

# Agenda

## Item #1



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

Minutes of the September 29, 2008, Meeting of the  
Commission on Governmental Ethics and Election Practices  
Held in Room 208, Burton M. Cross Office Building,  
111 Sewall Street, Augusta, Maine

Present: Michael Friedman, Esq., Chair; Hon. Francis C. Marsano; Hon. Edward M. Youngblood; Hon. Mavourneen Thompson; Walter F. McKee, Esq. Staff: Executive Director Jonathan Wayne; Phyllis Gardiner, Counsel.

At 9:00 a.m., Chair Michael Friedman convened the meeting.

The Commission considered the following items:

**Agenda Item #1. Ratification of Minutes of the August 25 and September 2, 2008 Meetings**

Mr. Youngblood made a motion, seconded by Mr. Marsano, to accept the August 25 and September 2, 2008, meeting minutes as drafted. The motion passed unanimously (5-0).

*In consideration of the Commission's practice to address agenda items out of order to accommodate the attendance of participants regarding particular items, the following agenda items (Items# 3 and #4) were taken out of order:*

**Agenda Item #3. Request for Waiver of Late Filing Penalty/Candidate Geraldine Randall**

Mr. Wayne explained that Geraldine Randall was required to file her 42 day post-primary campaign finance report on July 22, 2008. She had difficulty filing the report on the deadline because the internet browser she used was not compatible with the Commission's electronic filing system. She filed the report one day late on July 23. Mr. Wayne said the amount of the preliminary penalty is \$41.44, which she has paid. After further consideration by her treasurer, her campaign has requested a waiver of the penalty because of the browser problem and has also requested a refund of her penalty payment. Mr. Wayne said the Commission staff is actively working with its technology contractor to resolve the browser compatibility issue. He said the staff recommends waiving the penalty entirely and refunding her payment

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because she made a bona fide effort to file on the deadline but was prevented because of the browser compatibility problem.

Mr. McKee made a motion to waive the entire penalty amount and refund the amount due to the mitigating circumstances and the computer problems which are to be addressed. Mr. Marsano seconded the motion.

Ms. Thompson asked what the precedent has been with this type of browser issue.

Mr. Wayne said this issue has been coming about more often with filers. He explained that the website was developed in 2000 and it does not always work well with newer programs. He said there have been other requests for waivers in the past due to this same problem. He said he hoped the problem would be solved by the end of January.

The motion to return the penalty payment to Ms. Randall passed unanimously (5-0).

#### **Agenda Item #4. Public Hearing on Proposed Change to Commission Rules**

Mr. Wayne said that the Commission decided to accept public comment at the July 28, 2008, meeting on a proposed change to the Commission's rules that would increase the gubernatorial candidates' maximum amount of seed money contributions from \$50,000 to \$100,000. Mr. Wayne said the Commission has had only one other public comment from interested parties since July. Mr. Wayne said written comments may be submitted until October 14, 2008.

Ann Luther, Maine Citizens for Clean Elections, said the MCCE is in support of the increase to \$100,000. She said that this increase would not result in any harm to the program since the contributions will still be limited to \$100 from individuals. Candidates who intend to run as Maine Clean Election Act candidates only have seed money contributions to run their campaigns until they receive public funding. The current limit of \$50,000 may not be sufficient to run a campaign for a strong gubernatorial candidate who declares his or her candidacy in 2009. This change will make the program attractive to the strongest candidates.

Mr. Marsano questioned whether an increase to \$100,000 would be enough due to inflation since the law was passed.

Ms. Luther said the amount was a good starting place and the MCCE would not object if someone were to raise the amount more but the contribution would still be limited to \$100 per individual.

Ms. Thompson asked how the increase of \$100,000 was arrived at.

Ms. Luther stated, again, that the amount was totally arbitrary. She said it was decided to double the amount after listening to comments from people involved with the process.

Mr. Marsano asked Ms. Luther to confirm whether she thought that the contribution amounts of \$100 each should remain the same.

Ms. Luther said she did.

Mr. Joseph Greenier from Stockton Springs stated that he was a write-in candidate running traditionally since he lost the primary election. He stated his concern is that more money is given to candidates than needs to be. He said both the House and Senate candidates could run their campaigns on less money to save tax payer money. He also expressed concern regarding the money expended for campaign purchases made out of state. He said he would also like to see all meetings held broadcast over the internet.

Alison Smith, Maine Citizens for Clean Elections, passed out a written statement (attached). She also stated that the seed money cap is the only part of the statute that can be changed by rulemaking. She said that any unspent seed money is deducted from the initial distribution so all candidates start at the same point as far as funding is concerned.

Mr. Walter McKee commented regarding the potential of the increased seed money limit extending the length of the campaign period.

Ms. Smith said this change would not alter the start time for raising campaign contributions. Candidates for governor in 2010 could be raising seed money or regular contributions now. She also said that most candidates would probably not be able to raise as much as \$100,000 due to the contribution limit being at \$100 each. The idea behind the increase is to allow candidates to do more to build a campaign and collect qualifying contributions.

Mr. Friedman stated that the comment period is open until October 14, 2008, and further comments may be heard at the next Commission meeting on October 27.

**Agenda Item #2. Request for Waiver of Late-Filing Penalty/Charles R. Bearce**

Mr. Wayne said Charles Bearce was required to file a 42 day post-primary report on July 22, 2008, but filed it six days later on July 28. He said based on the formula in the statute, the amount of the preliminary penalty is \$248.64. Mr. Bearce has requested a waiver of the penalty based on a medical condition of a family member. Mr. Wayne said the staff recommends a partial waiver of the penalty because he is a first-time candidate and because the amount of \$248.64 is disproportionate to the harm suffered by the public from the lack of disclosure.

Rep. Tardy said that due to mitigating circumstances in Mr. Bearce's family during the reporting deadline, he was distracted from the due date. He also said he and Mr. Bearce would support the staff's recommendation to reduce the penalty to \$100.

Mr. Bearce had no further comment beyond his written statement submitted to the Commission.

Mr. Friedman asked Rep. Tardy whether the parties made any attempt to instruct their candidates on filing deadlines and requirements of the Maine Clean Elections Act.

Rep. Tardy stated that both sides – the parties and the Ethics Commission staff – make attempts through packets, memos and electronic transmissions. He said he did not know if his caucus had contacted this candidate or not.

Mr. Bearce said he did receive an e-mail and a written reminder from the Ethics Commission.

Mr. Bearce said his attention was directed towards his family situation at the time of the filing deadline.

Mr. Marsano made a motion to adopt the Commission's recommendation to reduce the penalty to \$100 due to the mitigating circumstance of Mr. Bearce's mother's health issue. Mr. McKee seconded the motion.

The motion passed unanimously.

**Agenda Item #5. Payments of Maine Clean Election Act Funds to Family Member/Robert Zabierek**

Mr. Wayne explained that House candidate Robert Zabierek wishes to use Maine Clean Election Act funds to hire a band to perform at a campaign event on Columbus Day weekend entitled, "*Rock and Register with House District 9 candidate Robert Zabierek.*" His son is a member of the band and would receive \$100 in income from the engagement. He has provided information to the Commission to demonstrate that the proposed expenditure satisfies the criteria enacted in 2008 for payments of public campaign funds to family members. Mr. Zabierek was unable to attend the meeting in person, so he was telephoning into the meeting.

Mr. McKee asked whether Mr. Zabierek's son lived at home in the summer and if he claimed his son as a dependent.

Mr. Zabierek stated his son did not live at home with him, but his son lives in a house in Old Town owned by Mr. Zabierek and his wife. He was not sure if his son was claimed as a dependent since his wife does the income taxes. He said his son is a full time college student, working approximately 25 hours a week at Microdyne during the school year and 40 hours during the summer. Mr. Zabierek only provides a room for his son in the house in Old Town. His son pays for all his other expenses. His son does not live with him during the summer.

Mr. Zabierek also stated that in trying to be creative with his campaign, he is trying to attract the younger voters in his district with the idea of using a band and this campaign event.

Alison Smith, co-chair of Maine Citizens for Clean Elections, stated that she felt this particular case could be covered under the exemption in the statute, but she questioned whether it was necessary. She said the purpose of the new law is to stop candidates from using public money to pay family members. She said the Legislature wants to stop this activity and prevent a personal enrichment scheme. Ms. Smith said it appears that Mr. Zabierek's son is within the same economic unit as the candidate, which could look like personal enrichment. She said the Legislature wanted to ban paying public funds to family members, but settled for narrow exceptions to the rule. She referred to the "Ann Rand Exemption" which came about because Ann Rand uses Dale Rand Printing, a family business, for her literature and print services, which allows for

services that are provided as a regular business to the public also be allowed to be provided to the candidate.

Ms. Luther said this expenditure would qualify under the exception; however, thought should be given to whether it is a legitimate expense and whether this is his son's regular business. She questioned whether the band ever does work for charity purposes and could this event be a donation to the campaign. She said this is the first case under this new law and she said a high standard should be set this first time around. She said the intent of the rule was to stop people from paying family members, not set rules by which candidates could pay family members.

Ms. Smith said Maine campaigns are well known for volunteer efforts and the Legislature does not want the public funding system to change that grass-roots type of campaigning.

Mr. Marsano said the phrase "*legitimate campaign purpose*" concerns him. He said Mr. Zabierek's type of expenditure does not seem to fall into that category and he cautioned against the Commission do anything that suggests approval of this type of expenditure or defines what is legitimate.

Ms. Luther said the definition of legitimate campaign purpose should be left up to the candidate. She said the candidate should decide what legitimate or good campaign strategies are.

Mr. Marsano said if the Commission approves to allow this expenditure, he is concerned that it would appear to the public that the Commission approves this as a legitimate campaign expense. He said the definition of "*legitimate campaign purpose*" should be addressed in order to approve or disapprove this request.

Ms. Smith said the Expenditure Guidelines provided by the Commission do not mention entertainment. She said this type of pre-approval process forces the Commission to make decisions that may set precedence. She said it would be better for the candidates to make the decision and take the risk of making the expenditure. She cautioned the Commission not to get involved and bogged down with defining what is a legitimate expense.

Mr. Greenier stated that if the candidate's son were not in the band, would this expenditure be allowed. He said the amount is not significant. He said that based on what he has heard, he thinks that it is a legitimate expense.

Mr. Zabierek stated that originally the band was willing to play at no cost; however, Mr. Zabierek was under the impression that this was not allowed because it would then become an in-kind contribution.

Mr. Wayne said he was under the impression that Mr. Zabierek wanted the band to be paid. He said anyone can volunteer their services with it being considered an in-kind contribution. He said if that is a possibility then this issue would not need to be decided today.

Mr. Zabierek stated, again, that he did not think this was an option under the law.

Mr. Wayne read the statute exceptions aloud.

Mr. Friedman asked Mr. Zabierek if he would like to offer that option to the band.

Mr. Zabierek said he would be happy to do so; however, he felt that under the circumstances since this was the first case being heard by the Commission under the new rule, he felt this was a good test case for the Commission to decide today.

Ms. Thompson stated she would like the Commission to define the term, "legitimate campaign purpose," and also how the staff relates Legislative intent with regard to developing examples of legitimate expenses.

Mr. Wayne explained that the voters enacted the phrase originally when the Act was adopted in 1996. He said there has not been any guidance from the Legislature with regard to what is a legitimate campaign related expenditure. He said the statute does require the Commission to develop guidelines, which the Commission has done. He said the guidelines are updated every two years.

Mr. Youngblood requested more clarification. He said if the Commission decides today on this issue, does it mean the Commission supports allowing bands as a legitimate expenditure, or does it mean the Commission only approves Mr. Zabierek pay his son \$100.

Mr. Wayne stated that the decision the Commission makes today is broader than this individual item, since it is the first case brought before the Commission with regard to the new rule banning the use of public funds to pay family members. He said there are three criteria in the rule that need to be met in order for an exception to be made. The three criteria used in order for payment to a family member are:

- For a legitimate campaign-related purpose;
- To an individual or business that provides the goods or services being purchased in the normal course of their occupation or business; and
- In an amount that is reasonable, taking into consideration current market value and other factors the commission may chose to consider.

Mr. Wayne said it could be interpreted that the Commission approves the expenditure of the band, if the vote is in favor of Mr. Zabierek's request today.

Mr. Marsano said when the rule was proposed he disagreed with it. He said the preliminary question is whether it is a legitimate campaign expense. He said he was pleased Mr. Zabierek was willing to bring the issue forward for the Commission's discussion and decision. He said this way, the public will know what the discussion was and how the Commission established the decision today.

Mr. McKee said that he was reticent about weighing in on the propriety of expenditure such as this particular instance especially since the Commission has established guidelines that state that a campaign event is specifically campaign-related. He said that the Commission should be very careful about making those decisions for the candidate. He said that when he sees thousands of campaign signs on the roads every election, he questions whether that is such a good idea. But he knows that it is not his decision, as a Commission member, to make. If he were a candidate, he might do it differently. Candidates must have a fairly broad zone in which to act. He said that looking at the facts as presented and the standard that must be applied, he does not see any other conclusion than that this expenditure should be allowed.

Mr. Friedman agreed with Mr. McKee. He said he believes the band is a legitimate expense and he cautioned against the Commission getting into the minds of the candidates and making decisions on how or what is legitimate campaign expenditures. He said bands do play at campaign events and in this case it is very appropriate in order to appeal to the younger voters.

Ms. Thompson made a motion that the proposed concert appears to be campaign related within the normal scope of the band's activities and a payment to James Zabierek appears a reasonable amount and should be allowed. Mr. McKee seconded the motion.

The motion passed (4-1 with Mr. Marsano opposing).

## **6. Update on 2008 Audits**

The Commission's auditor, Sumner Field, updated the Commission on audits of three Maine Clean Election Act candidates who were defeated in the 2008 primary election. These audits were conducted for Edward Kelleher, Henry Simmons and Rick Briggs. No exceptions were noted.

### **Other Business**

**VoteVets.org Ad:** A meeting date was set for October 17 at 1 p.m. for discussion of a request from the Maine Republican Party for the Commission to consider whether action should be taken regarding a television advertisement by VoteVets.org in which a Maine Clean Election Act candidate, Alexander Cornell du Houx, is the spokesperson opposing U.S. Senator Susan Collins' re-election.

**Lundeen Signs:** Rep. Jacqueline Lundeen is currently running for the Senate. Mr. Wayne explained that he received a phone call regarding her campaign signs which include the words, "Your Senator." She is not an incumbent and has never served in the Senate. Mr. Wayne said the sign is misleading; however, the Commission Counsel has cautioned against interfering with First Amendment rights.

Mr. Friedman said at this point, unless a complaint is made, nothing can or should be done.

Mr. Marsano said he did not believe the Commission could do anything about this issue. He said the Commission has no authority on these matters, only to allow discussion to be available for the parties.

**Independent Expenditure by the Maine Democratic Party:** The expenditure was made on September 18 and the report should have been filed on September 19; however the report was not filed until September 26, a week later. The amount was \$4,690 in support of Peter Bowman. The executive director of the Democratic Party said there was a newer member on staff who was unclear about the "express

advocacy” guidelines. Mr. Wayne said apparently the staff person thought the ad constituted issue advocacy and not express advocacy, which is why the IE was filed a week later. Mr. Bowman’s opponent was entitled to matching funds and the State has made that payment. Mr. Wayne explained that the issue is how to handle the enforcement matter. He said the preliminary penalty amount is just over \$300 which is an automatic penalty because the report was late. Mr. Wayne said there is a discretionary penalty when a late filed independent expenditure report results in a delay in payment of matching funds. The Commission can assess an additional penalty of up to \$10,000. He said the staff is not inclined to recommend an additional penalty, since the opponent, Mary Andrews, received her matching funds before the mailer for Peter Bowman was mailed out. Mr. Wayne said the Democratic Party feels the difference between the two types of advocacy is difficult to determine. Mr. Wayne said the state parties need to be made aware that they need to be pro-active in knowing what the requirements for filing are and realize, also, that matching funds are involved so timing is very critical. Mr. Wayne explained that he felt the decision to assess any additional penalty should be decided at the Commission level, not the staff level.

Ms. Thompson asked whether this should be on an agenda with those affected parties present before an action should be taken.

Mr. Wayne said the rules require him to bring this type of issue before the Commission. He said he also wanted the Commission to have the option to initiate an enforcement process, but the interested parties would have to have notice and an opportunity to be heard.

Ms. Thompson said for clarification, initiating enforcement action would be for assessing a greater penalty because matching funds were paid late.

Mr. Wayne confirmed that option. He said the Commission could also wait for a complaint to be filed.

Mr. McKee said more information would be beneficial before an additional penalty is assessed.

Mr. Friedman said one of the Commission’s functions is to educate, not just penalize. He said the publicity about this would educate and therefore it should be placed on the agenda for next month. He said he is not comfortable with proceeding with enforcement until more information is provided.

Mr. Marsano agreed with Mr. Friedman. He said the matter should be brought forth for the Commission to consider.

**2009 Meetings:** Mr. Friedman expressed a desire to meet the first week of every other month. He would like the matter on the next agenda.

**Meetings accessible by internet:** Ms. Thompson asked if the meetings could be broadcast over the internet. She said opening the meetings up to the public is very important. Mr. Wayne will look into the broadcast capabilities of the Public Utilities Hearing room.

Meeting adjourned at 10:35 on the motion by Mr. Marsano; seconded by Mr. McKee and voted on unanimously.

Respectfully submitted,

Jonathan Wayne, Executive Director

Attachment-MCCE



# Maine Citizens for Clean Elections

Hand Out  
Item 4  
9/29/10

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(207) 664-0696 Ann Luther, Co-chair  
(207) 879-7440 Alison Smith, Co-chair  
(207) 317-6310 Jill Ward, Program Director

September 29, 2008

To: Maine Commission on Governmental Ethics and Election Practices

Re: **Seed Money Rule Change**

**Maine Citizens for Clean Elections (MCCE) supports the proposed increase in the Seed Money cap for gubernatorial candidates.**

In the aftermath of the 2006 gubernatorial election, much effort was put into tightening up the Clean Election system to ensure that so-called "fringe" candidates are not able to access public funds for their campaigns. This was an important effort which was fully supported by MCCE.

Important as that was, it is also absolutely critical that the Clean Election option appeal to Maine's strongest, most viable gubernatorial candidates. Having a system that does not attract leading candidates will not allow us to reach the goal of severing the connection between private money and the state's highest office.

As potential gubernatorial candidates contemplate how to finance their campaigns, it is essential that they see that the Clean Election option provides a realistic opportunity to lay the groundwork for a viable statewide race before public funds are available in the spring of 2010. MCCE believes the cap must be raised in order to meet this test.

Seed money is limited private money that candidates may raise early in their candidacy to get their campaign off the ground and successfully fulfill the requirements of the qualifying process. The contribution limit for seed money is \$100 per donor. Corporations and political action committees are barred from making seed money contributions.

Seed money is the only money available to Clean Election candidates between the time they declare for office and prepare to run a statewide race and the time when public funds are distributed in the spring of 2010. For some candidates, this might be a year-long period.

It is appropriate to revisit the \$50,000 cap which was set more than a decade ago when the Maine Clean Election Act (MCEA) was first drafted. The change is in keeping with the higher costs for everything from gasoline to printing, as well as the significantly higher qualifying threshold that 2010 candidates will be asked to meet. Candidates in 2010 will have to collect a minimum of 3,250 Qualifying Contributions -- an increase of 30 percent over 2006.

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*Maine Citizens for Clean Elections is a coalition of groups and individuals that exists to advocate for, increase public support for, defend and improve the Maine Clean Election Act and related campaign finance law. Members include AARP Maine, Common Cause Maine, the League of Women Voters of Maine, League of Young Voters, Maine AFL-CIO, Maine Council of Churches, Maine People's Alliance/Maine People's Resource Center, Maine Women's Lobby, NAACP-Portland, and Peace Action Maine.*

Doubling the cap to \$100,000 is a big jump, and we don't expect that every candidate will raise the full amount. But we see no harm in raising it that high, and it poses no risk of allowing an influx of big special interest money into Clean Election campaigns.

Here is why:

- ✓ The Seed Money contribution limit remains at \$100.
- ✓ At least 1,000 individual supporters would have to donate in order for a candidate to raise the full amount.
- ✓ Only people – not corporations or political action committees (PACs) – may make Seed Money contributions.
- ✓ Raising the cap does not increase the cost of the program, since the money is given voluntarily by individual donors.
- ✓ Candidates will run campaigns on a level playing field, since any unspent Seed Money is deducted from the initial distribution of public funds.

The statute specifically permits the Commission to revise the seed money amounts by rule in order to “ensure the effective implementation of this chapter.” We believe that raising the Seed Money cap will do just that by enhancing the attractiveness of the Clean Election system to the strongest candidates for governor.

We appreciate the Commission undertaking this rule change and fully support its adoption.

# Maine Citizens for Clean Elections

Hand Uer  
Item 5  
9/29/08

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(207) 879-7440 Alison Smith, Co-chair  
(207) 317-6310 Jill Ward, Program Director

September 29, 2008

To: Maine Commission on Governmental Ethics and Election Practices

Re: **Agenda Item #5, Robert Zabierek**

Candidate Robert Zabierek presents the first opportunity for the Commission to rule on the appropriateness of paying a family member since the new law came into effect.

Outrage over the large (\$109,000) payment made by Barbara Merrill to her husband in the course of her gubernatorial campaign spurred the legislature to action, and in the course of the deliberations it was also revealed that quite a few candidates have made payments to spouses, children, and other family members. Typically these have been modest sums for unskilled labor (such as putting up signs) or skilled tasks that are often done by volunteers (acting as campaign treasurer, for example).

As we have testified previously, the clear purpose of the new law is to bar candidates from using Clean Election funds to pay their family or household members. The legislation that passed describes two exceptions to the ban: The first exception is for reimbursements, and the second is a very narrow exception in instances when the household member is a professional who routinely provides a campaign-related good or service during the regular course of their business.

The law was meant to stop the practice of paying family members from public funds, which many legislators feel is simply inappropriate, and to protect against personal enrichment schemes. That is why 'household members' became the standard. The sense was that if someone is in the same "economic unit" as the candidate, they should not profit from public funds.

There was also sentiment expressed that Maine campaigns are known for being grassroots efforts that are fueled by volunteers which often include the candidate's entire family. Legislators did not want to see the availability of public funds change that tradition.

So, the Legislature intended to enact a ban, not a law to require family members or candidates to jump through hoops before expenditures are made. In the course of deliberations in the Legislature, it became apparent that there were some instances where it is important for the ban not to be absolute. One example that was brought up repeatedly was candidate Anne Rand using her family firm, Dale Rand Printing, for campaign materials.

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In that example, the expenditure is for goods and services that are directly related to the campaign – there would be no need for the design and printing of Anne Rand’s palm card if she was not a candidate for office. Dale Rand Printing routinely designs and prints materials for candidates, and is a preferred printer for candidates who want to use a union shop. In that case, under the law, the burden is on candidate Anne Rand to demonstrate what is being requested is the regular business of the vendor and that she paid the same rate as any other candidate/customer – not less, which could indicate that an illegal in-kind contribution was made, and not more, which could indicate the possibility of a personal enrichment scheme.

MCCE believes that the case presented by Mr. Zabierek does not meet the high threshold the Legislature meant to establish for the exemption. The expenditure is only marginally campaign related, and it is arguable whether playing gigs with a band every couple of weeks meets the “normal course of their occupation or business” requirement. And it does not seem particularly important that the payment be exempt from the ban. There is no significant hardship imposed if the younger Mr. Zabierek performs in the upcoming free concert without receiving payment.

We also understand that the amount of the expenditure is not high enough to raise big red flags. Nevertheless, there is some risk in creating a precedent that simply sets the bar too low by allowing a weak rationale for such an expenditure to pass muster.

We respectfully ask the Commission to set the high standard that the Legislature intended by disallowing the proposed expenditure.



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Minutes of the October 10, 2008, Special Meeting of the  
Commission on Governmental Ethics and Election Practices  
Held in Room 208, Burton M. Cross Office Building,  
111 Sewall Street, Augusta, Maine

Present: Hon. Edward M. Youngblood, Acting Chair; Hon. Francis C. Marsano; Walter F. McKee, Esq.; and Hon. Mavourneen Thompson, by teleconference. Staff: Executive Director Jonathan Wayne and Phyllis Gardiner, Counsel.

Mr. Youngblood was nominated by Mr. Marsano to chair today's meeting. On motion by Mr. Marsano, seconded by Mr. McKee, it was unanimously decided to have Mr. Youngblood chair the meeting.

At 12:05 a.m., Acting Chair Edward Youngblood convened the meeting.

The Commission considered the complaint by Rep. Emily Ann Cain regarding a campaign communication by Valerie Carr-Winocour. Mr. Wayne said Rep. Emily Ann Cain has filed a complaint regarding a mailing sent by Senate candidate Valerie Carr-Winocour, who is a Maine Clean Election Act candidate for the State Senate, District 30. He said there are two issues to this complaint. He said the mailing includes the names and pictures of four members of the House of Representatives, along with Ms. Carr-Winocour's opponent and Governor John Baldacci. The first issue, he said, is Rep. Cain argues that the mailing represents an impermissible expenditure of Maine Clean Election Act funds by a Senate candidate to influence House races. Secondly, she believes the mailing should be viewed as an independent expenditure, which would influence the matching funds calculation in one of the House races. Mr. Wayne said Rep. Cain was being assisted today by Michael Mahoney, Esq. He said Valerie Carr-Winocour, participating by phone, was being represented by Daniel Billings, Esq.

Rep. Emily Ann Cain said she represents House District 19, which is within Senate District 30. She explained that she is running unopposed in this election as a Maine Clean Election Act candidate. She said her campaign is trying to spend as little public funding as possible. She said she received this flyer in her

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mailbox a week ago and again today as an insert in her Bangor Daily Newspaper. She called the newspaper this morning to find out what the time frame was for pulling an insert from the paper and was told at least two or three days notice was required. Rep. Cain said she had filed her complaint three days ago. Rep. Cain filed her complaint because she was certain the law did not allow spending MCEA funds outside of a candidate's own campaign. She said even though she is running unopposed, her colleague Richard Blanchard, who is pictured on the flyer, is running a three-way race in his district as is Senator John Martin who is running for the House and is pictured in the mailer as well. She said the content of the mailer concerns her; however, that is not what her complaint is focused on. She said her complaint is regarding the expenditure guidelines as stated in the Candidate Guidebook which she quoted, referring to what she thought were violations made by the Carr-Winocour campaign in this flyer. She said the Guidebook explicitly states, "*MCEA funds may not be spent to make independent expenditures supporting or opposing any candidate, ballot measure or political committee, assist in anyway to the campaign of any candidate other than the candidate for whom the funds were originally designated, contribute to another candidate or political committee or party committee, other than an exchange for goods and services.*" She said the Guidebook also states under Best Practices, "*MCEA funds must be spent only to promote the election campaign of the candidate, expenditures made for any other purpose, personal uses or to promote another candidate or candidate's party or charity are not permitted.*" She also referred to another page of the Guidebook that stated, "*MCEA candidates may spend public funds only on campaign related expenses and not for other purposes such as the candidate's personal benefit, party building or to promote another candidate's campaign.*"

Rep. Cain said this mailer sent out by the Carr-Winocour campaign, in her opinion, clearly does promote another campaign using MCEA funds. She said because it refers to other people running for office on the flyer and advises readers to take the flyer to the voting poll in order to know who not to vote for. Ms. Cain says this wording is a blatant violation of the MCEA rules. She stated that she will win her race on Nov. 4 because she is running unopposed; however, she struggled over whether to file the complaint because she does not have an opponent. She said she cannot counter the Carr-Winocour mailer and flyer because she has limited MCEA funds as an unopposed candidate and she will not get matching funds as result of the Carr-Winocour ads. Rep. Cain stated that Ms. Carr Winocour as a first time candidate running for office should have done more homework and research on what is allowed and not allowed under the Maine Clean Election Act if she intended to run as a candidate under this program. Rep. Cain stated that there are 18 people running in unopposed House campaigns. She further stated she encourages unopposed candidates

use their public funds sparingly when running without an opponent so that they can return funds to the State. However, if this mailer is acceptable under the MCEA, then it means that public funds can be used for ads in other candidates' races. She said that she would be able to use her funds to run an ad against Ms. Carr-Winocour, for example. She expressed concern over publicly funded candidates being allowed to use tax dollars to run campaigns in this manner.

Michael K. Mahoney, Esq., stated the two legal issues facing the Commission: first, whether there was improper use of MCEA funds for non-campaign related purposes; and second, whether this literature constitutes an independent expenditure which would result in matching funds to any qualifying opponents. Mr. Mahoney said regarding the first issue, the statute and the Guidebook both state very clearly that MCEA funds may not be used to make an independent expenditure supporting any other candidate or to assist the campaign of any candidate other than the candidate for whom the funds were given. He said Ms. Carr-Winocour should be familiar with the Guidebook. He said her flyer spells out who the voter should not vote for, which is in violation of the statute.

Mr. Mahoney said the second issue is whether this literature qualifies as an independent expenditure under section 1019-B of the statute. He said this is where the harm to other candidates could be a factor. He said, in his opinion, it does qualify as an independent expenditure since it names a candidate and it expresses the defeat of a candidate(s). Mr. Mahoney said he disagreed with Ms. Carr-Winocour's counsel's, Mr. Billings, position that since it was a Senate race being depicted in the flyer and not a House race, it would not qualify as an independent expenditure. Mr. Mahoney stated that the most reasonable interpretation of the staff's memo, on which Mr. Billings relies for his argument, is that if a candidate or a candidate's committee makes an expenditure for a communication in that candidate's own race, it would not be considered an independent expenditure. Mr. Mahoney pointed out that the Commission's advice is clear that MCEA funds cannot be used for independent expenditures. Mr. Mahoney said Mr. Billings' interpretation would mean that a Senate candidate could make an unlawful independent expenditure that expressly advocates for or against a candidate in the House race because it would not fall under the independent expenditure statute and would not entitle a candidate to matching funds. He said that it would be unfair if a lawfully made independent expenditure would entitle the affected candidate to matching funds but an unlawfully made independent expenditure did not.

Mr. Daniel I. Billings, Esq., representing Ms. Carr-Winocour, said this literature should not be considered an independent expenditure since it is a common tactic for candidates to associate themselves with other candidates, public officials, or issues that will portray their candidacies in a positive light, as well as associating their opponents with people or issues that will portray the opponents in a negative light. He gave some examples of campaign strategies in state and federal elections that associate other candidates in both a positive and negative fashion. He said this literature is no different. He cautioned the Commission not to second-guess what campaign strategies a candidate should or should not employ when running a campaign. Mr. Billings said Ms. Carr-Winocour was using the Democratic candidates' records while in office as an example of what she as a Republican candidate, would not support. He said this is a common tactic in campaigning. He further stated that adopting a position in favor of the complainant would affect the MCEA candidates negatively since it would limit their options for campaign communications.

Mr. Billings referred to a previous complaint back in 2006 against another candidate, David Babin, who stated his position on several issues in newspaper ads, including the Tax Payer Bill of Rights referendum. He said the Commission, at that time, decided in favor of Mr. Babin because the statements were looked at in the context of the ad and how it promoted his campaign. Mr. Billings said because the ad referred to the referendum issue along with other language to promote Mr. Babin's own campaign, the Commission felt it was not in violation. He said the Commission should view Mr. Carr-Winocour's ad in the larger context of the ad itself which, while it does mention other candidates, it does so in a manner that is clearly aimed at promoting Ms. Carr-Winocour's election. He said if the flyer were mailed to only Rep. Blanchard's district and referred only to Rep. Blanchard, then the situation would be different. He said because it was mailed to a wider group of people and referred to more than one candidate makes the context and associations more general in nature, so this flyer does not expressly advocate against anyone in particular. He said the primary purpose of the flyer is to advance Ms. Carr Winocour's own campaign. He expressed concern that this could be considered a misuse of MCEA funds for non-campaign purposes. He said that finding would damage the Clean Election system for future candidates. Mr. Billings also spoke about the insignificant amount of money and the affect it would have in either campaign.

Mr. Billings said Rep. Cain and her counsel are not reading the statute in an obvious fashion. He said the guideline does not intend for an independent expenditure every time another candidate is mentioned in a piece of literature. Mr. Billings stated his view that the guideline should be interpreted to mean that a candidate should not spend his or her funds only for promoting or opposing another candidate. It does not

mean a candidate cannot make reference to another candidate. He also said he was unaware of a previous circumstance where a candidate communication had been considered an independent expenditure. He said in looking at Clean Election Act expenditures, the analysis should be the same as if it were a traditionally funded candidate's expenditure. He said in the past, the Commission has looked at whether the expenditure was to promote a candidate's campaign.

Mr. Billings said with regard to the timing of the flyer in the newspaper, the second distribution was already in the pipeline and paid for and did not occur to the candidate to pull it. He said there was no intent of disrespect to the Commission by running it a second time.

Ms. Thompson asked Mr. Billings if he believes the flyer meets the restrictions of the law, why then did he consider removing it from the Bangor Daily newspaper distribution.

Mr. Billings said the only reason it occurred to him to have the flyer removed was it could be considered by the Commission as a lack of respect for the process or that the complaint was not being taken seriously.

Mr. McKee referred to the statute, 21-A M.R.S.A. § 1019-B, with regard to independent expenditures. He said based on the standards outlined in the statute, this literature appeared to qualify as an independent expenditure. It is an expenditure by a person, which is one of the criteria, and it appears to advocate against the election of clearly identified candidate. Mr. McKee asked Mr. Billings whether he would say that those criteria were met.

Mr. Billings stated that the Commission needs to look at the law in larger context and also consider the purpose of the law. He said the definition of person does not specifically include the terms "candidate or candidate committee" and the Commission could consider that also. He said the purpose of the law is to regulate spending by outside groups which would then trigger matching funds when groups are influencing campaigns. He said the law is not intended to regulate the content of candidates' political communications.

Mr. McKee raised the issue of the presumption period. He said as far as he could see there has been no rebuttal in this case.

Mr. Billings said that a rebuttal statement was not filed because no one considered this to be an independent expenditure. He said it was believed to be an expenditure to advance the candidate's campaign but not an independent expenditure. He said the Commission could consider the evidence and information it has at this point to decide whether the presumption was rebutted.

Mr. Marsano said the point Rep. Cain made regarding the 18 House candidates who are running unopposed in this election is a very good one. He said these candidates are holding a great deal of the public's money, and if Mr. Billings' views were to prevail, those unopposed candidates would have the ability to use their MCEA money on communications that would affect a number of other candidates' races, even though they are not involved in those races.

Mr. Billings said the Commission needs to look at the context of the communication. He said it would depend on how incidental the references to other candidates are. He stated that it is not the job of the Commission to second guess candidates, nor micro-manage candidates' communications. He also stated that each communication should be looked at on a case-by-case basis.

Mr. Marsano stated that this type of communication is a safety cover for the underlying antagonistic attitude towards a particular candidate mentioned in the flyer.

Mr. Billings said it was not a cover-up; it was intended to be Ms. Carr-Winocour's expressions of disagreement with a larger group of candidates who she believes are not doing a good job in the Legislature.

Senator Elizabeth Schneider, by phone, stated that this hearing is very important to the integrity of the Clean Election system. She said in an election referred to as the "clean election," a candidate should not be allowed to perpetuate lies about other candidates, especially candidates running outside their own race. She said the law is very clear regarding the use of wording such as "who not to vote for." She said it is not right to use public funds to influence a race that is not a candidate's own. She stated it is very sad that someone would stoop to this level in order to garner votes. She said tax payers do not want their money spent to sling mud and lies.

Joseph Greenier, Stockton Springs, stated he is a write-in candidate. He said the Maine Code of Fair Campaign Practices means nothing. He said the Commission has candidates sign this form, but it carries no weight when put to the test. He said because the form is meaningless, he refused to sign it. He said he would like to see the Commission make enforcement a priority.

Mr. Marsano said the letter Rep. Cain wrote was brilliant, succinct and accurate. He said he is concerned that the people's tax money might be spent needlessly by candidates running unopposed who would otherwise not need to spend their funds if it were not for this type of communication. He said the violation of the independent expenditure requirements is not egregious; however, as such, it provides the Commission the opportunity to consider these issues and make a determination that will prevent candidates from acting in a more egregious fashion. He also said the people of Maine need to be sure their money will not be used for the purposes of denigrating other people. Mr. Marsano commented that perhaps Rep. Cain may consider Mr. Greenier's statement regarding the Code of Fair Campaign Practices and the Commission's ability to enforce it.

Mr. McKee said the content of the mailer should be left to the candidate's judgment. Even though most people may bristle at ads like this one and even though he does not like them, it is not his job to judge the general propriety of the ads. He said that there was no question in his mind that the communication met the criteria for an independent expenditure as laid out in the statute, since it was a communication that advocated for the defeat of clearly identified candidates. Additionally, he did not hear or see any evidence that rebutted the presumption that it was an independent expenditure.

Mr. Youngblood said this may be a common method of campaigning for some, but public money is not intended to be used for this type of communication. He also agreed this qualified as an independent expenditure.

Ms. Thompson agreed this was an independent expenditure. She asked whether staff has been inclined to change the recommendation after hearing testimony today.

Mr. Wayne said the flyer does contain express advocacy and would qualify for an independent expenditure. He said this type of communication is the only one of its kind he has seen. He said Clean Election Act

candidates generally do not use their MCEA funds to influence other candidate races and the staff does not support the use of public funds for this type of expenditure.

Mr. McKee moved the Commission find this piece of communication an independent expenditure. Mr. Marsano seconded the motion. The motion passed (4-0).

Mr. Billings addressed the remedy issue. He said the total amount of the expenditure was \$3,857.87. He also said when calculating matching funds, the rules allow for taking into account multi-candidate communications. He said in this case the additional amount of contributions above the trigger amount that Rep. Blanchard would be permitted to raise would be very minimal since his district represents approximately one-third of the area that was affected. He said the calculation should also be based on a subjective, qualitative assessment of how much the communication itself is related to a particular race. He cautioned the Commission not to use a simple mathematical formula of dividing the cost of the communication evenly by the number of candidates mentioned. He said doing so could open a loophole for outside organizations to exploit by making incidental reference to some candidates whereas the bulk of the communication is directed at one particular race. He also expressed concern about imposing any financial penalty on Ms. Carr-Winocour because she is a first-time candidate who lacks experience and realizes she made a mistake. He said she never intended to influence the outcome of any other race but her own.

Mr. Mahoney told the Commission, having found the communication qualifies as an independent expenditure, the logical next step to consider is whether it constitutes an improper use of MCEA funds. He said the guidelines state very clearly that, "*MCEA funds may not be used to make independent expenditures supporting or opposing another candidate...*" He said it is important for the Commission to send a message and make a finding of that violation for the sake of precedent. He said MCEA funds should only be used for a candidate's own race.

Mr. McKee offered the option of dividing the total amount \$3,857.87 by three for the purpose of determining the amount of the independent expenditure. He also said he would support finding in violation of Section 1127(1).

Mr. Marsano said he would support a finding of violation; however, he suggested taking ten percent (10%) of the total amount since the impact was not that large to each candidate. He said he would support a civil

penalty of \$50 under Section 1127(1) and said this would send a clear message. He also recommended that candidates who wish to run as Clean Election Act candidates get educated with regard to the guidelines and procedures and what is allowed under those guidelines.

Mr. Youngblood asked if there were a formula used in the past with calculating independent expenditures by more than one candidate or person.

Mr. Wayne said the Commission has not had many cases such as this; however, in the 2004 election a rule was adopted which states that when a person is required to report an independent expenditure for a communication in support of multiple candidates, the cost should be allocated among the candidates in proportion to the benefit received by or detriment to each candidate.

Ms. Thompson asked whether the flyer was limited to only District 30.

Mr. Billings stated that the newspaper does allow for zoning; however, the zone is not exactly the same as the district, so there may be some overlap.

Mr. Marsano stated that it would benefit all parties to have a decision arrived at today. Mr. Marsano asked for clarification regarding the process of imposing a penalty under Section 1127 after finding a violation.

Mr. Wayne said in order to assess a penalty under Section 1127, the Commission would have to specifically refer to the provision in the statute that was violated.

Mr. Marsano moved to find a violation of 21-A M.R.S.A. § 1125(6) and further find the impact was 10% of the total amount of the independent expenditure, \$3,857.87. The motion was seconded by Mr. McKee.

Ms. Gardiner asked for clarification of the motion as to whether 10% of the impact was in reference to the cost to be considered for matching funds.

Mr. Marsano confirmed that to be the case.

The motion passed (4-0).

Mr. Marsano moved to find Ms. Carr Winocour in violation of 21-A M.R.S.A. § 1125(6) and assess a penalty of \$50. The motion was seconded by Mr. McKee.

The motion passed unanimously (4-0).

Mr. Wayne reminded the Commission about meetings scheduled for October 17 at 1 p.m. and October 27 at 9 a.m. to be held in Room 208 of the Cross Office Building in Augusta.

Mr. Marsano moved to adjourn and Mr. McKee seconded the motion. All in favor (4-0).

Respectfully submitted,

Jonathan Wayne, Executive Director