

COMMISSIONER OF
POLITICAL PRACTICES



STATE OF MONTANA

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January 31, 2014

Emilie Boyles
News Director
Marks Group Broadcasting
210 S. Douglas
Glendive, MT 59330

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', is written over the typed name.

Jonathan R. Motl
Commissioner of Political Practices