civil fine is justified (see §13-37-124

MCA). This Commissioner hereby, through this decision, issues a “sufficient evidence” Finding and Decision justifying civil prosecution under §13-37-124 MCA. This matter will now be submitted to (or “noticed to”)<sup>30</sup> the Lewis and Clark County attorney for his review for appropriate civil action (see §13-37-124(1) MCA). Should the County Attorney waive the right to adjudicate (§13-37-124(2) MCA) or fail to initiate civil action within 30 days (§13-37-124(1) MCA) this Matter returns to this Commissioner for possible adjudication.

Campaign practice violations, of the nature and scope encountered in this Matter, are new to the modern era Montana politics.<sup>31</sup> Montana’s second Commissioner, Peg Krivec, served her entire 6 year term (1981-1986) without issuing a Decision. Subsequent Commissioners Colberg, Vaughey, and Argenbright issued decisions that generally provided a platform for earnest political participants to pay a fine for the mistake and adjust future election activity to conform with the rulings.

In contrast, the parties in this Matter have, to date, been unwilling to accept or adjust to Montana’s expectations of appropriate election behavior. WTP has, to date, aggressively pursued a self-determined approach to involvement in Montana elections. Candidate Bannan also demonstrates an equally self-determined view of appropriate election activity. Commissioners have rarely found it necessary to seek the full legal redress allowed by Montana

---

<sup>30</sup> Notification is to “...the county attorney in which the alleged violation occurred...” §13-37-124(1) MCA. The failures to attribute and report occurred in Lewis and Clark County. This Commissioner chooses to Notice this matter to the county attorney in Lewis and Clark County.

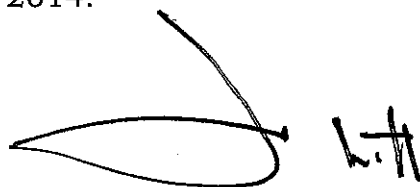
<sup>31</sup> This type of systemic violations in Montana’s past gave rise to many of Montana’s current campaign practice laws.

law against a candidate or treasurer.<sup>32</sup> Full legal redress is imposed by a district court judge and comes only after a full due-process district court hearing where the candidate may provide evidence and confront witnesses, including the Commissioner. The Commissioner notes that full legal redress includes ineligibility of adjudicated offender to be a candidate for, or to hold, public office (*see* §13-35-106(3) MCA). In addition the offender can be assessed a fine of up to three times the amount of the unlawful contribution or expenditure (*see* §13-37-128 MCA).

### VII. CONCLUSION

Based on the preceding discussion, as Commissioner, I find and decide that there is sufficient evidence to show that Candidate Bannan violated Montana's campaign practices laws as set out above and that civil adjudication of the violation is warranted.

Dated this 22<sup>nd</sup> day of January, 2014.

A handwritten signature in black ink, appearing to read 'J. Motl', is written above a horizontal line.

Jonathan R. Motl  
Commissioner of Political Practices  
Of the State of Montana  
P.O. Box 202401  
1205 8<sup>th</sup> Avenue  
Helena, MT 59620  
Phone: (406) 444-4622

---

<sup>32</sup> Commissioners have filed district court enforcement actions in several Matters. After filing these Matters settled without active district court enforcement litigation.

Exhibit 1  
Bonogofsky v. Kennedy COPP-2010-CFP-0015

The *Bonogofsky v. Kennedy* Decision summarizes election actions orchestrated by Western Tradition Partnership (WTP) through 16 direct mail pieces in support of Candidate Kennedy and/or in opposition to Candidate Bonogofsky in the Montana 2010 HD 57 Republican primary election. This document is a summary of comparable direct mail election actions orchestrated by WTP in support of Candidate Joel Boniek and/or in opposition to Candidate John Esp in the 2010 HD 61 Republican primary race. This summary provides a further example of the election related surveys, letters and attack pieces used by WTP to enhance the election of its chosen candidate in 2010 legislative elections.<sup>1</sup> The primary election was set for June 8, 2010. In the two months leading to the following WTP related election actions took place in the HD 61 race:

1. Direct contact with Esp by WTP: On April 4, 2010 WTP, through Christian LeFer, called Candidate Esp. LeFer tried to talk Esp out of running, calling Boniek a beacon of hope to so many. LeFer also accused Esp of spreading rumors about Boniek and threatened to run

---

<sup>1</sup> John Esp has a number of family members living in HD 61. Mr. Esp has provided the Commissioner with the Esp family archive of WTP orchestrated actions related to the 2010 Republican primary. The ESP family archive, added to information in the WTP files, created a comprehensive record of WTP activity in the 2010 HD 61 Republican primary election.



a "dirty campaign" against Esp in retaliation (Esp notes, Esp Campaign records).

2. Six Surveys: During May 3 through May 10, 2010 Candidate Esp received 6 candidate surveys -- those being from the National Gun Owners Alliance, Montana Citizens for Right to Work, WTP, the National League of Taxpayers, the National Pro-Life Alliance, and the Montana Tea Party Coalition. *Id.*
3. Boniek letter and Survey: In this same early May 2010 period Boniek sent an undated "Monday morning letter" announcing he was running for the HD 61 nomination, asking for money and enclosing a voter survey. *Id.*
4. 5 to 10 Attack Letters Based on Survey Results: During May 24 through June 1 the National Gun Owner's Alliance, National ProLife Alliance, Montana Citizens for Right to Work and WTP sent two letters each to HD 61 voters, each letter promoting Candidate Boniek and/or attacking Candidate Esp centered on the June 8 primary election in HD 61. *Id.*
5. 4 Boniek issue letters: Also during May 24 through June 1 Candidate Boniek sent four more letters on issues (abortion, taxes, spending and guns) to groups of HD 61 voters who were ID'd as favorable to his position on these issues. *Id.*

6. 3 final Boniek letters: On June 3, 2010 two people with WTP connections (Lair and Faw) sent a letter attacking Esp. Susan Boniek sent a letter [WIFE letter] imploring a vote in favor of her husband and Candidate Boniek sent a final 6 page candidate letter seeking votes.

*Id.*

7. 6 attack Esp pieces: During the final weeks of the campaign 6 glossy fliers (Slicks) attacking Candidate Esp were mailed or handed to HD 61 voters by four groups: WTP attacked Esp twice on tax/spend and inheritance taxes; Assembly Action Fund attacked Esp on supporting Planned Parenthood; the Sportsman's Rights PAC attacked Esp as opposing "pro-gun hero Joel Boniek", the Montana Conservative Alliance attacked Esp as being supported by unions; and an anonymous "fact check" piece attacked Esp for failing to return surveys. *Id.*

8. The NRA sent postcards to its membership supporting Boniek. *Id.*

The *Bonogofsky v. Kennedy* decision determined that WTP (partly through its agent, a for-profit corporation called Direct Mail and Communications) wrote, edited, printed, stamped and mailed all letters sent by Candidate Kennedy. Excluding the surveys (which only went to the candidate) Candidate Boniek was promoted or Candidate Esp attacked by 24 direct mail pieces, as set out above.



Exhibit 2  
*Bonogofsky v. Kennedy*, COPP-2010-CFP-0015

This Exhibit supplements the legal discussion of coordination, as introduced in the above Decision. This discussion is incorporated by reference into the Decision as though set out in full therein.

An expenditure that is deemed to be “coordinated” between a candidate and another entity or person is treated as though it is a contribution to and/or expense by the candidate’s own committee. Contributions to a candidate are limited in amount from any source and prohibited completely from a corporate source. (See §§13-35-227, 13-37-216, MCA). Because a coordinated third party election expense is deemed to be a contribution it becomes subject to the limits and prohibition of these laws.

A third party, including a corporation, can participate in an election through an independent expenditure. An independent election expenditure is subject only to reporting and attribution and is not subject to contribution limits or bans. The Courts, in upholding coordination findings, have recognized that there is a temptation to go past an independent expenditure and coordinate:

Independent expenditures “are poor sources of leverage for a spender because they might be duplicative or counterproductive from a candidate’s point of view” (citing to *FEC v. Colo. Republican*, 533 US 431 at 446 (2001)). By contrast, expenditures made after a ‘wink or nod’ often will be “as useful



to the candidate as cash." (*Id.* at 442, 446). For this reason, Congress has always treated expenditures made "at the request of suggestion of" a candidate as coordinated.

*McConnell v. FEC*, 540 U.S. 93, 224 (2003).

This circumvention of limits, through coordination, is not allowed:

"Moreover, recent cases have recognized that certain restrictions on corporate electoral involvement permissibly hedge against 'circumvention of [valid] contribution limits.'" 540 U.S., at 205, 124 S. Ct. 619, 157 L. Ed. 2d 491 (quoting *Beaumont*, 539 U.S., at 155, 123 S. Ct. 2200, 156 L. Ed. 2d 179, in turn quoting *FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 456 and n. 18, 121 S. Ct. 2351, 150 L. Ed. 2d 461 (2001) (*Colorado II*), (alteration in original).

Montana's definition of coordination is similar to that of federal law. Section 44.10.323(4) ARM defines coordination as "an expenditure made in cooperation with, consultation with, at the request or suggestion of, or the prior consent of a candidate..."

Commissions and Commissioners have found coordination only in particular circumstances. The FEC, while advancing a new coordination regulation in 2012 (11 C.F.R. §109.21(d)(4)), operates under a 6 member commission structure and that commission has deadlocked on basic enforcement decisions. Richard Briffault, *Coordination Reconsidered*, Colum. L. Rev., (May 2013). In regard to coordination, the FEC has found that there needs to be more than common vendors, interrelated individuals (as in a

former employee of the candidate) and shared contacts. Thus, the FEC has not found coordination unless there is actual evidence showing the coordination between the expenditure and the candidate. *Id.*

Past coordination decisions by Montana Commissioners show similar approach to that of the federal decisions. Commissioner Argenbright considered a complaint that a political committee, Citizens for Common Sense Government (CCSG), and six candidates for the Missoula City council were coordinated or linked such that CCSG was a candidate committee subject to contribution limits. *Harmon and Sweet v. Citizens for Common Sense Government, et. al.*, December 31, 1997. Despite extensive crossover in involvement (participation in parade using same mode of transportation) and people, the Commissioner found no coordination because there were "no notes, memoranda, records of telephone conversations, correspondence or other documents" supporting "coordination, cooperation or consultation". *Id.* p. 19. Further, there was "little, if any, similarity" in campaign literature. *Id.* p. 23.

Likewise, Commissioner Higgins rejected coordination between a candidate and a political committee that engaged in attack activity against the opposing candidate. *Close v. People for Responsive Government*, December 15, 2005. The Commissioner found crossover contributors between the political committee and the candidate but found no evidence of communication or activity showing coordination between the candidate and committee.

Likewise Commissioner Unsworth rejected coordination in *Keanne v. Montanans for a True Democrat*, April 2, 2008. The Commissioner noted

crossover contributions/activity by people involved in both the candidate campaign and the political committee but found no coordination because "...there is no evidence that MTDC's expenditures for newspaper and radio ads, billboards, and campaign flyers opposing candidate Keane and supporting candidate McAdam were made with the prior knowledge, consent and encouragement of McAdam or his campaign." *Id.* p. 9. In addition the Commissioner found that the crossover communication was "limited" and that it was personal and not on behalf of the political committee. *Id.*

In contrast to the above three decisions, Commissioner Vaughey found coordination in *Little v. Progressive Missoula*, July 22, 2004. The Commissioner, identified crossover activity, finding that members of the Progressive Missoula steering committee were directly involved in the candidate's campaign (Allison Handler). Further, the Commissioner found specific evidence showing that Handler and the individual committee members knew of the negative attack role that Progressive Missoula would play in support of the candidate's campaign. The Commissioner found that certain barriers between the Handler campaign and Progressive Missoula, including a letter of reproach from Progressive Missoula to Handler, were artifices designed to disguise the real cooperation. The Commissioner found that the PM's expenditures for flyers opposing candidate K. were made with "...prior knowledge, consent and encouragement of Handler...". Thus they were coordinated expenditures.

The predecessor decision to this Matter (*Graybill v. Western Tradition Partnership*, COPP-2010-CFP-0016 (Commissioner Unsworth)) focused on WTP's activities in 2008 elections in Montana and, while noting shared staffing, did not find coordination, *id* p. 28. Graybill noted "concern and healthy skepticism" as to coordination but spent little time on coordination and instead focused on and found express advocacy.

# INVOICE

## General Consulting

1302 24th St. W #297  
Billings, MT 59102

DATE: June 7, 2010  
INVOICE # 788-766

FOR:

BILL TO: Terry Bannan  
Terry Bannan for HD 68  
PO Box 1468  
Belgrade, MT 59714

DESCRIPTION	AMOUNT
Intro Letters to ABS mailed 5/10 \$0.50 per piece	839 letters x \$0.50 419.50
Intro Letter to PPV	799 letters x \$0.50 399.50
Issue Letter	1528 letters x \$0.45 687.60
Palm Card Printing (\$100 per 1000 cards)	100.00
Wife Letter	799 letters x \$0.75 599.25
Final Letter	1201 letters x \$0.45 540.45
payments received	(1,250.00)
	\$ 1,416.40
	0.00%
<b>SUBTOTAL</b>	-
<b>TAX RATE</b>	-
<b>SALES TAX</b>	\$ 1,416.40
<b>OTHER</b>	
<b>TOTAL</b>	

Make all checks payable to General Consulting.

**THANK YOU FOR YOUR BUSINESS!**



Bannan

# HD68 Terry Bannan

## R CANDIDATE FOLDER:

- Signature
- Letterhead
- Corner card (#10)
- #9

white paper

## ED:

Letterhead Blue # 328 maroon  
 Letterhead Red # 135 162 - IS printed on 8 1/2 x 11  
 Corner card (#10) Blue 162 maroon  
 Corner card (#10) Red 328  
 #9 # 135 maroon

y Mail Budget	Tier 1 Voters		1972		
	House Ct.	PerPiece	House \$	COPY TO CAND	COPY APPROVED
letter with Survey	199 1200	0.5	\$600.00		
etti	976	0.65	\$634.40		
D'd voters	1528	0.45	\$687.60		
GUN	246				
LIFE	27				
TAX	244				
TAX/RTW	230				
	1200	0.45	\$540.00		
<b>Totals</b>	<b>4904</b>		<b>\$2,462.00</b>		

tee Chase	T1 Abs. vtrs=	681	T2 Abs. Vot=	503	
	doing?	to whom?	House Ct.	PerPiece	House \$
				0.5	\$-
				0.65	\$-
				0.38	\$-
<b>Total Abs:</b>					\$-

<b>TOTAL</b>	\$2,462.00	Deposit:	\$1,231.00
--------------	------------	----------	------------

Bannan Intro Survey - 2200 - Done  
 Bannan Intro letter - 2200 - Done



Invoice No.

473

**INVOICE****Customer**

Name Assembly Action Fund  
 Address PO Box 3662  
 City Lewistown State MT ZIP 59457  
 Phone \_\_\_\_\_

Date 6/10/2010  
 Order No. \_\_\_\_\_  
 Rep \_\_\_\_\_

Qty	Description	Unit Price	TOTAL
1500	HD 3 Welch Main Street Slick	\$0.43	\$645.00
1000	HD 4 Barnhart Main Street Slick	\$0.43	\$430.00
2000	HD 57 Bonogofsky Main Street Slick	\$0.43	\$860.00
1,500	HD 71 Gilman Main Street Slick	\$0.43	\$645.00
2,000	HD 69 Washburn Main Street Slick	\$0.28	\$460.00
1,503	HD 84 Dooling Main Street Slick	\$0.43	\$646.29
2,148	SD 31 Arthun Main Street Slick	\$0.43	\$921.48
1,000	SD 35 Moran Main Street Slick	\$0.43	\$430.00
1300	HD 57 Bonogofsky Abortion Slick	\$0.43	\$559.00
1,500	HD 61 Esp Abortion Slick	\$0.43	\$645.00
1,129	HD 68 Washburn Abortion Slick	\$0.43	\$485.47
1499	HD 68 Flynn Main Street Slick	\$0.43	\$644.57
1,282	HD 84 Barnhart Slick- first class postage & two colors	\$0.54	\$692.28

**Payment Details**

Check

Name \_\_\_\_\_

Check #: \_\_\_\_\_

SubTotal	\$8,084.10
Discount/Contribution	
Taxes State	
<b>TOTAL</b>	<b>\$8,084.10</b>

Office Use Only

also purchased \$ 3,524 in Radio

Thank you for your business!

EXHIBIT

4

tabler