

COMMISSIONER OF  
POLITICAL PRACTICES



STATE OF MONTANA

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March 9, 2016

**RECEIVED**

**MAR 09 2016**

**MONTANA LEGISLATIVE  
SERVICES**

Senator Dee Brown  
Chairperson  
And Members  
State Administration and Veterans' Affairs Interim Committee  
Helena, MT

Entrusted to Sheri Scurr for Delivery to SAVA

Dear Senator Brown and Members of SAVA:

I write in response to Senator Brown's February 22, 2016 email requesting information on the status of litigation involving the COPP. It was a timely email inquiry as I had been independently thinking it was time to provide this information to members of SAVA.

The COPP's most recent litigation status memo to SAVA was dated July 29, 2015. I have updated that memo and a copy accompanies this letter. The updates are shown on the memo in bold type. As that memo lists, during the current fiscal year the COPP has engaged in 12 campaign practice judicial enforcement actions. In addition, the COPP is the named party in seven judicial actions defending the constitutionality of certain parts of Montana's campaign practice laws, including: laws setting contribution limits; laws setting COPP investigatory power (including subpoena power); laws setting the COPP's authority to determine venue; and, laws providing the COPP's with authority to contract with expert witnesses.

Senator Brown asked for an explanation as to the funding of litigation involving the COPP, as detailed in the attached memo. The litigation is significant in number and scope. The litigation could not be, and is not, funded by the spare litigation budget provided to the COPP. In brief, the litigation is carried out or funded, depending on the nature of the claim, by staff or funds provided by the Attorney General, Tort Claims, and/or the COPP. In addition, two law firms are working on a *pro-bono* basis as "special attorney general" appointed by the COPP and this means some attorney fees are waived by those law firms. The staffing or funding is described further below.

1. The Attorney General defends agencies, including the COPP, in cases that bring challenges to the constitutionality of statutes or regulations of the State of Montana. Please see the cases listed as Nos. 2, 3 and 6 under "Actions Brought Against the COPP". The Attorney General also successfully defended constitutional based counter-claims made by Defendants in several of the judicial enforcement actions brought by the COPP. The Attorney General staffs the defense by providing Department of Justice attorneys who handle the case for the benefit of the State of Montana. The attorneys assigned by the Attorney General to defend the COPP are Matt Cochenour, Pat Risken and Dale Schowengerdt.

2. The State of Montana, through the Department of Administration Torts claims office, defends state employees/agencies from certain claims, including settlement of the claim, if need be. In effect, torts claims is a limited form of "malpractice" insurance that becomes involved when a covered (or "tort") claim is made against a former or current state employee, based on actions taken by the state employee during the course and scope of an employee's work. If a claim is not covered by Tort Claims then the employee's agency must pick up the cost of defense. In this fiscal year Torts Claims covered the costs of defending and defeating third party claims asserted against former Commissioner Murray, current Commissioner Motl, Governor Bullock and Senator Tutvedt. The attorneys engaged by Torts Claims were Andy Forsythe and Chris Sweeney.

3. The COPP directly meets its legal needs in two ways. First, in-house counsel Jaime MacNaughton directly handles a considerable number of cases, more than any other attorney working with the COPP. Second, the COPP uses its "legal services" budget to pay for work by third party attorneys, including payment to attorneys supplied by the Attorney General's Agency Legal Services Bureau. When third party attorneys are engaged by Torts Claims the COPP also engages (and pays for) any part of the attorney's time that is spent on something other than a tort claim. When a third party attorney is appointed by the COPP as a special attorney general (under the authority of §13-37-113 MCA) that attorney is hired under contract and paid as specified by the contract.

4. The two attorney teams of special attorney general who were engaged by the COPP agreed to work for a stipend amount, covering expenses and time. That means that the attorneys are largely working *pro-bono* with the state of Montana benefiting from their service.

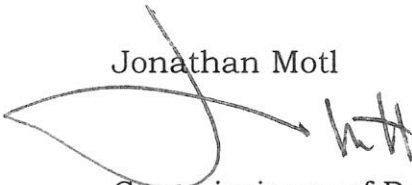
As you know, the COPP's legal services budget, including trial costs, is limited, set at \$42,180 for the 2015-2016 fiscal year. To date, during the 2015-2016 fiscal year the COPP has spent \$37,217.89 on legal fees and trial costs. The

legal fees paid were: Forsythe \$12,880.25 and Agency Legal Services \$6,660.36. Trial costs paid include \$4,262.50 in expert witness fees and \$13,414.78 in depositions, evidence related T services and transcript costs. The stipend amount (\$15,000 total) paid to the two firms serving as special attorney general was paid out of the supplemental appropriation funds allowed for the 2014-2015 fiscal year and therefore is not part of the 2015-2016 COPP budget..

The COPP expects to exceed the 2015-2016 legal services budget of \$42,180, but stay within the overall agency budget for the 2015-16 year, doing so by shifting funds from other agency budget lines to the legal services budget line, as allowed by State budget policy. The COPP expects that the costs associated with a March 28, 2016 jury trial will be included in and covered by the amounts allocated for the 2015-2016 agency budget.

There are two warnings we need to provide this Committee. So far the COPP attorneys have won every motion fight or other legal argument that could result in an attorney fee award against the State of Montana, had the COPP lost. It is possible that the COPP could lose such an argument and that this loss could lead to an attorney fee award. Second, in looking ahead, the COPP expects the current level of litigation to stay the same or increase during the next fiscal year. The COPP will need to file several new enforcement actions in order to toll the statute of limitations on Sufficiency Decisions related to 2012 elections. Further, there is an additional lawsuit filed against the COPP that has yet been served. Finally, the COPP has 25 Sufficiency Decisions in settlement, some of which may not settle and therefore trigger still additional enforcement litigation.

I acknowledge the invitation to appear at the April 19, 2016 SAVA meeting. As I explained to Committee staff, I will be one week removed from knee replacement surgery on April 19. If I am mobile enough I will attend. If I am not mobile then Jaime MacNaughton will appear on behalf of the COPP.

Jonathan Motl  
  
Commissioner of Political Practices

C  
Sheri Scurr  
Jaime MacNaughton

Memo

To: SAVA Committee

Re: Litigation update

From: Jonathan Motl

Date: July 29, 2015 (**supplemented on March 9, 2016 with supplement in bold type**)

I write in response to the request (from Ginger) for an update of litigation involving the COPP. The following is that update.

Enforcement Actions Brought by COPP

1. *COPP v. Miller* BDV-2014-62 1<sup>st</sup> Judicial District Lewis and Clark County (Judge Sherlock). Settled 1/23/15 with settlement posted on the COPP website.
2. *COPP v. Murray* BDV-2014-170 1<sup>st</sup> Judicial District Lewis and Clark County (Judge Sherlock). All counterclaims dismissed by Court, leaving only COPP enforcement claims. **Trial is set for June 26, 2017. Attorneys from the Goetz law firm, located in Bozeman, Montana have been engaged as special attorney general to litigate the case. The Wittich law firm is defending Mr. Murray. Attached is a copy of the contract with the Goetz firm.**
  - 2a. *Murray v. Motl* No. DV-14-36A 18<sup>th</sup> Judicial District Gallatin County Dismissed 9/22/14; Dismissal appealed to Montana Supreme Court by Murray in *Murray v. Motl* DA 14-0699. **Appeal dismissed by Montana Supreme Court on July 29, 2015.**
3. *COPP v. Bannan* BDV-2014-178 1<sup>st</sup> Judicial District Lewis and Clark County (Judge Seeley). **A trial schedule has not been set. MacNaughton is sole counsel of record.**
  - 3a. *Bannan v. Motl* No. DV-14-143B 18<sup>th</sup> Judicial District Gallatin County was dismissed 9-22-14. An appeal of the dismissal was filed by Bannan in the Supreme Court: *Bannan v COPP* DA 14-0716. **The appeal was dismissed by the Supreme Court on August 4, 2015.**
4. *COPP v. Wittich* BDV-2014-251 1<sup>st</sup> Judicial District Lewis and Clark County (Judge Sherlock). Multiple pre-trial trial motions decided: motions to dismiss denied 7/08/2014; COPP motion to dismiss 3<sup>rd</sup> party complaints granted 8/27/2014; Wittich motion to amend 3<sup>rd</sup> party complaints denied 10/8/2014. **Discovery is complete. A final pre-trial conference is set for March 10, 2016. A jury trial is set in Helena for the week for March 28 through April 1, 2016.**

Pro-bono legal counsel (Gene Jarussi and John Heenan) engaged by COPP as special attorney general to litigate this matter. **A copy of the contract is attached.**

5. *COPP v. Wagman* BDV-2014-267 1<sup>st</sup> Judicial District Lewis and Clark County (Judge Sherlock). **Wagman's counterclaims dismissed 5/11/2015. No scheduling Order has been entered. MacNaughton is sole counsel of record.**
  - 5a. *Wagman v. Motl* No. DV-2014-53 6<sup>th</sup> Judicial District Park County **Dismissed 9/12/14**; Dismissal appealed to Montana Supreme Court by Murray in *Wagman v. Motl* DA 14-0619. Appeal denied by Supreme Court on June 23, 2015.
6. *COPP v. Boniek* XADV-2014-202 1<sup>st</sup> Judicial District Lewis and Clark County (Judge Pinski, by substitution). Boniek motions to strike, and dismiss denied. Park County motion to intervene denied. Default against Boniek entered 12/17/14. A related settlement of the Soady's (Bonieks treasurers) has been entered and is posted on the COPP website. A penalty stage trial was held in a Great Falls courtroom on June 2, 2015 before the Honorable Judge Pinski. **On August 13, 2015 the Court entered its 24 page Order finding quid pro corruption by Boniek and assessing \$54,000 in fines. A copy of the Order accompanies this memo .**
7. *COPP v. Kennedy* BDV-2014-234 1<sup>st</sup> Judicial District Lewis and Clark County (Judge Sherlock). Kennedy motion to change venue denied. There is no current trial schedule in this matter. **MacNaughton is sole counsel of record. Mr. Kennedy is represented by James Brown.**
8. *COPP v. Sales* BDV-2014-283 1<sup>st</sup> Judicial District Lewis and Clark County (Judge Sherlock). Settled 12/19/14 with settlement posted on the COPP website.
9. *COPP v. Prouse* DDV-2014-250 1<sup>st</sup> Judicial District Lewis and Clark County (Judge Reynolds). **Default entered 11/21/14 and a default judgment hearing was held before Judge Reynolds. On January 5, 2016 the Court entered its 15 page Order finding quid pro corruption by Prouse and assessing \$59,000 in fines. A copy of the Order accompanies this memo .**
10. *COPP v. WTP et. al.* DDV-2014-351 1<sup>st</sup> Judicial District Lewis and Clark County (Judge Reynolds). There is no current trial schedule in this matter. **MacNaughton is sole counsel of record.**
11. *COPP v. Lair, Faw and Baird* ADV-2014-352 1<sup>st</sup> Judicial District Lewis and Clark County (Judge Menahan). There is no current trial schedule in this matter. **MacNaughton is sole counsel of record.**
12. *COPP v. National Gunowners Alliance* BDV-2014-353 1<sup>st</sup> Judicial District Lewis and Clark County (Judge Cooney). There is no current trial schedule in this matter. **MacNaughton is sole counsel of record.**

Actions Brought Against The COPP

1. *Powell v. COPP* OP14-0711 and OP14-0664. Original proceedings brought against the COPP at the Montana Supreme Court. The Supreme Court denied the petition on 10-17-14. **This Matter is ended and will not be included on future memos.**
2. *Montanans for Community Development v. COPP* 6:14-cv-00055 US District Court for the District of Montana. The US District Court denied preliminary injunction on 10/22/14 and the 9<sup>th</sup> circuit denied emergency motion for injunction on 10/30/14. **Discovery, including depositions, has concluded and each side is now submitting summary judgment briefs to the Court. The COPP is represented in this Case by the Attorney General through attorneys Pat Risken, Matt Cochenour and Dale Schowendergt.**
3. *Lair v. COPP* 9<sup>th</sup> circuit Court of Appeals 12-35809 and 35889. The 9<sup>th</sup> circuit reversed a 2012 Federal District Court Order finding Montana's contribution limits as unconstitutional. The Case was returned to the Montana Federal District Court (Judge Lovell). **Discovery has concluded and summary judgment briefs are being submitted with a bench trial, if necessary, set for May 9, 2016 before Judge Lovell. The COPP is represented in this Case by the Attorney General through attorneys Pat Risken, Matt Cochenour and Dale Schowendergt.**
4. *Skattum v. Motl* No. DV-14-32 6<sup>th</sup> Judicial District, Park County. **The COPP successfully removed venue to the 1<sup>st</sup> Judicial District: *Skattum v Motl* No. ADV-2014-739. On January 12, 2016 the Court (Judge Menahan) issued an eight page Order dismissing the claim (copy attached). The COPP was represented in this case through the summary judgment Order by contracted attorneys Andy Forsythe and Christopher Sweeney. The Plaintiff has appealed the dismissal to the Montana Supreme Court and COPP in-house counsel Jaime MacNaughton has replaced contracted counsel as the attorney of record.**
5. *Buell v. Motl and Fox* No. DV-15-144 12<sup>th</sup> Judicial District (Hill County). **To date this case is a motion fight with the Attorney General successfully dismissed and the COPP having moved for a change in venue to the 1<sup>st</sup> Judicial District. The COPP is represented in this case by Jaime MacNaughton, in-house counsel.**
6. *MGN v. COPP* No. DV-16-06 22<sup>nd</sup> Judicial District, Carbon County. **The COPP has recently been served with this Complaint (challenging the constitutionality of the COPP's subpoena power) and will likely be represented by the Attorney General.**
7. *LeFer v. COPP*, No. 13-35963 9<sup>th</sup> Circuit Court of Appeals. **Briefing completed, oral argument held, awaiting decision. Jaime MacNaughton is attorney of record.**