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**62nd Montana Legislature**

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**LEGAL MEMORANDUM**

TO: Members, State Administration and Veterans' Affairs Interim Committee

FROM: David S. Niss, Staff Attorney

RE: Litigation Report on Western Tradition Partnership, Inc. v. Attorney General and Lair v. Murry

DATE: March 27, 2012

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INTRODUCTION

On March 8, 2010, several group and individual plaintiffs filed a complaint in the First Judicial District challenging the constitutionality of section 13-35-227(1), MCA, prohibiting independent corporate political expenditures. In that case, Western Tradition Partnership, Inc. v. Attorney General,<sup>1</sup> Judge Sherlock held that subsection unconstitutional under the doctrine announced in Citizens United v. Federal Election Commission, 200 U.S. 321 (2010), and enjoined its enforcement. Thereafter, defendants appealed the decision to the Montana Supreme Court. On December 30, 2011, the Montana Supreme Court overruled Judge Sherlock and declared section 13-35-227(1), MCA, to be constitutional.<sup>2</sup> The plaintiffs then asked the U.S. Supreme Court to reverse the Montana Supreme Court decision in Western Tradition Partnership or stay the decision of the Montana Supreme Court pending a petition for a writ of certiorari to the U.S. Supreme Court. On February 17, the U.S. Supreme Court stayed the Montana Supreme Court's decision in Western Tradition Partnership pending the filing of a petition for certiorari.

On September 6, 2011, Western Tradition Partnership, now known as American Tradition Partnership, and other plaintiffs filed a separate action in U.S. District Court,

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<sup>1</sup>Cause No. BDV-2010-238, Mont. First. Jud. Dist. Ct., Lewis and Clark Co.

<sup>2</sup>Western Tradition Partnership, Inc. v. Attorney General, 2011 MT 328, 363 Mont. 220.

Lair v. Murry,<sup>3</sup> challenging the constitutionality of five other Montana election statutes.<sup>4</sup> On February 24, 2012, U.S. District Court Judge Charles Lovell granted the plaintiffs' motion for a preliminary injunction in Lair as to two of the five sections challenged by the plaintiffs, sections 13-35-225(3)(a) and 13-37-131, MCA.

This memorandum explains the Court's decision in Lair and the status of both the Western Tradition Partnership and Lair decisions.

## II DISCUSSION

### A. Lair v. Murry

Judge Lovell's ruling enjoining the enforcement of two sections of the election code is explained below.

#### 1. 13-35-225(3)(a), MCA.

This section of the election code requires that printed election material discussing a candidate's voting record include a "disclosure of contrasting votes known to have been made by the candidate on the same issue if closely related in time". The Court held that this subsection, challenged by the plaintiffs as being too vague under the Free Speech guarantees of the First Amendment, was so vague in its phrases "on the same issue" and "if closely related in time" that a reasonable person could not tell what was being required by the law. The Court noted that the U.S. Supreme Court has held that "A statute [that controls free speech] must be sufficiently clear so as to allow persons of ordinary intelligence a reasonable opportunity to know what is prohibited", citing Grayned v. City of Rockford, 408 U.S. 104 (1972). The Court gave several examples in its opinion of what might or might not be prohibited by each of the phrases in the statute and concluded that because the plaintiffs were likely to succeed on the merits of the case at trial, subsection (3)(a) should be enjoined pending that trial.

#### 2. Section 13-37-131, MCA.

This section of the election code prohibits political civil libel. Subsections (1) and (2) prohibit a candidate from misrepresenting the candidate's or another candidate's voting record "or any other matter that is relevant to the issues of the campaign" with the knowledge that the statement is false or with reckless disregard as to whether or not the

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<sup>3</sup>Cause No. CV12-H-CCL.

<sup>4</sup>The plaintiffs challenged sections 13-35-225(3)(a), 13-37-131, 13-37-216(1) and (5), 13-37-216(3) and (5), and 13-35-227, MCA.

statement is false. The plaintiffs argued to the Court that, as in the case of section 13-35-225, MCA, the language of the statute was so vague that the plaintiffs could not tell what speech was prohibited and what was not. The Court agreed that the language “relevant to the issues of the campaign” was vague because it could not possibly include every statement made in the course of a campaign (“the candidate’s eyes are blue”) and that what was relevant to one candidate might not be relevant to another. For this reason, the Court also enjoined the enforcement of all of section 13-37-131, MCA.

## B. The Status and Meaning of the Litigation

### 1. Western Tradition Partnership; Independent Corporate Political Expenditures

The state and federal court challenges of the plaintiffs have successfully challenged 13-35-227(1), MCA, insofar as it prohibits independent corporate political expenditures. Because the U.S. Supreme Court has stayed the decision of the Montana Supreme Court overruling Judge Sherlock’s decision, Judge Sherlock’s decision permanently enjoining the Attorney General and the Commissioner of Political Practices from enforcing the state’s ban on independent corporate political expenditures to support or oppose a candidate is now the law of the state unless the state can convince the U.S. Supreme Court to reverse its own decision in Citizens United or otherwise let the decision of the Montana Supreme Court stand. The fact that the U.S. Supreme Court stayed the decision of the Montana Supreme Court pending review on the merits is an indication that the opinion of the Montana Supreme Court will be overturned.

The decision of the U.S. Supreme Court in Citizens United indicated that there was nothing wrong with state reporting requirements applicable to independent corporate contributions. In response to the Citizens United decision, some states have had to adopt laws requiring the reporting of independent political expenditures if, unlike Montana, those states did not have political expenditure reporting requirements in existence.

### 2. Judge Lovell’s decision in Lair; Candidate Disclosure and Civil Libel

Judge Lovell’s decision holding the candidate reporting or disclosure statute and the political civil libel statutes unconstitutional and enjoining their enforcement is a preliminary decision and not normally subject to appeal. The statutes involved will still be subject to a complete trial on the merits of those sections, and the trial will include the other sections of the election code that the Judge did not preliminarily enjoin.<sup>5</sup> The

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<sup>5</sup>Judge Lovell refused to enjoin the enforcement of sections 13-37-216(1) and (5) and 13-37-216(3) and (5), MCA, because he found that the plaintiffs were unlikely to succeed on the merits. Judge Lovell also refused to enjoin section 13-37-227, MCA, as it applies to independent corporate contributions because the U.S. Supreme Court has already stayed the decision of the Montana Supreme Court.

decision of Judge Lovell on the merits of each of those sections of the election code will then be subject to appeal.

### III CONCLUSION

The two court decisions reviewed in this memorandum are not yet final in the sense that the U.S. Supreme Court still has to make a final ruling in Western Tradition Partnership on the constitutionality of section 13-35-227, MCA, and Judge Lovell still has to make a final ruling in Lair on the constitutionality of the five sections of law challenged in that suit. Whether the section held unconstitutional in Western Tradition Partnership should be amended or additional corporate reporting requirements enacted in response to the Supreme Court stay or whether any of the sections challenged or enjoined in Lair should be amended is now up to the Legislature. No legislative reactions to the actions of the Supreme Court in Western Tradition Partnership or of Judge Lovell in Lair are required but neither are they foreclosed by those decisions.

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