Agenda Item #1

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

Minutes of the June 27, 2008, Meeting of the
Commission on Governmental Ethics and Election Practices
Held in the PUC Hearing Room,
PUC Building, 242 State Street, Augusta, Maine

Present: Michael Friedman, Esq., Chair; Hon. David Shiah; Hon. Francis C. Marsano; Hon. Mavourneen Thompson (not present for Items 1 and 2). Staff: Executive Director Jonathan Wayne; Phyllis Gardiner, Counsel.

At 9:01 a.m., Chair Michael Friedman convened the meeting.

The Commission considered the following items:

Agenda Item #1. Ratification of Minutes of the May 30, 2008, Meeting

Mr. Marsano asked for clarification as to which set of minutes were being approved, the one mailed yesterday or the one provided this morning. It was confirmed that both copies were the same. Mr. Marsano moved and Mr. Shiah seconded the motion to accept the May 30 minutes as drafted.

The motion passed unanimously.

Agenda Item #2. Request for Waiver of Late-Filing Penalty/Build Maine PAC

Mr. Wayne explained that Build Maine PAC's campaign finance report due on May 30 was three days late. Mr. John Butts, executive director of the Associated General Contractors of Maine has submitted a letter requesting a waiver of the penalty. He said that based on the formula in the statute, the preliminary penalty amount is $903. Mr. Wayne said the staff recommends a reduction in the penalty because the amount of the penalty is disproportionate to the harm to the public by the late disclosure.

Mr. Marsano moved a penalty of $100 be assessed; Mr. Shiah seconded the motion.

Mr. Butts had no comment.

Mr. Friedman referred to the statute, stating a penalty may be waived due to the amount of harm suffered by the public and a penalty could also be reduced, in whole or in part, for mitigating circumstances. He questioned whether the Commission could reduce a penalty the way the statute was written with regard to "harm suffered by the public." He asked for counsel's opinion.

Ms. Gardiner stated that the way the statute was written it appears that the words "waived in whole or in part" may have been left out of the portion of the statute referring to "harm to the public" clause; however, she felt that logic would say it could be waived in whole or in part.

Mr. Friedman said deadlines are important and there are repercussions when deadlines are not met. He felt that the Commission is too quick to grant waivers when they are requested. He expressed concern over granting waivers when acts of God are not the reason. He said everyone who files knows when the deadlines are and it is the filer's responsibility to be accountable for those deadlines.

Mr. Marsano agreed with Mr. Friedman and said it is difficult to interpret the statute when the wording is written differently within a section of the law. He also agreed with Ms. Gardiner's logical interpretation of this section.

The motion passed 2-1. (Mr. Friedman opposed.)

Ms. Thompson arrived.

Agenda Item # 3. Request for Waiver of Late-Filing Penalty/Maine Citizens for Patients' Rights

Mr. Wayne explained that the Maine Citizens for Patients' Rights is a PAC organized in support of a citizen initiative entitled "An Act to Establish the Maine Medical Marijuana Act." He said the PAC filed its campaign finance report six days late. He said based on the formula, the preliminary penalty amount is $600. Mr. Wayne said the staff recommends a reduction in the penalty because the amount of the penalty is disproportionate to the harm to the public by the late disclosure. He said Mr. Leavitt was present today to speak on behalf of the PAC.

Mr. Leavitt had no comment.

Mr. Marsano moved to assess a penalty of $100; Mr. Shiah seconded the motion.

The motion passed 3-1. (Mr. Friedman opposed.)

Agenda Item #4. Request for Waiver of Late-Filing Penalty/Maine Center for Economic Policy

Mr. Wayne explained that the Maine Center for Economic Policy does not qualify as a PAC, but because it has spent over $1,500 opposing the people's veto referendum regarding the beverage tax, was required to file a report under 21-A M.R.S.A. § 1056-B. He said the organization filed the report five days late and based on the formula in the law, the preliminary penalty amount is $1,097.65. Mr. Wayne said the staff recommends a reduction in the penalty because the amount of the penalty is disproportionate to the harm to the public by the late disclosure.

Mr. Shiah moved to reduce the penalty to $100; Mr. Marsano seconded the motion.

Motion passed 3-1. (Mr. Friedman opposed).

Agenda Item #5. Public Hearing on Qualifications for MCEA Funding for Gubernatorial Candidates

Mr. Wayne explained that on March 20, 2008, the Legal and Veterans Affairs Committee requested that he draft a report, due October 1, 2008, regarding the sufficiency of the current qualifying requirements for gubernatorial candidates seeking campaign funding under the Maine Clean Election Act. He said the memo also requested that the Commission hold a public hearing to receive comments. He said that five sets of written comments have been received. He further explained that during his appearance before the appropriations committee during the last legislative session, he received many comments of concern that the Clean Election Act program was costing more than was originally anticipated when the law was enacted, especially with regard to gubernatorial candidates. Mr. Wayne said that prior Legislatures have taken large amounts of money out of this program in order to cover expenditures in other areas of the state's budget and have replaced some of the funds when needed. He said the net amount removed from the fund is $4.4 million. He said the recent budget bill that passed does contain language which suggests that that amount be returned in 2010, but given the budget climate facing the Legislature, it is not at all

certain that will occur. Mr. Wayne stated his personal view was the threshold allow the program be available for serious candidates only. He also said that the $5 qualifying contribution alone may not be a sufficient screening process for gubernatorial candidates.

Mr. Marsano said given the way the LVA Committee's request was written, he does not feel that the Commission is required to have any input into the report. He also said he saw no evidence of any public advertising of the hearing.

Ms. Thompson asked Mr. Wayne for a review of the 123rd Legislature's changes to the Act and how those changes may effect the funding for the program.

Mr. Wayne clarified for the Commission that there was an ad placed in the Kennebec Journal for comments at the public hearing. He said the number of qualifying contributions a gubernatorial candidate was required to submit increased from 2,500 to 3,250 – a 30% increase. The Legislature also allowed a process for individuals to make qualifying contributions on the Commission's website with a credit card. He said the staff had few concerns that the online qualifying contribution feature may make it much easier for gubernatorial candidates to meet the threshold even with the 30% increase. This would be especially true if the system were also able to verify a voter's registration which is a feature that is under consideration.

Ms. Thompson asked whether the Commission's ability to determine the viability level of the candidate has improved.

Mr. Wayne confirmed that it had. He said the number of contributions required to qualify has increased; however, the results of the online contributions capability is still unknown since only one election cycle has occurred and the gubernatorial was not included.

Mr. Marsano said the Commission's view is not required by the LVA Committee, but he does have comments as a citizen.

Mr. Friedman said there is no Commission action required by the Committee.

Ann Luther, co-president of the League of Women Voters and co-chair of Maine Citizens for Clean Elections, spoke in support of keeping the Maine Clean Election Act program for gubernatorial candidates. Reading from her written testimony, she said that failure to retain public financing for gubernatorial candidates would be a breach of public trust and a loss to the public good. She said that the fund has been eroded by past legislatures that borrowed and she said those borrowed funds should be restored. Ms. Luther stated that if the funds had not been borrowed, the MCEA would be able to fully fund the 2010 election. She further said the program promotes open and honest elections and maximum citizen participation in the political process. She said the MCEA is an exemplar of good government practice which is emulated around the country and the cost of the program is modest in light of the fundamental public benefit it provides.

Mr. Friedman expressed concern over the Legislature making changes to what the voters approved in 1996, and asked Ms. Luther if she felt there was support for making the process more difficult for candidates running in the gubernatorial campaign.

Ms. Luther said the League of Women Voters was in support of the 30% increase in qualifying contributions because this makes it more difficult for candidates to qualify which creates more viable candidates.

Alison Smith, co-chair of Maine Citizens for Clean Elections, handed out letters from former Senate President Rick Bennett and from the Maine Peoples Alliance, a coalition member, in support of keeping the gubernatorial campaigns in the MCEA program. She said public funding at this level is part of the entire program's success, since it is the most powerful office within the State, and reducing private money at this level is important. She said there has been a great deal of scrutiny to protect tax payer money over the years and the Commission has the authority to decertify candidates who are not viable.

Ms. Smith reviewed the Clean Election Act history of hearings, discussions and input on the different ideas for change during the 123rd Legislature. She said policy revisions should not happen as a result of the economy of the State of Maine or whether public funding is a viable program. She said the citizens of Maine support this program. She further stated that the money that was supposed to fund this program has been spent on other State programs by previous legislatures and governors. She said the "just in time"

funding process is not what the citizens of Maine intended when they voted in favor of the Clean Election Act years ago.

Ms. Smith said the qualifying process must separate the "fringe" (non-viable) candidates from the viable candidates. She believes the new qualifying contribution change has raised the bar even higher to a level where only viable gubernatorial candidates in 2010 will seek certification. She said there is more accountability on the part of the candidate because of the Commission's audit procedures. She also supported the new online contribution tool, but does not think that it will decrease the challenge of collecting qualifying contributions in any significant way.

Ms. Smith said the current process is sound and should not be changed at this time, especially during 124th Legislature since the timing would put it too close to the elections. She said one possible change could be to raise the seed money cap for candidates in order to account for the cost of living increase, since this amount was set back in 1994. She said this does not increase the cost of the Clean Election program and would help strong, viable candidates run a successful campaign. She suggested doubling the amount to $100,000.

In summary, Ms. Smith said the Legislature and Commission will always be scrutinizing this program and concern over third party spoilers will never go away. She said her final words are, "Do no harm to this system."

Ms. Thompson asked whether the LVA Committee recommended the seed money cap be raised.

Ms. Smith said the Committee considered whether raising seed money should be mandatory, not whether the cap amount should be raised.

Ms. Thompson asked whether the debates that took place were limited to personal interests or towards supporting the Clean Election Act as a whole.

Ms. Smith said her coalition's role is to educate the Legislature on the background and history of the MCEA in an unbiased fashion with regard to policy issues. She said partisan concerns do arise, but most members on the Committee were interested in making sure the policy is written correctly for all, not a few.

Ms. Shiah asked for clarification regarding the matching funds for gubernatorial candidates.

Ms. Smith said the initial distribution amounts have increased in order to pay more funds up front, early in the campaign. She said this was a fairly uncontroversial change that was proposed by the Commission.

Daniel Billings, legal counsel for the Chandler Woodcock campaign in 2006, said the current qualifying process was very difficult and time consuming. He said these changes have made a difficult process even more difficult. He recommended taking a wait and see approach through the next election cycle to see how the new changes have affected the process. He spoke to the viability issue and how the non-party candidates affect the election process in Maine, where there have been two independent governors elected. He said Maine has supported non-party candidates for governor in the past and they need to be considered viable candidates. Budget concerns and non-viable candidates seem to be the concerns with the program. Mr. Billings said he did not believe the funding concerns should be limited to the gubernatorial campaigns only. He said over two-thirds of the clean election money goes towards legislative races and there are many non-viable candidates in this area. He said the majority of the money goes into the legislative races that have no chance of winning, however, the Legislature looks at the gubernatorial process because it does not affect them. He would recommend looking at the whole system, not just the gubernatorial funding portion.

Mr. Friedman asked about the impact of raising seed money.

Mr. Billings said seed money was an issue that warranted more investigation. He also said it would be good to provide candidates with more money up front since it takes a long time to raise seed money when only $100 per contributor may be collected.

Ms. Thompson asked whether the Legislature has given any thought to require qualifying contributions be collected from various geographic locations in Maine to represent the diversity within the State's population.

Mr. Wayne said that language was not included in any of the bills and he was not aware of any discussions in that area.

Joseph Greenier of Stockton Springs spoke as a candidate in this year's primary election for the Senate. He said he believes the candidates should be doing their own campaign work which would create more viable candidates. He said the Clean Election program was created and voted into practice by the people of Maine; if changes are to be made, he thinks a referendum should be presented to the people for their opinion on how the money should be spent. He said the purpose of the program is to provide regular people the opportunity to run for office. He said the Clean Election fund is for non-political, regular people who want to make a difference.

Mr. Wayne requested direction from the Commission members regarding ideas the members may have for the gubernatorial program. He said the report is due to the Legislature in October.

Mr. Friedman said the Commission members could provide individual input over the next few months for inclusion in the final report to the Legislature.

Ms. Thompson said she believes the report should include comments and recommendations from the Commission as a whole.

Mr. Marsano disagreed. He said the request was made to Mr. Wayne as the director of the Commission directly. There was no mention of the Commission in the request for a report. He said he would make his comments as an individual.

Mr. Friedman said getting a unanimous opinion from the Commission members regarding this issue would be very difficult. He also stated that Mr. Wayne was asked to write the report, and therefore, should be the one who submits it.

Ms. Thompson disagreed with Mr. Marsano. She said policy changes and recommendations should include the Commission's input and she wondered if the LVA Committee had clearly thought out the request.

Mr. Friedman suggested, in the interest of time, putting the item on the agenda for the next meeting in July for further discussion.

The Public Hearing session ended.

Agenda Item #6. Draft Policy on Paying Campaign Funds to Family Members

Mr. Wayne explained that the Commission staff drafted proposed guidance on legislation passed in 2008 regarding the use of campaign funds to pay family members for campaign goods or services. At the Commission's April 28, 2008, meeting, the Commission requested changes to the draft policy, and requested that the staff invite public comment. The staff amended the draft advice in response to comments by the members of the Commission and circulated that to the Commission members. Mr. Wayne said Mr. Friedman expressed his concerns about having Commission members involved in a preapproval process for MCEA payments to family members, but that he would be open to the staff reviewing the submitted evidence prior to the expenditure being made. He said this remains an unresolved issue.

Mr. Wayne mailed the revised draft guidance out for public comment and received comments from the Maine Citizens for Clean Elections coalition. He said the staff drafted two options based on the comments received. He explained the first option would have the candidate submit the evidence before entering into an obligation, showing it was a legitimate campaign expense, that the family member normally provides the service in their normal course of business, and that the amount of the proposed payment was reasonable. Option two would have the candidate submitting the evidence that the payment complies with the statute after the payment has been made when they file their campaign finance report.

Mr. Wayne noted that Mr. Marsano had submitted another option regarding family member payments on the morning of the meeting. Mr. Wayne further noted that Mr. Marsano's draft option would require a more detailed procedure on the part of the candidate but thought it would be manageable.

Daniel Billings said that he was speaking from his experience as counsel for the Woodcock for Governor campaign in 2006 and stated his concern regarding the staff's guideline on reimbursement limits when a family member pays a vendor for services. He said sometimes family members are reimbursed for out of pocket expenses, like cell phone usage and travel, and Mr. Billings is not clear whether this would be allowed under the guidelines. He said this occurs quite often and is not an unreasonable or illegitimate expense. He believes the statute as written would cover this type of expenditure. Mr. Billings did not think that the Legislature intended to outlaw that kind of reimbursement.

Mr. Friedman asked Mr. Billings what evidence would be introduced in this circumstance to get preapproval in his view.

Mr. Billings stated he did not believe preapproval would be required under the statute. He said the statute makes an exception for some reimbursements and therefore would not be subject to the same kind of procedures. He said he thought the documentation requirements would be the same as those in an audit for other expenditures. His concern was that the guidelines seem to limit what kinds of reimbursements could legitimately be made.

Joseph Greenier, a 2008 candidate for Senate District 23 in the Democratic primary, said a family member should be reimbursed, like any other volunteer, for basic out of pocket expenses such as travel. He said running a campaign is costly and it would be unfair if people who did not have a lot of money could not get reimbursed for legitimate campaign work. He supported payments being cleared ahead of time with the Commission staff.

Alison Smith, co-chair of Maine Citizens for Clean Elections, cautioned against making this statute, which is simple and clear, more complicated than was intended. She said the statute was intended to be broad ban with very narrow exceptions. She expressed concerned that in trying to explaining the statute, the guidelines introduced other concepts that add confusion, pointing to the use of the word “may” in describing how candidates should handle reimbursements. She said the Commission should not try to flesh out concepts that do not need to be explained.

She said that her coalition does object to the preapproval option. She said that she thought that candidates should be able to look at the statute as written and the guidelines and figure out whether the expenditure they are contemplating would be allowed under the law. She said the language of the bill uses “will be made” while the summary of the bill uses “was made,” so it is not crystal clear whether the Legislature affirmatively wanted a preapproval process. She said the issue was not discussed at the Legislature. Ms. Smith said that the staff auditor’s suggestion to accept the submission without acting on it is probably a better option. The staff would have the opportunity to notify the candidate if there were an obvious deficiency in the submission. She said the burden of risk to fulfill the requirements should be on the candidate, and they would not be sure the expenditure was in compliance until after they had made the

expenditure and submitted the evidence to the Commission. She said the Commission should not have to make a decision about an expenditure until it had all the information regarding an expenditure.

In regard to Mr. Marsano's draft, Ms. Smith said she believes a preapproval process which would bring expenditures to family members before the Commission is not necessary. She said there is a high level of scrutiny on these kinds of expenditures. People who dispute the appropriateness of a payment can bring a complaint against the candidate before the Commission at any time.

Mr. Marsano said that he does not disagree with Ms. Smith. He said he felt the staff's option one and his draft were the same. He thought that it was possible for a candidate to pre-plan if a candidate's spouse would be traveling for the campaign, submit the documentation, and have it approved. He stated that there should be a way for the public to know that money is to be spent for that purpose. He said he realized that there would be some administrative work to accomplish this but thought it would be minimal once candidates realize what they are required to do. He said that this could be done in a routine procedure before the Commission where the proposed payments are presented on a list and approved in public, not by the staff but before the Commission.

Mr. Friedman stated he supports the preapproval option for expenditures to family members; however, he believes the staff should perform this process since the staff has the expertise in reviewing campaign finance reports. He said the Commission should not have a hearing on that same expenditure after the staff makes its decision. He said the Commission will receive a complaint if someone disapproves of the staff's decision and at that time the Commission would review the matter. Mr. Friedman does not support a Commission review of staff's approval of expenditures under routine circumstances outside of a complaint. He supports the staff's option one but without Mr. Marsano's draft regarding holding a public hearing on each expenditure.

Ms. Gardiner shared some observations. She said the statute does seem to indicate that the evidence should be submitted before an expenditure is made but the statute is silent with respect to any specific procedure. She said there is no requirement that the Commission or the staff make a decision for each and every expenditure. She said the complaint process would bring issues involving an expenditure before the Commission. She cautioned against inventing a procedure when the statute does not call for one. She suggested that the statute may contemplate that the candidate bear the burden to provide sufficient evidence

that supports the expenditure before the payment is made. The evidence will be on file available to the public. The staff will review the evidence in the normal procedure just as it reviews campaign finance reports, and will flag any issues with the proposed expenditure at that time. If anyone, including staff, sees a problem, it can be addressed by the Commission in public as Mr. Marsano suggests.

Mr. Friedman agreed with Ms. Gardiner's interpretation of the statute.

Ms. Thompson asked if Ms. Gardiner's interpretation of the statute was different from Mr. Marsano's draft.

Mr. Marsano said Ms. Gardiner's interpretation was different from his draft. He stated Ms. Gardiner's interpretation would keep the current policy in place, which means many instances, in his opinion, would not get public attention. He said he believes the public creates this Commission for the purpose of having these issues viewed in the public eye. Mr. Marsano said the Legislature enacted this law to address an issue that occurred in the last election which did not get aired in public before the expenditure was made. He said that the public wants to know if a candidate intends to pay a family member before the payment is made. He said the public is entitled to know and it should be done before the Commission.

Ms. Thompson stated that school boards and city councils have a process at budget meetings that includes a list of personnel actions which the board looks at during their public meeting and approves or disapproves. She said the list is reviewed in a public meeting for total transparency of public money. She said it is the Commission's responsibility to oversee the public funds and a review of candidate expenditures should be in a public forum, such as a Commission meeting. She would like to see a list of candidate expenditures to family members created for Commission review at regularly scheduled meetings.

Ms. Gardiner suggested a third option which would have a list of proposed expenditures available at a meeting, not necessarily for approval or disapproval, but for informational purposes. She said this would not require the Commission to act on each instance, but would be available for the Commission's review and the public's review.

Mr. Marsano said his draft option would be a simple, routine procedure. He said this procedure would, in his opinion, circumscribe overuse of public funds. He further stated that Ms. Thompson described exactly the procedure he would want to see implemented.

Mr. Shiah asked how this proposed procedure would have affected the expenditure made by Barbara Merrill's campaign in which a large payment was made to her husband, Phil Merrill.

Mr. Marsano said that the question in that case would have fallen under § 1125(6-B)(B) to see whether that corporation was in existence and his recollection was that it was. He said there would have been public disclosure of the proposed expenditure and it probably would have been approved. He said the problem at that time was that the public found out about the expenditure after it was made.

Mr. Friedman said he supports keeping the public informed; however, he does not believe the Commission should be involved in every expenditure made to family members by every candidate running for office. He expressed concern over the volume of cases that would be brought before the Commission and said the staff should be handling this oversight. He said the statute requires the submission of evidence and once submitted it becomes public. If there is an issue, the press or the public will bring attention to it.

Mr. Marsano said this procedure would be limited to expenditures to family members only. He said there is legislative intent for the Commission to review the expenditures.

Ms. Thompson moved that the draft characterized as the Marsano Draft regarding Timing of Submitting Evidence; Procedure for Commission Action replace the three paragraphs on page 2 of the draft submitted to the Commission by the staff entitled "Policy on Paying Campaign Funds to Family Members."

Mr. Friedman, stated for clarification, that under the Marsano Draft, there would be no expenditure made until after the Commission reviews the expenditure.

Mr. Marsano seconded the motion.

Mr. Shiah asked Ms. Thompson if she was comfortable with the last statement in the Marsano Draft, "The Commission must hold a hearing on the matter at the next regularly scheduled meeting of the Commission to determine if the proposed expenditure meets the requirements of the statute."

Ms. Thompson said she intended that statement be in her motion. She said city councils and school boards use this practice at their meetings and it is a very quick process. She said if it takes longer, she believes it would be for a legitimate reason.

Mr. Marsano said he put "regularly scheduled" in order to avoid a special meeting.

Mr. Friedman asked how this process would work during the last few weeks of the election, when a candidate had to make an important expenditure to a family member for their campaign, but the Commission could not approve the expenditure because there was no meeting scheduled.

Mr. Marsano said this procedure requires candidates to plan ahead and act accordingly. He said that he does not think that there will be an issue with an unmanageable number of requests.

The motion passed by a vote of 3 to 1, with Mr. Friedman opposed.

Mr. Marsano stated that the Commission needed to adopt the entire policy in its final form which would include the paragraph just approved.

Mr. Shiah moved to approve the draft Policy on Paying Campaign Funds to Family Members with the insertion of the Marsano Draft under "Timing of Submitting Evidence." Mr. Marsano seconded.

The motion passed unanimously.

(Ten Minute Break)

Agenda Item #7. Draft Guidance on Ballot Question Committees

Mr. Wayne explained that in 2008, the Legislature changed reporting requirements for organizations that file 1056-B reports and adopted a new term, "ballot question committee," for organizations which do not qualify as political action committees but spend more than $5,000 to influence a ballot question. The staff drafted guidance on the amended reporting requirement for consideration by the Commission. Mr. Wayne further explained that a draft was sent out for public comment and two written comments were received, one from Carl Lindemann, TrueDialog.org, and the other from Patricia Peard, an attorney who represents

several educational and advocacy organizations. Mr. Wayne said Ms. Peard was not able to attend the meeting; however, Zachary Heiden from the Maine Civil Liberties Union will be speaking. Mr. Wayne further stated that Ms. Peard's concern is that the guidelines would require educational and advocacy efforts that are unrelated to ballot questions to be reported to the Commission. In her written testimony, Ms. Peard encouraged the Commission to adopt an "express advocacy" standard for determining which expenditures were covered under § 1056-B.

Mr. Zachary Heiden is the legal director of the MCLU. He recognized that the Commission is well aware of the problems that can come about as a result of the way in which the First Amendment shapes the regulations and statutes passed by the Legislature. He also recognized the difficulty of the Commission's role in promulgating guidelines in harmony with legislation while respecting First Amendment and due process jurisprudence. Mr. Heiden said that, in developing guidelines, the Commission should start with the assumption that the Legislature intended the legislation to be consistent with established First Amendment case law and due process protections. Mr. Heiden had three points that he presented to the Commission. First, he said that the First Amendment provides a broad protection for public education and advocacy. That protection is based on the power of words to shape opinion and the principle that more speech will provide more information to people on a particular issue. Courts have recognized that there is a legitimate interest for the state to regulate some areas of electoral activities but the courts have also required a bright line test for those regulations so that they do not intrude on the broad protections afforded to speech. He said that the test should be based on the express advocacy standard as it currently exists in election law rather than a test that relies on interpreting the purpose or intent of the person speaking.

Secondly, in addition to the First Amendment concerns, Mr. Heiden said that there was a due process issue raised by the guidelines as written. He said that it would be unfair to organizations who traditionally conduct public education or advocacy activities on a particular issue to suddenly be subject to regulations and reporting requirements simply because a third party had started a citizen's initiative that involves that issue.

Mr. Heiden's third point was that a bright line test will allow potential § 1056-B filers to easily determine whether they are engaging in regulated activities or speech and will avoid the confusion, disputes and litigation that could come about if the test were based on the speaker's intent or the future effect of the speech.

Mr. Friedman said the Legislature did not pass the express advocacy changes in the bill that was recently enacted. The Legal and Veterans Affairs Committee even voted unanimously that a bill that contained the express advocacy standard ought not to pass.

Mr. Wayne confirmed that, in 2007, the Legal and Veterans Affairs Committee considered a bill that contained the express advocacy standard and voted "ought not to pass" on it while reserving the right to consider the issues in the bill at a later time. Mr. Wayne said that it did not appear to him that there was a great deal of support for the content of the bill that contained the express advocacy standard. Mr. Wayne further stated that it appeared that there was no interest from the Committee in the express advocacy standard.

Mr. Friedman asked Mr. Heiden his views on whether the Commission's role in drafting guidance should be affected by the Legislature's lack of interest in express advocacy.

Mr. Heiden did not believe the failure of the Legislative to take a particular action was evidence of anything specific. There could have been any number of reasons why the Committee voted against it. In general, courts do not accord much import to legislative history for that reason.

Daniel Billings, Esq., representing the Maine Heritage Policy Center (MHPC), said this issue was brought to light by the complaint filed against MHPC for their involvement with the tax payer bill of rights (TABOR) referendum in 2006. Mr. Billings said that if the Commission is going to regulate political speech, which is what happens when reporting requirements are imposed, the courts have said that there must be a bright line test as to what speech triggers the requirement and what speech does not. Even though there are some tests that are variations on the express advocacy standard, such as the electioneering test in federal law and the rebuttable presumption for independent expenditures under Maine law, those are still bright line tests. Mr. Billings said that he shared the concern raised by Mr. Heiden regarding the speech of certain organizations being swept up in § 1056-B because it was related to the same subject matter as a ballot question. Mr. Billings gave the example of MHPC and the proposed people's veto of the beverage tax. He said that MHPC is not involved in the ballot question but has written extensively on the Dirigo program on a regular basis. If it published a report on Dirigo in October, it could be covered under § 1056-B, even though it is not involved in the election and the publishing of the report is consistent with

MHPC's conduct prior to the ballot question. It should not be required to report because some other group has started a referendum drive. Mr. Billings pointed to the staff's guidelines regarding research and analysis as an example of how the guidelines were not clear as to what kind of speech was covered. He suggested the Commission establish a bright line test that is in line with the statute. The statute must be read in conjunction with the First Amendment and the resulting case law. Mr. Billings stated his preference for the express advocacy test but said that there are probably other tests that would pass constitutional scrutiny.

Ms. Gardiner asked Mr. Billings for his views regarding a different bright line test other than the express advocacy test. Ms. Gardiner asked whether the bright line could be defined by the extent to which information such as reports and analyses are disseminated, whether it would make a difference if the report were posted on an organization's website as opposed to being printed and distributed to a large number of voters around the state. She asked whether an objective indicator such as that could lead to a bright line test.

Mr. Billings said it would still be difficult to establish a bright line test based on whether the expenditure was for a communication that went directly to the voters or whether it was an indirect communication. He said increasing the threshold from $1,500 to $5,000 was a positive change that the Legislature did in this bill. He also said that a bright line test along the lines of the rebuttable presumptions for independent expenditures in candidate campaigns might be something that would withstand scrutiny. If the communication specifically mentioned the ballot question, that might be an acceptable bright line test.

Mr. Friedman asked for Ms. Gardiner's thoughts on how to evaluate express advocacy with regard to the guidance procedures and the statute.

Ms. Gardiner stated that the Commission is not required to adopt an express advocacy test. She explained that when the 1056-B guidance was originally drafted, the Commission requested comments and input from a variety of organizations that were involved with filing the reports and the TABOR referendum. Most organizations at that time did not think an express advocacy test was appropriate and favored a broader disclosure view. Ms. Gardiner said this statute does not set limits on the content of speech or restrict who can engage in speech, it only requires after the fact reporting that this money was spent or raised for these communications. She said this diminishes the burden on First Amendment rights and when courts evaluate

regulations relating to political speech, it looks first at the extent to which a regulation burdens the First Amendment right of expression. She said clarity and bright lines are helpful when dealing with First Amendment issues. However, she did not think that there was anything in the policy as written that would sweep all the organizations that Ms. Peard mentioned into § 1056-B reporting. Nonetheless, the staff guidance may leave some questions unanswered. It may be worth considering if there are other ways to add clarity, short of adopting the express advocacy test. She said even though courts do not give much weight to the Legislature's decision not to adopt something, as the agency charged with administering the statutes, that decision can inform the Commission's view as to how it should interpret that statute. The Commission may not want to use the express advocacy test given that the Legislature choose not to adopt it and that most of the entities that commented previously on the proposed guidance two years ago did not want the express advocacy test and the fact that it is not required under First Amendment law. But there may be another way to give guidance to advocacy organizations so they know what they need to report when the subject matter of their advocacy becomes the subject matter of a ballot question. In 2006, most of the organizations said that the Commission should err on the side of more disclosure.

Mr. Friedman asked if Ms. Gardiner could add more clarity from a legal standpoint after reviewing the staff's proposed draft. Ms. Gardiner said she could look at the draft again to check for clarity.

Mr. Friedman said after reading the draft, he would like more clarity and asked another draft be presented at the next meeting.

Mr. Marsano stated he thought that time was an issue since Mr. Heiden and Mr. Billings suggested that the guidance might seriously impact their actions. He said that he did not want to vigorously disagree with them, but that they advanced their positions as advocates. He did not think that the questions are so serious that a decision ought to be deferred.

Mr. Shiah expressed his desire for more clarity and would support the request for an additional draft to be submitted at the next meeting.

Mr. Friedman said that people will make decisions based on the statute with or without the guidance. The guidance will add some clarity and the Commission will give its best effort to make sure that the guidance

is clear from a legal standpoint. Mr. Friedman said that this matter will be on the agenda for the July meeting.

Agenda Item #8. Complaint regarding Campaigning at Polls/Rep. Charles Harlow

Mr. Wayne explained that Wayne Capron is challenging Rep. Charles Harlow (House District 116) in the 2008 general election for House of Representatives. Mr. Capron filed a complaint alleging that on June 10, 2008, when the primary election was held, Rep. Harlow campaigned within 250 feet of a polling place in violation of the restrictions on polling places in the Election Law, handed out campaign literature, wore his legislative nametag, and stopped cars. Mr. Wayne explained that the Commission does not have jurisdiction over the administration of polling places since that is handled by the municipal clerks and the Secretary of State's office. Mr. Capron's complaint is based on the Code of Fair Campaign Practices. He believes Rep. Harlow's actions violate the Code of Fair Campaign Practices, which Rep. Harlow signed. His complaint alleges that Rep. Harlow's actions interfered with the free expression of the voters which is contrary to a specific pledge in the Code.

Mr. Friedman stated he would like to have a preliminary discussion on the jurisdiction issue. He said the Commission should establish that before going forward to hear the complaint.

Mr. Wayne stated that the Commission staff researched the legislative history of the Code of Fair Campaign Practices (21-A M.R.S.A. §§ 1101-05). He said the Commission may wish to give further direction to the staff about handling requests for advice or complaints of campaign conduct which relate to the Code. Mr. Wayne said the history of the Code, which is also Agenda Item #10, has been attached for review. He said the issue is the statute states the Commission's requirement to distribute the Code to candidates and to inform candidates that it is a voluntary code. The Commission acts as a repository for those forms of those candidates who do subscribe to the Code. The statute does not explicitly give the Commission the authority to investigate any violations against the Code, to reach a determination if a violation occurred, or punish anyone who does violate the Code. Mr. Wayne said the question remains as to the appropriate forum in which to air complaints of Code violations and as to the purpose and extent of the Commission's administration of the Code if there is no remedy.

Ms. Gardiner stated that it is difficult when the Legislature only takes a statute part way and raises expectations that there ought to be a forum for complaints other than simply the press and the public square. She said the Commission has only authority granted by statute, which Mr. Wayne accurately described. She said the Commission is not precluded from giving the public an opportunity to be heard, but has no authority or power to do anything about complaints.

Mr. Friedman said if the Legislature wanted the Commission to investigate complaints of the Code, it would have given authorization to do so. He stated the Code is voluntary and if the Commission accepts jurisdiction, the candidates may not sign the form. He said if a candidate has a concern with another candidate, then that should be raised in the public sector, not before the Commission.

Ms. Thompson said that she did not see anything in the statute or the materials provided for this meeting that she could interpret as a grant of authority and jurisdiction to the Commission. However, she stated that she believes that the Commission can and should provide an opportunity for a citizen to bring an issue before the Commission, with the knowledge that the Commission does not have the jurisdiction to make a decision.

Mr. Marsano said he would support letting the parties who are present at a meeting at least argue the jurisdiction question. He said the complainants should have an opportunity to be heard in public.

Mr. Friedman and Mr. Shiah supported letting the parties be heard on the jurisdiction issue.

Kenneth Capron, a candidate for House District 116, said that he understood that there was jurisdictional issue regarding the complaint. He said that as far as he could determine, the Commission does not have any jurisdiction over any part of the complaint. He said the Legislature should address the jurisdiction issue. He said he would like the Commission to recommend that the Attorney General's office look into this matter since, in his view, Mr. Harlow committed a Class E crime. He further stated that the Code relates to candidates' ethics and he wondered who else but the Ethics Commission would have authority to hear complaints.

Representative Harlow said that he believes that the Commission has the jurisdiction to hear the complaint and that he would accept what the Commission decides. He said he asked the warden if he could pass out

papers and the warden approved it. Apparently, the warden did not know Rep. Harlow was on the ballot. Rep. Harlow said he wore his State of Maine name tag, not a political name tag.

Joseph Greenier stated he believed the Commission does have jurisdiction in this area. He read from an Executive Order dated 1989 regarding Maine State Government Code of Ethics. He also said he supports legislation that would promote ethical standards.

Dan Billings, Esq., speaking as counsel for the Senate Republican campaign committee, stated that the Commission does not have authority to take up these types of complaints. He said the law is clear on the Commission's jurisdiction in this regard. He stressed the importance of making a decision today regarding jurisdiction, in order to give the staff guidance going forward so these matters will not be put on the agenda. He cautioned that if these matters are allowed to come before the Commission, candidates will use this venue to their advantage in order to get publicity to air their differences in a public forum.

Mr. Wayne informed the Commission that there was another candidate, Kimberly McLaughlin, who is waiting to be heard today regarding this same issue.

Kimberly McLaughlin, a candidate for House District 107 in the Democratic primary election, stated that she was very confused with regard to where she should go to file her complaint. She said the Candidate Guidebook gives no advice or guidance to candidates regarding procedure and enforcement of the Code. She said after reading through the statute and listening to comments today, she believes a request should be made by the Commission to the Legislature to request jurisdiction and a procedure established to address complaints regarding violation of the Code. She said there is no recourse in place. She said that some of the issues raised in the complaints may not rise to the level of a referral to the Attorney General's office, but should be addressed by a state agency for enforcement.

Ms. Thompson asked whether some of the issues raised by Ms. McLaughlin should be handled by local officials.

Ms. McLaughlin said that the Candidate Guidebook does not provide guidance on that issue and she could not answer that question.

Mr. Wayne said that removal of signs is a police matter. Ms. McLaughlin has already brought up with the superintendant of schools the use of a school computer system by her opponent for political purposes. He was not certain who could handle the anonymous phone calls to which Ms. McLaughlin refers in her complaint.

Mr. Marsano said that if the Commission did have the authority to listen to the parties there may be some factual aspects raised in a complaint for which it might be helpful for candidates to air in public. If the Commission were to accept the facts, even if it had no authority to do anything about it under the Code, it would at least be information that would be available for them to use at a later time in the campaign. He said that a factual determination would have to be made in a public venue.

Ms. Thompson said that the Commission is a venue by default because there is no clear grant of jurisdiction regarding the Code.

Mr. Friedman stated the Commission should not get in the middle of campaign issues. He said the place for political publicity and candidate complaints is in the news media or some other public venue, not at a Commission meeting.

Ms. McLaughlin said candidates need a place to voice complaints and an agency to go to for enforcement when the rules of the Code are not followed. She said the news media is not the place for that type of publicity because the news media does not report accurately. She said there should be a review of these matters along with an enforcement mechanism. She said the Code implies there is an enforcement mechanism.

Mr. Marsano said there is no enforcement mechanism and candidates need to be aware of this. He said that at least the Commission is a venue in which complainants can address their concerns even if the Commission only has jurisdiction in very narrow circumstances. He said perhaps if these issues are heard publicly, it will cause a mechanism to be created.

Ms. Gardiner stated, for clarification, that people may come before the Commission to speak by way of general public comment, but if the Commission allows testimony and proceeds with finding of facts, she cautioned the Commission does not have a role by statute. The Legislature did contemplate a complaint

process and declined to adopt one. She said if the Commission were to engage in a partial complaint process with testimony and factual findings it would be going beyond what the statute provides.

Denise Harlow said she is nervous when campaigns are allowed to take information that may or may not be factual and use the information against their opponent. She said taking issues into the district, as suggested by the Commission, is just creating a bad situation.

Mr. Friedman moved that the Commission adopt the position that it decline to accept complaints based upon the Maine Code of Fair Campaign Practices on the basis that it lacks jurisdiction to do so; and further, when issues under the Code of Fair Campaign Practices are brought to the attention of Commission staff, the staff take steps to refer the individual to the proper authorities.

Mr. Marsano stated there were two motions; Mr. Friedman said there were two parts to one motion.

Mr. Marsano asked for clarification of the motion.

Mr. Friedman said the motion refers to matters within the Commission's jurisdiction. Mr. Friedman said several months ago an individual came before the Commission with a boundary dispute issue because he thought ethical rules should be established for issues on boundary disputes. Mr. Friedman said there are many agenda items that fall within the Commission's jurisdiction and to have issues come before the Commission that do not fall within its jurisdiction will make the Commission's job more difficult.

Mr. Friedman amended this motion. He moved the Commission find it does not have jurisdiction to hear complaints under the Maine Code of Fair Campaign Practices. Ms. Thompson seconded.

Mr. Shiah stated that the staff should make it known to candidates up front that the form is voluntary and there is no jurisdiction for the Commission to enforce it.

Ms. Thompson asked for clarification. She said the public needs a venue and some recourse for campaign related problems. She suggested asking the Legislature to give the Commission authority to handle complaints.

Mr. Wayne said a bill was submitted as a result of a complaint during the 2006 election to provide the Commission with authority, but the legislative committee unanimously voted ought not to pass. He said, however, a letter could be submitted to the legislative committee and leadership requesting advice.

The motion failed (1-3). Mr. Friedman voted in favor of the motion; Mr. Marsano, Mr. Shiah and Ms. Thompson opposed.

Mr. Shiah said that the staff should communicate to candidates that the Commission does not have any jurisdiction over complaints based on the Code so that they do not have the expectation that the Commission can resolved these matters. He said that it should be communicated this year.

Mr. Marsano said jurisdiction can be divided into two parts, the first being the Commission has no power over violations of the Code, the second having an opportunity for people to come forward and express their views about the facts and be heard in public. He suggested also having the statement, "The Commission has no power of enforcement" printed on the Code form.

Mr. Friedman expressed concern over the time constraints of the meeting. He asked the point in coming before the Commission when the Commission has no jurisdiction.

Ms. Thompson reminded that recently a vote was taken to have a public comment session on each agenda but it was defeated; she thought it should be brought forward again.

By way of analogy, Ms. Gardiner said when courts determine they do not have jurisdiction, then further presentations on the matter are not heard. She, again, cautioned the Commission not to exceed the authority granted by the Legislature.

Mr. Marsano disagreed with Ms. Gardiner's analogy. He said people should at least have the opportunity to speak publicly even though it takes time from a meeting. He said not allowing comments to be heard leaves the Code twisting in the wind.

Ms. Thompson said the interpretation could be the Commission has jurisdiction to hear complaints but does not have jurisdiction to do anything about the complaints.

Mr. Friedman expressed concern over the number of complaints that would come before the Commission if word gets out the Commission can hear complaints.

Ms. Gardiner said the Rules have a provision that states if the Director and Counsel agree the subject matter of a request for investigation is outside jurisdiction, the request may be forwarded to the appropriate authority or returned to the complainant. She said there is a mechanism in place now for matters outside the jurisdiction of the Commission.

Mr. Shiah said it is a waste of time for candidates to come forward with complaints to the Commission if there is no recourse. He said that he did not see what the candidates would gain from that.

Ms. Thompson suggested that the staff write a declarative statement for the Guidebook, under the section for the Code of Fair Campaign Practices, that informs candidates about the role of the Commission in administering the Code. She said the guidebook needs to be clear on this matter.

Mr. Wayne said there will be a mailing going out next week to all candidates that could include this type of information. He said he could e-mail the Commission the language to include in this mailing.

Mr. Marsano said the language in the mailing should state that the Commission has no jurisdiction to enforce violations of the Code. He said that will leave the door open for those that want to come to a meeting to be heard.

Ms. Thompson moved to have the staff craft a declarative statement that will be issued to candidates and in the Guidebook regarding the absence of jurisdiction to enforce the Code of Fair Campaign Practices. Mr. Shiah seconded.

The motion passed (3-1). Mr. Friedman opposed.

Agenda Item #9. Use of the Term "Re-Elect"

Mr. Wayne explained this issue came up because of advice regarding sign wording given to a candidate by Paul Lavin, Assistant Director. The advice given on use of the word "re-elect" was more cautious than a Commission member would have liked.

Zachary Heiden, legal director of the Maine Civil Liberties Union, said he was concerned that there was even a consideration that it was the proper purview of this Commission to regulate the use of a term, such as "re-elect," on a campaign sign. Based on his understanding of First Amendment law, it was unquestionable that such regulation is beyond the authority of this Commission. He said the term itself is ambiguous and could be used in a variety of instances.

Mr. Marsano said the original request that was made to the Commission was based upon whether "re-elect" was improper. He said he believed this issue should have been discussed in the open, especially with regard to the use of this term during a primary election. Mr. Marsano said he supports having an open discussion about this type of advice.

Mr. Heiden said he agrees with discussions taking place in the open; however, he said a Commission meeting is not the proper venue. He said these meetings are not public forums for hearing campaign disputes. He said a campaign discussion takes place in traditional public forums – the public square, media, candidate forums, etc. He said this Commission does not have the authority to advise on campaign speech.

Mr. Marsano said once there has been public reference to the Commission, that changes the realm.

Mr. Heiden said what a politician says during a campaign should always be acceptable by the Commission because of First Amendment rights because the Commission has no authority to regulate it.

Daniel Billings said the important piece the Commission needs to communicate to candidates and the public is that the Commission does not regulate the content of political communications. He said the wording of signs is not a matter for consideration by the Commission.

Mr. Greenier said he thinks this issue only created free publicity. He said matters such as this that are brought up at Commission meetings are free publicity for campaigns. He also said the term may be used if a candidate was ever elected.

Ms. Gardiner cautioned that the Commission is not authorized to issue any view as to the appropriate use of wording on signs or campaign speech.

Mr. Friedman pointed out that this matter was on the agenda, not because of a complaint filed with the Commission, but because of a discussion at the last Commission meeting. He did not think the Commission needed to take any action on this item.

Mr. Marsano said the matter was brought forward by him because the Commission was referred to in a news article. He said attributions made about the Ethics Commission need to be accurate.

Agenda Item #10. Jurisdiction of Ethics Commission Regarding the Code of Fair Campaign Practices

This item was discussed under Agenda Item #8

Agenda Item #11. Staff Advice and Other Administrative Issues

Daniel Billings, Esq., stated he represents many parties before the Commission and has asked for advice from the Commission staff on many issues, both within and not within the Commission's jurisdiction. He said his experience has been that the staff are very helpful and their advice has increased compliance by candidates. The fact that candidates and others can seek advice and not have their request placed on a public agenda is an encouragement to seek staff advice and this lead to better compliance. He said the staff is very good at what they do. He is concerned that if more matters are placed on monthly meeting agendas, simple questions that can avoid a problem will not be asked by candidates or PACs. He said in his experience the staff has been fairly conservative about advice given and if an area is unclear, the staff refers the matter to the Commission at the next meeting. He said his experience is that the advice is always within statute and rules. He further stated other regulatory bodies that permit their staff to give advice to regulated communities – such as Overseers of Bar, for an example. He said with regard to the issue of wording on a sign, he feels Mr. Lavin was well within the limits of the law and rules. He also stated that

articles get into the newspapers regularly, and the Commission cannot control what appears in articles. He said the staff has served the Commission well in the past and very few issues regarding staff advice have come before the Commission. This is an important service that advances the purposes of the statutes and the support of the public and the Legislature for the Commission. He said limiting the staff's ability to advise would hurt that support.

Mr. Friedman stated that the Chair of the Board of Overseers works in his office and the staff does receive calls asking for advice. He said there are other state agencies such as Workers Compensation Board, Maine Human Rights Commission whose staff give advice to the public. Mr. Friedman said he has total confidence in the Commission staff. He said historically the people the staff has served say the staff is very helpful. He said the advice helps prevent issues from coming to the Commission. He said if there is a question about policy, the staff refers the matter to the Commission to make final determination. He cautioned against micromanaging the staff and limiting inquiries they can respond to on a daily basis.

Mr. Shiah agreed with Mr. Friedman and Mr. Billings. He said there are other agencies such as the Board of Environmental Protection and LURC whose staff gives advice. He said the staff is very capable and he did not think it was necessary to have a log of phone calls and advice given. He said he did not want the Commission to micromanage the staff.

Alison Smith agreed with Mr. Billings and said not only state agencies but also municipal agency staff provide advice to regulated communities. She cautioned against cluttering the agenda with administrative matters that the staff is capable of handling. She said matters of policy will come before the Commission if need be. She said putting matters on the agenda for the sake of public discussion is not an efficient use of time, nor is it the proper venue. She said that not all arguable matters need a government-sponsored venue for a pubic argument about it. She said the campaign finance program is for regulating money, not speech.

Mr. Marsano said he was responsible for this item being placed on the agenda. He said the staff has responded well to his past inquiries.

Mr. Friedman stated the Commission's appreciation for the staff's work.

OTHER BUSINESS

Kim McLaughlin requested a chance to speak again. She read from a prepared statement. She also requested clarity of the Ethics Commission's role. She said the integrity of the program becomes diminished when issues go unchecked by the overseers of the program. She requested her case be referred to the Attorney General's Office.

Ms. Gardiner said citizens do not need a referral to bring matters to the Attorney General and she would be happy to deliver Ms. McLaughlin's request.

Ms. McLaughlin further stated that she felt hearing these matters at a regular meeting does not clutter the agenda. She said the staff handled an earlier complaint against her that was totally unfounded and took care of the issue without having to come before the Commission. She would not support limiting the staff's ability to give advice. She said more importantly, an enforcement mechanism needs to be established for the Code of Fair Campaign Practices through the Legislature.

Executive Session

At 1:55 p.m., Mr. Shiah moved to go into executive session in accordance with Section 405, subsection 6(E) of Title 1 for the purpose of discussing pending and contemplated litigation. The motion was seconded by Mr. Marsano. The motion passed unanimously.

At 2:30 p.m., Mr. Marsano moved that the Commission come out of executive session. Mr. Shiah seconded the motion. The motion passed unanimously.

There being no further business, Mr. Marsano moved that the meeting be adjourned. Mr. Shiah seconded the motion. Motion passed unanimously. The meeting was adjourned at 2:35 p.m.

Respectfully submitted,

Jonathan Wayne, Executive Director