

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Dick v. Republican State Leadership Committee No. COPP 2012-CFP-038	Summary of Facts and Finding of Insufficient Evidence to Show a Violation of Montana's Campaign Practices Act DISMISSAL OF COMPLAINT
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On October 30, 2012, Ted Dick, then Executive Director of the Montana Democratic Party, filed a complaint against the Republican State Leadership Committee (RSLC). Mr. Dick alleged that the RSLC violated Montana campaign practice law by failing to report and disclose campaign expenditures.

SUBSTANTIVE ISSUES ADDRESSED

The substantive areas of campaign finance law addressed by this decision are those of express advocacy and coordination.

DISCUSSION

Mr. Dick's complaint is that a substantial RSLC campaign expenditure (the complaint summarizes TV buys alone at \$537,773) in

the 2012 Montana election for Attorney General did not get reported or disclosed. The foundational facts for these allegations are as follows:

Finding of Fact No. 1: Tim Fox and Jim Shockley ran as candidates in the 2012 Republican primary election for nomination to be attorney general of the state of Montana. Tim Fox won the Republican primary election. (Secretary of State –SOS- Website).

Finding of Fact No. 2: Tim Fox and Pam Bucy were the Republican and Democratic nominees respectively for 2012 general election for Attorney General of the State of Montana. Tim Fox won the general election and now serves as the Montana Attorney General. (SOS Website).

Finding of Fact No. 3: The Republican State Leadership Committee, Inc. (RSLC) is the largest caucus of Republican state leaders in the country and the only national organization whose mission is to elect down-ballot, state-level Republican officeholders. (RSLC Website).

Finding of Fact No. 4: The RSLC engaged in 2012 Montana election activity as follows:

- a. RSLC registered as a political committee (filed a form C-2) on May 10, 2012, filing as an incidental committee and stating its purpose was to make contributions to RSLC-MontanaPAC for independent expenditures. (Commissioner's records).
- b. The RSLC-MontanaPAC filed its C-2 form as a political action committee on June 25, 2012. This PAC listed one candidate (Tim Fox – Attorney General - support") under the purpose of the committee specifying that the support was for the June 5 (primary), 2012 election.¹ (Commissioner's records).

¹ The RSLC-MontanaPAC was active in the 2008 and 2010 Montana election cycles. It appears to have operated under its 2009 C-2 statement until it filed the amended C-2 on June 25, 2012. The RSLC-MontanaPAC pre-primary campaign finance report (filed May 22, 2012) describes the \$108,251.00 in primary election expenditures as "supporting Tim Fox-AG". (Commissioner's records)

Finding of Fact No. 5: The RSLC-MontanaPAC reported and disclosed the following expenditures in the 2012 Montana elections:

- a. Its pre-primary election report (filed May 22, 2012) disclosed \$108,217.00 in independent expenditures through TV, radio and direct mail “supporting Tim Fox-AG”. (Commissioner’s records).
- b. Its post-primary, pre-general and post-general campaign finance reports disclosed no further primary or general election expenditures in support of Tim Fox or against his opponents. (Commissioner records).

The above findings of fact establish that the RSLC and its Montana PAC did not report and disclose any independent expenditures in the 2012 general election of Montana attorney general. There is, however, no challenge to the assertion that RSLC did make over \$500,000 of expenditures related to the 2012 general election of Tim Fox as attorney general. Indeed, legal counsel² for the RSLC responding to the Dick complaint did not deny either the RSLC advertisements or the alleged amount of \$537,733 in RSLC Montana advertising expenditures.

Instead, RSLC legal counsel denied any RSLC responsibility to report or disclose any 2012 general election communication expenditures as an independent expenditure because the “communication in question” is non-reportable “issue advocacy.” The letter cited to the U. S. Supreme Court case of *FEC v. Wisconsin Right to Life*, 551 US.449 (2007) and argued that the standards set in that case,

² Attorney E. Mark Braden of the Washington DC firm of Baker Hostetler authored the response in a November 2, 2012 letter to the COPP.

as applied to the “communication in question” dictate that the communication is “issue advocacy” such that it not reportable.

Because there is nothing to report the letter asserts that the RSLC has “complied with the letter and spirit of Montana’s campaign finance laws.”

The Commissioner now examines the RSLC communication against the standards of express advocacy and coordination. Each examination is separately made, below.³

1. Express Advocacy

Mr. Dick’s complaint asserts political (“express”) advocacy in the language used in the RSLC communication. In order to constitute such advocacy the language would need to meet the “functional equivalent of express advocacy” test set out in *McConnell v. FEC*, 540 US 93(2003) and refined in *FEC v. Wis. Right to Life*, 551 US 449 (2007). This “functional equivalent of express advocacy” standard has been discussed and applied by the COPP in a series of sufficiency Decisions.⁴ The functional equivalent test, while measured by specific application, begins with the directive that the complained of language must “...be susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate” before it constitutes express

³ The coordination issue was not specifically named in the complaint but once a complaint is filed the Commissioner is required to examine other possible violations of campaign practice laws. §13-37-111(2)(a) MCA.

⁴ *Roberts v. Griffin*, decided November 19, 2009, *Bonogofsky v. NGOA*, COPP-2010-CFP-008 and the Decisions cited therein.

advocacy. *FEC v. Wisconsin Right to Life*, at pp. 469-470.⁵

The language used in the RSLC communication⁶ at issue in this Matter was as follows:

Finding of Fact No. 6: The complained of RSLC sponsored communication consists of a series of visual displays showing 9 consecutive images or poses of Tim Fox, each with a voice repeating the imaged message shown in quotes below. Each separate voice message is followed with a separate written display⁷ as shown in italics:

- “Obamacare job killing Washington at its worst” (*NFIB 8-31-12*)
- “Tim Fox is fighting to stop Obamacare from killing Montana jobs” (*www.foxforag.com*)
- “Because Tim Fox wants to make it easier for businesses to create jobs.” (*www.foxforag.com and KLXH.com, 5/27/12*)
- “Fox believes in protecting gun rights” (*www.foxforag.com*)
- “And shielding children from sexual predators.” (*KLXH.com, 5/27/12*)
- “Fox wants to fix Montana’s broken sexual offender registry” (*KLXH.com, 5/27/12*)
- “Get Montanans working and stop (big government) Obamacare.” (*www.foxforag.com*)
- “Tell Tim Fox Keep Fighting for Montana Jobs.” (*Learn more: www.RightForMontana.com*)

The final disclaimer on the RSLC ad reads “Paid for by the Republican State Leadership Committee, Staci Goede, Treasurer 1201 F. St. NW, Suite 675, Washington, DC 20004.”

In examining the language of FOF No. 6, we do so with the understanding that it involves \$500,000-plus of campaign related

⁵ Please see *Bonogofsky v. NGOA* at pages 8-9 for a detailed discussion of this requirement.

⁶ The entire communication or ad may be watched on you tube at: https://www.youtube.com/watch?v=SRhbw_UWLCI.

⁷ The display is claimed to be a “source” listing by the RSLC. (Commissioner’s records)

communication (ad spending) by a corporation (RSLC is incorporated) in the last 60 days of the 2012 general election cycle.⁸ As explained in footnote 8, because of the Court's decision in *Citizens United*, Montana's 2012 elections RSLC could legally spend the \$500,000-plus on the election communication described at FOF No. 6. The only issue is whether RSLC could make that expenditure without reporting or disclosing to the people of Montana the amount and timing of the expenditure and the candidate to whom the expenditure addresses. RSLC could make the expenditure without reporting and disclosure only if the communication is "issue advocacy". It must report and disclose the expenditure if the communication is express advocacy.⁹

RSLC self-determined that its election related communication (FOF No. 6) was an issue advocacy expenditure and did not report or disclose any of the \$500,000-plus it spent on the communication.¹⁰ RSLC now defends this position arguing, through counsel, that the ad script set out in FOF No. 6 does not "urge anyone to 'vote for,' 'vote against,' 'support,' or 'oppose' either Mr. Fox or Ms. Bucy." This, of course, was

⁸ The information submitted with the complaint shows that the RSLC ad ran from early September to late October of 2012 at TV stations located in Great Falls, Missoula, Kalispell, Bozeman, Butte, Billings, Hardin and on statewide cable TV. The Commissioner notes that through 2011, Montana law banned corporate election expenditures, including independent expenditures, in a Montana candidate election (See §13-35-227, MCA and the history of this law set out in *Western Tradition Partnership, Inc. v. State of Montana*, 2011 MT 328, 363 Montana 220, 271 P3d 1). In 2010, however, the United State Supreme Court decided *Citizens United v F.E.C.*, 130 S. Ct. 876, 175 L. Ed. 2d 753 and in 2012 the *Citizens United* decision was applied to strike down the portion of §13-35-227 MCA that banned corporate independent expenditures. *American Tradition Partnership v. Bullock*, 132 S. Ct. 1307, 181 L. Ed. 2d 1036 (2012).

⁹ Under Montana law an entity making an independent expenditure must file and report its independent election expenditures. §13-37-226(5) MCA.

¹⁰ Letter from RSLC counsel. (Commissioner's records).

the original “magic words” express advocacy standard devised by the United States Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976). The Court narrowly construed the federal statutory definition of “expenditure” to apply, for certain purposes, “only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.” (*Buckley* at 44.)

The RSLC counsel’s letter, however, also implicitly conceded that the magic words standard is now replaced by later set “functional equivalent” standard: (Chief Justice Roberts writing for the majority) “...a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *Federal Election Comm’n v. Wisconsin Right to Life*, 551 U.S. 449, 469-70 (2007) (“*WRTL*”). The Court explained its application of functional equivalent test to *WRTL*’s ads as follows:

Under this test, *WRTL*’s three ads are plainly not the functional equivalent of express advocacy. First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate’s character, qualifications, or fitness for office. (*WRTL* at 470).

The Commissioner now applies the standards set out in the *WRTL* Opinion to the facts of the RSLC communication set out in FOF No. 6. The Commissioner first looks to the “focus”, “position”, “exhort” and

“urge contact” standards of issue ads as to the RSLC ad content set out in FOF No. 6.

Finding of Fact No. 7: The RSLC ad focuses on Tim Fox instead of an issue. Fox is mentioned by name 9 times compared to “jobs” (4 times), Obamacare (3 times) and sexual predators (2 times) and gun rights (1 time). In addition to listing his name the RSLC ad shows Fox’s photo in 9 different poses or images. The ad does take a position for more Montana jobs and exhorts the public to contact Tim Fox.

The Commissioner determines, based on FOF No. 7 that the RSLC ad meets the “position” and “exhort” standards of issue advocacy but fails to meet the “focus” and “urge contact” standards. Focus fails because Tim Fox was the focus instead of the necessary issue of public policy. “Urge contact” also fails because Tim Fox was not a public official, but a private practice attorney and a candidate for public office, at the time that the ad was running.¹¹ Accordingly, the Commissioner determines that the ad language of FOF No. 6 neither meets nor fails the issue advocacy standards of WRTL. In a word, it is “uncertain” as to whether the RSLC ad was or was not issue advocacy.

The Commissioner seeks further clarification as to the advocacy status of the RSLC ad by next applying the express advocacy standards measuring whether the language of the ads addressed: “...an election, candidacy, political party, or challenger; and [whether] they ... take a position on a candidate’s character, qualifications, or fitness for office.” (WRTL at 470).

¹¹ The Commissioner takes administrative notice, based on personal knowledge, that in September through November of 2012 both he and Tim Fox were in the private practice of law in different law firms located in Helena, Montana.

The Commissioner determines that the language of the RSLC ads (*See* FOF No. 6) does not mention an election, challenger or take a position on a candidate's character, qualifications or fitness for office. The ad language, however, does show both a candidacy and political party.¹² Given the lack of meeting all five (or even a majority) of the WRTL express advocacy standards the Commissioner again uses the word "uncertain" as a measure of the express advocacy content of the language of the RSLC ad.¹³

The U. S. Supreme Court has given explicit directions as to what to do in a situation of uncertainty as "... in a debatable case, the tie is resolved in favor of protecting speech." (*WRTL* at 474, n. 7). The "protecting speech" application in this Matter means that the RSLC ad is deemed to be issue advocacy such that it can be made without reporting and disclosure to the people of the State of Montana.¹⁴

The Commissioner notes that the people of Montana, by initiative, have set contrary state policy (§13-35-503 MCA) stating that the full disclosure interest of Montana's people is paramount over any competing non-

¹² The "AG" identification is taken from the "source" language and the Political Party identification is taken from the attribution language.

¹³ This express advocacy analysis of the RSLC ad is in sharp contrast to the express advocacy analysis of the letter mailed by a corporation in *Bonogofsky v. NGOA*, COPP-2010-CFP-008. The NGOA letter easily met each of the 5 tests for express advocacy.

¹⁴ The Commissioner understands the sheer volume of the RSLC ad buy in the last 60 days of a Montana election. This dollar volume, however, does not change the general, public nature of the speech. Again the Supreme Court has directed that, while contextual factors "should seldom play a significant role in the inquiry," courts "need not ignore basic background information that may be necessary to put an ad in context" (*WRTL*, 551 U.S. at 473-74). The dollar volume of the RSLC ad buy, however, does not change the context of the RSLC ad. It is an ad designed with content that rides the margins of issue advocacy/express advocacy in order to avoid reporting. It rides that margin with a \$1,000 general population ad buy or a \$500,000 general population ad buy.

disclosure corporate interests. However, this state policy interest may be applied only when it is constitutionally permissible to do so. *Landsgaard v. Peterson*, COPP-2014-CFP-008. We are a nation and a state of laws and the people of Montana, including this Commissioner, must follow law as set out above. The language of the 2012 RSLC ad (FOF No. 6) is therefore \$500,000-plus of 2012 election communication constituting issue advocacy that need not be reported or disclosed to the people of Montana.¹⁵

2. Coordination

The RSLC ad, even though an issue ad, can become a campaign expenditure if it is deemed to be “coordinated” between a candidate (Candidate Fox in this Matter) and another entity or person (the RSLC in this Matter) and is thereby 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.

The RSLC ad (see FOF No. 6) demonstrates two potential avenues

¹⁵ The RSLC ad buy in 2012 would be an “electioneering communication” under the SB 289 passed by the 2015 Montana legislature such that the RSLC would be required to report and disclose a similar 2016 election expenditure to Montana citizens. The Commissioner also notes that the RSLC advertisement potentially falls under 52 USCS § 30104 (f) as an electioneering communication, which refers to a clearly identified federal candidate for office (Barak Obama) that was made within 60 days before a general election (November 2012), by a committee which spent in excess of \$10,000 in a calendar year.

for coordination: 1) Coordination by relationship because the RSLC ad was placed by a Republican party committee and Candidate Fox was a Republican candidate; and 2) Coordination by direct interaction between candidate Fox and the RSLC in the form of provision of campaign photos by the Fox campaign to the RSLC. Each is addressed separately:

a. Assumed Coordination by Relationship

There has been supposition that coordination can “assumed” or inferred under Montana law solely through a relationship such as that of common vendor.¹⁶ The following analysis in this Decision rejects any basis under Montana law for assumed coordination based solely on a relationship.

Montana law [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...”¹⁷ Commissions and Commissioners have found coordination only on the basis of a specific act(s) of cooperation and have never assumed coordination based solely on a relationship.¹⁸

¹⁶ On July 24, 2015 attorney James Bopp took the deposition of Commissioner Jonathan Motl and asserted Montana has established coordination by relationship during deposition questioning. Motl Depo. PP 195-197.

¹⁷ The COPP has new proposed administrative rules moving through the administrative rule making process. These proposed rules include a new rule defining coordination.

¹⁸ The FEC takes a similar approach. 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. *Coordination Reconsidered*, Briffault, Columbia Law Review, 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.*

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 implicitly rejected coordination by association and instead 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.

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.

Commissioner Unsworth implicitly rejected relationship based coordination in *Keane 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 contrast to the above three decisions, Commissioner Vaughey found coordination based on specific action in *Little v. Progressive Missoula*, July 22, 2004. Specifically, the Commissioner found evidence showing that Candidate Handler and the individual members of a political committee (Progressive Montana) knew of the negative attack role that Progressive Missoula would play in support of Candidate Handler’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 acts of cooperation that led to coordination. The Commissioner found that the Progressive Missoula expenditures for flyers were made with “...prior knowledge, consent and encouragement of Handler...”. Thus they were coordinated expenditures.

This Commissioner has issued a series of Decisions finding coordination, all based on actions between Western (American) Tradition Partnership and 2010 candidates for Montana public office. These Decisions, like *Little v. Progressive Missoula*, rely on documents, actions and activity showing coordination. In total this Commissioner has

found undisclosed, unreported, and coordinated corporate involvement by WTP (and agents) in nine 2010 candidate campaigns.¹⁹

This Commissioner hereby incorporates the above Decisions into the comprehensive statement that coordination cannot be inferred solely by relationship, including that of political party to a candidate in the same political party.²⁰ There is therefore no coordination to be inferred between Candidate Fox and the Republican Party based solely on the relationship between a candidate and his or her Party.

b. Coordination by Specific Act

The RSLC ads are built around a series of pictures of Tim Fox speaking to students, shooting a gun and posing for a portrait type photo. The State of Minnesota recently found coordination between the Democratic Party and certain Democratic candidates when the candidates participated in a photo shoot arranged and paid for by the Democratic Party with the photo shoot producing photos later used in “independent expenditure” ads.²¹

With this coordination issue in mind, the Commissioner’s

¹⁹ *Bonogofsky v. Kennedy*, COPP 2010-CFP-015; *Washburn v. Murray*, COPP 2010-CFP-019; *Ward v. Miller*, COPP 2010-CFP-021; *Clark v. Bannan*, COPP 2010-CFP-023; *Bonogofsky v. Boniek*, COPP-2010-CFP-027; *Bonogofsky v. Wittich*, COPP-2010-CFP-031; *Madin v. Sales*, COPP-2010-CFP-029; *Bonogofsky v. Prouse*, COPP-2010-CFP-033, and *Bonogofsky v. Wagman*, COPP-2010-CFP-035.

²⁰ A finding of agency between the candidate and the third party entity or, to a lesser degree, actual shared knowledge of specific campaign activity, could result in coordination. *Little v. Progressive Missoula*, July 22, 2004.

²¹ State of Minnesota, Campaign Finance and Public Disclosure Board, Findings, Order, and Memorandum in the Matter of the Investigation of Expenditures Made by the Minnesota DFL Senate Caucus Party Unit, December 17, 2013, available online <http://www.cfboard.state.mn.us/findings.html>.

investigator examined for the source of the 9 images of Candidate Fox appearing in the RSLC ad (FOF No. 6). The investigator found an October 14, 2008 video publically available on the Montana Republican Party You Tube Channel, titled "MT GOP releases Tim Fox for Attorney General TV ad". The video was 30 seconds in length. Two sets of images of Tim Fox were primarily used: 1) A moving image video of Tim Fox wearing a blue shirt speaking in front of a classroom; and, 2) A moving image video of Tim Fox shooting a rifle while wearing a brown shirt, green vest and orange ear plugs.²² The video was used by the Montana Republican Party in Candidate Fox's unsuccessful 2008 campaign for Montana Attorney General.

The investigator noted that, while these 2008 campaign video shoots were clearly the source of the RSLC 2012 ad images, the frames used in the RSLC 2012 ads were slightly different in the posture and facial expression shown by Candidate Fox in the 2008 ads.

(Investigator's notes). The Commissioner considers the investigator's factual findings and determines that whatever the circumstances of the 2008 ads (that is, whether or not Candidate Fox participated in the production of the 2008 ads), the reuse of the 2008 video shoot material in 2012 cannot create coordination by RSLC with Candidate Fox in 2012. The 2008 ads were the property of the Montana Republican Party. Any cooperation or coordination with RSLC in 2012 would have

²² https://www.youtube.com/watch?v=mKn_KedWwI4

come from the Republican Party and not directly from Candidate Fox. With this in mind there is no evidence of a specific act by Candidate Fox that created coordination in regard to the 2012 RSLC ads.

OVERALL DECISION

This Commissioner, having duly considered the matters raised in the Complaint, and having completed his review and investigation, hereby holds and determines, under the above stated reasoning, that there is insufficient evidence, to justify a civil adjudication against the RSLC. The Commissioner hereby dismisses this complaint in full.

DATED this 22nd day of September, 2015.



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