

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES OF THE STATE OF MONTANA

Gutsche v. Sweeney No. COPP 2016-CFP-014	Finding of Sufficient Facts to Show a Campaign Practice Violation
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On May 16, 2016, Gail Gutsche, a resident of Missoula, Montana, filed a complaint against Mark Sweeney, a resident of Philipsburg, Montana. Both Ms. Gutsche and Mr. Sweeney are candidates seeking 2016 election to the Public Service Commission of Montana from Commission District 4. Ms. Gutsche alleges that Candidate Sweeney's campaign paid for a commercial advertisement that did not contain proper attribution.

Foundational Finding of Fact

The following finding of fact is necessary before proceeding to discussion of this Matter:

Finding of Fact No. 1. The position of Public Service Commissioner for District No. 4 has three candidates competing to be the Democratic nominee to the 2016 general election: Lee Tavenner, Gail Gutsche and Mark Sweeney. The primary election is set for June 7, 2016 and the candidate receiving the most votes will advance to the general election as the nominee of the Democratic party for election as Commissioner. (Montana Secretary of State, "Candidate Filing List.")

### Discussion

The political advertisement at issue in this Matter was made in the form of an automated political advertisement telephone message – known in the trade as a "Robo Call." Under Montana law an "automated telephone solicitation" or Robo Call cannot be used for political campaign purposes: "A person may not use an automated telephone system, device, or facsimile machine for the selection and dialing of telephone numbers and playing of recorded messages if a message is completed to the dialed number for the purpose of ... promoting a political campaign or any use related to a political campaign." §45-8-216, MCA.

While the law itself is clear, enforcement is not. Title 45 of the Montana Code defines "crimes" under Montana law. Chapter eight of Title 45 is a broad sweep of law defining "offenses against the public order" including animal cruelty, defamation, concealed weapons and deviate sexual conduct, along with Robo calls. As a crime, violations of the Robo calls statute are enforced (along with other crimes) through Montana's criminal justice system with a complaint filed by the State's criminal prosecution system "in the county where the offenses was committed." §46-3-110, MCA. Understandably, Montana's

county attorneys have not viewed a violation of law stemming from an automated political campaign phone call as having the same level of importance as a crime involving the physical safety of a person. Thus, despite the appearance of Robo calls in every election cycle since 1992 there has never been a Robo Call complaint advanced by a county attorney anywhere in the State of Montana.<sup>1</sup>

With the above discussion in mind, the Commissioner lacks authority to address the Robo Call itself as an improper campaign practice.<sup>2</sup> The Commissioner does, however, have authority to apply standard reporting and disclosure laws set out in Title 13, Chapters 35 and 37 to the content of the Robo call.<sup>3</sup>

The Complaint asserts receipt of a Robo Call on May 3, 2016. The Complaint sets out the complete text of the Robo Call as follows:

Hi, this is Amanda Curtis calling to ask you to join me in supporting Mark Sweeney for Public Service Commissioner in the Democratic Primary on June 7. I know Mark can bring the PSC back into balance by working hard to ensure Montanans have the lowest possible utility rates and making sure we have clean, reliable and affordable electricity. I think that's just what we need in our next Public Service Commissioner. I hope you'll join me by voting for Mark Sweeney in the Democratic Primary on June 7.

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<sup>1</sup> Section 45-8-216, MCA was passed in 1991 and therefore the Robo Call ban would have first applied to 1992 elections.

<sup>2</sup> The COPP has unsuccessfully sought to place enforcement of Robo calls under the authority of the Montana campaign practice act, explaining that confidence in the electoral process is undermined when law, such as the statute banning Robo calls in political campaigns, can be ignored because it is not enforced.

<sup>3</sup> Whether legal or not, Robo calls still cost money to produce (triggering reporting) and still must be properly attributed.

By its content the Robo Call is an election communication. Under Montana law “all election communications...must clearly and conspicuously include the attribution ‘paid for by’ followed by the name and address of the person who made or financed the expenditure for the communication.” §13-35-225(1), MCA. There is no such attribution in the ad text supplied by the Complaint. Mr. Sweeney responded to the complaint and admits that the Robo Call communication was placed and funded by his campaign and further admits that the attribution was inadvertently omitted from the ad.

Sufficiency Finding: The Commissioner finds sufficient facts exist to show that Candidate Sweeney has violated Montana’s campaign practice act by failing to properly attribute a campaign ad.<sup>4</sup>

Montana law requires an accelerated review (“as soon as practicable”) of a campaign practice complaint alleging an attribution violation so that the attribution violation can be corrected as soon as possible. Accordingly, Candidate Sweeney was immediately contacted by the Commissioner upon receipt of the Complaint. Candidate Sweeney responded that he was initially unaware of the prohibition on Robo calls and that the omission of attribution was an oversight. Candidate Sweeney apologized for his error and stated that immediately after being notified of the above concerns he directed the ad agency placing the Robo calls to cease any further efforts. The Commissioner accepts Candidate Sweeney’s actions as the appropriate, common-sense corrective response required by §13-35-225(7), MCA.

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<sup>4</sup> Candidate Sweeney’s campaign finance report, due May 26, 2016, should report and disclose the cost of the Robo calls.

## **ENFORCEMENT OF SUFFICIENCY FINDINGS**

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner “shall investigate” an alleged violation of campaign practices law. §13-37-111(2)(a), MCA. The mandate to investigate is followed by a mandate to take action: if there is “sufficient evidence” of a violation the Commissioner must initiate consideration for prosecution. (“shall notify,” see §13-37-124, MCA)

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 Sweeney’s campaign has, as a matter of law, violated Montana’s campaign practice laws, including those set out in this Decision. 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 failure to properly attribute was due to lack of diligence. Excusable neglect cannot be applied to lack of diligence. (See discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009.) Likewise the harm to the public caused by a failure to attribute a stand-alone campaign ad is substantial and obvious so as not to be excused as *de minimis*. (See discussion of *de minimis* principles in *Matters of Vincent*, Nos. COPP-2013-

CFP-006 and 009.)


Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable, a civil/criminal prosecution and/or a civil fine is justified (*See* §13-37-124, MCA). The Commissioner hereby, through this decision, issues a “sufficient evidence” Finding and Decision justifying civil prosecution under §13-37-124, MCA. Because of the nature of the violations (the failure to attribute occurred in Missoula County), this Matter, upon issuance of the final Decision, will be referred to the County Attorney of Missoula County for her consideration as to prosecution. §13-37-124(1), MCA. Should the County Attorney waive the right to prosecute (§13-37-124(2), MCA) or fail to timely prosecute (§13-37-124(1), MCA), this Matter then returns to this Commissioner for possible prosecution. *Id.*

Most of the Matters decided by a Commissioner and referred to the County Attorney are waived back to the Commissioner for his further consideration. Assuming that this Matter is waived back, the Finding and Decision in this Matter does not necessarily lead to civil or criminal prosecution as the Commissioner has discretion (“may then initiate” *See* §13-37-124(1), MCA) in regard to a legal action. Instead, most of the Matters decided by a Commissioner are resolved by payment of a negotiated fine. During negotiation of a fine mitigating factors such as forthright conduct of Candidate Sweeney will be considered in determining the amount of the fine.

In the event that a fine is not negotiated and the Matter is unresolved, the Commissioner retains statutory authority to bring a complaint in district court

against any person who intentionally or negligently violates any requirement of campaign practice law, including those of §13-37-226, MCA. (See §13-37-128, MCA). Full due process is provided to the alleged violator because the district court will consider the matter *de novo*.

DATED this 23<sup>rd</sup> day of May, 2016.



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