

MEMORANDUM

TO: ELECTIONS BOARD MEMBERS

FROM: GEORGE A. DUNST, LEGAL COUNSEL

MEETING DATE: AUGUST 3, 2005

**SUBJECT MATTER: COMPLAINT OF JOHN WEISHAN, JR. AND
GERRY BRODERICK, COMPLAINANTS AGAINST
SCOTT WALKER AND FRIENDS OF SCOTT
WALKER, RESPONDENTS**

FACTS

The complaint of John Weishan, Jr. and Gerry Broderick against Scott Walker and his committee, Friends of Scott Walker was filed on May 12, 2005, by Mike Maistelman, the attorney for the complainants. The complaint alleges that the respondent(s) failed to comply with s.11.30(2), Stats., with respect to telephone calls that were paid for by Friends of Scott Walker and that were made to Milwaukee County electors.

The principal allegations of the complaint are as follows:

5. Upon information and belief on or about November 4, 2004 Scott Walker and his Campaign Committee used campaign resources to communicate with over 40,000 Milwaukee area electors to encourage the electors to support Scott Walker's budget proposal. See attached hereto and incorporated herein as Exhibit A, the newspaper article regarding the number of calls placed by the Walker campaign. Respondents also reported the political expenditures on its January 2004 Campaign Finance Report, more specifically the following entry:

"11/5/2004," "The Markesan Group LLC," "10500 N. Port Washington Road Suite 203," "Mequon, WI, 53092-5539," "recorded phone calls," 2932.62

6. When respondents communicated with the electors they failed to include the identification of the Political Committee which paid for the communication. See attached hereto and incorporated herein as Exhibit B, the admission by the Walker Campaign.

RESPONDENTS FAILED TO IDENTIFY THE NAME OF THE COMMITTEE AND THE NAME OF THE TREASURER OF THE COMMITTEE IN VIOLATION OF WISCONSIN LAW

11. Paragraphs 1 – 10 above are re-alleged and incorporated herein by reference

12. Wis. Stats. Sec. 11.30(2)(b) provides:

Every such communication the cost of which is paid for or reimbursed by a committee or group, or for which a committee or group assumes responsibility whether by the acceptance of a contribution or by the making of a disbursement, shall be identified by the words "Paid for by" followed by the name of the committee or group making the payment or reimbursement or assuming responsibility for the communication and the name of the treasurer or other authorized agent of such committee or group.

On or about June 20, 2005, the respondents, by John Hiller, Treasurer for the Friends of Scott Walker, filed a response to the complaint; The substance of the response asserts that the issue raised by the complainants has been raised and decided by the Milwaukee County Board of Election Commissioners:

As a threshold matter, because the Milwaukee County Election Commission, exercising the authority specifically granted to it pursuant Wis. Stat. § 7.21, has already fully considered and disposed of this matter, the State Elections Board should not rehear the issue. The State Elections Board should not become, and Wis. Stat. § 5.05 does not contemplate, that the State Elections Board should function as an appellate body when a county Board of Election Commissioners has fully and properly exercised its duties and jurisdiction over a matter solely involving a committee registered for a county office. (Obviously, this Complaint is really about gubernatorial politics, however it is important to remember that at the time all relevant actions in the Complaint occurred, Friends of Scott Walker was registered solely for the office of Milwaukee County Executive and Scott Walker was not a candidate for any state office.)

The issue raised in ElBd. Cpt.05-10 were brought to the Milwaukee County Election Commission by the Friends of Scott Walker on November 5, 2004. The Milwaukee Board of Election Commissioners was the appropriate body to bring this matter to because the issue solely involved activities by a committee registered for county office. Having full notice of all the facts involved in ElBd. Cpt.05-10 in November, 2003, provided directly by the Friends of Scott Walker, the Milwaukee County Election Commission chose not respond with any action.

Then, almost six months after the Milwaukee County Election Commission was already aware of all of the facts, the Complainants in ElBd. Cpt.05-10 entered a complaint to the Milwaukee County Election Commission. The Milwaukee County Election Commission, exercising its authority and jurisdiction pursuant Wis. Stat. § 7.21, received written responses, documentary evidence, and held a public hearing. After considering all of the evidence, the Milwaukee County Election Commission found that no action was necessary related to the allegations contained in ElBd. Cpt.05-10. A copy of the minutes from that meeting are attached. Not satisfied with the answer received from the Milwaukee County Election Commission, the Complainants now come to the State Elections Board with the exact same allegations, all related to a committee solely registered for county purposes at the time of all relevant actions.

While Wis. Stat. §§ 5.05(1) and 7.21(1) grant concurrent jurisdiction over Wis. Stat. Chapters 5 to 12 to two regulatory bodies, that legislative grant should not be taken an invitation to blatant forum shopping and the misuse of that two regulatory bodies to advance purely political ends. The Complainants chose, appropriately given the county-based nature of the relevant committee and the relevant facts, to bring this matter to the Milwaukee County Election Commission. We urge the State Elections Board to, after considering all the ramifications of allowing dissatisfied complainants on an issue properly before the Milwaukee County Election Commission to simply take the fight to the State Elections Board, decline jurisdiction over this matter.

Notwithstanding that the Elections Board should not take jurisdiction over this matter, it is readily apparent that the Milwaukee County Election Commission properly disposed of this matter and that the State Elections Board should reach the same conclusions if it chooses to proceed.

In addition to its contention that the Board should not take jurisdiction over this complaint because it has already been decided by the Milwaukee County Board of Election Commissioners, the respondent supplied the following response to questions (relating to the absence of a disclaimer in the telephone calls) that were raised by the Board's counsel in the Board's request for a response:

The State Elections Board, in its May 12, 2005 letter, posed a series of questions. Following are the answers to each of those questions:

- *The vendor used for the recorded calls was Calling Post Communications. They were subcontracted for by our general consultant, The Markesan Group LLC.*
- *A transcript of the call is attached as exhibit C.*
- *Nothing other than the disclaimer at the end of the message seems to have been omitted from the call.*
- *The calls were made on November 4th and 5th, 2004. A total of 40,000 calls were made over the two day period. We are not sure how many went out without the disclaimer, but the calls were stopped about 11am on the first day, November 4, 2004.*

The call was recorded over a phone line to the vendor, Calling Post. Several versions may have been recorded before a final version was agreed upon. During the process of recording and re-recording the disclaimer was omitted.

We fully intended for the disclaimer to be at the end of the message. It is not clear to us how, during the editing process, the disclaimer was omitted. Keep in mind that it was our committee that discovered the error and corrected it as soon as we

knew. My phone number as the committee treasurer is on the list to be called as a control feature. When I received the call and realized that the disclaimer was not on the recording I immediately called to have the calls stopped.

Further, it was our committee who brought this matter to the attention of both the Wisconsin State Elections Board and the Milwaukee County Elections Commission. I called both bodies and was told to fax a letter explaining the situation. That letter was faxed to both on November 5, 2004 as directed by staff.

This clearly was not an attempt to disseminate political communications from our committee anonymously or in violation of the applicable law.

On July 5, 2005, the complainant, by Attorney Mike Maistelman, filed the following reply to the response:

This response is made pursuant to your letter dated June 23, 2005 regarding the above-referenced matter

Mr. Walker broke the law and readily admitted that he broke the law when he failed to identify the name of his committee and the name of his Treasurer of his Committee when he made over 40,000 telephone calls to Milwaukee electors. See Exhibit B of the original complaint filed with the Wisconsin State Elections Board ("SEB") - (Walker's admission of guilt).

*The facts are as follows:
Scott Walker at all relevant times has maintained an open campaign account with the SEB¹. In fact, he is required by state law to file periodic campaign finance reports with the SEB. Therefore, the SEB has proper jurisdiction over the verified complaint which was filed in this matter*

The Milwaukee County Election Commission ("Commission") was informally requested by Mr. Walker to review some issues that were raised by some Milwaukee County Supervisors. However, it was Mr. Walker and not the Milwaukee County Supervisors that requested the "informal opinion" by the Commission

At no point was any formal complaint filed with the Commission regarding this issue. In essence the "typical" adversarial proceeding which we are currently engaged in at the SEB never took place at the Commission.

The Chair of the Commission, a Walker supporter and appointee had an ex parte communication with Scott Walker's office prior to the hearing. In fact, the Chair of the Commission not only admitted this fact to a reporter at the Milwaukee Journal Sentinel, but he also stated that he already made up his mind that Walker

¹ Mr. Walker still has not revealed why he failed to properly terminate his State Assembly Campaign account with the State Elections Board even though he was no longer a State Representative.

had done nothing wrong – even before he reviewed any documentation. See Milwaukee Journal Sentinel Articles dated April 19 & 20, 2005 attached hereto and incorporated herein.

Last and but most interestingly is Mr. Walker's erroneous assertion that the Commission resolved the issues raised in the matter before the SEB. In support of this Mr. Walker attaches the minutes of the Commission's April 28 meeting to his Verified Response.

There are two items that were addressed by the Commission.

Item No.1 – Review email sent by the Office of County Executive regarding referendum on a pension borrowing-plan.

Action: Commission finds no violation of the campaign finance law in the County Executive's e-mail to obtain support for referendum on pension borrowing plan.

Item No. 2 – Review use of campaign funds by Scott Walker regarding County Executive's 2005 Budget.

Action: Use of campaign funds by the County Executive to place telephone calls to generate support for the County Executive's 2005 budget was not a violation of the State Campaign Financing Law.

The Commission never addressed the disclaimer issue as evidenced in the minutes and as listed above. Although, Election Commissioner Jack Melvin III found after hearing from the Walker Campaign that Scott Walker used a public employee for political purposes. See Milwaukee Journal Sentinel Article dated April 28 2005, attached hereto and incorporated herein.

For the reasons stated in the original verified complaint as well as the reasons set forth herein, we respectfully request that the SEB find that Mr. Walker and his campaign broke the law and assess the penalties as provided in Wis. Stats. Secs. 11.60(1)² and 11.61(b) & (c)³

² Any person, including any committee or group, who violates this chapter may be required to forfeit not more than \$500 for each violation.

³ 11.61(b) - Whoever intentionally violates [s. 11.25](#), [11.26](#), [11.27 \(1\)](#), [11.30 \(1\)](#) or [11.38](#) is guilty of a **Class I felony** if the intentional violation does not involve a specific figure or if the intentional violation concerns a figure which exceeds \$100 in amount or value. [Emphasis added]

11.61(c) - Whoever intentionally violates any provision of this chapter other than those provided in [par. \(a\)](#) and whoever intentionally violates any provision under [par. \(b\)](#) where the intentional violation concerns a specific figure which does not exceed \$100 in amount or value may be fined not more than \$1,000 or **imprisoned not more than 6 months** or both. [Emphasis added]

Part of the respondent committee treasurer's, John Hiller's, response is the extenuating circumstance that when he realized that the telephone calls did not include the source identification, he contacted the vendor and had that omission corrected. At the same time, the respondent also contacted the Elections Board and was told to send us a letter explaining the situation. That letter, on campaign committee letterhead, was received in the Board's offices on November 8, 2005 and reads as follows:

On November 4, 2004 our campaign made recorded phone calls to a list of our supporters. These calls were made in support of County Executive Scott Walker's budget proposal.

While it is not entirely clear if one was legally necessary or not, when the call was recorded it did include a disclaimer. However, when the calls were placed by our automated call vendor the disclaimer was inadvertently omitted from the call.

We regret that the calls were not made as intended, which included the disclaimer, and are notifying you of the situation in case you receive any inquiries on this matter.

Please contact us if you have further questions or concerns at 414-333-9476.

The response to the complaint was also supposed to include, (as Exhibit B), letters from the Markesan Group, the vendor with whom the campaign contracted for the placement of the calls, and from Calling Post Communications the subcontractor telecommunications company that did the actual calling. Those letters (Exhibit B) were, however, inadvertently omitted from the response and were later obtained upon the request by the Board's counsel. The Markesan and CallingPost letters read as follows:

*(The Markesan Group – letter, June 17, 2005)
Re: Automated Phone Project 11/0/04*

Again, in reference to the above project, The Markesan Group arranged for automated phone calls to be placed on your behalf on November 4 and 5, 2004. We subcontracted this project to an automated call vendor, Calling Post Communications.

*Our file indicates that as the calls began rolling out (to a list of approximately 40,000 unique numbers), we received a call from the campaign indicating the recording on the call was incomplete, that part of your message, including the required disclaimer, was truncated. We immediately alerted Calling Post and the calls were stopped. **A digital recording of the disclaimer was immediately added** and the calls were continued.*

If you have any further questions regarding your contracted services with TMG, LLC, please do not hesitate to contact George Ermert, our Senior Account Executive.

(Calling Post Communications- letter, June 30, 2005)

Calling Post Communications Inc. facilitates distribution of voice messages to phone number lists provided by candidates and/or their representatives. We were contracted to place calls for Friends of Scott Walker on November 4 & 5, 2004.

We have no information or explanation for the lack of a disclaimer on the Friends of Scott Walker recorded message that was initially distributed on November 4, 2004.

After notification from the client, a disclaimer was added for subsequent calls that were distributed with the aforementioned message on November 5, 2004.

(Emphasis supplied throughout)

The Markesan Group's statement that "A digital recording of the disclaimer was immediately added" together with CallingPost Communications' statements that "We have no information or explanation for the lack of a disclaimer on the Friends of Scott Walker recorded message that was initially distributed on November 4, 2004," and that "a disclaimer was added" are very tepid support, at best, for the campaign's contention that the original text of the phone message contained a source identification; and, at worst, suggest that disclaimer was added after complaints were received and the campaign realized that it would have to "add a disclaimer" – especially in light of the campaign's statement that, "While it is **not entirely clear if one was legally necessary or not, when the call was recorded it did include a disclaimer.**" One might have expected either (or both) Markesan and CallingPost to accept responsibility for the omission – if the text distributed to them included the disclaimer.

ISSUE

1. Whether the State Elections Board has jurisdiction over the Friends of Scott Walker campaign committee and over that committee's expenditure for telephone calls made to influence public opinion regarding the Milwaukee County budget.
2. If the Elections Board does have jurisdiction over the committee and the committee's expenditure for telephone calls, whether the telephone calls were required to comply with the source identification requirements of s.11.30(2), Stats., and failed to do so.
3. If the respondent committee's telephone calls were required to comply with the source identification requirements of s.11.30(2), Stats., whether those calls failed to so comply.
4. If the Elections Board does have jurisdiction over the committee and the committee's expenditure for telephone calls, and if the telephone calls failed to

comply with the source identification requirements of s.11.3092), Stats., what are the appropriate consequences or sanctions under s.11.60, Stats.?

STATUTES

11.60 Civil penalties. (1) Any person, including any committee or group, who violates this chapter may be required to forfeit not more than \$500 for each violation.

(4) Actions under this section arising out of an election for state office or a statewide referendum may be brought by the board or by the district attorney of the county where the violation is alleged to have occurred, except as specified in [s. 11.38](#). Actions under this section arising out of an election for local office or a local referendum may be brought by the district attorney of the county where the violation is alleged to have occurred. Actions under this section arising out of an election for county office or a county referendum may be brought by the county board of election commissioners of the county wherein the violation is alleged to have occurred. If a violation concerns a district attorney or circuit judge or candidate for such offices, the action shall be brought by the attorney general. If a violation concerns the attorney general or a candidate for such office, the governor may appoint special counsel under [s. 14.11 \(2\)](#) to bring suit in behalf of the state. The counsel shall be independent of the attorney general and need not be a state employee at the time of appointment.⁴

11.30 Attribution of political contributions, disbursements and communications.

(1) No disbursement may be made or obligation incurred anonymously, and no contribution or disbursement may be made or obligation incurred in a fictitious name or by one person or organization in the name of another for any political purpose.

(2)(a) The source of every printed advertisement, billboard, handbill, sample ballot, television or radio advertisement or other communication which is paid for by or through any contribution, disbursement or incurred obligation shall clearly appear thereon. This paragraph does not apply to communications for which reporting is not required under [s. 11.06 \(2\)](#).

(b) Every such communication the cost of which is paid for or reimbursed by a committee or group, or for which a committee or group assumes responsibility, whether by the acceptance of a contribution or by the making of a disbursement, shall be identified by the words "Paid for by" followed by the name of the committee or group making the payment or reimbursement or assuming responsibility for the communication and the name of the treasurer or other authorized agent of such committee or group.

(e) Communications under this section by a personal campaign committee may identify the

⁴ NOTE: Sub. (4) was amended eff. 7-1-03 to read as follows. Act 109, s. 9115, provided that if any treatments by Act 109 listed in s. 9115, including the treatment of this provision, was held to be unconstitutional by a court, then all of the listed treatments are void. The United States District Court for the Western District of Wisconsin in Wisconsin Realtors Assoc. v. Ponto, 233 F. Supp. 2d 1078 (2002), found the treatment of certain listed provisions unconstitutional, rendering the treatment of this provision void.

committee or any bona fide subcommittee thereof.

DISCUSSION

1. The Board does have jurisdiction over this matter.
 - a. Friends of Scott Walker has been a registrant with the Elections Board since Scott Walker registered with the Elections Board as a candidate for the Assembly. He has never terminated his registration, even after becoming a candidate for Milwaukee County Executive. Since his registration with the Milwaukee County Board of Election Commissioners (MCBEC), as a candidate for Milwaukee County Executive, his committee has had dual, concurrent registration with both the Elections Board and the Milwaukee Board (MCBEC).

The Walker Committee could have terminated its registration with the Board when Scott Walker became a candidate for county executive. For reasons of its own, the committee chose to continue its registration and has continued to file reports with the Board.

The Elections Board is responsible for the campaign finance compliance of all of its registrants. (See s.11.001, Stats.)

- b. MCBEC did not receive a formal complaint or conduct an adversarial proceeding regarding the source identification issue. Nor did MCBEC make a finding with respect to the issue of source identification. The source identification issue appears to have gotten no further than a mention of its presence (existence) by Treasurer Hiller at the Commission's meeting.

MCBEC considered two agenda items and took the following action with respect to each:

Item No.1 – Review email sent by the Office of County Executive regarding referendum on a pension borrowing-plan.

Action: Commission finds no violation of the campaign finance law in the County Executive's e-mail to obtain support for referendum on pension borrowing plan.

Item No. 2 – Review use of campaign funds by Scott Walker regarding County Executive's 2005 Budget.

Action: Use of campaign funds by the County Executive to place telephone calls to generate support for the County Executive's 2005 budget was not a violation of the State Campaign Financing Law.

Thus, MCBEC did not make a specific finding as to the issue of source identification and, if it had made a finding, it would have had to find that the respondent committee failed to include the appropriate source identification with an undetermined portion of the 40,000 telephone calls because, as the respondent has acknowledged, an undetermined number of the telephone calls were made without a source identification before the committee was able to correct the problem.

Consequently, neither jeopardy or anything like it, attached to the proceedings before MCBEC. Had MCBEC commenced a forfeiture action, the circumstances would be quite different, but, instead it chose not to exercise its authority. The Board, therefore, is not precluded from exercising its concurrent jurisdiction or its authority to commence its own forfeiture action. For reasons of its own, the Board may or may not wish to exercise that jurisdiction or that authority.

2. The telephone calls were required to include the source identification required by s.11.30(2), Stats. The statute, s.11.30(2), Stats., is quite clear that “The source of **every** printed advertisement, billboard, handbill, sample ballot, **television or radio advertisement or other communication** which is paid for by or through any contribution, disbursement or incurred obligation shall clearly appear thereon.” No exception is made for a telephone calls and the Board’s rule, ElBd 1.655, (*Identification of the source of communications paid for with money raised for political purposes – see the accompanying memorandum and discussion on amending the disclaimer rule*), specifically defines the term “communication” to include “telephone calls.”
3. The telephone calls failed to include the source identification required by s.11.30(2), Stats. The respondent does not contest this fact, but has added, in extenuation and mitigation of the non-compliance that the telephone message was intended to have the appropriate source identification, but that source identification was inadvertently omitted by the communications company that was hired to do the telephone calls. Also in extenuation or mitigation is the fact that the respondent notified the Board of the omission of the source identification and complied with the directions given by the Board.
4. Appropriate consequences, if the Board chooses to exercise its concurrent jurisdiction, with respect to source identification (disclaimer) violations), are determined on a case-by-case basis, (but see the Board’s counsel’s memorandum on amending ElBd 1.655 with respect to disclaimer requirements).