



Hidden Money: The Use of Electioneering Communications in Massachusetts



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Common Cause Massachusetts

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Common Cause Massachusetts is a nonpartisan, nonprofit, government watchdog, dedicated to citizen participation in an open, honest, and accountable government. An independent, member-supported organization, Common Cause has more than 200,000 members nationwide and 10,000 in Massachusetts.

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Introduction

In the 2004 Presidential campaign groups reported \$130,571,030¹ in expenditures on what are technically termed “electioneering communications” and more colloquially known as sham “issue ads”. While these terms may be unfamiliar, the ads themselves were ubiquitous, the most noted being those ran by the group Swift Board Veterans for Truth, a “527” organization. These ads ran close to the election in swing states and attacked John Kerry’s service record during the Vietnam War. Because they did not include the word “vote” they were not considered campaign contributions or expenditures, although their intent and effect on the election were clear.

What many people do not know is that in the 2004 Massachusetts state elections, groups, individuals, and corporations spent hundreds of thousands of dollars, and probably more than one million dollars, on electioneering advertising, most of which was distributed through mass mailings. One striking example of such electioneering spending occurred during Maureen Dever’s reelection campaign for Saugus Selectman in 2005. In 2003, Dever finished fourth in a field of nine, electing her to one of the five selectman seats. But when she sought reelection two years later, a group of undisclosed businesses and residents waged a targeted campaign against her—“Dever = Bad for Saugus. The “Dever = Bad for Saugus” campaign paid for a number of newspaper advertisements including a series of full-page ads in the *Lynn Daily Item* (see appendix B). They also distributed several targeted mass mailings and created a website attacking her record. Not surprisingly, the pieces were exceedingly negative. Although not proven, there was public speculation that the campaign was backed by businesses and individuals supporting development that Dever opposed.

The sole spokesperson for the “Dever = Bad for Saugus” campaign, a hired publicist, never disclosed who the group’s backers were or how much money they spent, nor was he required to do so. Because the ads, website and mailings paid for by the “Dever=Bad for Saugus” campaign did not use the word “vote,” and despite their clear intent to affect Dever’s reelection, they were not covered by Massachusetts campaign disclosure laws. We think they should be.

This report provides a background on “electioneering communications”—detailing current federal and state regulations of them, their use in Massachusetts, and lastly pending legislation, House 5033, which if passed will bring Massachusetts campaign finance disclosure laws in line with a growing number of states and current federal law.

What is an electioneering communication?

An electioneering communication is a broadcast or print advertisement, or in some jurisdictions a mailed, telephone, or internet communication, which is made close to an election and advocates for the election or defeat of a clearly identified candidate.

An electioneering communication is distinguishable from an “independent expenditure” because the communication does not contain “express advocacy” terms such as “vote for” or

¹ See Federal Election Commission website, <<ftp://ftp.fec.gov/FEC/electioneering.csv>>.

“defeat.” Electioneering communications differ from an in-kind contribution to a candidate, which would be subject to disclosure through the candidate’s committee and subject to contribution limits, because they are not coordinated with the candidate or his/her campaign.

Unless prohibited by law, electioneering communications can be made by any individual or organization— including a corporation. On the federal level, most electioneering communications were made by so-called “527” organizations such as Swift Boat Veterans, MoveOn.org, and others. The number “527” refers to a section of the Federal tax code under which these groups are organized. In Massachusetts, since disclosure is not required, it is difficult to assess which groups have spent the most, although it is known that non-profits, individuals, and corporations have all made electioneering communications.

Electioneering communications can be negative attack ads, as those described above, or they can be positive pieces, touting the strengths of a particular candidate or candidates. In either case, the clear intent, and effect, of these ads is to influence elections.

Federal electioneering communications and regulation

Electioneering communications have been made for decades at the federal level, but have increased substantially in the last two Presidential elections. Congress first regulated electioneering communications with the passage of the Bipartisan Campaign Reform Act of 2002 (BCRA). BCRA and its accompanying regulations bar the use of corporate and labor funds for financing electioneering communications and require that groups making electioneering communications disclose information regarding their organization and the amounts received and spent on electioneering communications. Legislation which would extend BCRA by reclassifying applicable “527” organizations as PACs and placing new restrictions on the funding of “527” expenditures is currently pending in Congress. See appendix C for more information regarding this legislation.

What other states have done to regulate electioneering communications

Since 2002 at least 14 states have enacted laws to regulate electioneering communications in state and local elections. These states include: Alaska, Colorado, California, Connecticut, Florida, Hawaii, Idaho, Illinois, Louisiana, North Carolina, Ohio, Vermont, Washington, and West Virginia. Although each state’s law differs in a few details, they are markedly similar. All states include broadcast advertisements in their definition of electioneering communications, 8 include advertisements distributed by mail, and 3 include Internet or e-mails as well. Communications such as newspaper articles, opinion pieces, membership newsletters, candidate debates and related advertisements, among other things are exempted from most states laws. The laws uniformly require disclosure of electioneering expenditures and 9 of the 14 states also require disclosure of contributions. Finally, over one third of the laws bar corporations from making these expenditures. A summary of each state’s law is located in appendix A.

Electioneering communications in Massachusetts

Electioneering communications have been made in Massachusetts for more than a decade, but reached new heights in the 2004 elections. Groups from both sides of the political spectrum such as the Article 8 Alliance and the Commonwealth Coalition have made electioneering communications both supporting and opposing candidates. None were disclosed, and only some indicated which organization was sponsoring them. While the “Dever=Bad for Saugus” advertisements mentioned in the introduction are a notable example of electioneering communications, they are by no means the only one. A sampling of other such ads used in Massachusetts is located in appendix B.

In addition to making electioneering communications, groups have been requesting legal advice from the Office of Campaign and Political Finance in order to craft issue ads that are not subject to disclosure under the law. While it is entirely appropriate for the agency to respond to these requests, it is sadly ironic for the agency charged with enforcing disclosure requirements to be put in this position. Closing the electioneering communication loophole by enacting H. 5033 would remove this Catch 22 for the agency and free up more time for other more important matters.

Massachusetts Legislation, H. 5033

House 5033 is currently pending in the Massachusetts House of Representatives after having received a favorable report from the Committee on Election Laws. The bill is very similar to those enacted in other states and if passed will make a number of improvements to Massachusetts campaign finance law. The proposed bill defines an electioneering communication as a broadcast, cable, mail, satellite, or print communication that refers to a clearly identified candidate 90 days prior to a general election. Internet, email, news stories, and political expenditures already covered by the campaign finance laws are specifically excluded.

The proposed law requires electioneering communications costing over \$250 be disclosed electronically to OCPF within seven days and prohibits business corporations from making an electioneering communication or from contributing to groups for the purpose of making an electioneering communication. Business corporations may make contributions or expenditures for non-partisan voter guides under certain circumstances, but the cost of these guides must be disclosed. The bill also requires that persons, groups, or associations that make independent expenditures (express advocacy) or electioneering communications of \$1,000 or more within the 7 days prior to the election must file a disclosure report with OCPF within 24 hours. In addition, any individual, group, or association not defined as a political committee who receives funds for the purpose of making an electioneering communication costing over \$250 must disclose the date the funds were received and the name and address of the provider of any such funds in excess of \$200.

Lastly, the bill requires that all print and broadcast advertisements (currently the law applies to print only) be accompanied by a statement, retained for one year, stating who placed the ad and identifying the name of the committee, group, or person paying for the ad.

Conclusion

Recent elections have shown a proliferation of electioneering communications which, when unregulated, allow corporations and individuals to spend large undisclosed and unmonitored amounts of money on campaigns. This violates the intent of our campaign finance disclosure laws and has serious consequences for candidates targeted by unseen opponents. Massachusetts should join 14 other states and the Federal government to bring these campaign expenditures into the sunshine.

Appendixes

- A. Chart Summarizing State Laws Regulating Electioneering Communications
- B. Samples of Massachusetts Electioneering Communications
- C. Legal History
- D. H. 5033

Appendix A: Chart Summarizing State Laws Regulating Electioneering Communications

State	Definition	Exemptions	Disclosure required: Expenditures / Contributions	Bans Corporate \$\$
Alaska Alaska Stat. § 15.13	Communications that: <ul style="list-style-type: none"> • directly or indirectly identify a candidate, • address an issue of political importance and attribute a position to the candidate identified; and • occur within the 30 days preceding a general or municipal election. 		<ul style="list-style-type: none"> • Expenditures: Yes, same manner as individual, group, or non-group entity under Title 15 • Contributions: Yes, same manner as individual, group, or non-group entity under Title 15 	Yes
California Title 9, Ch. 5, Art 3 § 85310	Communications disseminated, broadcast, or otherwise published, which: <ul style="list-style-type: none"> • clearly identify a candidate for elective state office; • do not expressly advocate the election or defeat of the candidate; and • occur within 45 days of an election. 	<ul style="list-style-type: none"> • Not required to report payments if a person is receives or is promised the payment for the purpose of providing goods or services which they are in the business of providing. 	<ul style="list-style-type: none"> • Expenditures: Yes, over \$50,000, file within 48 hours • Contributions: Yes, over \$5,000 	No
Colorado C.R.S.A. Const. Art. 28	Communications broadcasted by television or radio, printed in a newspaper or on a billboard, mailed or delivered by hand; which <ul style="list-style-type: none"> • unambiguously refer to any candidate; • occur within 30 days before a primary or 60 days before a general election; and • are targeted to members of the electorate for such public office. 	<ul style="list-style-type: none"> • News articles, editorials and opinion pieces in a newspaper, periodical, or by a broadcast facility; • Membership or business communications; • Communication that refers to a candidate only as part of the popular name of a bill or statute. 	<ul style="list-style-type: none"> • Expenditures: Yes, over \$1000 • Contributions: Yes, over \$250 	Yes
Connecticut Title 9, Chapter 150, Sec 9-333	Advertisements broadcast by radio or television (excluding public access channel), or appearing in a newspaper, magazine or on a billboard; which <ul style="list-style-type: none"> • refer to a clearly identified candidate; and • occur within 90 days preceding the election. 	<ul style="list-style-type: none"> • Commercial advertisements referring to a candidate who is an owner, officer, etc. of the business and that had been previously broadcast prior to the individual's candidacy. 	<ul style="list-style-type: none"> • Expenditures: Yes • Contributions: No 	No

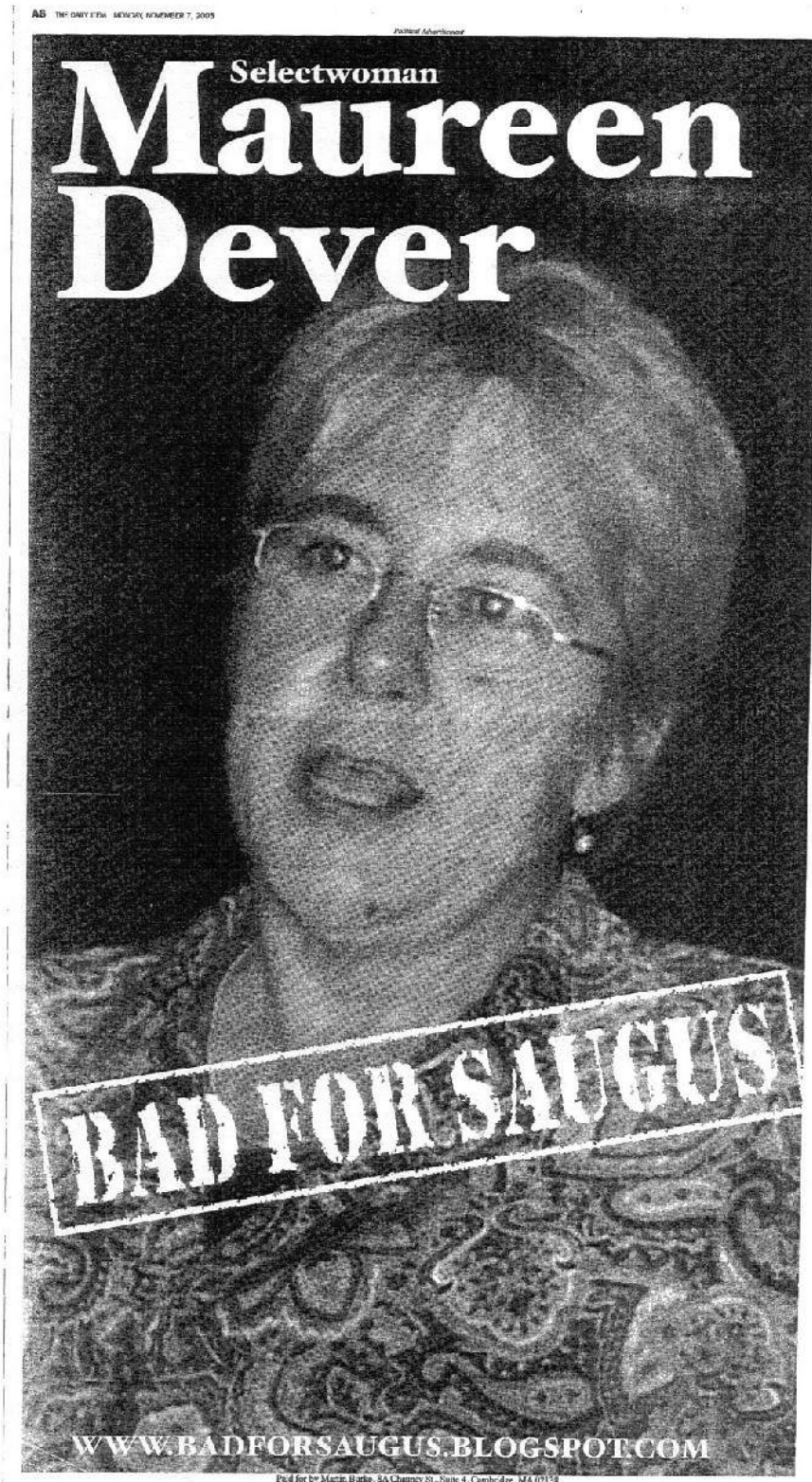
State	Definition	Exemptions	Disclosure required: Expenditures / Contributions	Bans Corporate \$\$
<p>Florida</p> <p>Fla. Stat. § 106</p>	<p>Communications broadcasted, appearing in newspaper, magazine, outdoor advertising facility, distributed by printer, direct mailing company, advertising agency, or internet and telephone company (some exceptions for telephone and internet); which</p> <ul style="list-style-type: none"> • refer to or depict a clearly identified candidate or electoral issue to be voted on, • without expressly advocating the election or defeat of a candidate or the passage or defeat of an issue; • are published after the end of the candidate qualifying period for the office sought by the candidate, or published after an issue is designated a ballot position, or 120 days before the date of the election on the issue; and • are targeted to 1,000 or more of the relevant electorate. 	<ul style="list-style-type: none"> • News articles, editorials and opinion pieces in a newspaper, periodical, or by a broadcast facility ; • Membership Communications; • Candidate debates or forums; • Spoken word in direct conversation. 	<ul style="list-style-type: none"> • Expenditures: Yes, over \$100 aggregate • Contributions: Yes, in same manner as a political committee 	<p>No</p>
<p>Hawaii</p> <p>HRS § 11-207</p>	<p>Advertisements broadcast from a cable, satellite, television, or radio broadcast station; published in any periodical or newspaper; or sent by mail at a bulk rate; which</p> <ul style="list-style-type: none"> • refer to a clearly identifiable candidate; and • occur within 30 days prior to a primary or initial special election or 60 days prior to a general or special election. 	<ul style="list-style-type: none"> • News articles, editorials and opinion pieces in a newspaper, periodical, or by a broadcast facility; • In-house bulletins; • Candidate debates or forums. 	<ul style="list-style-type: none"> • Expenditures: Yes, over \$2,000 • Contributions: No 	<p>No</p>
<p>Idaho</p> <p>ID ST § 67</p>	<p>Communications broadcast by television or radio, printed in a newspaper or on a billboard, mailed or delivered by hand to personal residences, or telephone calls made to personal residences; which</p> <ul style="list-style-type: none"> • unambiguously refer to any candidate • occur within 30 days before a primary election or 60 days before a general election; and • are targeted to the electorate for such public office. 	<ul style="list-style-type: none"> • News articles, editorials and opinion pieces in a newspaper, periodical, or by a broadcast facility; • Membership or business communications; • Communication that refers to a candidate only as part of the popular name of a bill or statute. 	<ul style="list-style-type: none"> • Expenditures: Yes, over \$100; over \$1,000, file within 48 hours. • Contributions: Yes: over \$50 	<p>No</p>

State	Definition	Exemptions	Disclosure required: Expenditures / Contributions	Bans Corporate \$\$
<p>Illinois</p> <p>10 ILCS 5/9</p>	<p>Communications including but not limited to a newspaper, radio, television, or internet; which</p> <ul style="list-style-type: none"> refer to a clearly identified candidate or candidates, political party, or question of public policy that will appear on the ballot; and occur within 60 days before a general election or consolidated election or 30 days before a primary election. 	<ul style="list-style-type: none"> News articles, editorials and opinion pieces in a newspaper, periodical, or by a broadcast facility; Candidate debates or forums; Communications by Section 501(c)(3) organizations Non-partisan voting guides, etc. Organization and labor membership communications. 	<ul style="list-style-type: none"> Expenditures: over \$5,000 by nonprofit organization (not labor), must register with board of elections; over \$3,000 by candidate, individual, or group must form political committee and disclose as such Contributions: same 	<p>No</p>
<p>North Carolina</p> <p>N.C.G.S.A. § 163-278</p>	<p>Communications by broadcast, cable, or satellite; which</p> <ul style="list-style-type: none"> refer to a clearly identified candidate for a statewide office or the General Assembly; occur within 60 days before a general or special election, or 30 days before a primary election or a convention; and are targeted to the relevant electorate 	<ul style="list-style-type: none"> News articles, editorials and opinion pieces in a newspaper, periodical, or by a broadcast facility; Candidate debates or forums; Lobbying communications during legislative session. 	<ul style="list-style-type: none"> Expenditures: over \$10,000 Contributions: No 	<p>yes</p>
<p>Ohio</p> <p>O.R.C. Ann. § 3517</p>	<p>Communications by broadcast, cable, or satellite; which</p> <ul style="list-style-type: none"> refer to a clearly identified candidate; and are made between the date the person becomes a candidate and the 30 days prior to that primary election, or between the primary election and the 30 days prior to the general election. 	<ul style="list-style-type: none"> News articles, editorials and opinion pieces in a newspaper, periodical, or by a broadcast facility; Candidate debates or forums. 	<ul style="list-style-type: none"> Expenditures: Yes, over \$10,000 Contributions: Yes 	<p>Yes</p>

State	Definition	Exemptions	Disclosure required: Expenditures / Contributions	Bans Corporate \$\$
<p>Oklahoma</p> <p>T. 74, Ch. 62, App. 257:</p>	<p>Communications sent by handbill or direct mail; broadcast by radio, television, cable or satellite; or appears in a newspaper, magazine or on a billboard; which</p> <ul style="list-style-type: none"> refer to a clearly identified candidates for state office or ballot measure; occur within 60 days before a general or special election; or 30 days before a primary or runoff election; and are received by 2,500 persons in the candidate's district for State House of Representatives; or 5,000 or more persons in the district for district attorney, district judge, associate district judge, or State Senate; or 25,000 or more persons for a statewide elective office or ballot measure 	<ul style="list-style-type: none"> News articles, editorials and opinion pieces in a newspaper, periodical, or by a broadcast facility; Candidate debates or forums.. 	<ul style="list-style-type: none"> Expenditures: Yes, over \$5,000, file within 24 hours Contributions: Yes, over \$50 	<p>Yes</p>
<p>Vermont</p> <p>17 V.S.A. § 2891-2893</p>	<p>Communications published in a newspaper or periodical or broadcast on radio, television, or public address system, placed on billboards, outdoor facilities, buttons or printed material attached to motor vehicles, window displays, posters, cards, pamphlets, leaflets, flyers, or other circulars, or direct mailing, robotic phone calls, or mass e-mails; which</p> <ul style="list-style-type: none"> refer to a clearly identified candidate for office and promote, support, attack, or oppose a candidate for that office, regardless of whether the communication expressly advocates a vote for or against a candidate. 	<ul style="list-style-type: none"> News articles, editorials and opinion pieces in a newspaper, periodical, or by a broadcast facility.. 	<ul style="list-style-type: none"> Expenditures: Yes, over \$500.00 within 30 days of a primary or general election Contributions: No 	<p>No</p>

State	Definition	Exemptions	Disclosure required: Expenditures / Contributions	Bans Corporate \$\$
<p>Washington</p> <p>Rev. Code Wash. § 42.17.</p>	<p>Any broadcast, cable, or satellite television or radio transmission, United States postal service mailing, billboard, newspaper, or periodical; which</p> <ul style="list-style-type: none"> clearly identifies a candidate for a state, local, or judicial office; occurs during the sixty days before an election; and has a fair market value of five thousand dollars or more in the jurisdiction in which the candidate is seeking election. 	<ul style="list-style-type: none"> News articles, editorials and opinion pieces in a newspaper, periodical, or by a broadcast facility; Membership communications; Candidate debates or forums; Commercial advertisements referring to a candidate who is an owner, officer, etc. of the business and that have been previously broadcast 12 months prior to the candidacy; Slate cards and sample ballots; Advertising for films or written works by a candidate or about a candidate when the candidate entered into a contract 12 months before becoming a candidate Public service announcements. 	<ul style="list-style-type: none"> Expenditures: Yes, within 24 hours Contributions: No 	<p>No</p>
<p>West Virginia</p> <p>W. Va. Code, § 3-8</p>	<p>Communications made by broadcast, cable or satellite signal, mass mailing, telephone bank, leaflet, pamphlet, flyer or outdoor advertising or published in any newspaper, magazine or other periodical; which</p> <ul style="list-style-type: none"> refer to a clearly identified candidate for a statewide office or the Legislature; occur within 30 days before a primary election or 60 days before a general or special election; and are targeted to the relevant electorate. 	<ul style="list-style-type: none"> News articles, editorials and opinion pieces in a newspaper, periodical, or by a broadcast facility; Membership communications; Candidate debates or forums; Lobbying communications made during legislative session; Communications paid for by any 501(c)(3) organization; Commercial advertisements referring to a candidate who is an owner, officer, etc. of the business previously broadcast prior to the candidacy; Nonpartisan educational communications, e.g. voter guides. 	<ul style="list-style-type: none"> Expenditures: Yes, over \$5,000 Contributions: No 	<p>No</p>

Appendix B: Samples of Massachusetts Electioneering Communications



DEVER = BAD FOR SAUGUS

With an agenda that is vindictive, misguided, and opposite of what is good for Saugus, it is clear that Maureen Dever is Bad for Saugus.



boosted to \$175,000 for the Lowe's Home Improvement development, Dever almost killed the whole deal by demanding \$250,000. Three other selectmen overruled and saved the deal. Now, the town will reap the hundreds of thousands in building permit fees and taxes -

Dever has made decisions that have been costly to the town, and potentially devastating to everything from your children's education and your pocketbook, to our town's environment.

We all know Saugus is struggling financially. Taxpayers like you have already suffered through one Maureen Dever override, and another is on the way. Water and sewer bills are sky-high and going higher. The school system is so strapped that last year all high-school sports were eliminated before cooler heads prevailed.

Despite all these problems, Dever continues to make bad decisions.

She approved the sale of a town-owned liquor license to a Saugus insider without advertising the availability to other town businesses - businesses that have been operating their restaurants, paying taxes in Saugus and waiting for the opportunity to obtain a full liquor license. The

license was voted and now the holder of the \$5,000 per year liquor license is in the process of leasing and could sell the license for upwards of \$250,000.

When she's not leaving money on the table, she's spending it on useless, vindictive pursuits. She's been the driving force in the case against the Palace, sprinting through nearly \$100,000 in legal fees earlier this year, and leaving the town exposed to a costly lawsuit. What could that \$100,000 have paid for? More officers for the undermanned Police Department? New equipment for the Fire Department? That would be good for Saugus. Dever is Bad for Saugus.

Even simple decisions can be trying for Dever. When the price for a \$16,000 piece of land was

money that was already put into the school budget. It also means millions over the years in taxes from Lowe's that Dever was willing to let walk away. How many textbooks did defeating Dever's bad idea save? How many future initiatives were almost lost through Dever's bad decision? This development is good for Saugus. Dever is Bad for Saugus.

Whether she has been souring the business atmosphere in town, ignoring proper funding for schools or public safety, or merely doing the wrong thing for taxpayers, Dever has proven to be Bad for Saugus. These decisions have cost the town dearly - not only in hundreds of thousands of dollars, but also in damaging the town's reputation and wounding the town's spirit - making it clear Maureen Dever is Bad for Saugus.

↑
Cost Saugus
\$250,000

↑
Cost Saugus
\$100,000

↑
How much will
she cost Saugus
in the long run?

WWW.BADFORSAUGUS.BLOGSPOT.COM



Is Massachusetts State Government up for sale?

They Give, They Get, WE PAY...

Sadly, special interests on Beacon Hill invest thousands in politicians and get millions in return.

- Chris Asselin accepted over \$19,350 from special interest PACs and lobbyists between 2001 and 2003.¹
- Chris Asselin voted six times against meaningful campaign finance reform despite the fact that over 71% of voters in his district supported the 1998 ballot measure to enact "clean elections" campaign finance reform.²

Whose priorities? Your Family's or the Special Interests'?



Call Representative Chris Asselin at 978.454.1326 and tell him to put our needs ahead of the special interests.

¹ Source: Office of Campaign and Political Finance
² Amendment offered by Rep. Reed Hillman, May 1, 2003. Subsidy estimate provided by Grey2K.
³ Vote 1: #28 on FY 2002 Budget, H#100; Vote 2: February 15, 2002; Vote 3: February 15, 2002; Vote 4: February 15, 2002; Vote 5: February 15, 2002; Vote 6: May 15, 2002.



Cleon Turner and Senator Robert O'Leary

know that education opens doors.

As a parent whose children went through the Dennis-Yarmouth School System, Cleon knows first-hand how important it is that Cape Cod schools...

- Get their fair share of education dollars from the state.
- Bring parents and teachers together to improve the quality of public education.

Please call Cleon Turner at 508-385-7283 and Senator Robert O'Leary at 508-790-4200, and thank them for standing up for public education.

This information is made available to you as a public service by The Commonwealth Coalition. For more information about the Coalition, please visit us at www.comcoal.org or call 617.422.0118.



Senator O'Leary



*Ginger Esty wants to
divide our Community*

For more information on how to protect all our families, contact MassEquality at 617-507-3470

* Town says group was within law: Foes of illegal immigrants within rights, counsel says By Eun Lee Koh, Boston Globe, 12/25/2003
** Candidates take sides in marriage controversy. By David McLaughlin / MetroWest News, Friday, August 20, 2004

- X In December, 2003, the Framingham Board of Selectmen voted on a proclamation stating that Framingham was a "welcoming community" to its newcomers. It said Framingham would stand "against bigotry, prejudice, intimidation, and hatred of any kind."
- X Ginger Esty was the only Framingham selectman to vote against the resolution.*
- X Ginger Esty wants to divide our communities and hurt our families by writing discrimination against same-sex couples into our Constitution. **
- X It's no surprise the Board of Selectmen voted unanimously to remove Esty from her leadership position as vice-chair.

MassEquality
396 Columbus Avenue #198
Boston, MA 02116

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ASSOCIATES

MASS EQUALITY Paid for by MassEquality, 396 Columbus Avenue #198, Boston, MA 02116

Appendix C: Legal History

Federal Election Campaign Act of 1971

The first major attempt to reform and regulate elections occurred in 1971 with the passage of the Federal Election Campaign Act (FECA) and its subsequent 1974 Amendments. In enacting FECA, Congress sought to control corruption, and reduce the disproportionate influence of wealthy donors on elections and the cost of elections by limiting political contributions and expenditures, increasing public disclosure of contributions and expenditures, and establishing the Federal Election Commission (FEC) to administer and enforce the legislation. FECA was reviewed by the Supreme Court in the seminal case *Buckley v. Valeo*.

The *Buckley* Court found controlling real and apparent corruption to be the only permissible goal of FECA and struck several provisions limiting expenditures because the provisions unconstitutionally limited free speech. The court reasoned that expenditures are more like direct speech and thus in greater need of protection than campaign contributions and that expenditures did not pose the same risks of corruptive influence on candidates as did large individual contributions. In addition, the court voiced concern that FECA's definition of expenditure as "the use of money or other assets . . . for the purpose of . . . influencing . . . a federal election" was too vague and overbroad potentially capturing protected issue advocacy speech. In order to remedy this problem the court construed the term expenditures "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." Whether a communication expressly advocated for the election or defeat of a candidate, and was thus subject to limitation and disclosure, depended on whether the communication employed "magic words" such as "vote for," "elect," "support," "Against John Doe," "defeat," or "reject." Express advocacy was subject to limitations under FECA and could not be financed using soft money or with money from corporate or labor union treasuries.

Issue advocacy communications, defined as communications which advocate for or against political issues or policies, rather than for the election or defeat of a candidate, on the other hand, are not constitutionally subject to regulation. The Court's intention in setting up the express advocacy test was to clearly delineate between the express and issue advocacy, however, in practice the test allowed individuals, groups, and corporations to spend a great deal of money on communications veiled as issue advocacy, which escaped limitation and disclosure because the communications did not contain the Supreme Court's designated express advocacy terms, but which were otherwise indistinguishable from express advocacy. In response to this and other issues arising from soft money spending, Congress passed the Bipartisan Campaign Reform Act (BCRA) of 2002.

Bipartisan Campaign Reform Act of 2002

The sponsors of BCRA presented various findings which illustrated the failure of the express advocacy test to accurately distinguish between express advocacy and issue advocacy. One study found that 99% of the “group-sponsored soft money ads” were in fact campaign ads though they did not employ designated express advocacy terms and so avoided regulation. The express advocacy test essentially allowed unions, corporations, and wealthy contributors to circumvent FECA’s disclosure and contribution regulations simply by avoiding the use of specified terms. In addition, because sponsors of issues ads were not required to disclose their identities, they often used misleading names, such as “Citizens for a Better Medicare,” which unknown to the public was an association of drug manufacturers.

With the passage of BCRA, Congress addressed the issue advocacy loophole by introducing a new definition to aid in distinguishing between true issue ads and campaign ads. The new term, “electioneering communication,” casts a wider net than the old express advocacy test, regulating broadcast, cable, or satellite communications that refer “to a clearly identified Federal candidate and that are publicly distributed to the relevant electorate within 60 days prior to a general election and 30 days prior to a primary election for federal office.” The new rules prohibit use of corporate or union treasury funds to finance electioneering communications and require that persons who spend \$10,000 or more in the aggregate on electioneering communications disclose disbursements and sources of the funds used to make the communications. These rules go a long way in closing off one avenue which allowed corporate and wealthy donors to funnel large unregulated and undisclosed amounts of money into their favored candidate’s campaigns.

McConnell v. Federal Election Commission

The new BCRA provisions were unsuccessfully challenged in *McConnell v. FEC*. The Supreme Court rejected plaintiff’s argument that “*Buckley* drew a constitutionally mandated line between express advocacy and so-called issue advocacy,” stating that the “express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law.” The *McConnell* Court further noted that the “unmistakable lesson from the record in this litigation . . . is that *Buckley*’s magic-words requirement is functionally meaningless . . . Not only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted.” In sum, rejecting plaintiffs’ arguments that BCRA was overbroad, the Court found that the previous express advocacy line did not aid in combating real or apparent corruption and that BCRA was a legitimate and constitutionally sound effort to correct the regulatory flaws of FECA.

New legislation

In 2005, a number of bills were introduced in the House and Senate which would place new limitations on 527 organizations. 527 organizations are committees, clubs, groups, or associations of people incorporated under section 527 of the Internal Revenue Code of 1986. These tax exempt organizations played a major role in the 2003-2004 election cycle, raising and spending vast amounts of money on electioneering communications. The 527 Reform Act which was recently passed by the House and placed on the Senate calendar would amend FECA to include applicable 527 organizations in the definition of political action committees (PACs) thus subjecting such 527 organizations to contribution limits and other federal regulations of PACs. The Act would exempt 527 organizations which reasonably expect to have gross receipts of less than \$25,000; political committees of a State or local candidate or State or local committees of a political party, or whose election nomination activities exclusively relate to non-federal elections, or exclusively influence only state issues and non-federal elected offices. In addition the Act would place some new restrictions on funds used for electioneering communications requiring that election communications referring exclusively to Federal candidates are funded entirely out of a segregated federal account and that communications referring to both federal and non-federal candidates or to political parties are at least 50% funded out of a segregated federal account. The segregated federal and non-federal accounts are subject to separate federal and state rules.

H. 5033

The Commonwealth of Massachusetts

IN THE YEAR TWO THOUSAND FIVE

An Act RELATIVE TO ELECTIONEERING COMMUNICATIONS AND INDEPENDENT EXPENDITURES.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Section 1 of chapter 55 of the General Laws, as appearing in the 2002 Official Edition, is hereby amended by inserting the following definitions:-

“Clearly identified candidate”, a candidate whose name, photo or image appears in a communication or a candidate’s identity is apparent by unambiguous reference in a communication.

“Electioneering communication” shall mean any broadcast, cable, mail, satellite, or print communication that fulfills each of the following conditions:

- a) the communication refers to a clearly identified candidate; and
- b) the communication is publicly distributed 90 days prior to an election in which the candidate is seeking election or reelection.

The following communications are exempt from the definition of “electioneering communication”:

- a) a communication that is disseminated through a means other than a broadcast station, radio station, cable television system or satellite system, newspaper, magazine, periodical, or billboard advertisement, or mail to less than 100 recipients;
- b) a news story, commentary, letter to the editor, news release, column, op-ed, or editorial broadcast by a television station, radio station, cable television system or satellite system, or printed in a newspaper, magazine, or other periodical in general circulation;
- c) expenditures or independent expenditures or contributions that must otherwise be reported under this chapter;
- d) a communication from a membership organization exclusively to its members and their families, otherwise known as a membership communication;
- e) Bonafide candidate debates or forums and advertising or promotion of the same; and
- f) internet or email.

“Independent Expenditure” shall mean an expenditure by an individual, group, or association, not defined as a political committee, expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or a nonelected political committee organized on behalf of a candidate, or any agent of a candidate and which is not made in concert with, or at the request or suggestion of,

any candidate, or any nonelected political committee organized on behalf of a candidate or agent of such candidate.

SECTION 2. Section 8 of said chapter 55, as so appearing, is hereby amended by inserting after the second paragraph the following new paragraph:-

No person or persons, group or association not defined as a political committee, shall solicit or receive from such corporation or such holders of stock any gift, payment, expenditure, contribution or promise to give, pay, expend or contribute for use for an electioneering communication or communications, nor shall such corporation directly or indirectly give, pay, expend or contribute, or promise to give, pay, expend or contribute, any money or other valuable thing for the purpose of making an electioneering communication except for a voter guide or questionnaire where all candidates running for the same office are asked the same question or questions and where all such candidates are given an equal opportunity to respond to each question or questions, provided that said questionnaire or guide does not contain additional language, images, or symbols, conveying support or opposition to the opinions of the candidates.

SECTION 3. Chapter 55 is hereby amended by striking Section 18A and inserting in place thereof:-

Section 18A. Every individual, group or association not defined as a political committee, who makes an independent expenditure or expenditures in an aggregate amount exceeding two hundred fifty dollars during any calendar year for the express purpose of promoting the election or defeat of any candidate or candidates shall file with the director, within seven days after making such independent expenditure or expenditures, on a form prescribed by the director, a report stating the name and address of the individual, group or association making the expenditure or expenditures; the name of the candidate or candidates whose election or defeat the expenditure promoted; the name and address of the person or persons to whom the expenditure or expenditures were made; and the total amount or value; the purpose and the date of the expenditure or expenditures.

Any person, group or association that makes or contracts to make independent expenditures aggregating \$1,000 or more within seven days prior to the date of an election shall file a report containing the information required by this section within 24 hours of making such expenditure.

Violation of any provision of this section or section 18C shall be punished by imprisonment for not more than one year or by a fine of not more than ten thousand dollars.

SECTION 4. Section 18C of Chapter 55 is amended by inserting after section (b)(3) the following:

- (4) Every individual, group, or association who makes an independent expenditure or electioneering communication expenditure in an aggregate amount exceeding two hundred and fifty dollars during any calendar year.

SECTION 5. Said chapter 55, as so appearing, is hereby amended by inserting after section 18C the following new section:-

Section 18D. Every individual, group or association not defined as a political committee, who makes an electioneering communication expenditure or expenditures, in an aggregate amount exceeding two hundred fifty dollars, shall electronically file with the director, within seven days after making such an expenditure, a report stating the name and address of the individual, group or association making the electioneering communication; the name of the candidate or candidates clearly identified in the communication; the total amount or value of the communication; the name and address of the vendor to whom the payments are made; and the purpose and date of the expenditure or expenditures. In addition, any individual, group, or association not defined as a political committee, who makes an electioneering communication expenditure or expenditures, in an aggregate amount exceeding two hundred and fifty dollars during any calendar year, who receives funds for the purpose of making such electioneering communications shall include in said electronic filing the date the funds were received and the name and address of the provider of any such funds in excess of two hundred dollars, if any.

Any person, group or association that makes or contracts to make electioneering communications aggregating \$1,000 or more within seven days prior to the date of an election shall file a report containing the information required by this section within 24 hours of making such expenditure.

Violation of any provision of this section shall be punished by imprisonment for not more than one year or by a fine of not more than ten thousand dollars.

SECTION 6. Section 24 of Chapter 55 is amended by inserting after the words “all other such statements shall be filed with the director” at the end of the first sentence the following:--

including all statements required to be filed by sections 18A and 18D regardless of the office sought.

SECTION 7. Chapter 56 is amended by deleting section 39 and inserting in place thereof the following section:

Section 39. No person, group, organization or association shall publish or broadcast or cause to be published or broadcast in a newspaper, periodical, radio broadcast, television broadcast, including cable or other means of electronic dissemination, any paid advertisement designed or tending to aid, injure, or defeat any candidate for public office or any question submitted to the voters, unless the name of the person, group, or organization paying for such advertisement appears therein in the case of any of the aforementioned visual media in a clearly visible and prominent typeface and in the case of a radio broadcast clearly audible statement; provided, however, that a duly authorized agent eighteen years of age or older has signed his name in the presence of a witness to the following statement authorizing the insertion or broadcast of such advertisement. The statement shall be retained by the newspaper, periodical, radio broadcast, television broadcast, including cable, for not less than

one year, shall be available to any person upon request, and shall be in substantially the following form:

I hereby authorize the affixing of my/our name to the attached political advertisement on behalf of _____ or in opposition to _____, candidate for _____ in the election to be held in the current year, or on behalf of or in opposition to a question being submitted to the voters in the election in the current year.

Witness:	Signature:
Address:	Address:
Date:	Date:
Organization or group:	Statement of group interests and/or mission that clearly identifies the economic or other special interest or employer, if identifiable, of a majority of its organizers or contributors:
Chairman and Treasurer:	

Political advertisements inserted in reading columns shall be preceded or followed by the word "Advertisement" in a separate line, in type not smaller than that of the body type of the newspaper or other periodical. This section shall not authorize expenditures otherwise prohibited by this chapter.

Any corporation violating any provision of this section or section thirty-eight, relative to payments to newspapers and periodicals, and to political advertising, shall be punished by a fine of not more than ten thousand dollars, and any officer, director or agent of a corporation violating any such provision, who authorized such violation, or any person who violates, or in any way knowingly aids or abets the violation of, any such provision, shall be punished by a fine of not more than one thousand dollars, or by imprisonment for not more than one year.

Sources

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