

Agenda

Item #10



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

To: Commission Members and Counsel
From: Jonathan Wayne, Executive Director
Date: June 20, 2008
Re: Jurisdiction of the Ethics Commission to Investigate and Make Determinations regarding Alleged Violations of the Code of Fair Campaign Practices

In case you wish to give further consideration to the Ethics Commission's jurisdiction to consider complaints concerning the Code of Fair Campaign Practices, I have attached two items:

- Legislative history of the Code as researched by Candidate Registrar Sharon E. Timberlake. Ms. Timberlake obtained the materials for her research from the Law and Legislative Reference Library. She will be present at the meeting in case you have any further questions for her.
- My June 6, 2008 letter to Commission Member Francis Marsano describing a December 12, 2006 decision by the Commission regarding a complaint alleging a violation of the Code. A private citizen, David Metz, filed the complaint against David Miramant, a candidate for State Representative in District 46. The complaint alleged that the respondent Miramant had violated the Code of Fair Campaign Practices by distributing campaign literature that misrepresented the voting record of his opponent, incumbent Representative Stephen Bowen. The Commission voted unanimously that the Commission was without jurisdiction to take further action on the complaint.

To save paper, I have removed any materials from the June 6 letter that were included in Ms. Timberlake's legislative history.

You may also wish to hear from the Commission Counsel on the jurisdiction issues and constitutional limitations on the Commission's authority.

Thank you.



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

June 17, 2008

To: Jonathan Wayne, Executive Director
From: Sharon Timberlake, Candidate Registrar 
Re: 1990 Legislative History of Code of Fair Campaign Practices, Comments in the Press,
and 1992 Report to Legislature by Ethics Commission Subcommittee

The following material has been compiled in response to Commission member Francis Marsano's request for the legislative history of the Code of Fair Campaign Practices. The Law and Legislative Reference Library provided me with the materials for this memo.

Introduction and OPLA Analysis of Legislation

January 9, 1990 - Introduction of Bill

L.D. 2158, "An Act to Discourage Negative Campaign Practices," was introduced by Rep. Joseph W. Mayo in the second regular session of the 114th Maine Legislature. The bill was an adaptation of Minnesota Law. It proposed requiring the Ethics Commission, at the request of an interested person or association, to conduct an investigation and to hold a hearing regarding alleged negative campaign practices. The Commission was required to issue a written advisory statement within 30 days.

January 29, 1990 - Bill Analysis, by Todd Burrowes, Legislative Analyst

Todd Burrowes of the Office of Policy and Legal Analysis (OPLA) reported to the Joint Standing Committee on Legal Affairs that while L.D. 2158 authorized the Commission to "investigate, hold hearings and issue written advisory reports," it did not give the Commission authority to impose any civil sanctions on those found to have engaged in negative campaign practices. He noted that the "penalty appears to be implicit: negative publicity." Furthermore, the bill intentionally limited the Commission's ability to impose sanctions in an effort to strengthen the "argument that the bill does not violate constitutional standards."

The analysis raised constitutional concerns stemming from the fact "that the bill proposes to regulate candidates' political speech made in the course of political campaigns," as were concerns regarding possible intrusions upon the First Amendment freedoms of the press. However, it was noted that not all political speech is constitutionally protected. For example, campaign-related speech made with "actual malice" may be penalized by states; *Vanesco v. Scharz*, 401 F. Supp. 87, 93 (1975), aff'd without opinion, 423 U.S. 1041 (1975), quoting *Garrison v. Louisiana*, 379 U.S. 64 (1964) (citation in Burrowes report). In the opinion of the Office of Policy and Legal Analysis, L.D. 2158 did "not appear to meet the constitutional standard" of "actual malice, i.e. made with knowledge that the statement was false or made with reckless disregard for the truth of the statement."

However, under L.D. 2158, an individual found to have committed a negative campaign practice would not be subject to criminal or civil sanctions, and courts could decide that the actions of the Commission would be unlikely to discourage candidates from political discourse, thus, eliminating the need for constitutional safeguards.

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In sum, L.D. 2158, as originally drafted, was thought to be unconstitutionally overbroad under the First Amendment.

February 5, 1990 - Ellsworth American Editorial on Negative Campaigns

This editorial was written in opposition to L.D. 2158 as introduced by Rep. Mayo. "We doubt that candidates seriously need such protection as the bill would provide If the bill becomes law, many candidates would flood the commission with complaints that their opponent attacked them unfairly (we have not met a politician who felt any attack was not unfair)."

February 6, 1990 Public Hearing before the Joint Standing Committee on Legal Affairs

Testimony Supporting L.D. 2158 by Rep. Joseph W. Mayo

In testimony to the members of the Legal Affairs Committee, Rep. Joseph W. Mayo, sponsor of L.D. 2158 stated that the purpose of the proposed legislation was to authorize the Commission on Governmental Ethics and Election Practices to "conduct hearings and investigations regarding allegations of negative campaign practices." In addition, the bill was designed to avoid constitutional issues related to the restriction of political speech "by empowering a bipartisan commission to issue advisory opinions" which Rep. Mayo deemed to be sufficient to prevent most candidates from engaging in negative campaign practices.

Public Testimony Supporting L.D. 2158 by Maine Common Cause

James Damicis, board member of Maine Common Cause, spoke in support of the bill that would allow the Commission to conduct hearings and investigations in response to allegations of "negative campaign practices."

Testimony Supporting L.D. 2158 by Secretary of State G. William Diamond

G. William Diamond, Secretary of State testified that the bill "attempts to redress the problem [of negative campaigns] by holding people accountable for their actions."

February 7, 1990 - Kennebec Journal, Peter Jackson, Bill Seeks to Curb Negative Campaigning

The article summarized the debate: "Several committee members questioned the absence of any penalty provision and suggested that 30 days is too long to allow for the commission's deliberations, noting that negative attacks are not launched until the closing hours of a campaign."

Amendment by Committee

February 23, 1990 - Committee Amendment

The Joint Standing Committee on Legal Affairs voted unanimously that L.D. 2158 ought to pass as amended. The amendment was Committee Amendment A (Filing No. H-919) which struck the language in the original bill after the enacting clause and before the statement of fact. Section 1 of the amendment inserted the current provisions in 21-A M.R.S.A. §§ 1101-05. Section 2 of the amendment required the Ethics Commission to appoint a subcommittee to study "the need for, costs of and legal issues involved with, establishment of a complaint procedure to enable a candidate ... who alleges an opponent has violated the code to file a complaint with the commission that will hold a hearing to determine whether a violation, in fact, occurred."

Debate on Floor of the Senate

March 26, 1990 – Senate Debate in Legislative Record

Senator Matthews: The Committee on Legal Affairs produced a significant piece of legislation, an amendment that basically replaces the Bill, establishing a Maine Code of Fair Campaign Practices, a voluntary code of ethics. It's a good start.

Senator Gill: Is it my understanding that what we just heard is purely a voluntary proposal? It is not required by anybody and there's no penalty involved here?

Senator Dillenbach: This is a voluntary thing. As a practical point no one is going to refuse to sign it, because it would be used against you in your campaign.

Senator Gill: Did the Committee consider making it mandatory and putting a penalty on this if there were infractions?

Senator Baldacci: I did, in fact, try to get that on the legislation that was in the Committee coming from the very high moral grounds of making sure this thing was done. But, because of the constitutional problems with it, it was explained that it would be almost unconstitutional if it was made mandatory.

The Bill was passed by a vote of 32 to 0 with three Senators absent. The Law and Legislative Reference Library did not provide me with any debate on the floor of the House of Representatives or any record of amendments to the bill by the full House or Senate.

March 27, 1990 - Kennebec Journal Voluntary Campaign Ethics Plan OK'd

Candidates for the governorship or the Legislature would be asked to sign a statement pledging to take the high road in their campaigns, but would face no sanctions for taking the low road, under a bill that the Senate enacted and sent to the Governor Monday. The bill is a version of a proposal that would have empowered the Commission to investigate complaints of negative campaign practices and issue findings in the form of advisory opinions.

Report of the Subcommittee of the Ethics Commission

January 1992 – Report Issued

As required by statute, the Ethics Commission established a Subcommittee to Study the Fair Campaign Practices Code in Maine. It was chaired by Marilyn Canavan, staff director of the Ethics Commission

The Subcommittee considered data from a fifty-state telephone survey conducted by the National Council on State Legislatures (NCSL) and found that Maine was one of only nine states that had developed a code of fair campaign practice at the time of the survey. Twenty-one other states had developed less comprehensive provisions. Only the states of Washington and Florida conducted investigations of violations of fair campaign finance laws on a regular basis, and Florida was able to impose a civil penalty of up to \$5,000. In most states, the county district attorney or Attorney General had jurisdiction over the investigation of campaign-related complaints and violations. In Maine during 1990 and 1991, the Commission received four (4) complaints related to the fair practices code.

The subcommittee concluded that there is not enough time, money or staff resources for the Commission to take on a new task. It was recommended that future funding should be devoted to "policing campaign spending and providing guidance on questions of ethics" rather than asking the Commission staff to assume new responsibilities.

I interviewed Marilyn Canavan, who advised me that there were no substantive actions taken by the Legislature in response to the report of the subcommittee.

Conclusion

I hope that this legislative history is helpful. My review of the materials indicates that the Legislature did not intend the Maine Ethics Commission to impose penalties or sanctions upon those who have engaged in negative campaign practices.



STATE LAW LIBRARY
AUGUSTA, MAINE

114th MAINE LEGISLATURE

SECOND REGULAR SESSION - 1990

Legislative Document

No. 2158

H.P. 1558

House of Representatives, January 9, 1990

Approved for introduction by a majority of the Legislative Council pursuant to Joint Rule 26.

Reference to the Committee on Legal Affairs suggested and ordered printed.

Ed Pert

EDWIN H. PERT, Clerk

Presented by Representative MAYO of Thomaston.

Cosponsored by President PRAY of Penobscot, Senator CLARK of Cumberland and Representative GWADOSKY of Fairfield.

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND NINETY

An Act to Discourage Negative Campaign Practices.



Be it enacted by the People of the State of Maine as follows:

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1 MRSA §1009 is enacted to read:

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§1009. Negative campaign practices

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1. Definition. "Negative campaign practice" means intentional participation by an individual or association in the preparation, dissemination or broadcast of paid political advertising or campaign material that:

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A. Concerns the personal or political character or actions of a candidate;

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B. The person or association knows or has reason to believe is false; and

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C. Is intended to promote the defeat of a candidate for nomination or election to a public office.

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2. Investigation; advisory opinion. The commission may initiate or conduct, at the request of an interested person or association, an investigation and hold a hearing regarding an alleged negative campaign practice. The commission shall issue a written advisory opinion indicating findings and recommendations within 30 days of the date an investigation is requested. When the commission conducts an investigation and holds a hearing as provided in this section, the commission shall provide a copy of its advisory opinion to the Secretary of State. When the commission conducts an investigation and holds a hearing on request, the commission shall provide a copy of its advisory opinion to the person or association who requested the investigation and to the Secretary of State.

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STATEMENT OF FACT

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This bill, derived from Minnesota Statutes, chapter 211B.06, authorizes the Commission on Governmental Ethics and Election Practices to conduct an investigation and hearing regarding an allegation of a "negative campaign practice" and issue its findings and recommendations in an advisory opinion. The bill defines "negative campaign practice" as preparation, dissemination or broadcast by an individual or association of political advertising or campaign material regarding a candidate's personal or political actions or character when the person or association knows or has reason to believe the ad or material is false and when the ad or material is intended to promote the candidate's defeat. The bill requires the commission, when it acts on its own initiative, to provide a copy of the advisory opinion to the Secretary of State. When the

2 commission conducts an investigation on request, the commission
3 shall provide a copy of its advisory opinion to the person or
4 association requesting the investigation within 30 days of the
5 request.

6 The bill does not empower the commission to impose any
7 sanction against a person or association it determines has
8 committed a negative campaign practice. The purpose of the bill
9 is to provide a mechanism to identify and discourage the use of
10 negative campaign practices which, by distorting the truth,
11 unfairly influence the voters and skew the election process.

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MARTHA E. FREEMAN, DIRECTOR
WILLIAM T. GLIDDEN, PRINCIPAL ANALYST
JULIE S. JONES, PRINCIPAL ANALYST
DAVID C. ELLIOTT, PRINCIPAL ANALYST
GILBERT W. BREWER
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BARBARA A. MCGINN, RES. ASST.
BRET A. PRESTON, RES. ASST.

January 29, 1990

To: Joint Standing Committee on Legal Affairs
From: Todd Burrowes, Legislative Analyst
Re: Bill Analysis, LD 2158/ Negative campaign practices

1. What does LD 2158 propose?

LD 2158 authorizes, but does not require, the Commission on Governmental and Election Practices to investigate, hold hearings and issue written advisory reports of its findings and recommendations regarding alleged "negative campaign practices". Under the bill, a "negative campaign practice":

- (1) concerns the personal or political character or actions of a candidate (e.g., how an incumbent voted on legislation or ways a candidate spends free time);
- (2) is known or suspected to be false by the entity which prepared or broadcast the statement; and
- (3) is aimed at promoting the defeat of a candidate.

A knowing falsehood designed to promote an candidate's election is not covered by the bill.

The bill does not give the Ethics Commission authority to impose any civil sanction on one found to have engaged in a negative campaign practice. The penalty appears to be implicit: adverse publicity. The Commission's lack of power to impose sanctions is, as noted below, a factor which supports an argument that the bill does not violate constitutional standards. See Issues section, below.

The bill applies to both "individuals and associations". Therefore, the bill applies to the press in addition to candidates, political parties, political committees and others. For example, a newspaper article publishing a statement known to be false by the person who made the statement that derided a candidate could result in a request to the Ethics Commission to issue an advisory opinion regarding the newspaper's conduct.

The bill does not propose to regulate the constitutionally protected speech of legislators conducting legislative business.

2. Current law

The Commission on Governmental Ethics and Election Practices does not currently have the type of authority proposed by LD 2158. The constitutionality of the bill, discussed below, is questionable.

3. Issues

There is a strong argument, based on federal court decisions, that LD 2158, as drafted, is unconstitutional. However, it appears that the bill could be amended to avoid constitutional problems.

The major constitutional problems with this bill stem from the fact that the bill proposes to regulate candidates' political speech made in the course of political campaigns. Courts subject laws regulating political speech to the strictest standards.

There is also an argument that, notwithstanding the lack of criminal or civil liability associated with finding a negative campaign practice, the bill unconstitutionally intrudes on the First Amendment freedom of the press. This memo does not separately discuss the freedom of the press issue.

REGULATION OF CANDIDATES' SPEECH: APPLICABLE CONSTITUTIONAL STANDARD

Not all political speech is constitutionally protected.

"That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, and political change is to be effected."

Vanesco v. Schartz, 401 F. Supp. 87, 93 (1975), aff'd without opinion, 423 U.S. 1041 (1975), quoting Garrison v. Louisiana, 379 U.S. 64 (1964).

States may legitimately penalize campaign-related speech made with "actual malice", i.e made with knowledge that the statement was false or made with reckless disregard for the truth of the statement. Vanesco, supra (striking down portions of New York Fair Campaign Code which prohibited attacks on a candidate's race, sex, religion or ethnic background and which prohibited misrepresentations of a candidate's qualifications, position or party affiliation as unconstitutional on their face under the First Amendment); Pesttrak v. Ohio Elections Commission, 670 F. Supp. 1368 (S.D. Ohio 1987)(following the Vanesco approach in ruling Ohio law banning false statements regarding candidates unconstitutional under First Amendment).

This "actual malice" standard is the same standard courts use when a public figure claims he or she has been defamed. New York Times v. Sullivan, 376 U.S. 254 (1976). In cases where public figures claim they have been defamed/ slandered, use of the N.Y. Times standard of falsity is means of achieving a fundamental First Amendment goal: protection of the free exchange of ideas and opinions, especially in regard to political matters. Courts are wary of laws which seek to penalize, and thus have a "chilling effect" on, persons who engage in political discussions.

Two other procedural protections need be included in laws which attempt to regulate the content of candidates' political speech. First, courts have indicated, in cases where some civil liability resulted from a finding that a negative practice had been committed, that the Constitution requires proof by clear and convincing evidence. Pesttrak, supra at 1375-77; Vanasco, supra at 96 - 99. Second, since regulation of this type is a prior restraint on speech, both federal courts which have considered this issue indicated that the Constitution requires the statutory scheme to provide for judicial review. Pesttrak, supra at 1377; Vanasco, supra at 99-100.

CONSTITUTIONALITY OF LD 2158

LD 2158 does not appear to meet the constitutional standard discussed above.

First, the bill subjects to Commission action speech which is not only known to be false but also speech which the speaker "has reason to believe" is false. This provision is "overbroad" in that it encompasses more speech than speech which is defamatory under the N.Y. Times actual malice standard. It appears that incorporation of that standard would remove this constitutional problem without affecting the bill's intent.

Second, the bill does not clearly place the burden on the party making a complaint of a negative campaign practice to prove the speech complained of meets the definition by clear and convincing evidence. Also, the bill does not specify the nature of the proceedings or the procedures for a hearing before the Commission.

Third, the bill does not grant an entity found to have committed a negative campaign practice with an opportunity for judicial review.

However, LD 2158, unlike similar laws struck down in part as unconstitutional in the cases cited above, a person found to have committed a "negative campaign practice" would not be subject to criminal or civil sanctions. Faced with LD 2158, a court could decide that the hearing and finding by the Commission, and the attendant adverse publicity, would not have the "chilling effect" of discouraging candidates from engaging in free ranging political discourse and thus the constitutional safeguards adopted in the cases cited above are not necessary.

In sum, LD 2158 is arguably unconstitutionally overbroad under the First Amendment. The bill could be amended to reconcile the bill's intent with applicable constitutional standards. Since the press may be held liable for damages for publication of statements which meet this same standard ("actual malice", N.Y. Times v. Sullivan) it seems that amendments drafted to cure the candidates' free speech problem would cure any freedom of the press problems.

2154

On Negative Campaigns ✓ *E. America*

We hope the Maine Legislature will quietly bury a bill (LD 2155) that would set up a commission to which candidates for office could go when they feel an opponent is guilty of a "negative campaign practise."

The measure, introduced by Majority Whip Joseph W. Mayo and supported by Sen. Charles Pray, would provide a body to which a candidate could complain about unfair campaign statements. It is not entirely clear what the commission could do about it, but apparently it would simply arrive at a conclusion confirming or refuting the charge.

It is based on a Minnesota statute that 13 states have adopted. There is no substantial evidence that unfair tactics have been widely used in this state. The voters here seem quite competent to judge, without the benefit of a state board, bureau, or commission. No doubt the board, if created, would hear plenty of complaints. Politicians usually resent only two kinds of criticism—that which is unfair and that which is fair. Both kinds go

along with the job. As President Harry Truman said: "If you can't stand the heat, get out of the kitchen."

We doubt that candidates seriously need such protection as the bill would provide. Election to office is becoming election for life, so the security of incumbents seems to indicate that there is not enough criticism of any kind. If the bill has any effect, it will be that of "chilling" public discussion and debate, of which we do not have anywhere near enough. If the bill became law, many candidates would flood the commission with complaints that their opponent attacked them unfairly (we have not met a politician who felt any attack was not unfair). On the other hand, failure to make a complaint might be construed by constituents as a candidate's confession that the most negative criticism was fair.

This bill ought to be consigned to the scrap heap along with other measures to silence robust debate in election campaigns.

February 6, 1990

TESTIMONY BY
REP. JOSEPH W. MAYO
SPONSOR OF LD 2158
AN ACT TO DISCOURAGE NEGATIVE CAMPAIGN PRACTICES

Senator Matthews, Representative Priest, distinguished members of the Legal Affairs Committee, I am Rep. Joe Mayo from Thomaston, representing District 80, and sponsor of LD 2158. This bill proposes to authorize the Commission on Governmental Ethics and Election Practices to conduct hearings and investigations regarding allegations of negative campaign practices. The Commission is authorized to issue findings and recommendations in an advisory opinion.

The purpose of this bill is to discourage the use of negative campaign practices in primary and general elections. While Maine has not experienced serious problems with respect to negative campaigning, this type of campaigning has loomed on the horizon.

As you are probably aware, restrictions on political speech are highly suspect with respect to court review. The United States Supreme Court has struck down some state laws designed to prevent negative campaigning by curbing negative political speech. This bill is designed to avoid constitutional problems by empowering a bipartisan commission to issue advisory opinions. The premise behind the bill is that an advisory opinion declaring a candidate's campaign practices to be negative or unethical will be sufficient to prevent most candidates from engaging in this type of rhetoric.

February 6, 1990

Public Testimony Supporting "An Act to Discourage Negative Campaign Practices", Legislative Document No. 2158

Senator Matthews, Representative Priest and members of the Joint Standing Committee on Legal Affairs. Good afternoon, and thank you for allowing me this time to speak. My name is James Damicis and I am a board member of Maine Common Cause, a state-wide citizen organization committed to the promotion of fair and effective governmental practices.

I am here today on behalf of Maine Common Cause to ask your support for "An Act to Discourage Negative Campaign Practices", Legislative Document No. 2158.

The media, through advertisements, has come to play the primary role in providing information to citizens regarding candidates for public office. Negative campaign practices characterized by personal attacks on a candidate, untruths, or distortions of facts, prevent citizens from becoming well informed voters.

We at Maine Common Cause, feel the public is best served through an open debate of the issues between candidates for public office. L.D. No. 2158 is an important step in achieving this goal. If passed, the bill would authorize the Commission on Governmental Ethics and Election Practices to conduct investigations and hearings in response to allegations of "negative campaign practices". This would provide two important

services to citizens. First, it would inform citizens of a candidate's attempt to distort the truth or attack another candidate personally. Second, it would provide candidates with criteria for developing fair campaign advertisements. Citizens would benefit from both of these services through increased access to clear, honest information with regard to candidates and through campaigns which concentrate on issues rather than personalities.

By supporting this bill, the legislature will be taking an important initiative towards keeping Maine's political races clean. In the process, candidates and citizens alike will benefit.



G. WILLIAM DIAMOND
SECRETARY OF STATE

State of Maine
Office of
Secretary of State

AUGUSTA, MAINE 04333-0148

TESTIMONY OF

G. WILLIAM DIAMOND, SECRETARY OF STATE

FEBRUARY 6, 1990

L.D. 2158, AN ACT TO DISCOURAGE NEGATIVE CAMPAIGN PRACTICES

The emergence over the past decade of a new style in negative campaigning has caused a justifiable increase in public concern. Of particular concern are the serious questions raised with regard to the accuracy and accountability of recent negative campaign charges and tactics, and their impact upon the tone and quality of political discourse and public participation in Maine.

Current negative campaign tactics differ significantly from the "dirty politics" of the past in that they seldom focus upon personal attacks but rather on those which are designed to generate doubt and hostility in the minds of potential voters sufficient to cause them either to vote against the targeted candidate, or not to vote at all.

Molded by the rise in professional political consultants and the use of sophisticated marketing and survey techniques, modern negative campaigns have proven highly successful. Yet, at a considerable cost.

Negative campaigns have lowered the quality of political debate in this country. They are often inaccurate and distorted and are generally engaged in by individuals who are not held accountable for such actions. Representative Mayo's bill attempts to redress the problem by holding people accountable for their actions. Such a step will provide us with a basis for ensuring that candidates and campaigns in Maine are conducted in a manner worthy of its citizens. I believe this measure to be long overdue and urge your support.

Bill seeks to curb negative campaigning

2158

By PETER JACKSON
Associated Press Writer

KA
2-7-80

AUGUSTA — When politics turn dirty in Maine, politicians who feel maligned should be able to turn to the state's ethical watchdog panel for redress, leading Democrats told a legislative committee Tuesday.

"I don't think we want to become a New Jersey," Senate President Charles P. Pray (D-Millinocket) told the Legal Affairs Committee.

Under a bill sponsored by House Majority Whip Joseph W. Mayo and modeled on a Minnesota law, candidates who allege that a "negative campaign practice" has been used against them could seek advisory opinions from the state Commission on Governmental Ethics and Election Practices.

The commission would determine whether the accused individual or group intentionally took part in preparing or disseminating paid political advertising or

campaign material that falsely attacks the character or actions of a candidate in attempt to cause his or her defeat.

The bill would give the commission 30 days to issue its opinion, which would be delivered to the person or group requesting it and to the secretary of state. The commission would not be empowered to impose any penalties.

No one testified against the proposal, and proponents said its passage would help restore public confidence in the political system and combat what they portrayed as a trend toward more negative campaigning.

Sen. N. Paul Gauvreau, one of several lawmakers who recounted personal experiences with negative campaign tactics, said the growing use of such tactics dissuades qualified people from seeking public office.

If such practices go unchecked, the Lewiston Democrat said, "The public will bear the loss."

Senate Majority Leader Nancy Randall

Clark said she advises candidates to keep envelopes pre-addressed to all the residents of their districts on hand so they can move quickly to counter any unfair attacks by opponents.

The Freeport Democrat said she has done so since 1982, when anti-abortion activists left literature sharply attacking her pro-choice views on the windshields of vehicles parked outside some Roman Catholic churches during Saturday mass. In that case, her supporters moved in and removed as much of the literature as possible before the churchgoers left to go home.

"That may seem an extreme reaction, but I frankly felt fair was fair," she said.

Keron Kerr, the Democratic state chairwoman, said 14 states currently have some form of fair-campaign law and urged that Maine follow suit in anticipation of intensified negative campaigning this year.

"I challenge the Republican Party to join me in denouncing negative campaigning," she said.

Several committee members questioned the absence of any penalty provision and suggested that 30 days is too long to allow for the commission's deliberations, noting that negative attacks often are not launched until the closing days or even hours of a campaign.

Although some proponents expressed a willingness to see the bill amended, they urged that lawmakers should not move too hastily.

The bill is a "a good step in the right direction," said Mayo (D-Thomaston).

Sen. Robert G. Dillenback (R-Cumberland), a committee member who had questioned the effectiveness of the bill during the hearing, said afterward he fully expected the proposal to become law.

"I think it'll pass," he said. "It may be a deterrent."

VOTING TALLY SHEET

Committee: LEGAL AFFAIRS

Date: February 23, 1990

Question: L.D. 2158 An Act to Discourage Negative Campaign Practices."

Motion by: Rep Jalbert Sen Matthews
OTPA

SENATORS		Yea	Nay	Absent	Abstained
1	Sen. Zachary E. Matthews, Chair.	✓			
2	Sen. John E. Baldacci			✓	
3	Sen. Robert G. Dillenback	✓			
REPRESENTATIVES					
1	Rep. Charles R. Priest, Chair	✓			
2	Rep. Jeanne F. Begley	✓			
3	Rep. Mark W. Lawrence	✓			
4	Rep. Jo Anne D. Lapointe			✓	
5	Rep. John Jalbert	✓			
6	Rep. Norman R. Paul	✓			
7	Rep. Charles C. Plourde	✓			
8	Rep. Eleanor M. Murphy	✓			
9	Rep. Albert G. Stevens	✓			
10	Rep. Helen M. Tupper	✓			

NAME	TOWN/AFFILIATION	FAVOR	OPPOSE	NEI
1. Rep Mayo		✓		
2. President Pray		✓		
3. Senator Goddard		✓		
4. Senator Nancy Clark		✓		
5. Karen Kerr		✓		
6. James Damico		✓		
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STATE OF MAINE
HOUSE OF REPRESENTATIVES
114TH LEGISLATURE
SECOND REGULAR SESSION

COMMITTEE AMENDMENT "A" to H.P. 1558, L.D. 2158, Bill, "An Act to Discourage Negative Campaign Practices"

Amend the bill by striking out everything after the enacting clause and before the statement of fact and inserting in its place the following:

Sec. 1. 21-A MRSA c. 13, sub-c. V is enacted to read:

SUBCHAPTER V

MAINE CODE OF FAIR CAMPAIGN PRACTICES

§1101. Maine Code of Fair Campaign Practices

1. Distribution to candidates. At the time a candidate for the office of Governor, the Senate or the House of Representatives registers with the commission as required under section 1013-A, the commission shall give the candidate a form containing a copy of the Maine Code of Fair Campaign Practices established in this subchapter. The commission shall, at that time, inform the candidate that subscription to the code is voluntary. For the purposes of this subchapter, "code" means the Maine Code of Fair Campaign Practices.

2. The code form. The code, printed on the form provided to candidates under subsection 1, must read as follows:

"Maine Code of Fair Campaign Practices

I shall conduct my campaign and, to the extent reasonably possible, insist that my supporters conduct themselves, in a manner consistent with the best Maine and American traditions, discussing the issues and presenting my record and policies with sincerity and candor.

I shall uphold the right of every qualified voter to free and equal participation in the election process.

2 I shall not participate in and I shall condemn defamation of
4 and other attacks on any opposing candidate or party that I do
not believe to be truthful, provable and relevant to my campaign.

6 I shall not use or authorize and I shall condemn material
8 relating to my campaign that falsifies, misrepresents or distorts
10 the facts, including, but not limited to, malicious or unfounded
accusations creating or exploiting doubts as to the morality,
patriotism or motivations of any party or candidate.

12 I shall not appeal to and I shall condemn appeals to
14 prejudices based on race, creed, sex or national origin.

16 I shall not practice and I shall condemn practices that tend
18 to corrupt or undermine the system of free election or that
hamper or prevent the free expression of the will of the voters.

20 I shall promptly and publicly repudiate the support of any
22 individual or group that resorts, on behalf of my candidacy or in
opposition to that of an opponent, to methods in violation of the
letter or spirit of this code.

24 I, the undersigned, candidate for election to public office
26 in the State of Maine, hereby voluntarily endorse, subscribe to
and solemnly pledge to conduct my campaign in accordance with the
above principles and practices.

30 Candidate for Public Office"

32 §1102. Printing of code forms

34 The commission shall print, or cause to be printed, copies
36 of the code for distribution to registered candidates.

38 §1103. Acceptance of completed forms

40 The commission shall accept, at all times prior to the
42 election, completed code forms that are properly subscribed to by
a candidate.

44 §1104. Public records

46 The commission shall retain for public inspection all
48 completed code forms accepted by the commission under section
1103. A code subscribed to by a candidate is a public record
under Title 1, section 408.

§1105. Subscription to code voluntary

In no event may a candidate be required to subscribe to or endorse the code.

Sec. 2. Study. The Chair of the Commission on Governmental Ethics and Election Practices shall select 2 commission members, one from each major political party to serve, together with a 3rd member chosen by those 2 commission members or by the chair if those persons can not agree, on a subcommittee. The subcommittee shall study, in consultation with the Department of the Attorney General, candidates' compliance with the Maine Code of Fair Campaign Practices established by this Act and the need for, costs of and legal issues involved with establishment of a complaint procedure to enable a candidate for the office of Governor, the Senate or the House of Representatives who alleges an opponent has violated the code to file a complaint with the commission that will hold a hearing to determine whether a violation, in fact, occurred. A person who is unqualified to serve on the commission may not serve on the subcommittee. In addition, the subcommittee shall recommend any changes in the terms of the code necessary to ensure that it is enforceable with civil or criminal penalties for violations. The subcommittee shall report its recommendations to the joint standing committee of the Legislature having jurisdiction over legal affairs by January 15, 1992.

Sec. 3. Transition provision. As soon as practicable after the effective date of this Act, the Commission on Governmental Ethics and Election Practices shall send the code form provided for by the Maine Revised Statutes, Title 21-A, chapter 13, subchapter V, to candidates for the office of Governor, the Senate or the House of Representatives who have registered as required under Title 21-A, section 1013-A. The commission shall accept and make available for public inspection the endorsed code forms in the manner provided by Title 21-A, chapter 13, subchapter V.

FISCAL NOTE

The Commission on Governmental Ethics and Election Practices will absorb the costs of printing and distributing code forms, as well as the costs associated with the study, within its available resources.

STATEMENT OF FACT

This amendment replaces the bill. The amendment establishes the Maine Code of Fair Campaign Practices, a voluntary ethics code, according to which candidates for the office of Governor,

COMMITTEE AMENDMENT "A" to H.P. 1558, L.D. 2158

2 the Senate or the House of Representatives may agree to conduct
their campaigns. The code is modeled after the fair campaign
practices code of the State of Washington.

4
6 The code not only requires a candidate to avoid
misrepresentations, appeals to prejudice and other negative
campaign practices but also requires a candidate to disavow and
8 condemn negative practices undertaken by others on the
candidate's behalf.

10
12 In the amendment, the Commission on Governmental Ethics and
Election Practices is responsible for distributing, at the time
candidates register with the commission, copies of the code forms
14 for those candidates' endorsement. The commission will keep on
file returned forms that are properly endorsed. The forms will
16 be available for public inspection.

18 The amendment requires the chair of the commission to
establish a bipartisan subcommittee to study, in consultation
20 with the Department of the Attorney General, compliance with the
voluntary Maine Code of Fair Campaign Practices and costs of,
22 need for and legal issues associated with establishment of a
procedure whereby a candidate could file a complaint alleging a
24 violation of the code with the commission which would then hold a
hearing and make a finding. The subcommittee will make
26 recommendations regarding any changes in the code required to
make it enforceable with criminal or civil sanctions. The
28 subcommittee shall report its recommendations to the joint
standing committee of the Legislature having jurisdiction over
30 legal affairs on January 15, 1992.

32 The amendment includes a transition provision requiring the
commission to send, as soon as practicable after the effective
34 date of this amendment, a copy of the code to registered
candidates for the office of Governor, the Senate or the House of
36 Representatives and to accept and make available for public
inspection endorsed and returned code forms.

38

The amendment adds a fiscal note.

Reported by the Committee on Legal Affairs
Reproduced and distributed under the direction of the Clerk of the
House
3/13/90 (Filing No. H-919)

On motion by THE PRESIDENT, supported by a Division of at least one-fifth of the members present and voting, a Roll Call was ordered.

THE PRESIDENT: The pending question before the Senate is ENACTMENT.

A vote of Yes will be in favor of ENACTMENT.

A vote of No will be opposed.

Is the Senate ready for the question?

The Doorkeepers will secure the Chamber.

The Secretary will call the Roll.

ROLL CALL

YEAS: Senators ANDREWS, BALDACCI, BERUBE, BOST, BRANNIGAN, BUSTIN, CLARK, COLLINS, DILLENBACK, DUTREMBLE, ERWIN, ESTES, ESTY, GAUVREAU, GILL, HOLLOWAY, KANY, MATTHEWS, PEARSON, PERKINS, THERIAULT, TITCOMB, TWITCHELL, THE PRESIDENT - CHARLES P. PRAY

NAYS: Senators BRAWN, CAHILL, CARPENTER, GOULD, LUDWIG, RANDALL, WEBSTER, WEYMOUTH

ABSENT: Senators EMERSON, HOBBS, WHITMORE
24 Senators having voted in the affirmative and 8 Senators having voted in the negative, with 3 Senators being absent, the Bill was PASSED TO BE ENACTED and having been signed by the President, was presented by the Secretary to the Governor for his approval.

An Act to Discourage Negative Campaign Practices
H.P. 1558 L.D. 2158
(C "A" H-919)

THE PRESIDENT: The Chair recognizes the Senator from Kennebec, Senator Matthews.

Senator MATTHEWS: Thank you. Mr. President, Men and Women of the Senate, I won't take very much time this morning but I did want to stop just to bring your attention to a piece of legislation which I think is very significant and very important. Not only to all of us in this Chamber and all of us that hope to serve in government, but I think to the citizens of this state that have talked to many of us about campaigning and the unfortunate development of campaigning, the side that tends to be negative.

The Committee on Legal Affairs worked on legislation, both sponsored by the President and the Majority Leader of the Senate, "An Act to Discourage Negative Campaign Practices". Our Committee worked hard on this issue. It is complex. It sounds very cut and dry. It sounds like it should be very simple. But, it isn't, because of the concerns of our constitutional rights and freedom of speech and other kinds of things. We worked with the sponsors of the Bill and the Committee and came out with, I think, a very significant piece of legislation, an amendment which basically replaces the Bill, establishing a Maine Code of Fair Campaign Practices, a voluntary code of ethics.

Many professions, in many aspects of our society, organizations have codes of ethics. It's an established practice to try to bring some equity and fairness and fair play into whatever profession you're dealing with. With respect to the political system and campaigning, I think a Code of Ethics, a voluntary Code of Ethics, is long overdue and I want to take a minute just to cite what the Code will say.

The first part of the Code says, "I shall conduct my campaign and, to the extent reasonably possible, insist that my supporters conduct themselves in a manner consistent with the best of Maine and American traditions, discussing the issues and presenting my record and policies with sincerity and candor. I shall uphold the right of every qualified voter to

free and equal participation in the election process. I shall not participate in, and I shall condemn, defamation and other attacks on any opposing candidate or party that I do not believe to be truthful, provable or relevant to my campaign. I shall not use or authorize, and I shall condemn, material relating to my campaign which falsifies, misrepresents or distorts the facts, including, but not limited to, malicious or unfounded accusations, creating or exploiting doubts as to the morality, patriotism or motivations of any party or candidate. I shall not appeal to, and I shall condemn, appeals made based on prejudice, race, creed, sex or national origin. I shall not practice, and I shall condemn, practices that tend to corrupt or undermine the system of free election, or that hamper or prevent the free expression of the will of the voters. I shall promptly and publicly repudiate the support of any individual or group that resorts, on behalf of my candidacy or in opposition to that of an opponent, to methods and violations of the letter and spirit of this Code." And then the candidate agrees to sign the Code.

It's a good start, ladies and gentlemen. It isn't just looking across the country at other states that have had problems with campaigning. We've had problems here in our state and rather than wait until we have the kinds of problems that other states are experiencing today, I think it behooves us to get involved in making sure that campaigning and the election process is as pure and as true as the founding fathers envisioned it to be. I'm very proud of this. I'm very proud of the members of my Committee on both sides of the aisle and I think this is a good start. Thank you, Mr. President.

On motion by Senator DUTREMBLE of York, supported by a Division of at least one-fifth of the members present and voting, a Roll Call was ordered.

THE PRESIDENT: The Chair recognizes the Senator from Cumberland, Senator Gill.

Senator GILL: Thank you, Mr. President. May I pose a question through the Chair to anyone who would answer the question?

THE PRESIDENT: The Chair would answer in the affirmative.

Senator GILL: Is it my understanding that what we just heard is purely a voluntary proposal, that it's not required by anybody and there's no penalty involved here?

THE PRESIDENT: The Senator from Cumberland, Senator Gill, has posed a question through the Chair to any Senator who may care to respond. The Chair recognizes the Senator from Cumberland, Senator Dillenback.

Senator DILLENBACK: Thank you, Mr. President. This is a Bill that we debated long and hard because there's many concerns about what you should do or what you shouldn't do. This is a voluntary thing. As a practical point, no one is going to refuse to sign it, because I think it would be used against you in your campaign. I see that it does no harm and perhaps it will do some good. I think if people agree to rules and regulations, and they know what happens the last two weeks before the election, I think it puts them on record. They have agreed to what we all think should be done, the proper way to run a campaign, so I think you should support the Bill. Thank you.

THE PRESIDENT: The Chair recognizes the Senator from Cumberland, Senator Gill.

Senator GILL: Mr. President, could I pose another question through the Chair to whomever would like to answer?

THE PRESIDENT: The Chair would answer in the affirmative.

Senator GILL: I just would like to know, I didn't sit in on this at all and I'm reading this for the first time also, but did the Committee consider making it mandatory and putting a penalty on this if there were infractions?

THE PRESIDENT: The Senator from Cumberland, Senator Gill has posed an additional question through the Chair to any Senator who may care to respond. The Senator recognizes the Senator from Penobscot, Senator Baldacci.

Senator BALDACCII: Thank you. Mr. President, Members of the Senate, very quickly, as the other member of the Legal Affairs Committee, I did, in fact, try to get that on the legislation that was in the Committee coming from the very high moral grounds of making sure that this thing was done. But, because of the constitutional problems with it, it was explained that it would be almost unconstitutional if it were made mandatory and it was with that proposal that we did have penalty provisions. But, I appreciate my good seatmate's comments.

THE PRESIDENT: The pending question before the Senate is ENACTMENT.

A vote of Yes will be in favor of ENACTMENT.

A vote of No will be opposed.

Is the Senate ready for the question?

The Doorkeepers will secure the Chamber.

The Secretary will call the Roll.

ROLL CALL

YEAS: Senators ANDREWS, BALDACCII, BERUBE, BOST, BRANNIGAN, BRAWN, BUSTIN, CAHILL, CARPENTER, CLARK, COLLINS, DILLENBACK, DUTREMBLE, ERWIN, ESTES, ESTY, GAUVREAU, GILL, GOULD, HOLLOWAY, KANY, LUDWIG, MATTHEWS, PEARSON, PERKINS, RANDALL, THERIAULT, TITCOMB, TWITCHELL, WEBSTER, WEYMOUTH, THE PRESIDENT - CHARLES P. PRAY

NAYS: None

ABSENT: Senators EMERSON, HOBBS, WHITMORE

32 Senators having voted in the affirmative and No Senators having voted in the negative, with 3 Senators being absent, the Bill was PASSED TO BE ENACTED and having been signed by the President, was presented by the Secretary to the Governor for his approval.

Emergency

An Act to Facilitate Enforcement of Penalties for Desecration of a Cemetery

S.P. 719 L.D. 1894
(H "A" H-940 to C "A" S-560)

This being an Emergency Measure and having received the affirmative vote of 31 Members of the Senate, with No Senators having voted in negative, and 31 being more than two-thirds of the entire elected Membership of the Senate, was PASSED TO BE ENACTED and having been signed by the President, was presented by the Secretary to the Governor for his approval.

Emergency

An Act to Require the Public Utilities Commission to Conduct an Analysis of the Comparative Environmental and Economic Impacts of Alternate Energy Resource Plans in Utility Proceedings

H.P. 1455 L.D. 2029
(C "A" H-925)

On motion by Senator CLARK of Cumberland, Tabled Unassigned, pending PASSAGE TO BE ENACTED.

Emergency

An Act to Make Recommendations on the Governance of the Mackworth Island Public Trust Lands

H.P. 1608 L.D. 2221
(C "A" H-909)

This being an Emergency Measure and having received the affirmative vote of 30 Members of the Senate, with No Senators having voted in negative, and 30 being more than two-thirds of the entire elected Membership of the Senate, was PASSED TO BE ENACTED and having been signed by the President, was presented by the Secretary to the Governor for his approval.

Emergency

An Act to Continue the Driver Education Evaluation Program

S.P. 871 L.D. 2233
(C "A" S-584)

This being an Emergency Measure and having received the affirmative vote of 30 Members of the Senate, with No Senators having voted in negative, and 30 being more than two-thirds of the entire elected Membership of the Senate, was PASSED TO BE ENACTED and having been signed by the President, was presented by the Secretary to the Governor for his approval.

Emergency

An Act Allowing the Yarmouth Water District to Acquire the Assets and Liabilities of the North Yarmouth Water District

H.P. 1665 L.D. 2305
(S "A" S-585)

This being an Emergency Measure and having received the affirmative vote of 29 Members of the Senate, with No Senators having voted in negative, and 29 being more than two-thirds of the entire elected Membership of the Senate, was PASSED TO BE ENACTED and having been signed by the President, was presented by the Secretary to the Governor for his approval.

Emergency

An Act to Amend the State Railroad Preservation and Assistance Act

H.P. 1724 L.D. 2383
(C "A" H-921)

This being an Emergency Measure and having received the affirmative vote of 30 Members of the Senate, with No Senators having voted in negative, and 30 being more than two-thirds of the entire elected Membership of the Senate, was PASSED TO BE ENACTED and having been signed by the President, was presented by the Secretary to the Governor for his approval.

Emergency

An Act Regarding Squa Pan Stream

H.P. 1742 L.D. 2406
(C "A" H-924)

This being an Emergency Measure and having received the affirmative vote of 30 Members of the Senate, with No Senators having voted in negative, and 30 being more than two-thirds of the entire elected Membership of the Senate, was PASSED TO BE

Under the plan, a judge could send a criminal to one of the
the money would come from a \$20.2 million prison bond issue now before the committee.

KENNEBEC JOURNAL MAR 27 1990
Voluntary campaign ethics plan OK'd

AUGUSTA (AP) — Candidates for the governorship or the Legislature would be asked to sign a statement pledging to take the high road in their campaigns, but would face no sanctions for taking detours along the low road, under a bill that the Senate enacted and sent to the governor Monday.

"As a practical point, no one is going to refuse to sign it," Sen. Robert Dillenback (R-Cumberland) acknowledged during a brief debate that preceded the 32-0 vote.

The bill would direct the state ethics commission to distribute the proposed Maine Code of Fair Campaign Practices among all registered candidates for the governorship or the House and Senate.

Candidates would promise not to misrepresent the facts, appeal to voters' prejudices or use other "negative" campaign tactics. However, the bill provides no penalties for violators.

Sen. Zachary Matthews (D-Winslow), who co-chairs the Legal Affairs Committee, said the legislation is "very significant and very important."

Sen. John Baldacci (D-Bangor) said he had pressed his fellow committee members to include penalties, but the panel felt such a move could be unconstitutional.

The bill is a version of a proposal that would have empowered the Commission on Governmental Ethics and Election Practices to investigate complaints of negative campaign practices and issue findings in the form of advisory opinions.

House Majority Whip Joseph

Mayo (D-Thomaston), sponsor of the original bill, said he is satisfied with the version that emerged.

Also Monday, the Senate sustained Gov. John McKernan's Friday veto of a bill to increase the size of the board of trustees of the Maine State Retirement System.

McKernan cited past votes against tampering with the board by both the board and a bipartisan commission that studied the system.

Monday, Sen. Bonnie Titcomb (D-Casco) urged the veto be overridden, calling the legislation "a simple matter of equal representation" for at least 3,800 workers who lack any direct representation on the board.

In other activity, senators killed all three versions of a bill that called for a variety of reforms in county government, including some that had been bitterly opposed by county sheriffs from around the state.

2158

STATE OF MAINE
115TH LEGISLATURE
SECOND REGULAR SESSION

Report of the Subcommittee
to Study the Fair Campaign Practices Code in Maine

January 1992

Staff:

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Henry G. Beyer
Joseph B. Ezhaya

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IN BRIEF

In the following report, these points are made:

- While a voluntary Fair Campaign Practices Code is preferred to other approaches, it is not financially feasible at this time.
- Existing programs have a higher priority.
- Membership on the Commission on Governmental Ethics and Election Practices should be balanced between the political parties.

REPORT TO THE LEGISLATURE

BACKGROUND

The Subcommittee to Study the Fair Campaign Practices Code was created by P.L. 1990, Ch. 802 which charged the subcommittee with studying, "in consultation with the Department of the Attorney General, candidates' compliance with the Maine Code of Fair Campaign Practices, and the need for, costs of and legal issues involved with establishment of a complaint procedure" to enforce the code. Ch. 802 requires the subcommittee to report its recommendations to the joint standing committee having jurisdiction over legal affairs by January 15, 1992. The subcommittee is comprised of three members of the Commission on Governmental Ethics and Election Practices.

Subcommittee members are:

Paul K. McCann, Chair of the Subcommittee and the Commission
Henry G. Beyer
Joseph B. Ezhaya

The subcommittee held two meetings and one workshop. First year efforts focussed on development of background information on compliance with the existing code in Maine, collecting and evaluating information on codes in other states and their effectiveness, and maintaining records on the number of complaints received that could be deemed related to the Fair Campaign Practices Code.

Ch. 802 established the Fair Campaign Practices Code. The provisions apply only to candidates for the office of Governor, the Senate and the House of Representatives. The first draft of the legislation, L.D. 2158, is an adaptation of Minnesota law. It requires the Commission on Governmental Ethics and Election Practices to hear complaints alleging violations of the Code. An amendment (CA-A H-919) based on Washington State's code, struck out all of the language in the first draft and established the existing voluntary code.

LAWS IN OTHER STATES

The subcommittee considered the following data from a 50-state telephone survey conducted by the National Council on State Legislatures (NCSL) in December 1989, and updated in the Fall of 1991 by Commission staff. The study revealed that 26 states have laws dealing with unfair campaign practices. They govern disclosure, campaign literature, dirty tricks, and other campaign practices. The following states have developed fair campaign practices codes, most of which are voluntary:

California	New York
Illinois	Washington
Kansas	West Virginia
Maine	Wyoming
Montana	

Laws in the above-mentioned states typically include a clause similar to that found in Maine's code, vowing not to misrepresent or distort the facts and to condemn defamation or attacks on any opposing candidate or party.

Laws in 21 states prohibit false campaign statements. Some apply only to false incumbency designations. Seven state prohibitions apply only to written false statements. States prohibiting false campaign statements are:

Arkansas	Nevada
California	North Carolina
Colorado	North Dakota
Florida	Ohio
Indiana	Oregon
Louisiana	Tennessee
Massachusetts	Utah
Michigan	Washington
Minnesota	West Virginia
Mississippi	Wisconsin
Montana	

In recent years, falsity laws in New York, Ohio, Nebraska, and Louisiana have been struck down or challenged. According to the NCSL study, "key provisions of New York's Fair Campaign Code were struck down as unconstitutionally overbroad in *Vanasco v. Schwartz*, 401 F. Supp. 87 aff'd 423 U.S. 1041 (1975). The *Vanasco* ruling, which has become the leading opinion on campaign falsity statutes, held that any state regulation of campaign speech must be premised on the 'actual malice' standard applicable to public figures according to *New York Times Co. v. Sullivan*, 376 U.S. 251 (1964). Similarly, Nebraska's campaign falsity statute (NRS Sec. 49-14, 132) was ruled 'constitutionally invalid as overbroad' by the Nebraska Supreme Court and was repealed in 1986. Ohio's current prohibition against false statements was ruled unconstitutional by a federal district court in 1987 (*Pestrak v. Ohio Elections Commission*, 670 F. Supp. 1368 (1987)); that ruling is now on appeal. A successful 1989 challenge to the constitutionality of Louisiana's false statement prohibition is also on appeal as of October 1991 (*State v. Burgess*, 543 S 2d 1332(1989))."

LAWS IN OTHER STATES (continued)

Many of the statutes provide for criminal penalties ranging from fines up to \$5,000 to loss of nomination or office; but in most of the states surveyed, the statutes are not invoked because of the standards of proof required. Two notable exceptions are Washington State and Florida where investigations of violations of fair campaign practice laws are conducted regularly. In Florida, an aggrieved candidate can file a complaint and the Florida Commission on Ethics must conduct an expedited hearing. To make a guilty finding, the Commission must prove 1) that the person committed the act, 2) there was actual malice. There is a civil penalty of up to \$5,000. Of 100 complaints filed with the Florida Commission annually, only 5 percent relate to the falsity provisions. Probable cause was found only once in two years. Jurisdiction covers state, county, and municipal candidates. The Commission is staffed by 9 professionals and a support staff of 6, and has an annual budget of \$734,180.

The Washington State Public Disclosure Commission conducts investigations of violations of the falsity provision, handling 25-30 complaints per year. Jurisdiction covers state, county, and municipal candidates. Their provision is in the campaign finance laws and prohibits false political advertising. Just as in Florida, actual malice must be proven. According to the Director of the Washington Public Disclosure Commission, there is a very small window of opportunity for enforcement of the law because intent is difficult to prove. He cited only two instances where the Commission was able to apply the actual malice standard and estimated that the Commission spends approximately 50% of its time processing complaints dealing with allegations of violations of the falsity provision. Washington State has a professional staff of 8 and a support staff of 6, with an annual budget of \$656,558.

Both Florida and Washington State have full-time legal counsel.

One other state, Montana, invoked its law on falsity statements this year. The state enacted a political criminal libel law in 1979 prohibiting false representation of a candidate's voting record. Actual malice must be proven. The law was not invoked until August 1991 when the Commissioner of Political Practices initiated a criminal prosecution against a candidate alleged to have violated the act. The case was dropped at the recommendation of the Attorney General's office because it was felt that actual malice would be very difficult to prove.

JURISDICTION

In most states surveyed, the district attorney of a county or the Attorney General is charged with investigating complaints alleging violation of the campaign falsity statutes.

RECENT LEGISLATION IN OTHER STATES

Although there is a general reluctance in other agencies to initiate action to enforce laws prohibiting false campaign statements, there is increasing sensitivity in state legislatures to the problem of negative campaigning. In 1991, 15 states proposed legislation in an attempt to regulate campaign conduct. The fact that none of the proposals was passed indicates that such measures are quite difficult to enforce, and probably do not meet constitutional muster.

COMPLIANCE WITH THE MAINE CODE

In accordance with Ch. 802, the staff of the Commission distributed copies of the code to 339 registered candidates and made available for public inspection the names of the 215 (63%) who subscribed to the code. Of the 124 not signing the code, 16 ran unopposed. 77% of incumbents signed the code, while 67% of non-incumbents subscribed.

COMPLAINTS ALLEGING VIOLATIONS OF THE EXISTING CODE

During calendar years 1990 and 1991, the Commission received 4 complaints that were deemed code-related.

WORKSHOP ON MAINE'S FAIR CAMPAIGN PRACTICES CODE

The subcommittee held a workshop to solicit other views on the question of whether a complaint procedure is needed to enforce the Fair Campaign Practices Code. Participants included:

Russell Christensen, Executive Director, Common Cause
Jon Doyle, Attorney at Law, Doyle and Nelson
Professor Kenneth Hayes, University of Maine
The Honorable Joseph Mayo, House Majority Whip
Alvin Moss, Vice President, Maine League of Women Voters
Edward O'Meara, Chair, Maine Republican Party
Professor Kenneth Palmer, University of Maine
Vendean Vafiades, Chief Deputy Attorney General
Janet Waldron, Assistant Secretary of State

Also participating were the following members of the Commission on Governmental Ethics and Election Practices: Gregory Cyr, Richard Pierce, and Paul Violette; and Commission Director Marilyn Canavan.

Chief Deputy Attorney General Vendean Vafiades suggested especially in the area of attempts to control the speech of public officials or figures during campaigns the constitutional guarantee of freedom of speech has its most strict application. Encouraging such political debate is at the heart of our

WORKSHOP (continued)

political system and when the State seeks to control such speech, it must have a compelling reason to do so. To meet constitutional standards, any legislation that would seek to control the content of political speech must be carefully and narrowly drafted. For example, if the Commission sought to limit the content of campaign materials, the elements necessary to prove a violation would be 1) that a statement in the material was false and 2) the person who made the statement knew it was false. Some states impose criminal penalties; others have civil fines for violations of such legislation. The Commission would need to put in place an administrative hearing process that meets due process requirements and all decisions would be subject to judicial review. To deal with enforcement issues, the Commission and Attorney General's Office would need additional resources.

The question was raised as to how such hearings could be held expeditiously in the heat of campaigns very close to election day, and there was a consensus it would be very difficult.

Several participants proposed to monitor and regulate campaign allegations and advertising. Others focussed on educating candidates. Suggestions included:

- Make printing firms subject to the same provisions as broadcasters as set forth in 21-A Section 1014(3). That law states: "No person operating a broadcasting station within this State may broadcast any communication . . . without an oral or written visual announcement of the name of the person who made or financed the expenditure for the communication."
- Regulate media advertisements, including requiring candidates themselves to appear in any advertisement that mentions an opponent.
- Strengthen the Commission to a level of importance that is needed in order to enforce stricter campaign laws.
- Require the Commission to conduct seminars to encourage candidates to conduct positive campaigns that focus on the issues.
- Publish the names of candidates who subscribe to the existing code.
- Require the Commission to review all political ads prior to distribution.

Suggestions to regulate campaign advertising were offset by fears that such controls would interfere with the right of free speech. There was wide support, however, for increased promotion of a voluntary code.

WORKSHOP (continued)

Though not central to the issue of negative campaigning, one of the strongest points raised in the workshop was the need to balance politically the make-up of the Commission on Governmental Ethics and Election Practices.

Recommendations came from several participants including House Majority Whip Joseph Mayo. (Four of the six appointed members are now named by leaders of the majority party and two by the minority. The chair is elected by the six.) One speaker suggested the Legislature should not be involved in the selection of the Commission. While Commission members agree that politics have not been a concern to members of the Commission, the perception of one-party domination exists. The subcommittee therefore unanimously favors a Commission balanced between the two parties to eliminate that perception.

CONCLUSIONS

While the subcommittee appreciates the participation and suggestions of those who assisted the Commission in the study, it is also clear there is not the time, money, or staff resources for the Commission to take on a new task.

If, in the future, funds cut from the Commission budget are restored, it is our opinion they should be spent on policing campaign spending and providing guidance on questions of ethics. Meager staff resources have been cut nearly in half, and it is questionable if the Commission at this time can comply with all aspects of the law governing its activities. Additional computer equipment is essential. There is a lot of catching up to do, before adding new programs.

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND NINETY

H.P. 1558 - L.D. 2158

An Act to Discourage Negative Campaign Practices

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 21-A MRSA c. 13, sub-c. V is enacted to read:

SUBCHAPTER V

MAINE CODE OF FAIR CAMPAIGN PRACTICES

§1101. Maine Code of Fair Campaign Practices

1. Distribution to candidates. At the time a candidate for the office of Governor, the Senate or the House of Representatives registers with the commission as required under section 1013-A, the commission shall give the candidate a form containing a copy of the Maine Code of Fair Campaign Practices established in this subchapter. The commission shall, at that time, inform the candidate that subscription to the code is voluntary. For the purposes of this subchapter, "code" means the Maine Code of Fair Campaign Practices.

2. The code form. The code, printed on the form provided to candidates under subsection 1, must read as follows:

"Maine Code of Fair Campaign Practices

I shall conduct my campaign and, to the extent reasonably possible, insist that my supporters conduct themselves, in a manner consistent with the best Maine and American traditions, discussing the issues and presenting my record and policies with sincerity and candor.

I shall uphold the right of every qualified voter to free and equal participation in the election process.

I shall not participate in and I shall condemn defamation of and other attacks on any opposing candidate or party that I do not believe to be truthful, provable and relevant to my campaign.

I shall not use or authorize and I shall condemn material relating to my campaign that falsifies, misrepresents or distorts the facts, including, but not limited to, malicious or unfounded accusations creating or exploiting doubts as to the morality, patriotism or motivations of any party or candidate.

I shall not appeal to and I shall condemn appeals to prejudices based on race, creed, sex or national origin.

I shall not practice and I shall condemn practices that tend to corrupt or undermine the system of free election or that hamper or prevent the free expression of the will of the voters.

I shall promptly and publicly repudiate the support of any individual or group that resorts, on behalf of my candidacy or in opposition to that of an opponent, to methods in violation of the letter or spirit of this code.

I, the undersigned, candidate for election to public office in the State of Maine, hereby voluntarily endorse, subscribe to and solemnly pledge to conduct my campaign in accordance with the above principles and practices.

Candidate for Public Office"

§1102. Printing of code forms

The commission shall print, or cause to be printed, copies of the code for distribution to registered candidates.

§1103. Acceptance of completed forms

The commission shall accept, at all times prior to the election, completed code forms that are properly subscribed to by a candidate.

§1104. Public records

The commission shall retain for public inspection all completed code forms accepted by the commission under section 1103. A code subscribed to by a candidate is a public record under Title 1, section 403.

§1105. Subscription to code voluntary

In no event may a candidate be required to subscribe to or endorse the code.

Sec. 2. Study. The Chair of the Commission on Governmental Ethics and Election Practices shall select 2 commission members, one from each major political party to serve, together with a 3rd member chosen by those 2 commission members or by the chair if those persons can not agree, on a subcommittee. The subcommittee shall study, in consultation with the Department of the Attorney General, candidates' compliance with the Maine Code of Fair Campaign Practices established by this Act and the need for, costs of and legal issues involved with establishment of a complaint procedure to enable a candidate for the office of Governor, the Senate or the House of Representatives who alleges an opponent has violated the code to file a complaint with the commission that will hold a hearing to determine whether a violation, in fact, occurred. A person who is unqualified to serve on the commission may not serve on the subcommittee. In addition, the subcommittee shall recommend any changes in the terms of the code necessary to ensure that it is enforceable with civil or criminal penalties for violations. The subcommittee shall report its recommendations to the joint standing committee of the Legislature having jurisdiction over legal affairs by January 15, 1992.

Sec. 3. Transition provision. As soon as practicable after the effective date of this Act, the Commission on Governmental Ethics and Election Practices shall send the code form provided for by the Maine Revised Statutes, Title 21-A, chapter 13, subchapter V, to candidates for the office of Governor, the Senate or the House of Representatives who have registered as required under Title 21-A, section 1013-A. The commission shall accept and make available for public inspection the endorsed code forms in the manner provided by Title 21-A, chapter 13, subchapter V.

In House of Representatives, 1990

Read twice and passed to be enacted.

..... Speaker

In Senate, 1990

Read twice and passed to be enacted.

..... President

Approved 1990

..... Governor



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

June 6, 2008

Hon. Francis C. Marsano
88 Congress Street
Belfast, ME 04915

Dear Commissioner Marsano:

As further background on the code of fair campaign practices, I have enclosed information regarding a November 2006 complaint alleging a violation of the code and the Ethics Commission's consideration of it.

Shortly after the November 2006 general election, a private citizen, David Metz, filed a complaint against David Miramant, a candidate for State Representative in District 46. The complaint alleged that the respondent Miramant had violated the code of fair campaign practices by distributing campaign literature that misrepresented the legislative voting record of his opponent, incumbent Representative Stephen Bowen. Mr. Miramant was represented by David W. Walker, Esq. of Bernstein Shur Sawyer & Nelson, P.A. He argued that the Commission had no jurisdiction to take any action against Mr. Miramant for a violation of the code and that the literature was accurate.

Prior to the Commission's meeting, the complainant and respondent's counsel looked at the legislative history of the code of fair campaign practices, which was enacted in 1990. The code was the result of LD 2158, which was introduced in 1990 by Representative Joseph Mayo. The bill proposed authorizing the Commission to investigate false campaign literature and advertising (including by holding a public hearing) and to issue written advisory opinions with findings and recommendations that would be filed with the Secretary of State.

LD 2158 was significantly amended and enacted as Chapter 802 of the Public Laws of 1989. This law required the Commission to provide copies of the code of fair campaign practices to legislative and gubernatorial candidates, and to inform them that subscription to the code is voluntary. Chapter 802 authorized the Commission to accept signed copies from candidates. It did not contain any provision authorizing the Commission to investigate violations of the code. Chapter 802 did, however, direct the Commission to form a subcommittee to study the need for a complaint procedure under which the Commission could hold hearings to determine whether a violation occurred.

The subcommittee issued its report to the Legislature in January 1992. It concluded that the Commission did not have the staff or financial resources to investigate violations of the code, and that the Commission's scarce resources would be better spent providing advice on and enforcing campaign finance issues. The Legislature did not amend the law to authorize the Commission to conduct investigations or make written determinations regarding violations. In fact, the law has not been amended since it was enacted in 1990.

At the December 12, 2006 meeting, the Commission members heard from the parties regarding the Commission's jurisdiction and the accuracy of Mr. Miramant's campaign literature. Commission member Friedman asked the Commission's counsel Phyllis Gardiner about her assessment of the jurisdictional issue. She responded that she agreed with respondent's counsel that the Commission did not have jurisdiction over the complaint, that the code was voluntary, and that the Commission had no enforcement authority. She was not aware that the Commission had ever addressed a complaint concerning the code, which is why the Commission staff believed it was appropriate to put this complaint on the agenda. She repeated her view that the Commission did not have any jurisdiction to do anything other than perhaps to give someone an opportunity to air their concerns.

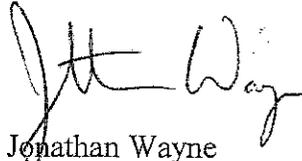
In summary, the Commission's Chair, Andrew Ketterer, stated his view that the Commission did not have the authority to take any action and that the Legislature did not intend that the Commission would conduct a line-by-line review of campaign literature. He believed that there are political consequences for people who grossly mischaracterize their opponent's voting record. He said that the Commission might be the appropriate forum to give people an opportunity to be heard, but that the Commission probably did not have jurisdiction to take action.

Commission member Friedman agreed, and said that the staff did the right thing in providing Mr. Metz with a forum. He noted that Rep. Bowen did not file a complaint himself. He expressed that the complaint was about how individuals conduct their campaigns, and that was not something that the Commission should get into.

The Commission members voted unanimously (4-0) that the Commission was without jurisdiction to take further action on the complaint. Ms. Ginn Marvin made the motion,

and Ms. Thompson seconded the motion. If you have any questions about this matter, please let me know.

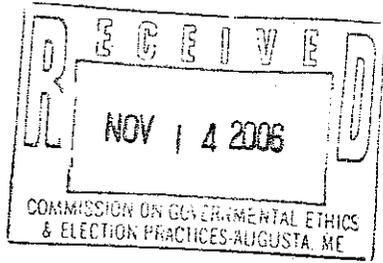
Sincerely,

A handwritten signature in black ink, appearing to read "Jonathan Wayne". The signature is fluid and cursive, with the first name "Jonathan" and the last name "Wayne" clearly distinguishable.

Jonathan Wayne
Executive Director

cp
Enclosure

cc: Hon. Michael P. Friedman, Ethics Commission Chair
Assistant Attorney General Phyllis Gardiner



November 13, 2006

From: David Metz
16 West Street
Rockport, ME 04856
236-6910

To: Jonathan Wayne
Executive Director
Maine Commission of Government Ethics and
Election Practices
135 State House Station
Augusta, ME, 04333-0135

My complaint is against David Miramant of Camden, Maine, running for Representative in District 46 against Rep. Steve Bowen.

Mr. Miramant has violated the Maine Code of Fair Campaign Practices 21-A MRSA 1101 (2)...., in particular the fourth paragraph:

"I shall not use or authorize and I shall condemn material relating to my campaign that falsifies, misrepresents or distorts the facts...."

The violation was the use of a campaign mailer that distorts and misrepresents Steve Bowen's voting record:

The description of the nature of the roll call votes 537 and 311 were deceptive and misleading. Both these roll call votes were "recede and concur" issues and were deceptively described as NO votes against the issues themselves (as described in the mailer).

On the mailer Rep. Bowen's vote of NO on issue 1 would be a vote NO to Protecting Victims of Domestic Violence. And, Rep. Bowen's vote of NO on issue 2 would be a vote NO to Protecting Maine Children from Lead Poisoning.

Votes on "recede and concur" are procedural votes, not votes on the issues stated on the mailer.

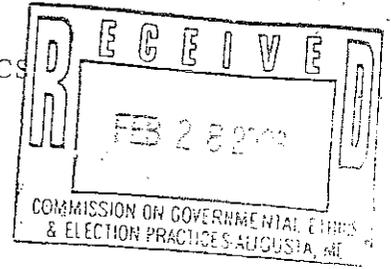
Enclosed:

- 1. Mr. Miramant signed the Maine Code of Fair Campaign Practices 21-A MRSA 1101-(2) dated 2-22-06.
- 2. Copy of mailer.

Submitted by yours truly,
David Metz



STATE OF MAINE
 COMMISSION ON GOVERNMENTAL ETHICS
 AND ELECTION PRACTICES
 135 STATE HOUSE STATION
 AUGUSTA, MAINE
 04333-0135



MAINE CODE OF FAIR CAMPAIGN PRACTICES
 21-A M.R.S.A. §1101(2)

I shall conduct my campaign and, to the extent reasonably possible, insist that my supporters conduct themselves, in a manner consistent with the best Maine and American traditions, discussing the issues and presenting my record and policies with sincerity and candor.

I shall uphold the right of every qualified voter to free and equal participation in the election process.

I shall not participate in and I shall condemn defamation of and other attacks on any opposing candidate or party that I do not believe to be truthful, provable and relevant to my campaign.

I shall not use or authorize and I shall condemn material relating to my campaign that falsifies, misrepresents or distorts the facts, including, but not limited to, malicious or unfounded accusations creating or exploiting doubts as to the morality, patriotism or motivations of any party or candidate.

I shall not appeal to and I shall condemn appeals to prejudices based on race, creed, sex or national origin.

I shall not practice and I shall condemn practices that tend to corrupt or undermine the system of free election or that hamper or prevent the free expression of the will of the voters.

I shall promptly and publicly repudiate the support of any individual or group that resorts, on behalf of my candidacy or in opposition to that of an opponent, to methods in violation of the letter or spirit of this code.

I, the undersigned candidate for election to public office in the State of Maine, hereby voluntarily endorse, subscribe to and solemnly pledge to conduct my campaign in accordance with the above principles and practices.

David Miramant
 Signature of Candidate

2-22-06
 Date

DAVID MIRAMANT
 Printed Name

REP. to the Legislature
 Office Sought

Dave Miramant will vote: Rep. Bowen did vote:

PAID PERMIT PORTLAND

1	Protecting victims of domestic violence <small>(Roll Call #537)</small>	YES!	NO
2	Protecting Maine children from lead poisoning <small>(Roll Call #311)</small>	YES!	NO
3	Having George Bush fix the flaws in Medicare Part D that left Mainers without drug coverage <small>(Roll Call # 479)</small>	YES!	NO
4	Supporting Maine Small Business <small>(Roll Call #435)</small>	YES!	NO
5	Increasing the minimum wage for Maine workers <small>(Roll Call #484)</small>	YES!	NO

[Handwritten signature]

*****ECRWSS**R-003
 RESIDENT 6
 16 WEST ST 14
 ROCKPORT ME 04856-5911

|||||



On Tuesday, November 7, Elect
Dave Miramant
 Democrat for State Representative

DAVE MIRAMANT HAS A PLAN FOR MAINE

Authorized by Dave Miramant - Paid for by the Committee to Elect Dave Miramant
 174 Mountain St., Camden, Maine 04843

DESIGNED, PRINTED & MAILED IN MAINE PRINTED ON RECYCLED PAPER

Voting for **Dave**

Miramant

is as easy
as counting
to five...



BERNSTEIN SHUR

COUNSELORS AT LAW

207 623-1596 main
207 626-0200 facsimile
bernsteinshur.com

146 Capitol Street
PO Box 5057
Augusta, ME 04332-5057

Daniel W. Walker, Esq.
dwalker@bernsteinshur.com

December 4, 2006

Mr. Jonathan Wayne
Executive Director
Maine Commission on Governmental
Ethics and Election Practices
135 State House Station
Augusta, ME 04333-0135



Re: Response to November 13, 2006 Complaint of David Metz

Dear Mr. Wayne:

Please accept this letter as the response of David Miramant to the November 13, 2006 complaint filed by David Metz with the Maine Commission on Governmental Ethics and Election Practices ("Ethics Commission").

Mr. Miramant forcefully denies the groundless allegations set forth in the complaint. This complaint arises from a flyer distributed by the Miramant campaign, entitled "Count to Five" (the "flyer") that accurately portrayed Representative Steve Bowen's voting record on five important policy issues. The complaint alleges that Miramant has violated the Maine Code of Fair Campaign Practices, 21-A MRSA §§ 1101 – 1105, by distorting and misrepresenting the voting record of Mr. Bowen regarding two of the five issues.

This complaint is groundless and should be dismissed for two reasons. First, the Ethics Commission does not have the statutory authority to hear a complaint based upon an alleged violation of the Code of Fair Campaign Practices. Second, and most importantly, the complaint is groundless because the flyer distributed by the Miramant campaign was wholly accurate with regard to Representative Bowen's voting record, and therefore, does not violate the voluntary Code of Fair Campaign Practices.

Moreover, under the United State Constitution and Maine Constitution, every citizen is entitled to be able to participate in public debate, especially during a political campaign. The flyer furthered the public debate by demonstrating Mr. Miramant's opposition to the public policy positions of Representative Bowen. Such opposition does not provide grounds for Mr. Metz to bring a complaint against Mr. Miramant. Such free speech only furthers the ideals of democracy and public debate.

I. FACTS

David Miramant filed to run for the Maine House of Representatives as a Democrat against incumbent Republican Representative Steve Bowen in District 46. On February 22, 2006, Miramant signed the voluntary Maine Code of Fair Campaign Practices form. See Exhibit A.

As a part of the campaign, Miramant purchased from the House Democratic Campaign Committee ("HDCC") and distributed a flyer, entitled "Count to Five." See Exhibit B. This flyer accurately portrayed the voting record of the incumbent Representative Bowen.

The mailer was carefully researched and developed by the HDCC to demonstrate the differences between Representative Bowen and Miramant on public policy issues based on a comparison of actual votes by Representative Bowen. The flyer clearly described the topic of the bill and gave a clear reference to the number of the roll call vote. Miramant also included on the flyer his name and address to give anyone the opportunity to receive more information regarding Representative Bowen's votes.

On November 7, 2006, the voters of District 46 elected Miramant over Representative Bowen by a vote of 2295 to 2186.

On November 13, 2006, Mr. Metz filed a complaint against Miramant with the Ethics Commission.

On November 17, 2006, Mr. Miramant received a letter from Jonathan Wayne, the Executive Director of the Ethics Commission, providing notice that Mr. Metz had filed a complaint against Mr. Metz, alleging violation of the Code of Fair Campaign Practices. See Exhibit C. As part of this letter, Mr. Wayne informed Mr. Miramant, after consultation with the Ethics Commission counsel, that the Ethics Commission may not have the statutory authority to take any action regarding the complaint.

II. ARGUMENT

A. The Ethics Commission Should Dismiss the Complaint Because It Does Not Have the Statutory Authority to Hear the Complaint

Although the Ethics Commission would find that the flyer is wholly accurate and does not violate the Maine Code of Fair Campaign Practices, the Ethics Commission should not have to make this determination, as it does not have the jurisdiction to investigate and prosecute this complaint. Therefore, the Ethics Commission must dismiss this complaint against Mr. Miramant.

1. Plain Meaning

The Ethics Commission should dismiss this complaint because the plain meaning of the governing statutes in Title 21-A of the Maine Revised Statutes Annotated does not

provide the Ethics Commission with the authority to hear a complaint brought under the guise of a violation of the Maine Code of Fair Campaign Practices. Additionally, under the plain meaning of the statute, even if the conduct alleged by Mr. Metz were true, which it is most certainly not, there exists no actionable conduct under Maine election law.

The Maine Law Court has recently stated that “[t]he primary goal of statutory interpretation is to give effect to the intention of the Legislature. To meet that goal we examine the plain meaning of the statute. Only if the statutory language is ambiguous do we go beyond the plain meaning and look at the legislative history.” Yeadon Fabric Domes, Inc. v. Maine Sports Complex, LLC, 901 A.2d 200, 205 (Me. 2006).

Nowhere in Maine election law in Title 21-A of the Maine Revised Statutes Annotated, has the Legislature established a complaint procedure to enforce the Maine Code of Fair Campaign Practices, 21-A M.R.S.A. § 1101 – 1105. As a result, the Ethics Commission may neither accept a complaint nor investigate a candidate for an alleged violation of the voluntary Maine Code of Fair Campaign Practices. Currently, the Ethics Commission may only investigate a candidate concerning his/her registration, contributions by or to the candidate, and expenditures by a candidate. 21-A M.R.S.A. § 1003 (Investigations by the commission).

Additionally, no violation or penalty under the jurisdiction of the Ethics Commission sufficiently covers a violation of the Maine Code of Fair Campaign Practices. Although the statute includes a violation of “false statements,” this provision only covers reports “required by this chapter¹.” Id. § 1004(2) (emphasis added). However, subscription to the Maine Code of Fair Campaign Practices is entirely voluntarily, and is, thus, not required. Section 1101 states that the “the commission shall, [at the time the candidate registers and is given the form] inform the candidate that subscription to the code is voluntary.” Id. § 1101(1). Additionally, section 1105 clearly states that “[i]n no event may a candidate be required to subscribe to or endorse the code.” Id. § 1105 (Subscription to code voluntary).

Therefore, the plain meaning of Maine election law unambiguously provides no statutory authority to the Ethics Commission to hear or prosecute this complaint.

2. Legislative History

Even if the Ethics Commission finds that the statutory language of Maine election law in Title 21-A is ambiguous with regard to establishing a complaint procedure for alleged violations of the Maine Code of Fair Campaign Practices, the legislative history of the Maine Code of Fair Campaign Practices provides clear evidence that no such procedure was ever established by the Maine Legislature.

The Maine Code of Fair Campaign Practices derived from LD 2158, which was submitted to the Legislature by Representative Joe Mayo in 1990. See Exhibit D. LD 2158 set forth a complaint procedure for the Ethics Commission to investigate alleged “negative

¹ The chapter referred to here is Chapter 13, Campaign Reports and Finances, of Title 21-A, and this chapter includes the Maine Code of Fair Campaign Practices.

campaign practices.” However, an amendment (CA-A H-919), struck out all of the language in the first draft and established the existing voluntary code. See Exhibit E, Report of the Subcommittee to the Fair Campaign Practices Code in Maine, p.1, January 1992.

LD 2158, which passed as Public Law 1989, Chapter 802, included the exact language of the current Maine Code of Fair Campaign Practices. See Exhibit F. What is not included in the current version was unallocated language establishing a subcommittee of the Ethics Commission. One of the subcommittee’s main purposes was to examine the

need for, costs of and legal issues involved with establishment of a complaint procedure to enable a candidate for the office of Governor, the Senate or the House of Representatives who alleges an opponent has violated the code to file a complaint with the commission that will hold a hearing to determine whether a violation, in fact, occurred.

Public Law 1989, Chapter 802 § 2. Thus, the enacting language never was intended to provide for a complaint procedure.

In January of 1992, the subcommittee created by Public Law 1989, Chapter 802 issued its report to the Maine Legislature. This report stated that if any complaint procedure were to be put in place, such an administrative hearing process would have to meet due process and judicial review requirements, and the standard of proof would be required to be malice (knowingly false statement). However, the subcommittee concluded

While the subcommittee appreciates the participation and suggestions of those who assisted the Commission in the study, it is also clear there is not the time, money, or staff resources for the Commission to take on a new task.

Report of the Subcommittee to the Fair Campaign Practices Code in Maine, p.5, January 1992.

Therefore, because the Legislature never enacted a complaint procedure, the Ethics Committee does not have and never had the statutory authority to hear a complaint of an alleged violation of the Maine Code of Fair Campaign Practices.

B. The Ethics Commission Should Dismiss the Complaint Because David Miramant Did Not Violate the Maine Code of Fair Campaign Practices.

Even if the Ethics Commission does determine that it has statutory authority to hear a complaint of an alleged violation of the Maine Code of Fair Campaign Practices, the complaint should still be dismissed, as David Miramant did not violate the Maine Code of Fair Campaign Practices. The flyer distributed by the Miramant campaign accurately and appropriately described Representative Bowen’s roll call votes.

1. The description of Representative Bowen's vote in Roll Call # 537 was entirely accurate as the vote taken was substantive and pivotal in the ultimate failure of LD 1938.

In his complaint, Mr. Metz alleges that Mr. Miramant's flyer was "deceptive and misleading" in its depiction of Representative Bowen's vote on LD 1938 as the vote referenced was "procedural" and not substantive. In fact, this argument misunderstands the legislative process and the significance of a "recede and concur" motion and subsequent vote. Representative Bowen's "no" vote on the recede and concur motion was, in essence, a death knell for LD 1938, which is exactly why Representative Bowen voted the way he did.

First, Mr. Metz draws an erroneous distinction between "procedural" and "substantive" votes and appears to argue that, in effect, that the vast majority of legislative votes are not, in fact, statements of an elected official's position on the issues. In reality, the line between procedural and substantive votes is blurry at best. There are very few votes which might be considered purely procedural, in fact, the vast majority of the votes taken in the legislature are substantive – that is – they have a great impact on the final form and disposition of the bill at issue.

Mr. Metz appears to argue, without much explanation, that simply because Representative Bowen's vote was on a recede and concur motion, it was procedural and had no bearing on his ultimate position related to the legislation. This is simply not true. There were in fact, four roll call votes on LD 1938, and all of them were what Mr. Metz might describe as "procedural" votes.² In fact – all four roll calls were substantive – as all four votes were related to amendment language which would have very *substantively* changed LD 1938.

Representative Bowen's vote on LD 1938 was not procedural - he was not voting on whether the House should adjourn for the day or whether a question should be called - he was voting on the *substance* of the proposed amendments to LD 1938. In an earlier roll call, Representative Bowen voted to adopt House Amendment D to LD 1938 – an amendment which would have required police training on the proper storage of guns in police possession. The Senate, disagreeing with the House, stripped off the amendment leaving the original bill. When the bill was again before the House, members were faced with deciding whether they supported the original language (now the Senate version) or House Amendment D. Members who believed strongly that House Amendment D was an important component of LD 1938 voted "no" on the recede and concur motion. This short review of the legislative history should leave no doubt, roll call #537 was anything but a procedural vote – it was a critical vote on the very important issues surrounding LD 1938.

RC #488 April 11, 2006 INDEF POST H 'B' H-990 to C.A PREVAILS 71 70
RC #489 April 11, 2006 ADOPT COM AMEND 'A' S-525 PREVAILS 142 0
RC #529 April 27, 2006 ADOPT H. 'D' H-1044 TO C. 'A' PREVAILS 96 50
RC #537 April 27, 2006 RECEDE AND CONCUR FAILS 68 77

As described earlier, the path of LD 1938 was both controversial and complicated. While the bill passed out of committee with a unanimous ought to pass vote, it ran into trouble in the House, where several amendments surfaced – in a widely believed attempt by the National Rifle Association to kill the bill. These new, un-vetted House amendments caused the bill to stall when the Senate insisted on sticking with the original unanimously supported bill. In the meantime, some House members also insisted on the newly created version – a move universally understood to mean the bill would die in nonconcurrency.³

And that is *exactly* what happened – the House voted not to recede and concur – and the bill died between the bodies. LD 1938 failed – as a result of “no” votes by Representative Bowen and 76 others. Mr. Metz argues that Representative Bowen’s “no” vote on #537 cannot be characterized as a vote against protecting victims of domestic violence.⁴ In fact, that is *exactly* how his vote should be characterized. Representative Bowen was a two-term legislator, sitting on the powerful Appropriations Committee, who knew *exactly* what a no vote on the recede and concur motion meant. If he supported LD 1938 – he would have voted yes on the motion – he didn’t support the bill – and his votes reflect that opposition accurately.

2. The description of Representative Bowen’s vote in Roll Call #311 was entirely accurate as the vote taken was a roll call on final enactment on LD 1034.

Mr. Metz further alleges Mr. Metz alleges that Mr. Miramant’s flyer was “deceptive and misleading” because it depicts a “recede and concur” vote as a “no” vote. An examination of the legislative record shows that Roll Call #311 was *not* a vote on a “recede and concur” motion, but rather, was a roll call vote on *final enactment* of the bill, which is clearly a substantive vote. (See Exhibit G, Roll Call #311). While a recede and concur roll call did take place (Roll Call #301), the roll call referenced in David Miramant’s mail piece was the final enactment vote, and the description of his vote as “no” was entirely accurate.

There is nothing in Mr. Miramant’s description of Representative Bowen’s that is inaccurate, false or misleading. On the contrary, the Miramant flyer accurately and straightforwardly describes Representative Bowen’s vote on the lead poisoning bill. There is nothing related to Mr. Miramant’s flyer which violates Maine Code of Fair Campaign Practices. It is a truthful and completely accurate account of Representative Bowen’s vote – a vote entirely appropriate for Mr. Miramant to highlight and publicize in his mailer.

The flyer sent by David Miramant was an accurate description of Representative Bowen’s voting record on all the issues – including Roll Calls #537 and #311. Despite Mr. Metz’s arguments, Representative Bowen’s votes were accurately depicted and were in no way a violation of the Maine Code of Fair Campaign Practices.

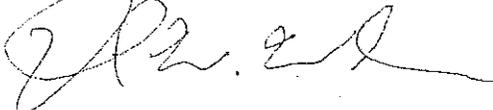
³ Wells, Ellen & Whittenburg, Cathie, Bangor Daily News “*Is this any way to run a democracy*” May 3, 2006; Leary, Mal, Bangor Daily News “*Protection from abuse measure derailed by gun amendment*” May 11, 2006.

⁴ It is important to note that David Miramant’s flyer does not say Representative Bowen voted no on LD 1938 itself, only that he voted no on “protecting victims of domestic violence.”

C. Conclusion

For all the foregoing reasons, the Ethics Commission should dismiss the November 13, 2006 complaint of David Metz against David Miramant.

Very truly yours,

A handwritten signature in black ink, appearing to read "D.W. Walker", written in a cursive style.

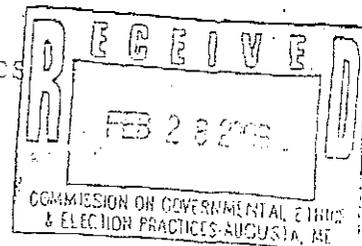
Daniel W. Walker, Esq.

DWW/an

cc: Representative-elect David Miramant
Representative Glenn Cummings
Representative Hannah Pingree
Representative Sean Faircloth



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135



MAINE CODE OF FAIR CAMPAIGN PRACTICES
21-A.M.R.S.A. §1101(2)

I shall conduct my campaign and, to the extent reasonably possible, insist that my supporters conduct themselves, in a manner consistent with the best Maine and American traditions, discussing the issues and presenting my record and policies with sincerity and candor.

I shall uphold the right of every qualified voter to free and equal participation in the election process.

I shall not participate in and I shall condemn defamation of and other attacks on any opposing candidate or party that I do not believe to be truthful, provable and relevant to my campaign.

I shall not use or authorize and I shall condemn material relating to my campaign that falsifies, misrepresents or distorts the facts, including, but not limited to, malicious or unfounded accusations creating or exploiting doubts as to the morality, patriotism or motivations of any party or candidate.

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I shall not practice and I shall condemn practices that tend to corrupt or undermine the system of free election or that hamper or prevent the free expression of the will of the voters.

I shall promptly and publicly repudiate the support of any individual or group that resorts, on behalf of my candidacy or in opposition to that of an opponent, to methods in violation of the letter or spirit of this code.

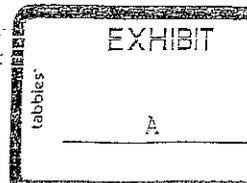
I, the undersigned candidate for election to public office in the State of Maine, hereby voluntarily endorse, subscribe to and solemnly pledge to conduct my campaign in accordance with the above principles and practices.

Signature of Candidate

2-22-06
Date

DAVID MIRAMANT
Printed Name

Rep to the Legislature
Office Sought





STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

November 17, 2006

David Miramant
174 Mountain Street
Camden, Maine 04843

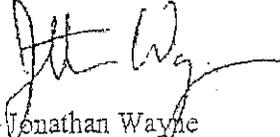
Dear Mr. Miramant:

The Maine Commission on Governmental Ethics and Election Practices received the attached complaint from David Metz regarding a flyer sent out by your campaign. Mr. Metz contends that the flyer distorts and misrepresents Steven Bowen's voting record on two issues, which violates the Code of Fair Campaign Practices that you signed when you initiated your campaign.

After conferring with the Commission's counsel, I am scheduling this matter for a meeting of the Commission on December 12 at 9:00 a.m. at our office. Kindly submit a written response to the complaint no later than Thursday, November 30, which I will include in the packet of materials. I would also recommend that you or a representative of your campaign be present at the meeting to discuss this matter.

As you are aware, the Commission's counsel and I are uncertain whether the Commission has statutory authority to take any action regarding the complaint. Nevertheless, we believe it is appropriate to schedule this matter for the Commission's consideration. Please telephone me at 287-4179.

Sincerely,


Jonathan Wayne
Executive Director

cc: David Metz
Stephen Bowen
Benjamin F. Dudley
Michael K. Mahoney, Esq.
Julie O'Brien
Daniel P. Riley, Esq.

It was agreed to bring this item back to the table at the next meeting for more discussion after all members have had a chance to review today's public comments.

Agenda Item #5 – Alleged Violation of the Code of Fair Campaign Practices – David Miramant

Mr. Wayne informed the Commission that David Metz of Rockport brought a complaint to the Commission regarding literature sent by the Miramant campaign. The question is whether the literature is misleading and whether that would be a violation of the Code of Fair Campaign Practices that Mr. Miramant signed. There is a jurisdictional issue since signing the Code is voluntary and since the statute does not authorize the Commission to perform any investigation or impose any fine in violation of the Code.

Mr. Metz addressed the Commission. He said that there were two issues: Does the Commission have the authority to hear the matter and the matter itself. Statement of Fact in the original Bill gives direction for Commission to proceed with investigation and forward findings to the Legislature. Mr. Metz believes the Commission does have jurisdiction with regard to this matter. Mr. Metz contends that the David Miramant flyer mailed out is misleading because of the nature of the roll call referred to in the flyer. The roll call account of Mr. Miramant's general election opponent, Rep. Steve Bowen was not accurate and misleading regarding Rep. Bowen's position on domestic violence and protecting children from lead poisoning. Mr. Metz contends that when candidates sign the Code, they are giving up certain amount of their First Amendment right of free speech and agree to control their speech within the parameters of the Code.

Representative Miramant from Rockland and his counsel, Dan Walker, Esq., addressed the Commission. Mr. Walker addressed the jurisdiction issue. Statute is clear that the Commission does not have jurisdiction on this issue. This is purely a voluntary option on the part of candidates. The complaint procedure that was in the original bill was pulled from the law that was enacted. The study group convened pursuant to the enacted law to study the options for enforcing the Code decided that there were not the resources to institute a complaint procedure and that there would be significant First Amendment issues. Mr. Walker contended that the statements in the mailer about Rep. Bowen's votes and positions were not false.

Rep. Miramant reviewed the reasons and justification for the mailing along with the accuracy of the information. He received many positive comments as a result of the flyer.

Ms. Gardiner agreed that jurisdiction is the issue here and felt no action was warranted.

Mr. Ketterer expressed concern over the Ethics Commission getting involved in looking over literature printed by candidates. The opportunity to be heard is valid, however, having the Commission make any decisions on these issues is not appropriate.

Mr. Friedman agreed with Mr. Ketterer and thought that the staff was correct in affording the complainant an opportunity to be heard.

Ms. Ginn Marvin moved that the Commission adopt the staff recommendation that there is no jurisdiction in this matter. The motion was seconded by Ms. Thompson and the Commission voted in favor by vote of 4-0.

Agenda Item # 6 – Misreporting of Expenditures Dates – Geoffrey Heckman

Mr. Wayne reviewed that an audit of Geoffrey Heckman's reports found dates that were inaccurate causing him to receive \$200 more in the distribution of MCEA funds for his primary election funds that he would not have received if the dates had been correct. Because he spent all his seed money, he received public money in excess of \$200. Mr. Heckman was a candidate for the House.

Mr. Heckman addressed the Commission. He confirmed that he believed he had to spend all his seed money, he did not read the Guidebook carefully and was relying on what other people told him.

On motion by Ms. Thompson and seconded by Ms. Ginn Marvin it was moved to accept the staff recommendation and impose a violation in the amount of \$200. (4-0)



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

December 14, 2006

David Metz
16 West Street
Rockport, ME 04856

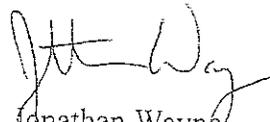
Dear Mr. Metz:

This is to confirm that at its meeting on December 12, the Ethics Commission members voted to take no action on your complaint regarding David Miramant. During discussion of the motion, the Commission members expressed that they did not believe the Legislature had authorized them through the code of fair campaign practices to make judgments about the accuracy of candidates' campaign literature.

If I could offer one further comment on behalf of the staff, the Commission members try hard to stay within their statutory mandate. The code of fair campaign practices was enacted in 1990 ten years before the Maine Clean Election Act. It is a voluntary pledge available to all candidates for the Legislature – both privately and publicly financed. Obviously, we all want candidates to adhere to the highest standards, but compliance with the code is not part of a Maine Clean Election Act candidate's "agreement" with the state when the candidate joins the public funding program. If you or other concerned citizens would like compliance with the code to be a precondition for participating in the Maine Clean Election Act, I believe a statutory change would be necessary.

Please telephone me at 287-4179 if you have any further questions.

Sincerely,


Jonathan Wayne
Executive Director

cc: Hon. David Miramant
Hon. Stephen Bowen
Daniel W. Walker, Esq.

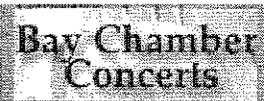
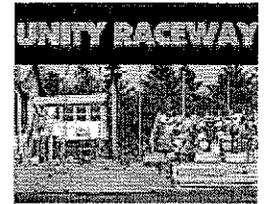
Government

No sign of Greenier's campaign signs

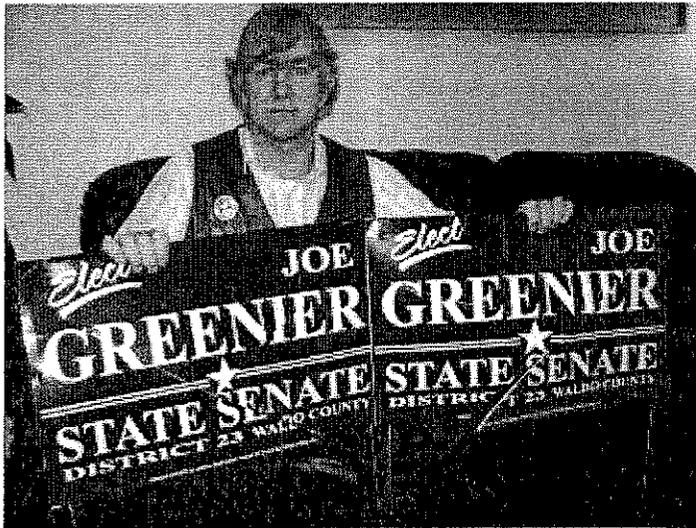
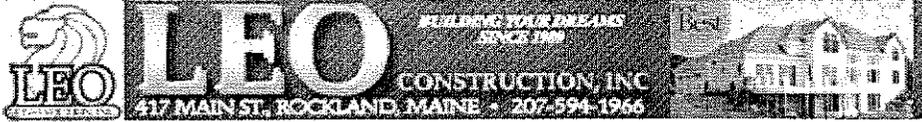
By Tanya Mitchell
VillageSoup/Waldo County Citizen Reporter

STOCKTON SPRINGS (June 18): Joseph Greenier lost his bid last Tuesday for the Democratic ticket in State Senate District 23, but he's upset about another loss — his campaign signs.

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Joseph Greenier (Photo by Tanya Mitchell)

When Greenier, of Stockton Springs, learned that Diane Messer of Liberty was the victor in the primary election, he began traveling around the county to pick up his campaign signs; that's when he discovered many were missing.

Near the Samuel Wagner Middle School in Winterport, he found two signs damaged.

Greenier estimated as many as 50 campaign signs, paid for with money from the Maine Clean Elections fund, are missing. The theft or vandalism of the signs, he said, hurts Maine taxpayers.

Greenier contacted the Maine Commission on Governmental Ethics and Election Practices and local and state police, and learned little that can be done about it unless a person is caught in the act. "It's promoting that bad behavior if we don't do something about it," he said.

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Greenier, who is considering continuing his campaign as a write-in candidate, asks anyone who has a sign to return them to 104 Muskrat Road, Stockton Springs, or call 567-3635. The signs will be accepted, no questions asked.

VillageSoup/Waldo County Citizen Reporter Tanya Mitchell can be reached at 207-338-0484 or by e-mail at tmitchell@VillageSoup.com.

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rnordstrom@roadrunner.com