

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Miller v. Van Dyk, et. al. No. COPP 2014-CFP-002	Summary of Facts and Finding of Insufficient Evidence to Show a Violation of Montana’s Campaign Practices Act <u>Dismissal of Complaint</u>
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On January 15, 2014, Billings resident Scot Miller filed a complaint with the COPP against Billings senator Kendall Van Dyk (Senate District 25, hereafter SD 25) alleging Senator Van Dyk violated Montana campaign finance and practice laws during his 2010 general election campaign for SD 25. The allegation was that Candidate Van Dyk violated election law by coordinating expenditures with 9 certain individuals and groups.

SUBSTANTIVE ISSUES ADDRESSED

The substantive area of campaign finance law addressed by this decision is that of campaign expense coordination between a candidate and a third party entity.

FINDING OF FACTS

The foundation facts necessary for this Decision are as follows:

Finding of Fact 1: On June 8, 2010, a SD 25 primary election was held. Three candidates were on the ballot for Senate District # 25: Kendall Van Dyk (Democrat), Linda Wetzel (Democrat) and Roy Brown (Republican). Mr. Van Dyk advanced to the general election with 1,208 votes. Mr. Brown received 2,071 votes and also advanced to the general election. *Id.* (Secretary of State (SOS) Website).

Finding of Fact 2: On November 2, 2010, a general election was held. Candidate Van Dyk was elected to office, defeating Candidate Brown by a narrow margin. (SOS Website, investigative notes).

Finding of Fact 3: The following additional 2010 election campaign practice complaints concerning Candidate Van Dyk have been filed with, and decided by, the COPP:

- a. *Olsen v. Van Dyk* (Decision June 30, 2011, Deputy Commissioner Colburg) was filed in 2010. The Complaint alleged Candidate Van Dyk engaged in improper influence of voters. The complaint was dismissed by the June 30, 2011 Decision.
- b. *Berry v. MEA-MFT* (Decision, September 7, 2012, Commissioner Murry) was filed on December 11, 2011. The complaint alleged money laundering by entities who engaged in expenditures related to Van Dyk's 2010 campaign. The Complaint was dismissed by the September 7, 2012 Decision.

c. *Kenat v. Van Dyk*, COPP-2014-CFP-004 was filed was filed on January 27, 2014. The complaint alleged contribution and reporting violations. The complaint was dismissed by a Decision (Commissioner Motl) dated March 13, 2014. (Commissioner's Website).

DISCUSSION

This Matter presents another look at issues involving third party involvement in the campaign of a 2010 candidate for public office in Montana. This Office has issued 11 recent Decisions involving such 2010 campaigns by candidates.¹ Ten of these campaigns involved 2010 Republican Party primary elections in legislative races with one of the candidates in the primary election receiving support from a non-profit corporation then known as Western Tradition Partnership, WTP.² The commissioner found sufficient facts to show a violation of the Montana campaign practice act in nine of the Decisions listed in footnote 1. The Commissioner did not find sufficient facts in *Madin v. Burnett*, COPP- 2012-CFP-052 and *Ponte v. Buttrey*, COPP-2014-CFP-007.³

Ten of the 11 Decisions listed in footnote 1 involved third party campaign practice actions by a particular non-profit entity that in 2010 was called

¹ *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; *Bonogofsky v. Wagman*, COPP-2010-CFP-035; *Madin v. Burnett*, COPP-2012-CFP-052; and *Ponte v. Buttrey*, COPP-2014-CFP-007. .

² *Madin v. Sales*, COPP-2010-CFP-029 involved WTP actions on behalf of a candidate in an election to the Gallatin County Commission.

³ The COPP complaints are numbered according to the year the complaint is filed. The *Madin v. Burnett* and *Ponte v. Buttrey* complaints, filed in 2012 and 2014 respectively, raised 2010 primary election campaign practice complaints.

Western Tradition Partnership (WTP).⁴ These Decisions identified certain common patterns of activity between WTP and the 2010 candidates. These common patterns are discussed in detail in *Ponte v. Buttrey* and the reader is directed to that Decision for a detailed discussion. For the purposes of this Decision three of the patterns are discussed.

First, the Decisions showed that WTP, and the WTP supported candidates, self-determined what Montana campaign finance laws they would or would not follow. Neither WTP nor Candidate Prouse, for example, reported contributions or expenditures despite engaging in an extensive direct mail campaign, including WTP attack slicks.⁵ Further, the candidates involved in the 9 Sufficiency Decisions listed in footnote 1, including 3 presently sitting legislators, did not comply with Montana law requiring all candidates to keep and produce campaign records. The two Decisions where insufficient record keeping was not involved were *Madin v. Burnett* (where complete record production was not asked for) and *Ponte v. Buttrey* (where record production was requested and complete records were produced).⁶

Second, the Sufficiency Decisions showed that the 9 WTP supported candidates acted in concert with WTP so as to establish a campaign relationship. The WTP supported candidates did this by: entrusting WTP to

⁴ *Madin v. Burnett* did not involve action by a WTP entity. The Decisions determined that WTP carried out its actions through several affiliated corporate entities. One of those entities was Direct Mail and Services, Inc., a Colorado for-profit corporation. The Decisions listed in footnote 1 determine that Direct Mail acted as an agent of WTP in Montana 2010 elections for public office.

⁵ *Bonogofsky v. Prouse*, COPP-2010-CFP-033.

⁶ The COPP complaints are numbered according to the year the complaint is filed. The *Madin v. Burnett* and *Ponte v. Buttrey* complaints, filed in 2012 and 2014 respectively, raised 2010 primary election campaign practice complaints.

carry out the bulk of their campaign activity, giving WTP campaign authority over use of their signature on letters, making use of voter ID'd lists created by WTP, and allowing campaign letters signed by the candidate to be coordinated with third party attack letters and attack Slicks.⁷

Third, each of the 9 WTP-supported candidates who received Sufficiency Decisions were involved in a contested Republican Party primary election. A primary election race involves fewer voters than a general election and therefore relies more on use of documents targeting specific voters. WTP's specialty was document campaigning through the mail. WTP self-described its campaign method as a "shock and awe electoral bombing campaign." WTP's campaign was based on use of coordinated candidate and attack letters aimed at primary voters.

Candidate Van Dyk's 2010 general election campaign did not fall within any of the above three general patterns. As was the case with Candidate Buttrey the claimed Candidate Van Dyk campaign practice violations came in a general election rather than a primary. As was the case with Candidate Buttrey there was complete document production by the Van Dyk campaign. As was the case with Candidate Burnett there was no evidence of involvement by WTP or its aligned entities with Candidate Van Dyk's campaign.

1. Candidate Document Retention and Production

Candidate Van Dyk produced the records of his 2010 campaign, including a complete copy of all contributions received and expenditures made, along

⁷ Decisions by the Commissioner (FN 1) establish that WTP used the word "Slick" to describe a campaign mailing that had a glossy finish on an oversize postcard type mailing.

with campaign product (brochures) resulting from the expenditures. The records were complete such that the Commissioner was able to determine the purpose of expenditures and also determine whether the campaign activity demonstrated by the records matched the actual campaign activity that occurred.⁸ The Commissioner reviewed the documents produced and determined that Candidate Van Dyk produced an acceptably complete record of his 2010 campaign activity, including that of expenses and contributions.

An account and records inspection by the Commissioner goes to the core of a candidate's public trust related campaign obligations.⁹ A candidate is required by Montana's campaign practice to account for, report and disclose all contributions and expenditures. The public and the opposing candidate rely on the campaign finance reports as accurately disclosing campaign information. The candidate understands (or should understand) the public trust obligations inherent in a campaign finance report as he or she signs each campaign finance report "I [the candidate] certify the foregoing report of campaign finances with attachments is complete and correct to the best of my knowledge, in accordance with [Montana law]..." A Commissioner's account and records inspection is the means by which the public is assured that a

⁸ The issue of Candidate Van Dyk's campaign activity is discussed further in this Decision at page 7-10.

⁹ By law Candidate Van Dyk's campaign was 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 records preserved must be those used to prepare "...directly from the accounting records, the reports required by Title 13." ARM44.10.501. This must include invoices. Commissioner Vaughey determined that the invoices must be detailed sufficiently to "...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.

candidate's campaign finance report was accurately made such that it met these public trust obligations.¹⁰

The Commissioner's inspection determined that Candidate Van Dyk, as did Candidate Buttrey, met the public trust obligation inherent in filing a campaign finance report. This is in contrast to the failure-of-record-keeping determinations made in Sufficiency Decisions regarding 9 WTP-supported 2010 candidates for Montana public office. (See FN 1 and page 4, this Decision).

2. Coordination

The Miller complaint alleges that Candidate Van Dyk's campaign "coordinated expenditures" with 9 named entities or people.¹¹ The Complaint, in part, recites claims of coordination between the nine entities in regard to Van Dyk's election. That specific complaint of coordination between entities other than the candidate, has already been investigated, addressed and decided by Commissioner Murry in *Berry v. MEA-MFT Cope* (September 7, 2012, Commissioner Murry). The *Berry v. MEA-MFT Cope* Decision dealt directly with the same 2010 Van Dyk election (FOF No. 3) and, at page 5, determined that "[t]here is no statutory prohibition against political committees

¹⁰ Under Montana law the Commissioner has a right to "inspect any records, accounts or books that must be kept" (§13-37-111(2)(b) MCA). The Commissioner may "require production of any books, papers, correspondence, memoranda, bank account statements ... or other records that are relevant material for the purpose of conducting any investigation..." (§13-37-111(2)(c)MCA).

¹¹ The entities or people named were: Montana Democratic Legislative Alumni Association, David Gallik, Montana Hunters and Anglers Political Action Committee, Conrad "Duke" Williams, Strategies 360, Q Communications, Montana Democratic Party, Values, Energy, and Growth Political Action Committee and North Valley Political Action Committee.

cooperating for the purpose of affecting the outcome of an election.”

The 9 entities or people named in the Miller complaint include the entities or people named in *Berry v. MEA-MFT Cope* complaint. The Miller complaint recognizes the *Berry* Decision and raises the new allegation of coordination between Candidate Van Dyk and some or all of the 9 entities and people. While making this allegation, however, the Miller complaint submits no evidence of such coordination.

The Commissioner therefore begins this investigation with a complainant’s suspicion of coordination, but no specific evidence of coordination between Candidate Van Dyk and third parties. Further, the Van Dyk campaign was not involved with Western Tradition Partnership and therefore falls outside of the and evidence base the Commissioner has built in regard to 2010 primary election races. Any evidence of coordination will be unique to this campaign and therefore needs to be discovered during investigation.

Montana law [44.10.323(4) ARM] defines coordination as “an expenditure made [by a second party] in cooperation with, consultation with, at the request or suggestion of, or the prior consent of a candidate...” There are two sources of evidence of such coordination, the third parties and the candidate.

The Commissioner’s investigator wrote to each of the 9 named entities and individuals asking for any communication between the party and Candidate Van Dyk. Each of the nine entities wrote back stating that there was no such communication and categorically denying any coordination. (Commissioner’s records). Candidate Van Dyk also wrote to the Commissioner’s investigator

stating no such communication existed and explicitly stating that “I did not coordinate with the third-party groups spending money in our [SD25] race.” (Van Dyk letter, February 26, 2014).¹²

The Commissioner’s prior investigations and Decisions (see FN 1) have shown that a candidate’s campaign activity may indicate coordination by showing candidate campaign gaps filled by coordinated third party campaign activity. While there was no indication of such a circumstance in regard to the Van Dyk SD 25 campaign, the Commissioner still undertook such an investigation. The Commissioner asked for and received the campaign records of Van Dyk’s SD 25 campaign.¹³

Based on review of campaign records the Commissioner was able to determine that:

1. Candidate Van Dyk’s campaign hired 20 individuals at a cost in excess of \$22,000, most of whom were paid to carry out door to door canvass work, identifying voters for future contact by mail or in person.¹⁴
2. Candidate Van Dyk’s campaign spent over \$45,000 with four vendors for printing and mail costs.¹⁵
3. Candidate Van Dyk’s campaign spent \$10,000 in costs for

¹² Van Dyk stated that his campaign “raised over \$100,000 from 850 donors.”

¹³ In particular the Commissioner received and examined each of the 141 campaign checks issued by the Van Dyk 2010 SD 25 campaign. This is a large number of checks for a Montana legislative campaign. This is to be expected, however, because the SD 25 2010 campaign was the first in the history of Montana to raise and spend \$100,000.

¹⁴ The campaign wrote over 90 checks for this purpose (each signed personally by Candidate Van Dyk) for this work. (Commissioner’s records).

¹⁵ The campaign wrote 17 checks for this purpose (each signed personally by Candidate Van Dyk) for this work. (Commissioner’s records).

advertisement, graphics, and transportation.¹⁶

In sufficiency decisions finding coordination (FN 1) the Commissioner found a direct relationship, through partial payment, to the WTP-related third party determined to be in coordination with the candidate. Further, the uncompensated work provided by the third party was a defined part (candidate letters or attacks slicks) of the candidate's campaign that was not being otherwise carried out by the candidate. See Decisions listed in FN 1. With this campaign activity "gap" in mind, the Commissioner reviewed Candidate Van Dyk's campaign records and makes the following findings of fact:

Finding of Fact 4: There were no payments shown by the Van Dyk 2012 SD25 campaign records to any of the nine entities or people listed in the COPP complaint. (Commissioner's records).

Finding of Fact 5: There was no mention of or reference to any of the nine entities or people in the Van Dyk 2012 SD25 campaign records. (Commissioner's records).

Finding of Fact 6: There was no "gap" in candidate campaign activity as Candidate Van Dyk's 2012 SD25 campaign records showed a full range of candidate activity including attack slicks and direct candidate mail. (Commissioner's records).

The Decision will now present the law and policy that provides guidance to a coordination Decision in this Matter.

¹⁶ The campaign wrote 21 checks for this purpose (each signed personally by Candidate Van Dyk) for this work. (Commissioner's records).

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. *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.*

Coordination decisions by Montana Commissioners show a 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.

Commissioner Unsworth rejected 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 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 (Allison Handler) campaign. 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 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.¹⁷ 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. (See FN 1).

In contrast, the Commissioner did not find coordination in the *Madin v. Burnett* or *Ponte v. Buttrey* Decisions. The Commissioner declined to find coordination because of a lack of evidence of a relationship with which coordination was alleged (*Madin v. Burnett*) or because of the lack of evidence of an assigned campaign role (*Ponte v. Buttrey*) for the third party entity. Consistent with these Decisions the Commissioner does not find sufficient evidence of coordination in this Matter. There is no evidence of any contact with the 9 named entities (FOF Nos. 4 and 5) and Candidate Van Dyk’s campaign was fully engaged on all fronts without the need for assistance from

¹⁷ Prior Decisions (FN1) have determined WTP includes its corporate agents such as Direct Mail.

any third party (FOF No. 6).¹⁸ The involvement of each of the 9 named entities was, based on the Commissioner's review, that of an independent party making an expenditure independent of the candidate. The Commissioner determines a lack of facts showing Candidate Van Dyk coordinated with a 3rd party entity making an independent expenditure in the 2010 SD 25 election.

OVERALL DECISION

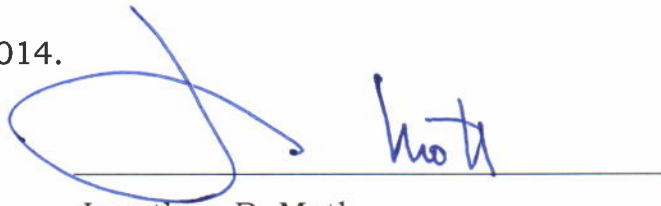
This Commissioner, having duly considered the matters raised in the Complaint, and having completed his review and investigation, hereby holds and determines, under the above stated reasoning, that there is insufficient evidence, to justify a civil or criminal adjudication against Candidate Van Dyk under §13-37-124(1) MCA. The Commissioner hereby dismisses this complaint in full.

The Commissioner notes that it is only the limiting language of the *Berry v. MEA-COPE* (the language seemed to invite a coordination complaint, such as this one) that prevents the Commissioner from labeling this complaint as frivolous. *Landsgaard v. Peterson*, COPP-2014-CFP-008. Without that inviting language it is likely this complaint would have been summarily dismissed without an investigation. The Commissioner further notes this is the fourth

¹⁸ Contrast this with the role of WTP/Direct Mail with the 9 sufficiency decision candidates, as determined in the Decisions regarding those candidates. (See FN 1). Those 9 WTP supported candidates were part of the coordination as each allowed Direct Mail to write, assemble, target, coordinate and mail multiple letters bearing the candidate's signature to voters in a 2010 primary election. Those multiple candidate letters were coordinated with 3rd party attack letters and/or flyers, again prepared by or orchestrated by WTP/Direct Mail.

complaint filed against Candidate Van Dyk (see FOF No. 3). All four complaints have been dismissed.

DATED this 1st day of July, 2014.



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