

COMMISSIONER OF
POLITICAL PRACTICES

EXHIBIT 4
DATE 3/17/2015
SB 289



STATE OF MONTANA

JONATHAN R. MOTL
COMMISSIONER
TELEPHONE (406) 444-2942
FAX (406) 444-1643

1205 EIGHTH AVENUE
PO BOX 202401
HELENA, MONTANA 59620-2401
www.politicalpractices.mt.gov

March 17, 2015

Honorable Tom Berry
Chairperson
House Business and Labor
Jeffrey Welborn- Vice Chair
Ryan Lynch - M. Vice Chair

Members

Christy Clark
Willis Curdy
Steve Fitzpatrick
Chuck Hunter
George Kipp, III
Mike Lang
David (Doc) Moore
Mark Noland
Andrea Olsen
Gordon Pierson
Christopher Pope
Vince Ricci
Tom Richmond
Daniel Salomon
Scott Staffanson
Tom Steenberg

Re: Senate Bill 289
Hearing Date: Tuesday, March 17,
2015 at 8:30 AM
Sponsor: Senator Ankney

Dear Chairperson Berry and members of the Committee:

The Office of the Commissioner of Political Practices supports Senate Bill 289 and respectfully offers the following information to the members of the House Business and Labor Committee.

First, SB 289 makes changes to existing law but does so with language that does not raise process or compatibility concerns. The COPP has thoroughly vetted each part of SB 289 and informs this Committee that the language changes and language additions made by SB 289 are worded and placed such that they are compatible with and consistent with the remaining language of Title 13. While the COPP will need to propose and adopt administrative regulations to administer SB 289, this regulatory work comes at an opportune time since the COPP was already planning a complete administrative regulation overhaul during the summer and fall of 2015.

Second, SB 289 offers the following necessary substantive improvements to Montana's campaign practice law. Specifically, SB 289 adds a reporting period for state district candidates and affords the COPP discretion to require electronic reporting by candidates, both needed reforms that will enhance transparency and timeliness of disclosure.

Third, SB 289 clarifies Montana law by specifically stating that political parties may provide certain in-kind personal services (candidate support through field staff paid by the political party) to Montana candidates for public office without the value of those in-kind services counted toward the aggregate contribution limits applied to a political party by §13-37-216(3)MCA. The reasons for this clarification are several and are explained at length in that certain COPP Advisory Opinion dated May 19, 2014 and accessible on the COPP website as COPP-AO-2014-009. That Advisory Opinion is based on Montana tradition and encouraged by U. S. Supreme Court Decisions based on associational rights of political parties. See *Randall v. Sorrell*, 548 U.S. 230 (2006). SB 289 follows the path of the Advisory Opinion in exempting political party paid staff from contribution limits but still requiring reporting and disclosure of the value.

Fourth, SB 289 defines electioneering communication through the "electioneering communication" definition set out at page 7. This definition provides a succinct and appropriate measure of an electioneering communication. It does this by requiring use of "clearly identified candidate" and "election." This means that communications (business listings, sales documents, church bulletins, community event notices) listing just the name or likeness of a person who is also a candidate for public office will not be an electioneering communication. The communication must list the name or likeness of the person and also tie that name or likeness to a public office or position that is up for election. The bill instructs rule making by the

Commissioner (p. 7, l. 20), and such rule making will be made providing examples so that the above distinction is clearly set out.

Fifth SB 289 provides a “*de minimis*” definition (p. 6, l. 14), along with a directive for the Commissioner to create an appropriate *de minimis* regulation (p. 15, ll. 10-15). This two-step approach is the appropriate way to deal with this issue. Federal courts have directed the COPP to avoid regulation of *de minimis* election activities. *Canyon Ferry Baptist Church v. Unsworth* 556 F3d 1021 (9th circuit, 2009). SB 289 sets out a general definition of *de minimis* consistent with *Canyon Ferry*. Consistent with the SB general definition, the COPP currently measures each campaign practice Decision by *de minimis* and has dismissed a dozen Decisions finding a violation of the Montana Campaign Practice Act by application of the *de minimis* principle. Application of the *de minimis* principle requires a measure of the extent of the violation, the amount of money involved, the length of time involved, the harm to the public and other such factors as measured against the burden on robust election speech.¹ It is time that these *de minimis* factors be discussed and published as an administrative regulation. Accordingly, the Commissioner will propose a draft *de minimis* regulation incorporating the factors applied in the several Decisions. That draft regulation will then progress through the public review and public hearing process under MAPA. This rule making process insures that interested parties have an opportunity to comment on and understand the final factors involved in setting the detailed regulatory application of *de minimis* consistent with the general definition of SB 289.

Montana candidates for public office, the press, the public and the COPP are at a particular reassessment point as to Montana’s campaign practices. Montana’s 100 year old ban on corporate independent expenditures is gone (stricken by the US Supreme Court in late 2012) and the 2014 elections demonstrated that third party independent expenditures in Montana’s candidate races will be made by political parties, PACs and incidental committees. Montana’s campaign practice future, including 2016 elections, is likely going to include increasing amounts of campaign expenditures by third party entities that are not connected with candidates and therefore fall outside of Montana’s candidate campaign culture.

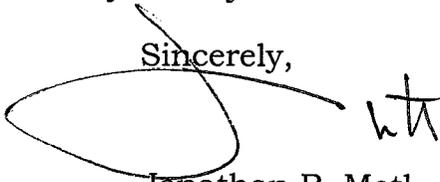
SB 289 enhances the ability of Montanans to deal with these increasing third party expenditures by providing the transparency that is essential to an open and fair political culture. Yes, a third party may spend against a

¹ Please see the *Brastrup v. Ravndal* COPP-2014-CFP-040 Decision attached to this testimony.

candidate, but the additional reporting period and the increased transparency set by SB 289 means that the timing, amount and nature of the expenditure will be timely known to the opposing candidate, the press and the public. This information will promote political discussion, rather than just serve as political attack, and this serves fair elections.

Thank you for your consideration of SB 289.

Sincerely,

A handwritten signature in black ink, consisting of a large, stylized loop followed by the initials 'JM'.

Jonathan R. Motl
Commissioner of Political Practices

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Brastrup v. Ravndal No. COPP 2014-CFP-040	<u>Dismissal of Complaint By</u> <u>Application of <i>De Minimis</i> Principle</u>
--	---

On October 7, 2014, Robert Brastrup, a resident of Townsend, Montana, filed a complaint against Tim Ravndal, a 2014 candidate for County Commissioner District #1, Broadwater County. Mr. Ravndal is also a resident of Townsend, Montana. Mr. Brastrup alleged in his complaint that Mr. Ravndal violated campaign practice laws by failing to properly attribute required information in a campaign letter Mr. Ravndal mailed to Broadwater County residents.

SUBSTANTIVE ISSUES ADDRESSED

The substantive area of campaign finance law addressed by this decision is that of attribution of campaign materials, with enforcement measured by application of *de minimis* principle.

FINDING OF FACT

The foundational fact necessary for this Decision is as follows:

Finding of Fact No. 1: On June 3, 2014, a primary election was held. Five candidates were on the ballot for Broadwater County Commissioner, District #1. Candidates Laura Obert and Tim Ravndal received the most votes and are on the general election ballot. (Montana Secretary of State's Office).

DISCUSSION

The complaint alleges that Candidate Ravndal distributed campaign literature in the 2014 Broadwater County Commissioner general election that lacked the appropriate party designation. Under Montana law all election materials prepared by Candidate Ravndal: "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.

The Commissioner makes the following further Findings related to this Complaint:

Finding of Fact No. 2: On October 2, 2014, Candidate Ravndal sent a campaign mailer to about 400 people within Broadwater County. (Investigator's Interview with Mr. Ravndal).

Finding of Fact No. 3: On October 7, 2014, Robert Brastrup filed a complaint with the COPP against Candidate Ravndal for sending a campaign letter without proper attribution information. (Commissioner's records).

Finding of Fact No. 4: The campaign mailer included a one page letter signed by Candidate Ravndal attacking Candidate Obert. (Copy of letter provided by Complainant and Mr. Ravndal).

Finding of Fact No. 5: The Commissioner's investigator was provided a unopened envelope containing the October 2, 2014 campaign mailer sent by Candidate Ravndal. The envelope contained a one page letter signed by Candidate Ravndal that was folded three times. Within the folded letter (but unattached to it) was Candidate Ravndal's campaign brochure. The one page letter did not have an attribution statement other than Candidate Ravndal's signature. The tri-folded campaign brochure did contain an attribution that read, "Paid for by Tim Ravndal, PO Box 287, Townsend, Montana 59644." (Investigative notes).

Finding of Fact No. 6: Mr. Ravndal apologized to the public for any oversight and agreed to place a stand-alone attribution on the one page letter described in FOF No. 5, should that letter be used again in the future. (Investigative notes).

Candidate Ravndal failed to comply with Montana's attribution law by failing to properly attribute the one-page letter. (FOF No. 4). Candidate Ravndal explained that he thought the attribution on the brochure enclosed with the letter (see FOF No. 5) would also serve as an attribution for the letter. A shared disclosure based on two separate and independent documents, however, is not sufficient as Montana law requires that "[a]ll communications" [§13-35-225(1) MCA] must be attributed.¹ The Commissioner, however, accepts that the error was unintentional (FOF No. 6) and likely of minor harm to the public. The Commissioner further notes that Candidate Ravndal, through the investigator, apologized to the people of Montana for his error. *Id.*

Having decided that this a matter of oversight, not intention, the issue the Commissioner next addresses is whether Candidate Ravndal's oversight can be excused as *de minimis*. *De minimis* is an established concept of law meaning

¹ The COPP staff notes that it has required correction, as it must, of a missing attribution on a single campaign sign. The statute says "all" communications, not "some" communications.

that “the law does not care for, or take notice of, very small or trifling matters.”
Black’s Law Dictionary 4th Edition.

The COPP began to regularly apply a *de minimis* exception to civil enforcement of a technical or minor violation of Montana’s campaign practice, when directed to do so law by the 9th circuit court of appeals in that Matter of *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth* 556 F. 3d 1021, 1028-29 (9th Cir. 2009). The *de minimis* actions in *Canyon Ferry* were the limited use of staff and copying expenditures by a party involved in a ballot issue campaign.

While not always identifying it as *de minimis*, Commissioners have long used the concept to dismiss prosecution of technical violations: no prosecution for lack of address, *Shannon v. Andrews*, COPP-2012-CFP-035 (Commissioner Murry); no prosecution for failure to list party affiliation or funding source on a candidate website display, *Fitzpatrick v. Zook*, COPP-2011-CFP-014 (Commissioner Gallik); and no prosecution when full name of committee treasurer omitted, *Ellis v. Yes on CI-97*, April 15, 2008 (Commissioner Unsworth). This Commissioner has applied *de minimis* to excuse technical violations for: omitting a ‘paid for by’ attribution, *Ulvestad v. Brown*, COPP-2013-CFR-025; accepting a contribution of \$40 over the allowed amount, *Rodda v. Bennett*, COPP-2014-CFR-013; failing to register/attribute as a political committee, *Royston v. Crosby*, COPP-2012-CFP-041; failure to fully attribute on a candidate letter, *Ponte v. Buttrey*, COPP-2014-CFP-007; failure to properly apportion total allowed amount of contribution between husband and

wife, *Kenat v. Van Dyk*, No. COPP-2014-CFP-004, and failure to list political party *Strizich v. Loney*, COPP 2014-CFP-034.

Further, this Commissioner, in a January 31, 2014 advisory opinion to Emilie Boyles, generally placed the *de minimis* principle in Montana campaign practice law as follows:

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.

COPP-2014-AO-003, Boyles. The constitutional considerations inherent in the "robust election speech issue" raised in the advisory opinion are discussed in *Landsgaard v. Peterson*, COPP-2014-CFP-008.

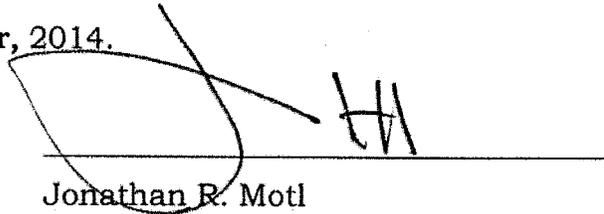
Turning now to the Candidate Ravndal's activity, the Commissioner notes that a substantial number of (400) letters were distributed without the required attribution. On the other hand, a fully attributed brochure was also enclosed in the same envelope. With these (and the above) considerations in mind, the Commissioner finds that the technical violation in this Matter is dismissed under the *de minimis* principle.

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 the above described violation of attribution standards is dismissed as *de minimis* . The Commissioner hereby dismisses this complaint.

DATED this 21st day of October, 2014.

A handwritten signature in black ink, appearing to be "JRM", is written over a horizontal line. The signature is somewhat stylized and partially overlaps the line.

Jonathan R. Motl
Commissioner of Political Practices
Of the State of Montana
P. O. Box 202401
1205 8th Avenue
Helena, MT 59620
Phone: (406)-444-4622