



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

Minutes of the December 20, 2010, Meeting of the
Commission on Governmental Ethics and Election Practices
Held at the Commission Office, 45 Memorial Circle,
2nd Floor, Augusta, Maine

Present: Walter F. McKee, Esq., Chair; André G. Duchette, Esq.; Hon. Edward M. Youngblood; Margaret E. Matheson, Esq., Michael T. Healy, Esq. Staff: Executive Director Jonathan Wayne; Phyllis Gardiner, Counsel.

At 9:00 a.m., Chair Walter McKee convened the meeting.

The Commission considered the following items:

Agenda Item #1. Ratification of Minutes of the October 20 and November 30, 2010 Meetings

Ms. Matheson moved to accept the meeting minutes as drafted. Mr. Duchette seconded.

Motion passed unanimously (5-0).

In consideration of the Commission's practice to address agenda items out of order to accommodate the attendance of public participants regarding particular items, the following agenda item was taken out of order:

Agenda Item #4. Investigation of Cutler Files Website

The Commission considered whether to continue the investigation of the Cutler Files website and whether to take action on a complaint filed by Eliot Cutler's 2010 gubernatorial campaign alleging a violation of the disclaimer requirement and other statutes.

Mr. McKee explained that the procedure will be for the Commission to hear from counsel for each party and then the Commission will go into executive session to receive advice from Commission counsel.

OFFICE LOCATED AT: 45 Memorial Circle, Augusta, Maine
WEBSITE: WWW.MAINE.GOV/ETHICS

Mr. Daniel I. Billings, Esq., counsel for Cutler Files, stated that since this issue was discussed at the previous meeting, the staff has conducted its investigation and the results support the conclusion that less than \$100 was spent on the website. He said the claim that much more money had been spent on research and consultants for the website was false. He said looking over the relevant court decisions on the issues in this matter, they all can be traced back to *Buckley vs. Valeo* where the Supreme Court determined that the State does have an interest in regulating money involved in political campaigns in order to avoid corruption and the appearance of corruption. Even when reference is made to the state's informational interest to support disclosure laws, that informational interest arises from the fact that money is being spent on political campaigns. The State has no interest if there is no money involved. Maine campaign finance laws recognize this because the laws relate to the fact that money is being spent on campaigns. The State has no interest in knowing who is involved in political campaigns when there is no money involved. He said there are no disclosure requirements for individuals who design websites or conduct research unless they are being paid to do that work. He also said it was unfortunate his clients did not seek counsel before the website went online in order to develop other means of getting their research out to the public. The reason they did not do so was because they never thought it was necessary because they felt they were engaged in citizen journalism and had a right to speak. He said had the material been given to an existing political website that covers issues on a regular basis, this matter would have been viewed differently. He said they could have created a legal entity such as an LLC or corporation which would have been listed as the organization making the expenditure, and thus avoided disclosing their personal identities. He said the only reason the Commission has jurisdiction over this matter is because his clients did not choose one of these alternate avenues.

Mr. Billings said, with regard to the staff memo, he took issue with the statement that the readers of the website could not adequately judge the credibility of the material on the website without knowing who the individuals behind it were. He said there were several links within the materials which backed up the research. He said his clients wanted the credibility of the website to be based on the material, not on the creators of the website.

Mr. Billings said he disagrees with the contention of the Cutler campaign's counsel that the *Citizens United* decision effectively overruled the *McIntyre* decision. *Citizens United* dealt with the federal law that required on-message disclaimers. That law has a much higher dollar threshold compared to Maine's law

which has none. In addition, the law at issue in *Citizens United* dealt with broadcast communications which is very different from Maine's law. In fact, if the correct federal law were applied to the Cutler Files, the disclaimer would not be required due to the minimal money involved in this matter. Mr. Billings said that it was interesting to note that the Supreme Court said in *Citizens United* that the Court should look at whether the disclosure of contributors' name would subject them to threats or reprisals. Mr. Cutler's attorney has already threatened the company that registered the domain name of the website with a lawsuit if it did not reveal the name of the purchaser. He also disagreed with the argument that public figures have less of a right to anonymity than others. To make that argument, the Cutler campaign relied on defamation cases. Those cases used the concept of the public figure to protect the rights of individuals to speak. The Cutler campaign takes those cases out of context and turns them on their head in order to limit free speech rights.

Mr. Billings said in closing that the Commission has discretion on whether and how to take enforcement action. He said, first, the statutes and rules have not considered the issue of the Internet and how to deal with matters that arise involving the Internet. Secondly, he said, the amount of money involved is less than \$100 which is minimal and no independent expenditure report was required. He said the disclaimer requirement is there to make it more difficult for people to avoid disclosing expenditures. If a communication has a disclaimer on it, then people will know to look to see whether a report of that expenditure has been filed with the Commission. He said in this case the investigation proved there was no requirement to report. He said also this particular statute is the most violated one but is seldom brought before the Commission. He said quite often during elections the disclaimer is left off or incorrectly reported and rarely results in enforcement action. He referred to some videos produced by the Cutler campaign which were posted on YouTube that had no disclaimer as well.

Mr. Billings also noted that what has driven the most traffic to the website and created its promotion was Mr. Cutler's complaint to the Commission. Mr. Billings said this was part of an intentional campaign strategy on behalf of the Cutler campaign and not because of a significant legal issue or concern over the content of the site.

Mr. Richard Spencer, Esq., counsel for the Cutler campaign, said this was a clear, deliberate and facial violation of the disclaimer requirements in § 1014. He said the people responsible were not just trying to

remain anonymous but tried to mislead the electorate by lying on the site about who they were. He said this material was character assassination through innuendo and demeaning characterization. He said the Commission must apply the exacting scrutiny standard, not strict scrutiny, in assessing the constitutionality of this statute. The state does have a sufficiently important governmental interest in making sure that voters had information about who was speaking about a candidate in the time leading up to an election. He said the Legislature has directed the Commission to enforce the law and it was up to the courts to decide whether the law is unconstitutional. If the Commission were to consider an as applied challenge to the statute, the statute would survive. The website bore no resemblance to Mrs. McIntyre's leaflets. He said the anonymous speakers on this website were public figures who were actively involved in the gubernatorial race and had a reduced privacy interest because of that. He discounted the contention that the website cost less than \$100. He said the payments to a paid political consultant would easily go over \$100. He said one of the creators, he understands, tried to sell the research to another campaign for \$30,000. He also said this candidate involved signed the Commission's Code of Fair Campaign Practices pledge and wondered how the Commission could administer the pledge while protecting the anonymity of the creators of this site. He stated that the reason for wanting anonymity is because the creators do not want to be associated with the misrepresentations on this site. He stressed the importance for the Commission to stand up for transparency and ethical conduct in campaigns.

Mr. McKee moved to go into executive session in accordance with Title 1, Section 405, subsection 4, to discuss information contained in the investigative working papers made confidential by statute pursuant to Section 405(6)(F), and to consult with Commission counsel concerning the legal rights and duties of the Commission and contemplated litigation pursuant to Section 405, subsection 6(E). Ms. Matheson seconded the motion. The motion passed unanimously.

After the meeting was reopened to the public, Mr. McKee explained that the Commission will identify two individuals, not by name, using John Doe I and John Doe II in order to preserve the anonymity of those involved.

Mr. McKee moved, with respect to John Doe I, that the Commission find there was no violation of 21-A M.R.S.A. §§ 1014 or 1019-B; and with respect to John Doe II, that there was no violation of 21-A

M.R.S.A. § 1019-B, but that the Commission find a violation of 21-A M.R.S.A. § 1014(2) based on the information provided in the investigative report. Mr. Healy seconded.

Ms. Gardiner brought up the question of whether the Commission would also make a finding with respect to subsection 2(A).

Mr. Wayne explained that there could be greater challenges in defending this section, however, said he felt that there was a violation of this provision of the statute.

Mr. McKee asked if the motion should include section 2(A) as well.

Mr. Healy moved to amend the motion that the Commission find with respect to John Doe I, that there was no violation of 21-A M.R.S.A. §§ 1014 or 1019-B; and with respect to John Doe II, that there was no violation of 21-A M.R.S.A. § 1019-B, but that the Commission find a violation of 21-A M.R.S.A. § 1014(2) and (2-A) based on the information provided in the investigative report. Ms. Matheson seconded.

Motion passed unanimously (5-0).

Mr. McKee moved that the Commission take enforcement action with respect to John Doe II. Mr. Healy seconded.

Motion passed unanimously (5-0).

Mr. Healy asked for clarification regarding the penalty phase.

Ms. Gardiner said it could be considered an enhanced penalty which would mean a maximum of \$5,000 for misrepresentation.

Mr. Duchette said more discussion needed to take place regarding the type of misrepresentation and how narrowly the statute is interpreted. He said even though there were no names or address disclosed, it could be determined there was misrepresentation, perhaps, through affiliation.

Mr. Healy said the misrepresentation of the affiliation of John Doe II as an agent for the campaign was misleading to voters.

Mr. McKee noted the language in the statute refers to misrepresenting the name or address, however in this case there was no name or address provided on the website.

Mr. Healy said it was also constructed in a manner to mislead people as to who could be the sponsor.

Mr. Healy moved that the Commission assess a civil penalty of \$200 against John Doe II. Mr. Youngblood seconded.

Motion passed unanimously (5-0).

Mr. Healy moved that the Commission find that the statements made on the website misrepresented the name and address of John Doe II. Mr. McKee seconded.

Mr. McKee said although the website was produced to make people believe it was done by someone when in fact it was produced by another, he expressed concern that it was not actual misrepresentation of the "name or address" of the person.

Mr. Youngblood said because the website indicated that more than one person was involved, that part of the statement would not be a misrepresentation. He said that he did not see a basis to conclude that anyone misrepresented a name or address.

Mr. Duchette read two sections of the disclosure statement from the website which he found particularly concerning, "we are a group of researchers, writers and journalists," and "we are not authorized by or affiliated with any candidate or political party and have not been compensated in any way for our effort." He said these statements are troubling because they are misleading as to the identity of the creators of the website and questioned whether they would be considered misrepresentation under the statute. He said the Commission view on how narrowly this statute should be read makes a difference in determining the

outcome. He said he believed the intent was to mislead and to throw people off the trail of the responsible parties. He said for the purpose of interpreting the statute, he believed that identity was the same as name and address.

Ms. Matheson said she disagreed and thought the statute should be interpreted more narrowly. She said the Legislature specifically mentioned “name and address” and if it intended the statute to be broader, the Legislature would have used different language.

Motion failed (2-3). Yeas: Mr. Duchette, Mr. Healy. Nays: Mr. Youngblood, Mr. McKee, Ms. Matheson.

The Commission resumed the scheduled order of agenda items at this point.

Agenda Item #2. Preliminary Consideration of Statute Changes Proposed by Staff

Under 1 M.R.S.A. § 1009, the Ethics Commission may submit a bill to the Legislature by February 2, 2011. Following the December 20 meeting, the staff will conduct outreach to interested persons and will submit a final proposal at the Commission’s January 27, 2011 meeting.

Ann Luther, Maine Citizens for Clean Elections, made the following comments:

- They support the changes in § 1015(4), chapter 13, regarding a candidate participating in fundraising for political action committees which has the sole purpose of working on behalf of that candidate.
- They were troubled by the changes to § 1018 regarding recounts that would expressly allow candidates to receive funds without limits from any source for the purpose of conducting a recount. Raising funds after an election does raise the appearance of possible corruption.
- They support the change to § 1053(3) to require political action committees to file the statement of intent more rigorously and updated regularly. They would even support strengthening this section even more.
- They were troubled by § 1125(6)(d), chapter 14, regarding legislative candidates purchasing personal computers. Legislative candidates should not be allowed to purchase equipment for themselves for later use that they would not otherwise be able to afford with their own resources; however, she cautioned against government regulation of a candidate’s choice of campaign strategy.

- They were concerned that the changes in § 1125, chapter 14, did not address the issue of whether unenrolled candidates had to be certified by the Secretary of State as candidates in the district in which they are running by April 20, which is the end of the qualifying period for all MCEA candidates. She said that she believed that was the intent of the Legislature when it established the April 20 deadline, but because of a conflict with another section of the Act, there is some ambiguity.

Agenda Item #3. Initiation of Rule-Making

Mr. Wayne proposed that the Commission postpone consideration of the proposed rule changes for one month.

Ms. Matheson moved to adjourn and Mr. McKee seconded the motion.

Respectfully submitted,

Jonathan Wayne, Executive Director