

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Hagan v. Pinocci No. COPP 2014-CFP-026	Finding of Sufficient Facts to Show a Violation of Montana’s Campaign Practice Act
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Randy Pinocci is a resident of Sun River, Montana. Mr. Pinocci was a candidate in the 2014 Republican primary election for Republican nominee to the Montana legislature, House District No. 19 (HD 19). Roger Hagan is a resident of Great Falls, Montana. Mr. Hagan was also a candidate for nomination to the Montana legislature, HD 19, losing to Candidate Pinocci in the June 3, 2014 Republican Party primary election. On May 28, 2014, Mr. Hagan filed a complaint with the COPP alleging that Candidate Pinocci engaged in campaign practice violations in connection with use of an unattributed campaign video.

DISCUSSION

Candidate Hagan’s complaint was dated May 28, 2014. The complaint referenced a link to a You Tube video advocating “Vote for Randy Pinocci.” The complaint alleged that a link to the You Tube video appeared on Candidate Pinocci’s Facebook account. The complaint further alleged that the You Tube video did not attribute the name of the person who paid for the video.

The Commissioner's investigator was able to confirm the allegations of Candidate Hagan's complaint. That is, the investigator located and looked at the You Tube video, confirmed that a link to the video was on Candidate Pinocci's Facebook account and confirmed the lack of attribution.

Candidate Pinocci, when contacted about the video, claimed he produced it himself at no cost. Candidate Pinocci represented that at first he took the video down, but claimed he did not need to attribute or report because there was no cost associated with the video. Candidate Pinocci later placed the video back up for public view, with an appropriate attribution. (Commissioner's records, Baker and Sanddal notes).

The Commissioner has addressed the requirements of attribution and reporting of the value of electronic campaigning through an advisory opinion dated January 31, 2014. A copy of that advisory opinion (COPP-2014-AO-003) accompanies this Decision and is incorporated by reference. At page 4 the advisory opinion states:

Montana law requires that an electioneering act be attributed with the name and address of the person or entity paying for the act. This means that any act of electronic campaigning that rises to the level of becoming a contribution or expenditure will need to be properly attributed. The volunteer and *de minimis* exceptions would apply such that a volunteer or *de minimis* electioneering action would not need to be reported, disclosed or attributed.

The video in this matter is several minutes in length. The video includes footage of Candidate Pinocci questioning Candidate Hagan about a school

related issue at a political event. The video also includes use of an image of a Montana Family Foundation flyer. The Montana Family Foundation flyer makes use of a school funding issue to attack Candidate Hagan and support Candidate Pinocci.

Candidate Pinocci asserts that he produced the video himself and placed it for public viewing on You Tube. For the purposes of this Decision the Commissioner accepts this representation and therefore will not consider paid services to be part of the expense analysis in this Matter. Candidate Pinocci further asserts that there was no other cost or expense involved in the production of the video. The Commissioner does not accept this representation. As explained below, the Commissioner determines that video equipment, computer hardware, internet access and a computer software program were used to produce or distribute the video. As explained below, the Commissioner determines that, at a minimum, there is an internet access charge involved, along with overhead costs associated with campaign use of equipment and supplies.

The Commissioner initially notes that common sense and prudence, even without legal mandate, should motivate a candidate to attribute something like the video in question. The video was viewed by many¹ and the video appearance showed it was clearly “produced”, thereby showing value. Further, the video showed direct involvement by Candidate Pinocci and, through work product, also showed involvement of a non-profit corporation. Without

¹ The Commissioner’s investigator printed a screen shot showing 142 You Tube views of the video as of May 28, 2014.

attribution to the candidate, thereby showing that the candidate alone is responsible for producing the video, the viewer may be led to believe that there was cooperation between the non-profit corporation and the candidate. This raises the appearance of a coordinated illegal corporate in-kind contribution, a specter that prudence counsels a candidate to avoid.

Turning to the legal mandate analysis, the Commissioner determines that value exists such that the video must be attributed.² Pages 10 and 11 of the COPP's Accounting and Reporting Manual for 2014 Candidates states that all in-kind contributions must be accounted for. ARM 44.10.321(2) is reproduced in full wherein an in-kind contribution is defined, at pertinent part, as including "[t]he cost of distributing, republishing or reproducing campaign material (print or broadcast) produced or prepared by the candidate...". The in-kind "cost" has been defined by the COPP to include a proportional share of "overhead" involved in use of any "office space, equipment and supplies." *Griffin v. MontPIRG*, August 2002 (Commissioner Vaughey).³

For the purposes of this Decision the Commissioner determines that value existed in regard to services, supplies and materials associated with production of the video. Montana law defines expenditure to include "anything of value" (§13-1-101(11)(a) MCA), with "value" defined by the regulations and Decisions

² The Commissioner notes that candidate Pinocci's pre-election campaign finance report did not list campaign expenses for the video or internet access that allowed distribution of video.

³ The 56 page *Griffin* Decision and its accompanying 13 page settlement agreement (both accessible on the COPP homepage) discuss and determine a number of instances of reportable cost based on specific uses of office space, equipment and supplies. A candidate has clear direction of the application of law to determine whether there is an in-kind expense based on the *Griffin* Decision and associated regulations, statutes and Decisions.

cited above.⁴ Because value existed in regard to production of the video (and therefore an expenditure was made), it was necessary that Candidate Pinocci attribute “the name and address of the person who made or financed the expenditure for the communication.” §13-35-225(1) MCA. The Commissioner determines that sufficient facts exist to establish that Candidate Pinocci failed to so attribute the video as required by §13-35-225(1) MCA.

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 act on, an alleged campaign practice violation 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 Pinocci has, as a matter of law, violated Montana’s campaign practice laws, including, but not limited to §13-35-225(1) MCA and all associated ARMs. Having determined that sufficient evidence of a campaign

⁴ An in-kind expenditure by the candidate becomes an in-kind contribution to the candidate’s campaign. The definition of “value” is the same for contribution as it is for expenditure.

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.

Candidate Pinocci was directly engaged in the video production and chose not attribute the same. Excusable neglect cannot be applied to such choices. See discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009.

Turning to a second level of analysis, the failure to attribute resulted in an unattributed electioneering video being distributed to the public. The video was widely viewed, resulting in harm to the public that cannot 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, civil/criminal prosecution 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. Because of nature of violations (the failure to attribute occurred in Cascade County) this matter is referred to the County Attorney of Cascade County for his 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 prosecute within 30 days [§13-37-124(1) MCA] this Matter 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. In the event that a fine is not negotiated and the Matter resolved, the Commissioner retains statutory authority to bring a complaint in district court against any person who intentionally or negligently violates any requirement of law, including those of §13-35-225(1) 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*.

At the point this Matter is returned for negotiation of the fine or for litigation, mitigation principles will be considered. See discussion of mitigation principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009.

DATED this 18th day of June, 2014.



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January 31, 2014

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COPP-2014-AO-003

Re: electronic campaigning

Dear Ms. Boyles:

I write in response to your inquiry of January 9, 2014 regarding certain reporting and disclosure issues associated with electronic campaigning. I apologize for the length of time it has taken to respond. I have framed this letter as an advisory opinion as your question raises a campaign finance issue on which this Office hereby provides guidance.

ADVISORY OPINION

It is the opinion of this Office that any website use or service for the purpose of electioneering and for which anything of value exchanged hands must be reported by the candidate as a campaign expense and/or contribution. Where applicable, a third party (if a political committee) must also report and disclose. Having offered that Opinion this Office recognizes that this type of website use or service may need further definition based on specific instances of use or service. This Advisory Opinion starts that definition.

As a starting point, this Office has a published general policy (see Frequently Asked Questions on Commissioner's website) on website value as a reportable electioneering expense/contribution. The pertinent part of the policy reads as follows:

A website utilized by a candidate or political committee to advocate the success or defeat of a candidate or issue is categorized as election material. The costs associated with the development and maintenance of the website should be reported in the same manner as costs associated with the production of brochures, bumper stickers, print ads, and other forms of advertising.

The operative language, then, is that "the costs associated with the development and maintenance of the website should be reported."

1. General Principles

Your letter notes that during the 2012 campaign season "many individuals" used their Facebook or Twitter account to promote their candidate or issue. You asked whether this is electioneering. It is. The issue, however, is whether it is electioneering that is required to be reported or disclosed. There are three general principles that affect the requirement of reporting and disclosure

First, there is a volunteer exception to the Montana's requirement that a campaign report "anything of value" spent in support of the campaign. Montana law has a particular exception from the definition of campaign contribution for volunteer time as well as for certain unreimbursed expenses (gas for car) associated with that volunteer time. The time spent by legions of civic minded people going door to door in Montana to talk in favor of a candidate is not a reportable contribution. Similarly, the time spent by a citizen in internet chat in support of his or her chosen candidate is excepted. In contrast, the amount paid to campaign staff to organize the door to door campaign is reportable.¹ Translated to internet chat, any paid work, fees or costs associated with the reach of that chat must be reported and disclosed.

¹ If paid by the candidate it is reported as an expense. If paid by a third party it is reported by that entity as either an in-kind contribution to the candidate (subject to limits) or as an independent expenditure.

Second, there is a *de minimis* exception to Montana's definition of campaign contribution. This means that costs, fees or charges associated with a minor amount of campaign speech need not be reported. The *de minimis* principle holds that robust election speech is favored such that minimal election speech actions cannot be burdened with any requirements. This principle would apply to except small cost amounts (such as one time electronic campaigning costs) from disclosure or reporting requirements.

2. Facebook and Twitter

Under the "anything of value" rule, Facebook and Twitter electioneering use by the candidate should be reported as a campaign expense by the candidate if any charge or fee is involved.² The same analysis applies to a third party using Facebook or Twitter to support or oppose a candidate. The charges and fees involved in that use are a campaign expense. If the third party use is coordinated with a candidate then the value of the fees and charges becomes an in-kind contribution to the candidate. If the third party use is independent then it is an independent expenditure. There are reporting requirements for contributions and independent expenditures. In-kind contributions are subject to contribution limits.

Lastly, Twitter or Facebook cannot make an in-kind contribution to a candidate. A corporate contribution to a candidate is illegal in Montana regardless of amount. If there are fees and charges associated with such a use, someone or something is paying the fees and charges and that entity is the entity that must report and disclose.

3. Website Development

The costs and services associated with Website development must be reported as campaign expenditure.³ If someone else pays those costs and services that payment becomes an in-kind contribution that must be reported as a contribution by the campaign. If someone volunteers their time to create the website there is no contribution involved as volunteer time is excluded as a campaign contribution. You should compare it to the long established rules for yard signs. Campaigns traditionally purchase the yard sign material (the printed sign, posts, staples) and then construct and place the yard signs with volunteer help. The cost of the materials is reported while the value of the

² The volunteer exception and *de minimis* principle apply to except certain campaign expenses.

³ The volunteer exception and *de minimis* principle apply to except certain campaign expenses.

time, gas, and yard space associated with construction, delivery, and placement of the yard sign is not reported as it is a volunteer activity or cost excepted under Montana law.

4. Compare to Ballot Issue work

It is good for all of us when election speech is vigorous because it promotes educated election choice by voters and it is a form of democratic participation that promotes more respect and confidence in government. On the other hand, those very values of educated election choice and participation are damaged, and public trust damaged, when election speech is created or manipulated in a manner that is unknown to the public. The disclosure and reporting rules, measured against the volunteer exception and *de minimis*, are designed to reconcile these sometimes clashing values. The development of the nuances of candidate campaign reporting and disclosure, including those of electronic campaigning, lags behind that of comparable reporting and disclosure in ballot issues. In ballot issue campaigns multiple political committees routinely report portions of paid staff time for campaign activities. Candidate campaigns can adjust and do the same.

This opinion spans almost the entire scope of Title 13 MCA, the laws governing campaign practices in Montana. Citations to particular laws are not included.

5. Attribution

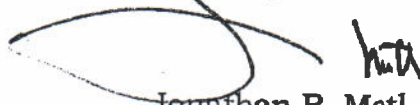
Montana law requires that an electioneering act be attributed with the name and address of the person or entity paying for the act. This means that any act of electronic campaigning that rises to the level of becoming a contribution or expenditure will need to be properly attributed. The volunteer and *de minimis* exceptions would apply such that a volunteer or *de minimis* electioneering action would not need to be reported, disclosed or attributed.

LIMITATIONS ON ADVISORY OPINION

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

jurisdiction, including alleged violations involving all or some of the matters discussed above.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jonathan R. Motl', written over a large, loopy scribble.

Jonathan R. Motl
Commissioner of Political Practices