



Approved on: 7/31/2014

Minutes of May 28, 2014, Meeting of the  
Commission on Governmental Ethics and Election Practices  
45 Memorial Circle, Augusta, Maine

Present: Walter F. McKee, Esq., Chair; Margaret E. Matheson, Esq.; Michael T. Healy, Esq.;  
André G. Duchette, Esq.

Absent: Hon. Jane Amero

Staff: Jonathan Wayne, Executive Director; Phyllis Gardiner, Counsel

Chair Walter McKee convened the meeting at 9:05 a.m.

The Commission considered the following items:

**1. Ratification of Minutes of the April 30, 2014 Meeting**

Ms. Matheson moved to accept the minutes of the April 30, 2014 Meeting. Mr. Healy seconded. Motion passed (4-0).

**2. Findings of Violation and Penalties Recommended by Commission Staff/National Organization for Marriage**

Mr. Wayne explained that in 2009 the Maine Legislature enacted, and Governor Baldacci signed, a new law allowing same sex couples to marry. The opponents of the law went through the process of a people's veto referendum to repeal the law. A political action committee was formed in Maine to promote the people's veto referendum called Stand for Marriage Maine (SMM) which spent over three million dollars on its efforts to pass the people's veto. The National Organization for Marriage (NOM) provided approximately two million dollars to Stand for Marriage Maine, about 2/3 of the total amount spent for the referendum. The Executive Director for NOM, Brian Brown, was also one of three people who were overseeing the Maine PAC, Stand for Marriage Maine. Mr. Wayne said NOM did not register as a ballot question committee even though it provided the campaign in Maine nearly two million dollars. Fred Karger of California submitted a complaint in August 2009 requesting the Commission investigate the source of the funds donated to Stand for Marriage Maine and NOM. Mr. Wayne

said the process took five years to complete and the staff has developed the findings and recommendations for consideration today.

Mr. McKee raised the issue of the Commission agreeing not to identify the donors by name while the staff is in the investigation stage and asked, for clarification, if the donors would be identified ultimately when the report is filed.

Ms. Gardiner agreed that upon NOM filing the report, that information would become public.

Mr. Healy asked what the process would be if upon learning who the donors were, a Commission member had a conflict of interest if they knew a donor.

Ms. Gardiner said if there is a concern about a conflict of interest, the Commission members should review the donor list. The donor list is not for the public's review she said.

The Commissioners recessed briefly to review the donor list.

Mr. Healy noted that after reviewing the list, he has known one couple over the years socially only and said the relationship does not arise to the level of conflict of interest.

Mr. McKee asked if the only sworn testimony or affidavit around the time of the decision to investigate was that of Brian Brown. Mr. Wayne confirmed this. Mr. McKee pointed out that there were very specific statements made back at the beginning of the investigation regarding receiving and soliciting funds specifically for Maine that were not completely accurate and if the Commission had stood on those statements the investigation probably would not have gone any further and none of this information would have been discovered. Mr. McKee said that after reviewing the staff's report and the attached materials, it seemed that some of those earlier statements were not accurate.

Mr. McKee noted an invoice from C. C. Advertising and asked for further information.

Mr. Wayne explained that NOM had apparently planned to conduct a large telephone survey in Maine using C.C. Advertising. The work was prepared but not executed and the invoice was issued in error according to the spokesperson from the firm. There was no record of the payment being returned to NOM. The vendor suggested that the error could have been reconciled later on.

Mr. Healy asked if there was any information from Mr. Brown's deposition that indicates he personally solicited Donors 2, 9, 10, 11 and 12.

Mr. Wayne said during the deposition, Mr. Brown was shown dates and amounts of contributions but he didn't know specifically who the donor was by looking at amounts so he could not answer any questions regarding the nature of the solicitations. Mr. Brown did testify that in August or September 2009 there was a telephone conversation related to NOM's national strategy involving Brian Brown, Donor #11 and NOM's Chair Robert George and President Maggie Gallagher. He testified that as a result of this conversation, NOM was expecting one million dollars be donated in October 2009 to the national organization.

John Eastman, Esq., Chairman of the Board of NOM and NOM's counsel, referred to the first meeting in 2009 when Commissioner Michael Friedman said national organizations contribute to efforts in Maine all the time and none of them register as a ballot question committee, and under the current statute there is no requirement to identify contributors. Mr. Eastman said that NOM protects the anonymity of its donors because of negative impact on donors throughout the country in the past. He said the purpose of providing protection to NOM's donors is not to avoid disclosure laws. He said all the activity during this campaign was reported through the Stand for Marriage Maine PAC as was required by law. He said these donations went to the NOM general treasury. He acknowledged that some emails did go out to specifically solicit contributions for the Maine campaign; however, not all the donations meet the definition of contribution by law. Once those contributions are removed, the total of earmarked contributions is less than the \$5,000 that would require registration as a ballot question committee. Once NOM received legal advice from its counsel regarding communications, the emails were changed to point donors either to the Maine campaign or the national organization, and the PAC was set up here in Maine

to run the fundraising operation and those donations for Maine were reported. He explained that Brian Brown was serving as the Executive Director of NOM as well as one of the committee members of the Maine PAC. When Mr. Brown raised money for the purpose of the Maine effort, he advised donors to donate to the Stand for Marriage Maine PAC and people who wanted to support national efforts for matters in all states were advised to give to NOM, and those funds went into the general treasury. Mr. Eastman said, as proof that NOM was trying to comply with the Maine reporting requirements, there was one donation that came in to NOM that indicated it was for the Maine effort and NOM returned it to the donor.

In response to a question from Mr. Healy, Mr. Eastman said that NOM's only direct expenditures in Maine related to the ballot question were in the form of in-kind contributions to SMM. These in-kind contributions were properly reported by SMM and did not count towards the registration threshold.

In regard to the advertising invoice, Mr. Eastman explained that this particular service was a survey for Maine which was developed but not used because of advice from counsel due to Maine's reporting requirements. They were advised that it should not be run by NOM but by the PAC which they did. The billing was in error. He said all expenditures and donations for the purpose of the Maine campaign were handled through the PAC.

Mr. Healy asked why Mr. Brown, as the Executive Director, was put on the committee in Maine creating a situation where he was wearing two hats.

Mr. Eastman said he wears two hats also. He is the Chairman of the Board and is also the director of a litigation firm representing NOM today. He said it happens all the time in these issues. He said what looks like a coordination is designed to have NOM carrying out its national mission but in compliance with Maine law by setting up a political action committee for the focus of the efforts in Maine.

Brian Brown addressed Mr. Healy's question by saying that if NOM was making large contributions to a PAC or ballot question committee, obviously NOM would want to have a say

in how the PAC is run. He said he has served on several committees in different states so that NOM has a say in how the committee is run, not that NOM would run the committee but that it would have a say. In the case of SMM, there were three people on the executive committee of SMM.

Mr. Healy said Mr. Brown would obviously want some say, but asked if he actually controlled the Committee since he gave two-thirds of the funds.

Mr. Brown said he did not control the Maine PAC.

Mr. Healy said if there happened to be a disagreement with the other members of the committee Mr. Brown could walk out and cut off the funds. Mr. Healy added that with the amount of money provided by NOM to the PAC, it was difficult to believe that NOM did not control the PAC.

Mr. Brown said of the three person committee, if two people disagreed with something then it did not get done.

Mr. Eastman said it is lawful for NOM to donate to the PAC and used the scenario that if there were \$5 million in NOM's general fund and they donated \$2 million to the PAC, it would not be an issue. He said what raises the difficulty is whether NOM raised the money for the purpose of the Maine campaign and directed those funds to the Maine PAC. The fact that Brian Brown was in a leadership role of NOM as well as the Maine PAC and raising funds for both, cuts against the argument that Mr. Brown was raising money for NOM to be redirected to SMM.

Mr. Duchette asked Mr. Eastman if his opinion would change if Mr. Brown had control over how the Maine campaign was going to be run.

Mr. Eastman said it would not change his opinion. Whether Mr. Brown is on the committee does not alter that scenario.

Mr. McKee said looking at the circumstantial evidence, on September 4, 2009 NOM received a wire transfer of \$150,000 from a donor and on the same day Stand for Marriage Maine received \$140,000; on October 1, 2009, NOM received \$300,000 from a donor and on the same day NOM transferred \$300,000 to Stand for Marriage Maine; on October 9, 2009, a wire transfer of \$400,000 came from another donor and on the same day \$300,000 went to Stand for Marriage Maine. He said to suggest that these were only coincidences strains credibility. Mr. McKee said that was a tough set of facts.

Mr. Eastman said the District Court found that these were recurring donors that had been giving over a period of time on a regular basis. He said those commitments were made before the Maine campaign began and were not earmarked for the purpose of the Maine effort. The recurring donations went directly into the general treasury. The funds were then given to the PAC and reported by the PAC. He said the question is whether, when the funds came in, they were given for Maine specifically. He said since they are recurring donations, that means they were not specifically given for the Maine campaign.

Mr. Healy asked if the District Court's factual finding stated that Donors 2, 9, 10, 11 and 12 were recurring donors.

Mr. Eastman said the Court was not that specific but the Court was referring to NOM's major donors of which there are about a dozen.

Mr. Healy asked if Donors 2, 9, 10, 11 and 12 were recurring donors in 2007 and 2008. Mr. Eastman said that he did not know.

Mr. Healy asked Mr. Brown if he had conversations with Donors 2, 9, 10, 11 and 12 from the time he became an executive committee member of the PAC in June 2009 through the election.

Mr. Brown reviewed the names of Donors 2, 9, 10, 11 and 12 and said he did speak directly to Donor 11 from July on directly. He did not have direct conversations with three of the donors but it is possible that he had a direct conversation with one other major donor on the list. In

response to Mr. Healy, he said all but one were recurring major donors. He said he did not believe Donor 2 was a recurring donor. He stated that any donor he spoke to he told them, unequivocally, that NOM would not accept any gift designated for the ballot initiative in Maine.

Mr. Healy said he accepted that as being true. He explained his issue was that Mr. Brown was the Executive Director of NOM and on the executive committee of the Maine PAC. NOM has a budget of two million dollars which is the level of support it intends to give to the Maine PAC. Mr. Brown is wearing two hats and soliciting for both at the same time. He said NOM's cash needs were high at the time and there were large contributions coming in. Even though the donors were told their donations were not designated for Maine, it does not mean that Mr. Brown could not have designated those funds. He said the funds came in one day and went out the next day to the Maine PAC, which is not the scenario Mr. Eastman raised where NOM had five million dollars in its general treasury which had accumulated over a period of time from different people and different sources.

Mr. Brown said there were large pledges from each of these donors ahead of time who had been pledging a long time. Mr. Healy asked if these pledges were in writing and Mr. Brown said no.

Mr. Healy asked Mr. Brown if these donors had pledged prior to the formation of the Maine PAC. Mr. Brown said he had pledges from two, possibly three donors before July but could not recall for sure since there was no written documentation, only oral communications.

Mr. Eastman referred to the U. S. Supreme Court's decision in the Wisconsin Right to Life matter with regard to chilling core political speech because of First Amendment rights. He said it has taken the Commission five years to find out who these donors were. He said the reason Brian Brown served on the Maine PAC was so he could raise funds in compliance with Maine law for the PAC. Mr. Brown's conversations with donors specifically said, if you want to give for the purpose of the Maine campaign, give to the Maine PAC. If you want to support the national efforts of NOM, then give to NOM. Moneys that are not designated by the donor go into the general treasury and this is no different in his view than if that money had existed prior to the Maine campaign. Any money given to the PAC is reported as required by Maine law.

Mr. Healy said he agreed with Mr. Eastman except in one fact. Mr. Brown was Executive Director of NOM, had full control over the cash and how and when it would be disbursed. And almost simultaneously with the receipt of these donations, Mr. Brown made a donation to the Maine PAC with which he was deeply involved. Mr. Healy said his concern was how could donors differentiate which hat Mr. Brown was wearing when making a solicitation?

Mr. Brown said he did not have complete control over the cash. He said meetings took place where all parties would decide where the funds would go.

Mr. Eastman stated that once it was NOM's money, it does not matter how long it was in the bank account.

Mr. Healy said there was one donor from Maine who was probably not a recurring pledge and had not made a pledge before Mr. Brown was on the PAC. This person made a substantial donation which was most likely intended for the Maine campaign.

Mr. Eastman said it is possible that this person was a previous donor but even if they were not, it could be that they could have become aware of NOM because of the Maine PAC and could have just appreciated NOM's support here and nation-wide and so decided to support the nation-wide efforts.

Mr. Healy said it could be that they gave to the national organization so they could remain anonymous.

Mr. McKee said the argument about what the donor's purpose for the funds was could go on all day long. However, a great deal of information has been uncovered since 2009 and for him these current facts have changed the accuracy of original statements made back in 2009.

Mr. Eastman said legal counsel advised NOM on how to proceed with the Maine campaign and everything was done with those requirements in mind. He said there is no evidence to show that



there was a specific designation or solicitation for the Maine campaign. He said the Commission is interpreting these donations as being earmarked for Maine but they were not. He said the Human Rights Campaign set up their campaign in the exact same way as NOM.

Mr. Healy asked if the executive director of the Human Rights Commission was also the director of the Maine PAC for Human Rights. Mr. Eastman did not know. Mr. Healy followed up asking if NOM's legal counsel advised Mr. Brown to be on both committees.

Mr. Brown could not recall specifically with regard to the Maine PAC but in the past he had been told it was a good way for him to control the donations.

Mr. Eastman reviewed the similarities between the two organizations. The Human Rights Commission set up a PAC called HRC Maine Marriage PAC and NOM set up a PAC called Stand for Marriage Maine. He said he did not know if a Human Rights officer was on the political committee or not but would be very surprised if one was not. He said there were significant donations made to the PAC, just as NOM did. He said everyone sets up their structure the same way and back in 2009 Commissioner Friedman stated this structure did not violate Maine law.

Mr. McKee said the factual issue is having Mr. Brown on the national committee as a fundraiser and the state committee as a fundraiser. Being in both capacities raises questions about whether these donations were in fact for Maine.

Mr. Duchette asked what percentage of NOM's general fund was spent in 2009 for the Maine campaign. Mr. Brown said approximately 23%.

Mr. Eastman reviewed the solicitations e-mailed out and said the total number of donations was less than \$5,000 which would not trigger reporting requirements.

In response to Mr. Healy, Mr. Eastman spoke to the anonymity laws and said the two decisions that NOM goes by are *NAACP v. Alabama* which in the 1950s held that members and donors can

be anonymous if there are significant risks of harm with disclosure. The second is *Socialist Workers v. Brown*. NOM filed a case in California claiming their donor list which had been reported by the PAC publicly resulted in people being harassed and properties vandalized. The 9th Circuit just recently decided that because the names were already published, the case was moot but did not rule on the merits of the challenge. He said the Supreme Court now in two cases has recognized this issue is generating hostility and threats that warrant confidentiality.

Mr. Healy asked, for clarification, if the two Supreme Court cases recognize that the NOM Donors 2, 9, 10, 11 and 12 have a constitutional right to anonymity.

Mr. Eastman said those specific donors were not mentioned. He said these cases were not about NOM. However, NOM's case in California was referenced in the Supreme Court opinions and briefs.

Mr. Healy asked if Donors 2, 9, 10, 11 and 12 have actual notice of this proceeding.

Mr. Brown said he believed he had given notice of the hearing to all but one of those donors.

In summary, Mr. Eastman referenced Commissioner Friedman's comments back in 2009 that NOM's conduct followed Maine law. Mr. Eastman stated that the donations NOM gave to Stand for Marriage Maine were fully reported as required by Maine law and that NOM scrupulously tried to comply with all rules while providing protection for the national donors. He said all donors are specifically instructed that if they want to give to a particular effort, give to that effort directly so it will be reported correctly. Also, if they give to the national organization, it is entirely NOM's judgment as to where it will be directed. There are many cases where NOM can show donations returned because they have been earmarked for a specific effort in one of the statewide fights.

Mr. Brown said the central question is whether anyone at NOM solicited funds from donors for NOM and told the donor that the funds would be designated for the Maine campaign. He said he did not do that and has sworn under oath that he did not. In his view there is nothing he said in

the affidavit that contradicts that. He added the Commission staff has not produced any evidence that he did. He said the key question is whether there is any evidence of him or any member of his staff going to a donor to solicit a donation to NOM and telling them the donation would be used for the effort in Maine. He said all NOM staff were clearly advised that they could not accept donations that the donor designated for a specific campaign. He said he consulted counsel on many campaign finance issues to be sure they were doing everything correctly and in compliance. He said the law must be applied fairly and applied to everyone.

The Commission took a break at the conclusion of Mr. Brown's testimony.

After the break, Fred Karger briefly reviewed his role in the complaint and NOM's activity in Maine. He said the investigative report made it clear that NOM blatantly and intentionally ignored Maine's reporting requirements. He thanked the Commission and the Attorney General's Office for all their hard work over the last five years with the investigation to seek the truth. He urged the Commission to accept the staff's recommendations.

Pursuant to Title 1 of the Maine Statutes, section 405(4), Mr. Healy moved to go into executive session pursuant to Title 1, section 405(6)(E) at 10:30 a.m. to consult with the Commission's counsel concerning legal rights and duties of the Commission. Mr. Duchette seconded.

Motion approved (4-0).

At 11:15 a.m. Mr. Healy moved to come out of executive session. Mr. Duchette seconded.

Motion approved (4-0).

Mr. McKee explained that he and Commissioner Duchette were present at the meeting in 2009 when the complaint was filed by Mr. Karger. He said the vote whether to pursue an investigation was very close, 3-2. He said it was a difficult decision but it was clear there was some activity going on that warranted further investigation. He said that at the point the Commission decided to initiate the investigation, the thought was that where there is smoke there may be fire. He said once the staff got through all the appeals and was able to complete the

investigation, there is no question that there is fire here. He said if the Commission took NOM's view and rejected the staff recommendation; the Commission would be accepting a mockery of Maine's disclosure laws. He said the Commission's duty is to follow and apply the law, not beliefs. He said the final evidence shows by a preponderance that the alleged actions of NOM did in fact take place and he is pleased that the Commission followed through so these issues were not swept under the rug.

Mr. Healy said that he recognizes NOM's right to participate in the election process and their efforts to comply with Maine's campaign finance law. However, Mr. Healy stated that after May 29, 2009 when the Stand for Marriage Maine PAC was formed and Mr. Brown became one of three members of the PAC's executive committee – and based upon the record, he was an influential member of the PAC – as well as the Executive Director of NOM with the authority he had as set forth in his deposition, some, if not all, of the contributions of Donors 2, 9, 10, 11 and 12 were contributions as defined in section 1056-B (2-A)(C) applying an objective standard. Mr. Healy said that he did not think the statute has been complied with for that reason.

Mr. McKee moved to find NOM in violation of 21-A M.R.S.A. § 1056-B by receiving contributions aggregating in excess of \$5,000 for purposes of initiating or promoting the 2009 people's veto referendum and failing to register and file campaign finance reports as a ballot question committee. Mr. Duchette seconded.

Motion passed (4-0).

Mr. McKee moved to determine that donations received by NOM in response to solicitations distributed by electronic mail from NOM to its subscribers from May through at least September, 2009 constituted contributions under 21-A M.R.S.A. § 1056-B(2-A)(B) and/or (C). Ms. Matheson seconded.

Mr. Healy stated for clarity that he did not believe the electronic solicitations (e-mails) reached the \$5,000 threshold but the donations made by Donors 2, 9, 10, 11 and 12 were well over the threshold and were contributions. Ms. Matheson disagreed but supported the motion.

Motion passed (4-0).

Mr. McKee moved to determine that donations received by NOM from several major donors, such as Donors #2, 9, 10, 11, and 12, during the period from May through November, 2009 constituted contributions under 21-A M.R.S.A. § 1056-B(2-A)(B) and/or (C). Mr. Duchette seconded. Mr. Healy said he agreed that the donations constituted a contribution under (C).

Motion passed (4-0).

Mr. McKee moved to direct NOM to register as a ballot question committee for its activities in support of the 2009 people's veto referendum and to file a consolidated report for 2009. Ms. Matheson seconded.

Motion passed (4-0).

Mr. McKee moved to assess a civil penalty of \$250 for failure to register as a ballot question committee. Ms. Matheson seconded.

Motion passed (4-0).

Mr. McKee moved to find NOM in violation for failure to file timely campaign reports due 11 days before and 42 days after the November 3, 2009 election and failure to file four reports of single expenditures due in the last 13 days before the election. Ms. Matheson seconded.

Motion passed (4-0).

Mr. McKee moved to accept the staff recommendation and find that NOM was not required to file any reports during 2010 and 2011. Mr. Healy seconded.

Mr. Wayne explained that NOM made two payments in 2010 and 2011 to Stand for Marriage Maine to help the PAC retire its debts and those were reported. He said there is no evidence that NOM raised or spent any funds during this time period.

Motion passed (4-0).

Mr. McKee moved to accept the staff recommendation of penalty amounts. Ms. Matheson seconded.

<b>Filing Deadline:</b>	<b>Penalty</b>
10/23/2009 (11-day pre-election report)	\$10,000
10/24/2009 (24-hour report)	\$10,000
10/27/2009 (24-hour report)	\$5,000
10/28/2009 (24-hour report)	\$10,000
10/30/2009 (24-hour report)	\$5,000
12/15/2009 (42-day post-election report)	\$10,000

Motion passed (4-0).

Mr. McKee explained the next procedural step will be for staff to draft proposed findings of fact on the complete record to be distributed and voted on at the next meeting.

### **3. Findings of Violation and Penalties Recommended by Commission Staff/Candidates who have Failed to Register with the Commission**

Mr. Wayne said the staff has been trying to get all candidates to register with the Commission as required by law. There are currently only three candidates left who have not registered, two House candidates, Benjamin Bryant and Ashley Ryan, and one Senate candidate, Danielle Unterreiner. He explained that they have had three notices to-date and have not responded. He

said Mr. Bryant no longer lives at the address provided by the Secretary of State website. He explained that a \$10 penalty will be assessed.

Mr. Duchette asked whether candidates are eventually removed from the ballot if they do not respond.

Mr. Wayne explained they cannot be removed from the ballot unless they withdraw themselves.

Mr. McKee moved to accept the staff recommendation to find the three candidates in violation and assess the \$10 penalty as required by statute. Mr. Duchette seconded.

Motion passed (4-0).

#### **4. Enforceability of \$25,000 Aggregate Contribution Limit**

Mr. Wayne explained that Maine Election Law forbids any individual from contributing more than \$25,000 to candidates for state office in a calendar year (21-A M.R.S.A. § 1015(3)) and proposed a policy regarding the enforceability of the Maine aggregate limit, in light of the U.S. Supreme Court decision in *McCutcheon v. FEC*.

Mr. Healy moved to adopt the policy regarding the enforceability of the aggregate limit for campaign contributions in Maine law as recommended by the staff. Mr. McKee seconded.

Motion passed (4-0).

Meeting adjourned at 11:40 a.m.

Respectfully submitted,

*/s/ Jonathan Wayne*

Jonathan Wayne, Executive Director