BEFORE THE INDEPENDENT ETHICS COMMISSION
STATE OF COLORADO

CASE NO. 08-01

In the matter of

MICHAEL COFFMAN

COMPLAINANT'S CLOSING BRIEF

Petitioner Colorado Ethics Watch ("Ethics Watch") respectfully submits its closing brief.

I. INTRODUCTION

Despite all the "smoke and mirrors" produced by Mr. Coffman's defense during the prehearing process and the March 6 hearing, this case is and always has been uncomplicated. Factually, only two questions are at issue: (1) did Mr. Coffman knowingly allow an employee and political ally to operate a partisan side-business that violated state law, and (2) did Mr. Coffman have a conflict of interest with one of the voting system vendors when he exercised his official discretion to certify said vendor's machines? Legally, the only two issues the IEC must determine are whether an affirmative answer to either of these factual questions means Mr. Coffman failed to comply with "any other standards of conduct" and if so, what should be the IEC's finding or penalty, if any.

The central, material question is whether Mr. Coffman knew about Mr. Kopelman's operation of the Political Live Wires business, which both the state auditor and the secretary of state's office found to be a violation of state law, not whether Mr. Coffman knew about the politicallivewires.com website by itself. Similarly, the tedious details of the certification process and the validity of the ultimate decision to certify the

conflicted vendor's machines are also inconsequential. The central, material issue is only whether that discretionary decision was made while a conflict of interest existed. As set forth below, the documents and testimony support a finding that indeed Mr. Coffman was aware of both conflicts and that both conflicts violated standards of conduct.

In fact, Mr. Coffman's testimony at the hearing removed all doubt as to why he fought so hard to stop it, why he flouted the IEC's Rules of Procedure that required him to produce relevant documents three months earlier than he did, and why he tried to change the subject to Ethics Watch's alleged motives for bringing the case. What the IEC saw at the hearing was the defense of a man who knows he has been caught and will say or do anything to avoid accountability. Mr. Coffman's efforts to stonewall Ethics Watch and the IEC, however, did not prevent the truth from coming out: that Mr. Coffman knew, and has known all along, of the two conflicts of interest that are the subject of the complaint, and yet tolerated those conflicts because he considered himself to be beyond reproach.

II. STATEMENT OF FACTS

In addition to all stipulated facts, Ethics Watch submits that the testimony and documentary evidence and filings in the record of this case show the following:

1. Mr. Coffman's long-standing relationship with Dan Kopelman is based almost exclusively on partisan, political associations. Mr. Coffman first met Mr. Kopelman in 1994 when they were both walking precincts in a state Senate campaign. Mr. Coffman also knew Mr. Kopelman from his work on Congressman Tom Tancredo's campaign and Mr. Kopelman's own campaign for Adams County Treasurer. Hearing Transcript ("Trans.") at 149-51.

2. In 2006, Mr. Kopelman worked on Mr. Coffman's campaign for Secretary of state. Trans. at 155; *see also* Exhibit 3 (Mr. Kopelman's time records from the Treasurer's Office). Mr. Kopelman asked Mr. Coffman to pay him for some of his time, and Mr. Coffman agreed to compensate Mr. Kopelman $1500 payable to his Political Live Wires business. *Id*.; Trans. at 155-56, 216-18; Exhibit 2. Mr. Coffman was also aware that in August 2005 his secretary of state campaign had reimbursed Political Live Wires for a laptop computer (erroneously identified as "software") that Mr. Coffman wanted to take with him to Iraq. Trans. at 155-56, 217; Exhibit 2.

3. Mr. Coffman testified that he understands it is common practice for political consultants to establish business entities through which they are paid for campaign work, but that he didn't view Political Live Wires as an "active business." Trans. at 217-25, 233. Mr. Coffman could not explain why he did not think Political Live Wires was not an "active business" and did not define what he meant by that. *See id*.

4. In fact, the business records of the secretary of state's office show that Political Live Wires was a trade name through which Mr. Kopelman transacted business during the pertinent time period. Exhibit 1. Mr. Coffman's official duties as secretary of state included oversight of business records.

5. In direct contradiction to his own testimony that he did not think Political Live Wires was an "active business," Mr. Coffman testified that he knew Mr. Kopelman would have loved for Political Live Wires to grow into a consulting business, but it was nothing more than a business through which he got paid for "grunt work on a campaign." Trans. at 224.

6. In January 2007 when Mr. Coffman took office, he hired Mr. Kopelman as the elections technology manager for the secretary of state's office. Exhibit 24. Prior to that, Mr. Kopelman worked for Mr. Coffman in the treasurer's office. Trans. at 159. According to Mr. Kopelman, Mr. Coffman hired him in part because he was a political activist. Exhibit DD.

7. Both before and after he started working at the secretary of state's office, Mr. Kopelman operated a weekly blast e-mail service as part of his Political Live Wires business. Exhibits 4 – 8. The e-mails carried advertisements for complete website services offered by campaignsecrets.com for $24.95 per month. Exhibits 5 - 8. Mr. Hobbs testified that the secretary of state's internal investigation found that Mr. Kopelman's business received some advertising revenue during the relevant time period and could not rule out that some or all of the revenue came from the e-mail service. Trans. at p. 75, 114.

8. Mr. Coffman received the Political Live Wires e-mails at his state-issued e-mail address while he was state treasurer and continued to receive them after he became secretary of state. Trans. at 224; Exhibit DD at p.3. In Mr. Kopelman's words, "Treasurer Mike **Coffman** and his transition and communications manager, Brian Anderson, as well as his previous Deputy Treasurer Ben Stein **had ample knowledge of my political affiliation and business**, they have been on my mailing list for years." Exhibit DD at p.3 (emphasis added).

9. Mr. Kopelman added Mr. Coffman's executive assistant, Abby Thomas, to the Political Live Wires e-mail list once he became secretary of state. Trans. at 226. Ms. Thomas testified that she printed out the Political Live Wires e-mails in Exhibit 8 and

gave a hard copy to Mr. Coffman, who reviewed them and let her know which events to schedule. Trans. at 17-20. Ms. Thomas also testified that although Mr. Coffman received "hundreds" of scheduling requests, none of those people had direct, daily access to Mr. Coffman and his senior staff like Mr. Kopelman. Trans. at 33.

10. Ms. Thomas would flag an e-mail with a "Follow Up" message when she needed to follow up on a scheduling item with Mr. Coffman and then flag the e-mail "Completed" after the follow-up conversation with Mr. Coffman took place. Trans. at 18-20.

11. Mr. Coffman's testimony regarding his knowledge of politicallivewires.com was riddled with contradiction, which wholly discredits his defense. First he confirmed that Ms. Thomas printed out the e-mails contained in Exhibit 8 and went over them with him, but claimed that he really didn't notice the politicallivewires.com reference, or if he did, he assumed it was a volunteer activity conducted outside of business hours. Trans. at 216-17. Then he testified that he was put on the politicallivewires.com list while serving as state treasurer, that he believed Mr. Kopelman had a lot of folks on the list and that he "was okay with having [Mr. Kopelman] send it to [him]." Trans. at 224.

12. Later still, when asked if he noticed the advertisements carried on the e-mails in Exhibits 7 and 8, Mr. Coffman testified that he did not. Trans. at 227-28. After his counsel objected, Mr. Coffman attempted to change his testimony to state that he did not recall whether he reviewed the e-mails in Exhibit 8 with Ms. Thomas *at all*. Trans. at 230. And yet moments earlier Mr. Coffman testified that he had reviewed the politicallivewires.com emails but didn't think the content "was very beneficial, because

of the fact that they didn't really – they didn't provide the kind of updates that [he] needed… So to [him], it wasn't very effective to use it." Trans. at 221-222. This is a classic example of a witness attempting to change his testimony based on a perceived signal from an objection by his counsel and casts further doubt on Mr. Coffman's credibility.

13. Notably, when asked if he didn't ever notice the politicallivewires.com e-mail Mr. Coffman did not say no; instead he changed the subject to the fact that he did not find the lists to be very beneficial. Trans. at 221-22. Based on his own testimony, there can be no question that he read the e-mails and was well aware of Mr. Kopelman's outside partisan business activities.

14. The evidence shows that Mr. Kopelman's assistance to Mr. Coffman went far beyond his role in elections technology. Exhibits 5, 6, 9, 11 and 12 show that Mr. Kopelman openly and repeatedly used the Political Live Wires e-mail address to transmit messages (including e-mails forwarded from Mr. Coffman's campaign website) to Mr. Coffman's senior staff at the secretary of state's office to schedule political events during business hours, and that Mr. Kopelman was actually encouraged to do so.

15. Mr. Coffman testified that he had been advised by the attorney general's office that he could use his administrative assistant for political scheduling, but he did not say that office told him it was an appropriate use of other state employees' time to strategize regarding political events. Trans. at 176-77. Yet this was exactly what Mr. Coffman was doing with Mr. Kopelman and why it was a benefit to him to have the operator of Political Live Wires working at his side on the state payroll.

16. Mr. Hobbs, the deputy secretary of state, launched an investigation of Mr. Kopelman on or about May 4, 2007, when he learned of the politicallivewires.com website and advised Mr. Coffman, who he described as having been "mortified" at the revelation. Trans. at 67-68. Exhibit 4 is an archived copy of the politicallivewires.com website as it existed at the time the website ePluribus Media broke the story of its existence. Trans. at 103-06.

17. Mr. Coffman testified that he did not notice the front page of the website boldly advertised the very e-mail service to which Mr. Coffman had subscribed for years and that he discussed with Ms. Thomas at least twice monthly for four months. Trans. at 23-25, 238-39.

18. Exhibit 4 also shows that Mr. Kopelman's contact e-mail on the offending website was dkopelman@technologist.com, the same e-mail through which he transmitted the e-mails to Mr. Coffman in Exhibit 9. Trans. at 297. Despite these red flags, Mr. Coffman did not advise Mr. Hobbs of the existence of the Political Live Wires e-mails. Trans. at 239. Importantly, Mr. Hobbs testified that based on his experience the blast e-mail service presented the same conflict as the website. Trans. at 117.

19. Mr. Coffman testified that he took severe corrective action in the form of transferring Mr. Kopelman away from any supervisory responsibility and cutting his pay. Trans. at 169-70. This assertion is contradicted by Exhibit 40, a document delivered by Mr. Coffman's counsel to Ethics Watch as a trial exhibit on February 13, 2009. That document indicates that on May 8, 2007, Mr. Kopelman was indeed transferred to the Information Technology division of the department of state, however, his "**[t]itle & salary remain the same.**" Exhibit 40 (emphasis added).

20. According to Mr. Hobbs, when Mr. Kopelman was moved from the state treasurer's to the secretary's office he received a pay increase that was revoked as part of his disciplinary action. *See* Trans. at p. 65. In reality, the pay increase was only $770 per month, was set to be paid for only six months and could be revoked upon ten day's notice. *See* Individual Agreement for Temporary Pay Differential Between Department of State and Dan Kopelman, Exhibit 41. That means Mr. Kopelman suffered a salary loss of only $1,540, or the last two months of the temporary increase period. Under the plain language of the documents, Mr. Kopelman's salary remained the same.

21. Mr. Hobbs' testimony regarding the temporary pay increase was carefully phrased. He testified that "at an annual rate, it was a little over 9,000 per year" without advising the IEC that the temporary pay increase was scheduled to expire in July 2007 or that it could be revoked with ten day's notice. Trans. at 65. Mr. Hobbs' misleading half-truth calls his credibility into doubt.

22. Shortly after the story regarding Mr. Kopelman's outside business activity broke, Mr. Coffman announced a new policy forbidding all employees in the Elections, Administration and IT divisions from engaging in a wide variety of partisan activities. Exhibits X and Z; Exhibit 20. This policy was later rolled back to apply only to employees of the Elections Division and certain employees of the IT Division. Exhibit 21; Trans. at 252-53. The rollback freed Jacque Ponder, a member of his administration, to work as a volunteer on his campaign during her spare time; Ms. Ponder is now Mr. Coffman's chief of staff in Washington, D.C. Trans. at 255-57. At the end of the day, Mr. Coffman's purportedly aggressive, comprehensive policy was anything but, and should not be viewed as anything other than public relations damage control.

23. Ethics Watch's criticism of the policy was limited to only one provision - the blanket ban on campaign contributions by employees, which Ethics Watch contended was unconstitutional. Exhibit AA. Ethics Watch instead called on Mr. Coffman to "pledge to follow and enforce the laws already on the books." *Id*. The attorney general's office also expressed constitutional concerns with the policy. Trans. at 258-60.

24. On or about December 3, 2007, the auditor's office released the results of a performance audit of the Department of State in a comprehensive report to the legislative audit committee. *See Voter Registration, Help America Vote Act, Department of State, Performance Audit*, Office of the State Auditor Staff (November 2007) (the "Audit"). Exhibit CC. In short, the Audit concluded that Mr. Kopelman violated state law and that Mr. Coffman shared responsibility for those violations. *Id*. at p. 45.

25. The Audit, dated November 2007, found that several months after the new partisan activities policy had been implemented (and partially rolled back), management did not know whether all employees with outside businesses had filed disclosures and that "[n]either does management have a process for providing reasonable assurance that staff will self-report." Exhibit CC at p. 46. Although the state auditor charitably described the new policy as "a step in the right direction," she also stated that "the Department needs to continue this effort to strengthen management accountability for compliance with state personnel rules" and suggested additional actions. *Id*. The Department of State stated that it agreed with the Auditor's recommendations and would immediately implement them. *Id*. at p. 47.

26. The state auditor further found that it was Mr. Kopelman's operation of the Political Live Wires partisan business, not merely the website, that violated state

conflict of interest laws because "the employee's ownership and operation of this business appears to 'raise criticism and the appearance of a conflict of interest' particularly given the job responsibilities for which this individual was assigned within the Elections Division." Exhibit CC at p. 44 (quotation marks in original).

27. As late as December 1, 2007, long after the completion of the secretary of state's supposedly thorough investigation of Mr. Kopelman, Mr. Coffman was asking him by e-mail when the website was started, what it contained when it was launched, and suggesting language for a press release in response to the anticipated release of the Audit. Exhibit 23; *see also* Exhibit 24. If you remove all the "smoke and mirrors" produced by Mr. Coffman, it is plain to see that he had ample knowledge of Mr. Kopelman's business and allowed him to continue operating the business in violation of state law.

28. Turning to the facts regarding the second incident giving rise to this complaint, it is undisputed that Diebold Election Systems, Inc., now known as Premier Election Systems, Inc. ("Premier") was one of the voting system vendors that applied to the secretary of state's office for certification in 2007. *See* Stipulated Fact Nos. 4 and 5.

29. On September 17, 2007, Premier hired Phase Line Strategies ("Phase Line") as its lobbyist of record in the State of Colorado. Exhibit 31. No later than October 2, 2007, Mr. Coffman knew that Phase Line was lobbying on behalf of Premier. Trans. at 286-88.

30. Mr. Coffman and Sean Tonner are longtime friends and political allies. Exhibit I at ¶ 14; Trans. at 208. Mr. Coffman knew that Mr. Tonner was the sole owner of Phase Line. Trans. at 272; see also Exhibit 28 (Phase Line's website identifying Mr.

Tonner as Founder and President). Mr. Coffman understands that as Phase Line's sole owner, Mr. Tonner gets the profit if Phase Line is profitable. Trans. at 272-73.

31. In 2005, Mr. Tonner promised Mr. Coffman that if Mr. Coffman ever ran for Congress in the Sixth Congressional District, Mr. Tonner would help him get elected. Exhibit I at ¶ 13. Consistent with that promise, on or about October 29, 2007, when Rep. Tom Tancredo announced that he would not run for re-election, Mr. Coffman immediately notified Mr. Tonner that he intended to run for the seat being vacated by Mr. Tancredo. *See* Exhibit I at ¶¶ 11, 12. Knowing that there would be a contested primary election, Mr. Coffman wanted his intentions about running for the open seat made public immediately and so Mr. Tonner agreed to send a press release for him. Exhibit I at ¶ 15.

32. On November 5, 2007, Mr. Coffman filed his "Statement of Candidacy" with the Federal Election Commission for the office of United States Representative for the Sixth Congressional District of Colorado. Exhibit 27.

33. Mr. Coffman acknowledged hiring Phase Line to perform fundraising services for his congressional campaign in the 4th Quarter of 2007, and his campaign committee reported disbursing $6363.58 to Phase Line during that period, including $4000 for fundraising services. Trans. at 270-72; Exhibit 30.

34. According to his own testimony, Mr. Coffman was aware when he hired Phase Line to launch his congressional campaign that Phase Line also represented Premier and nonetheless engaged Phase Line without disclosing or correcting the conflict of interest. Trans. at 286-89.

35. Mr. Coffman engaged a panel of voting machine testing experts to advise him in connection with the retesting portion of the certification process (the "Testing

Board"). Trans. at 86-89. The Testing Board recommended that none of Premier's voting systems be certified. Exhibits ZZ and AAA.

36. Using his power as Secretary of state to determine whether Premier "substantially complied" with state law, and notwithstanding the Testing Board's recommendation, Mr. Coffman decided to certify or conditionally certify all of Premier's voting systems. *See* Exhibits 35-38; Trans. at 138-39, 289-90; *see also* C.R.S. § 1-5-616 (2007); C.R.S. § 1-1-103.

37. Unlike Mr. Coffman, who took no action to redress the conflict after it became public, Premier terminated Phase Line as its lobbyist of record in the State of Colorado effective January 15, 2008. Exhibit 31. Mr. Coffman's business relationship with Phase Line continued through the November 2008 election. Trans. at 277-78.

38. Mr. Coffman testified that he did not think his relationship with Phase Line created an improper conflict. Trans. at 288. Mr. Coffman's position is one of convenience and sets a flagrant double-standard not supported in law. In an affidavit dated December 1, 2008, Mr. Coffman stated that he believed Commissioner Wood could not make an objective decision on this complaint because of "our past association and business relationship" and political differences. Affidavit of Michael Coffman (Exhibit 42) at ¶ 14.[1] The "past association and business relationship" to which Mr. Coffman referred occurred in the 1995-99 time period. Id. at ¶¶ 7-14.

39. Through his counsel, Mr. Coffman argued to the IEC that "**appearance of impropriety** is a basis for disqualification" and that, based on the ten-year-old

[1] Ethics Watch recognizes that Exhibits 42 and 43 are already part of the record of this case. Trans. at 8. Copies have been filed with Ethics Watch's supplemental exhibits for the convenience of the IEC.

association and business relationship between Mr. Coffman and Commissioner Wood, it was reasonable to fear that Mr. Coffman would not sit impartially in this matter. *See* Mr. Coffman's December 10, 2008 *Motion to Transfer to an Administrative Law Judge or, in the Alternative, Motion to Recuse Commissioner Wood and Provide Disclosures by Commissioners*, Exhibit 43 (emphasis in original). In other words, Mr. Coffman showed his true colors by asking the Commissioners to hold themselves to an ethics standard he personally scoffs at.

III. STATUS OF THE INVESTIGATION

Colo. Const. art. XXIX, § 5(3)(b) provides that the IEC "shall conduct an investigation, hold a public hearing, and render findings on each non-frivolous complaint pursuant to written rules adopted by the commission." Shortly after the IEC determined that the Complaint was not frivolous, Ethics Watch requested an investigation. In its procedural order dated November 3, 2008, the IEC advised the parties that "no further investigation of the complaint will be undertaken by the IEC." The IEC also advised the parties that they could use "the Colorado Open Records Act and other provisions of law to obtain the information each may believe is necessary to present to the IEC." The Order also rejected Ethics Watch's request for leave to conduct discovery pursuant to IEC Rule of Procedure 8.D.2.

In a good faith attempt to proceed as directed by the IEC, Ethics Watch served CORA requests on the state auditor and the Department of State to obtain documents relevant to this case, including documents that should have been, but were not, disclosed by Mr. Coffman in his initial disclosures on November 13. Exhibits 44 and 45. Both rejected the request. The state auditor's rejection was based on state law forbidding the

release of auditor work papers without permission from the Legislative Audit Committee, which denied permission. Exhibit 46; *see also* Trans. at 268, 299. The Department of State asserted (among other things) that it was required by statute to assist Mr. Coffman in his defense, and therefore, the requested documents were protected from disclosure by a joint defense privilege. Exhibit 47.

Mr. Coffman did not produce any documents in this case until late in the afternoon of February 13, 2009, the deadline for the parties to file final prehearing statements under IEC Rule of Procedure 8.D.4. The documents included in Coffman's February 13 submission included selected portions of Mr. Kopelman's personnel file that are exempt from CORA, a fact well known to Mr. Hobbs. *See* C.R.S. §§ 24-72-202(4.5) and 204(3)(a)(II)(A); Trans. at 125-26. Some of those documents were later withdrawn from Mr. Coffman's exhibit list. *See* Exhibits 40 and 41. Others have still never been seen by Ethics Watch or the IEC, such as the corrective action letter issued to Mr. Kopelman (referred to in Exhibit DD but never produced) or the version of the politicallivewires.com website that Mr. Hobbs testified that he saved as part of his investigation. Only Mr. Coffman and his attorneys (and, presumably, their joint defense partners at the Department of State) know what other documents in Mr. Kopelman's personnel file exist that might shed light on this matter.

The result is that Mr. Coffman had the ability to pick and choose what portions of Mr. Kopelman's personnel file to make public as part of his defense, secure in the knowledge that the remaining documents would be kept secret as personnel documents not subject to CORA. Also, the IEC does not have before it the Consulting Services Agreement between Phase Line and Premier (*see* Exhibit J at ¶ 5) and therefore cannot

review for itself the scope of Phase Line's lobbying assignment nor how its compensation was determined. Similarly, the alleged attorney general opinion authorizing elected officials to use secretarial support for political work has not been presented to the IEC.

Ethics Watch recognizes that the IEC's order that the parties could file supplemental exhibits by March 12 may be intended to alleviate the prejudice suffered by Ethics Watch as a result of Mr. Coffman's failure to produce documents until after Ethics Watch had submitted its Final Prehearing Statement, and his attempt to withdraw exhibits after the deadline. In compliance with that order, Ethics Watch has filed supplemental exhibits including: (a) two documents from Mr. Kopelman's personnel file (Exhibits 40 and 41) that were produced as trial exhibits by Mr. Coffman on February 13 and then removed when he filed his supplemental exhibit list after the deadline; (b) Mr. Coffman's affidavit and motion to disqualify Commissioner Wood (Exhibits 42 and 43) that are already in the record but are included for convenience because they are referred to herein; (c) documents related to CORA requests (Exhibits 44-47) that were produced by Ethics Watch in its First Supplemental Disclosures and which help clarify testimony regarding cooperation between the Department of State and Mr. Coffman's defense team and the Legislative Audit Committee's disapproval of Ethics Watch's CORA request; (d) documents regarding actions taken by Ethics Watch (Exhibits 48-66) to clarify the facts and rebut Mr. Coffman's claim that the case was filed to harass him; and (4) the state auditor's report of the Department of State's lobbyist regulation under Mr. Coffman (the original Exhibit CC), that did not result in an ethics complaint against Mr. Coffman despite its finding that the department showed favoritism toward certain lobbyists. Ethics Watch appreciates the IEC's courtesy; however, the ability to file supplemental exhibits

cannot make up for the fact that Mr. Coffman has been able to selectively present documents from Mr. Kopelman's personnel file which were otherwise cloaked by CORA or that Ethics Watch was unable to conduct third party prehearing discovery with respect to Phase Line.[2]

The IEC still has discretion to investigate Mr. Kopelman's personnel file and the Phase Line-Premier agreement before entering findings. Even without that additional information, there is sufficient evidence to determine that Mr. Coffman knowingly tolerated the conflicts of interest that are the subject of the complaint.

IV. ARGUMENT

A. Jurisdiction.

Amendment 41, passed in 2006, created the IEC. The Amendment, now codified as Article XXIX of the Colorado Constitution, mandates that "[t]he purpose of the independent ethics commission shall be to hear complaints, issue findings, and assess penalties, and also to issue advisory opinions, on ethics issues arising under this article and under any other standards of conduct and reporting requirements as provided by law." Colo. Const. art. XXIX, § 5(1).

Complaints are governed by Section 5(3) of Article XXIX of the Colorado Constitution, which provides:

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[2] Mr. Coffman's counsel has advised that his client will not stipulate to any of Ethics Watch's supplemental exhibits; however, all of them are admissible under the standard applied to testimony at the hearing and the IEC's order authorizing the parties to supplement the record with clarifying exhibits. *See also* IEC Rule of Procedure 8.E and *Colorado Dep't of Revenue, Motor Vehicle Div. v. Kirke*, 743 P.2d 16, 21 (Colo. 1987) (rules of evidence need not be strictly applied in administrative hearings; evidence may be accepted if it "possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs"). Moreover, Ethics Watch properly designated documents to rebut the selective portrayal of Ethics Watch's activities unveiled by Mr. Coffman for the first time in his Final Prehearing Statement.

> (3)(a) Any person may file a written complaint with the independent ethics commission asking whether a public officer, member of the general assembly, local government official, or government employee has failed to comply with this article or any other standards of conduct or reporting requirements as provided by law within the preceding twelve months.
>
> (b) The commission may dismiss frivolous complaints without conducting a public hearing. Complaints dismissed as frivolous shall be maintained confidential by the commission.
>
> (c) The commission shall conduct an investigation, hold a public hearing, and render findings on each non-frivolous complaint pursuant to written rules adopted by the commission.
>
> (d) The commission may assess penalties for violations as prescribed by this article and provided by law.

All of this should be read in harmony with the voters' intent, expressed in Section 1 of Article XXIX, that public officials should "avoid conduct that is in violation of their public trust or that creates a justifiable impression among members of the public that such trust is being violated." Colo. Const. art. XXIX, § 1(c).

Reading these provisions together, determining whether the IEC has jurisdiction over a matter involves a three step analysis. First, is the defendant a public officer, member of the general assembly, local government official, or government employee? Second, does the complaint pose a question whether the respondent failed to comply with Article XXIX or any other standard of conduct or reporting requirement guiding the respondent's conduct in office? Third, does the complaint present an "ethics issue" arising from those standards? Those criteria are amply satisfied here: as secretary of state, Mr. Coffman was a "public officer" as defined in Colo. Const. art. XXIX, § 2(6), the IEC has already determined (and the district court agreed) that the complaint alleges violations of standards of conduct that apply to his conduct in that office, and the conflict

of interest questions presented easily qualify as "ethics issues" subject to IEC jurisdiction.[3]

B. Mr. Coffman's "frivolous" argument should be rejected.

Mr. Coffman has argued that this case is "frivolous" under C.R.S. § 24-18.5-101(5)(a), because it purportedly failed to allege private gain or personal financial gain. First, the position is legally erroneous because allegations of private or personal finance gain are not a request element of the claims. C.R.S. § 24-18.5-101(5)(a) is correctly read as a reasonable pleading restriction applicable to complaints alleging violation of the Article XXIX gift ban and revolving door provisions, and not an unconstitutional attempt to limit the IEC's jurisdiction over ethics issues arising from "other standards of conduct." *See* Colo. Const. art. XXIX, §§ 5(3)(a), 9; *People v. Felgar*, 58 P.3d 1122, 1124 (Colo. App. 2002) (whenever possible, statutes should be construed to avoid constitutional problems).

Nonetheless, the complaint pleads and Ethics Watch established at the hearing that Mr. Coffman and/or his cronies benefited politically and financially from the conflicts of interest. Mr. Coffman was able to provide financial support in the form of a state job for a political friend who was trying to grow his apparently struggling, unprofitable outside business. He also hired Phase Line to work on his campaign at the

[3] Mr. Coffman protests that if Ethics Watch's view of the IEC's jurisdiction is accepted, the floodgates will open for complaints every time an appointing authority is known to have tolerated outside business, pointing to the state auditor's report on the Division of Aeronautics, Department of Transportation that is Exhibit H. This argument should be rejected for three reasons. First, policy arguments against Amendment 41 cannot provide a basis for excluding claims that fall within the plain language of the amendment. Second, there is no indication that the Division Director's tolerance of the outside business was related to a conflict of interest, meaning that the element of an "ethics issue" within the IEC's jurisdiction may not be present. *See* Exhibit H at p. 84.

same time Phase Line was collecting fees for its conflicting representation of Premier, knowing that any profit would inure to the benefit of his good friend and political ally Sean Tonner.

Based on the foregoing, jurisdiction is proper and the complaint is non-frivolous.

C. Standard of Proof.

The IEC previously ruled that the clear and convincing evidence standard shall apply to Ethics Watch's claim of a violation of C.R.S. §§ 18-8-404 and/or 405, and that the ordinary preponderance of the evidence standard shall apply to the other claims. A claim is established by a preponderance of the evidence when "the existence of the contested fact is more probable than its nonexistence." *Page v. Clark*, 592 P.2d 792, 800 (Colo. 1979). Clear and convincing evidence is an intermediate standard between the ordinary civil preponderance standard and the criminal standard of proof beyond a reasonable doubt and has been defined as "unmistakable and free from serious or substantial doubt." *In re Jane Doe 2*, 166 P.3d 293, 294 (Colo. App. 2007) (quotation omitted). As set forth below, Ethics Watch has satisfied the burdens of proof with respect to each claim.

D. The Evidence Establishes Violations of Ethical Standards of Conduct.

1. The Conflict of Interest Involving Political Live Wires.

The ethics issue for the IEC to resolve is whether Mr. Coffman violated standards of conduct as Secretary of state by knowingly allowing Mr. Kopelman to continue the operation of Political Live Wires, a partisan outside business that was incompatible with his official duties. The evidence demonstrated that he did.

a. Violation of C.R.S. § 24-50-101(3)(d), 4 CCR § 801, Rule 1-11.

Colorado state employees in the personnel system, like Mr. Kopelman, are prohibited from engaging in any activity that creates a conflict of interest with their official duties. C.R.S. § 24-50-117. Pursuant to C.R.S. § 24-50-101(d), the heads of principal departments "shall be responsible and accountable for the actual operation and management of the state personnel system for their respective departments…" Similarly, the State Personnel Board Rule 1-11 provides that, "[a]ll appointing authorities… are accountable for compliance with [state personnel] rules and state and federal law…" 4 CCR § 801.

In this case, there is no dispute that Mr. Kopelman violated State Personnel Board Rules 1-13 and 1-14 by owning and operating a partisan political business while employed with the secretary of state's office that was directly incompatible with the duties of his state position and without prior written authorization. And yet, Mr. Coffman attempts to evade any accountability by arguing that Mr. Kopelman's website alone was the offending conduct, not his other actions. The website versus the operation of his business is a distinction without a difference. Even the Mr. Coffman's own defense witness, Deputy Secretary of State Bill Hobbs agreed that based on his experience the blast e-mail service presented the same conflict as the website. Trans.at p. 117. The IEC should follow suit and recognize the entirety of Mr. Kopelman's outside business as the violation. *See e.g.*, Exhibit CC at p.44. As the state auditor said, Mr. Kopelman's ownership and operation of "a partisan political business while employed with the Department of State," not merely his website, "appears to raise criticism and the

appearance of a conflict of interest" with his job duties in the Department of State. *Id*. at p. 44 (quotation omitted).

The evidence now before the Commission establishes that Mr. Coffman knew that Kopelman operated his outside political consulting business under the name "Political Live Wires," received the Political Live Wires e-newsletter at his state e-mail address for years, at least twice a month reviewed hard copies of the Political Live Wires newsletter with his assistant Ms. Thomas, and was so familiar with the contents of that newsletter that he was able to disparage the usefulness of Mr. Kopelman's work and belittle the status of his business at trial. When others revealed that the Political Live Wires website offered voter data for sale and speculated that the data came from the Department of State, Mr. Coffman went into damage control mode. Regardless, the fact that Mr. Coffman took purportedly "tough" measures (that turned out on closer inspection not to be so tough) does not alter the fact that he was well aware of the ongoing conduct of the Political Live Wires business from the beginning of his term of office and only took action when that business became a public embarrassment to him.

While there was some attempt at the hearing to shift blame onto Deputy Secretary of State Hobbs, the law is clear and even Mr. Coffman did not dispute that the buck stopped with him as the secretary of state and appointing authority. C.R.S. § 24-50-101(d); 24-21-102(d) ("The secretary of state shall have such other powers, duties, and functions as are prescribed for heads of principal departments . . ."); Exhibit CC at p. 45 ("The Secretary of State, as the appointing authority, shares responsibility for these violations") (citing 4 CCR 801, § 1-11).

Applying the preponderance of the evidence standard to this claim, the Commission should find that Mr. Coffman violated standards of conduct because, based on the evidence, it is more probable than not – indeed it is conclusive – that Mr. Coffman knew about Mr. Kopelman's outside business and did nothing to redress the offending conduct until it was exposed by the media.

b. Violation of C.R.S. §§ 18-8-404 or 405.

According to state law, "[a] public servant commits first degree official misconduct if, with intent to obtain a benefit for the public servant or another… he or she knowingly… [r]efrains from performing a duty imposed upon him by law; or… [v]iolates any statute or lawfully adopted rule or regulation relating to his office." C.R.S. § 18-8-404 (first degree official misconduct). A public servant commits second degree official misconduct "if he knowingly, arbitrarily, and capriciously… [r]efrains from performing a duty imposed upon him by law; or… [v]iolates any statute or lawfully adopted rule or regulation relating to his office." C.R.S. § 18-8-405.

Here, Mr. Coffman had a legal duty to ensure that Mr. Kopelman complied with state rules and statutes and to require that he obtain permission before engaging in any outside business activities. Mr. Coffman knowingly refrained from performing that duty so Mr. Kopelman could continue running his partisan business and Mr. Coffman could continue using Mr. Kopelman's services to schedule appearances at partisan events and maintain campaign correspondence – to the benefit of both. If the IEC is not convinced by the compelling evidence that Mr. Kopelman or Mr. Coffman benefited, Mr. Coffman's conduct still constitutes second degree official misconduct at a minimum because no showing of benefit is required.

Applying the clear and convincing standard, the IEC should find that Mr. Coffman's violation of official misconduct standards "is unmistakable and free from serious or substantial doubt." *See In re Jane Doe 2*, 166 P.3d at 294.

2. The Conflict of Interest Involving Phase Line Strategies.

The next ethics issue for the IEC to resolve is whether Mr. Coffman violated standards of conduct as secretary of state by knowingly having a conflict of interest with one of the voting system vendors while exercising his official discretion to certify that vendor's machines. Under the same standard Mr. Coffman demanded be applied to members of this Commission, Mr. Coffman's actions created a classic conflict of interest that the IEC should not condone.

The evidence before the Commission demonstrates that when Mr. Coffman hired Phase Line to launch his congressional campaign, he knew that Phase Line was lobbying on behalf of Premier, one of the vendors attempting to have its electronic voting systems certified by Mr. Coffman in a court-ordered process. The evidence also shows that when Mr. Coffman hired Phase Line, he was also fully aware that as Secretary of state he had a non-delegable duty to exercise his discretion in making the final certification decision. Despite this knowledge, there is no dispute that Mr. Coffman did nothing to cure or disclose the obvious conflict because, in his words, he didn't think it was a conflict at all. As a result, when Mr. Coffman ultimately made his discretionary decision to certify Premier's voting system, he did so while the conflict continued to exist.

Mr. Coffman's defense was to try this case as if it were a lawsuit challenging the election system certification decision. Having argued to the Denver District Court that he was prejudiced by only having three and a half hours to present his case, Mr. Coffman

chose to spend a huge proportion of that time on irrelevant information about the merits of the certification. However, the ultimate merits of the certification decision are inconsequential to the question whether Mr. Coffman's decision was improperly tainted by his conflicts of interest.

There is no dispute that Mr. Coffman was vested with discretion to make the judgment call as to whether Premier's election systems substantially complied with state standards and that there existed more than one option he could have chosen consistent with the legal framework governing voting system certification. Indeed, that is the point. As secretary of state, Mr. Coffman had no choice but to make a discretionary call on Premier's certification. The choice he did have was whether to hire Premier's lobbying firm to work on his campaign.

It was the decision to hire Premier's lobbying firm to work on his campaign that Mr. Coffman should not have made. While the IEC does not have jurisdiction to rule that Premier should or should not have been certified under the discretionary substantial compliance standard, the IEC can and should condemn Mr. Coffman's retention of Premier as having created a conflict of interest and a reasonable suspicion that the certification decision was tainted by bias.

a. Elections Code Standards of Conduct.

C.R.S. § 1-5-614 provides that "[t]he Secretary of State shall certify electronic and electromechanical voting systems and approve the purchase, installation and use of such systems by political subdivisions and establish standards for certification." The use of the mandatory word "shall" indicates that the secretary of state does not have the choice to recuse himself from the decision nor delegate it to anyone else. There was no

real dispute in this case that the final certification decision was a discretionary decision that was made by Mr. Coffman.

C.R.S. § 1-5-614 provides an ethical standard of conduct for the secretary of state in making his certification decision under the Elections Code: He must avoid "corrupt conduct in the discharge" of that duty. The United States Supreme Court, citing several dictionary definitions, has held that the common meaning of the words "corrupt" and "corruptly" "are normally associated with wrongful, immoral, depraved, or evil." *Arthur Andersen LLP v. United States*, 544 U.S. 696, 705 (U.S. 2005) *See also In re Samay*, 764 A.2d 398, 408 (N.J. 2001) (judge corrupted his office when he presided over cases knowing he had a conflict of interest); Corrupt, Dictionary.com. *Dictionary.com Unabridged (v 1.1).* Random House, Inc., http://dictionary.reference.com/browse/corrupt (accessed: March 13, 2009) (defining "corrupt" as "guilty of dishonest practices; lacking integrity").

Earlier in this case, Mr. Coffman argued for application of a conflict of interest standard far stricter than he thinks should be applied to him. According to Mr. Coffman's sworn affidavit filed with the IEC, Mr. Coffman believed that Commissioner Wood "cannot objectively decide the complaint filed against me because of our past association and business relationship and that he should immediately remove himself from any further participation in these proceedings." Exhibit 42 at ¶ 14. Ethics Watch opposed the motion because of the long passage of time, the lack of connection between the business relationship and the facts of this case, and the duty of a Commissioner to hear a case when a disqualifying conflict does not exist. It is elementary, however, that it would be inappropriate for a commissioner or a judge to sit on a case when he has an

existing business relationship with a representative of one of the parties before it. *See Zoline v. Telluride Lodge Ass'n*, 732 P.2d 635, 640 (Colo. 1987) (trial judge disqualified when he owned controlling interest in a bank that had one party as a substantial customer); see also *Board of County Comm'rs v. Blanning*, 479 P.2d 404, 406 (Colo. 1970) (disqualification required only when conflict relates to subject matter of the case).

Ethics Watch submits that persons of common intelligence would have little difficulty concluding that it would be "corrupt conduct" for a commissioner or judge to sit on a case knowing that he or she had an existing business relationship with a company that was working for one of the parties before it on the very matter that was before that commissioner or judge. This would remain true even if the ultimate decision the commissioner or judge made was legally defensible in the sense that it fell within a range of outcomes that a reviewing court could find did not constitute an abuse of discretion, or even if the commissioner or judge knew in his or her heart of hearts that the conflict of interest did not really affect the final decision.

What then makes the secretary of state's decision to certify voting machines – a decision related to the most fundamental right in a democracy, the right to vote – somehow less important than the decision of an agency commissioner or judge so that a conflict of interest that would not be tolerated in other contexts is fine when it belongs to the secretary of state? Of course there is nothing. Mr. Coffman himself stated in his newsletter that his office "must be held to the highest ethical standards" because it oversees statewide and federal elections. Exhibit BB. Ethics Watch agrees – acting under a conflict of interest is equally corrupt regardless of whether the actor is a judge, a commissioner, or secretary of state.

In the words of Article XXIX, public officials "shall . . . avoid conduct that is in violation of their public trust or that creates a justifiable impression among members of the public that such trust is being violated." Colo. Const. art. XXIX, § 1(c). "Trust me" is never an acceptable response when a conflict of interest is demonstrated. It was wrongful, immoral, dishonest and lacking in integrity for Mr. Coffman to proceed with making the discretionary decision to certify Premier when he knew the firm that was helping him launch his campaign was also lobbying for Premier.

Unlike a judge or commissioner who knows others are available to make a decision if he or she needs to recuse, there is only one secretary of state and the decision whether to certify a voting systems vendor cannot be outsourced to anyone else. That is why it was so critically important that Mr. Coffman not create a conflict of interest by hiring a firm that he knew was lobbying for a voting system vendor to work on his political campaign. Just as Mr. Coffman said he reasonably feared that Commissioner Wood could not impartially judge him because of their ten-year-old business relationship, the people of Colorado could more reasonably fear that Mr. Coffman could not impartially judge Premier when he was using Premier's lobbyist to jump-start his congressional campaign. He was ethically obligated to avoid this conflict.

Mr. Coffman asks the IEC and the people of Colorado to trust him because the Testing Board process was insulated from outside influence and because he refused to meet with Mr. Ciletti, the Phase Line lobbyist assigned to the Premier account. But by his own admission, the ultimate decision to certify was Mr. Coffman's alone, applying a different standard than the Testing Board applied. Also by his own admission, Mr. Coffman was fully aware that Phase Line represented Premier when he made that

ultimate, discretionary decision. No firewall could insulate Mr. Coffman from his own knowledge that the same firm that was working for his election to Congress was also lobbying for Premier and no firewall could prevent the justifiable appearance of impropriety. The IEC should forcefully state that this conduct is "corrupt" as that word is commonly understood, condemn the behavior, and let it be known that this conduct must not be repeated by future secretaries of state or other public officials with nondelegable discretionary decision-making authority.

b. Official Misconduct.

A public servant commits first degree official misconduct if "with intent to obtain a benefit for the public servant or another… he or she knowingly… [r]efrains from performing a duty imposed upon him by law; or… [v]iolates any statute or lawfully adopted rule or regulation relating to his office." C.R.S. § 18-8-404. For the reasons set forth above, the IEC should find that Mr. Coffman violated C.R.S. § 1-5-614. The IEC should also find that Mr. Coffman acted to obtain benefits for himself, Mr. Tonner, and Phase Line.

That Mr. Coffman benefited from the conflict of interest is obvious – he wanted to jump into the void left by Mr. Tancredo's retirement as quickly as possible and get a leg up in what he knew would be a contested primary. Exhibit I at ¶ 15. By ignoring the conflict of interest between Phase Line's lobbying work for Premier and its consulting work for him, Mr. Coffman was able to immediately get out a press release announcing his candidacy. *Id*. In Mr. Tonner's words, Phase Line also "assisted, and was compensated for providing the Coffman campaign in getting off of the ground with fundraising, media relations and party outreach." *Id*. Mr. Coffman admitted under cross-

examination that Phase Line's services were a benefit to his congressional campaign. Trans. at 278.

Mr. Coffman also knew that Mr. Tonner and Phase Line would benefit from the dual representation. If Mr. Coffman had done the right thing and gone with a different consultant to get his campaign off the ground, Mr. Tonner and Phase Line would have lost the revenue they received from working on his campaign, and Mr. Tonner would have lost an opportunity to make profit from the venture. *See* Trans. at 272-73, 277-78.

The IEC should find that Mr. Coffman shirked his responsibility to run a conflict-free certification process by engaging Premier's lobbying firm to work on his campaign and that he did so with the intent that he and Mr. Tonner benefit from the conflict.

E. Coffman's "Defense" of Attacking Ethics Watch Should Be Rejected and the IEC Should Find That The Complaint Was Not Filed For Purposes Of Harassment.

In his defense, Mr. Coffman counter-attacks that Ethics Watch filed the complaint for the purposes of harassing him and asserted that Ethics Watch is a partisan group that targets only Republicans. Ethics Watch timely objected to the admission of this evidence as irrelevant and inadmissible under rules of evidence. The Commission, however, permitted the evidence and, as a result, Ethics Watch has been unduly prejudiced. This prejudice can and should be cured by the Commission finding that Ethics Watch is indeed a nonpartisan organization that filed the complaint herein for proper purposes while also recognizing that the evidence submitted was not relevant to any issue in the case.

1. The Evidence Proves That Ethics Watch Brought The Complaint For Proper Purposes.

In support of his contention that Ethics Watch filed the complaint as part of a "two-year jihad" against him and because it targets only Republicans, Mr. Coffman

submitted only his own speculative testimony, an unsubstantiated news article from Newsweek (Exhibit C) and selective print-outs from Ethics Watch's website (Exhibit D).

The Newsweek article is nothing more than speculation and is wholly unreliable. Its speculation is no more valid than the speculation of PolitickerCO.com columnist Wally Edge in his article, *Coffman fights invisible foe,* attached as Exhibit 48. According to this article, "some say" Ethics Watch's "attacks" against Coffman "are inspired by Democrats that just want to get the Secretary of State's office filled by a Democrat," while others "are saying that the attacks are inspired by Republicans working against Coffman who are only using Ethics Watch as a front." Of course Ethics Watch is not offering Exhibit 48 to prove that it is a front group for Republicans opposed to Mr. Coffman; the point is that Mr. Coffman's "evidence" is equally speculative and not something reasonable people would use to guide them in their affairs. *See Colo. Dep't of Revenue*, 743 P.2d at 21. These cynical, triple-bank-shot conspiracy theories that try to explain Ethics Watch's behavior in terms of other people's political agendas ignore the most obvious explanation for why this case was filed: Ethics Watch believes Mr. Coffman committed ethical violations that the IEC exists to correct.

Equally unconvincing is the selective print-out from Ethics Watch's website submitted by Mr. Coffman as Exhibit D. The exhibit distorts the totality of Ethics Watch's work. To the first point, a plain reading of Exhibit D readily reveals that a majority of the items listed do not relate in any way to actions taken by Ethics Watch against Mr. Coffman. For example, Ethics Watch filed a complaint with Mr. Coffman's office against Yellow Cab for lobbying violations. News reports regarding the Yellow Cab complaint are included in Mr. Coffman's Exhibit D as purported evidence of

improper motive. Exhibit D, p. 20. Exhibit D is primarily composed of news items listed in Ethics Watch's "Ethics Headlines" that merely contain Mr. Coffman's name, including stories portraying Mr. Coffman in a favorable light ("Mike Coffman: leatherneck, fiscal watchdog," p. 6) or stories that mention him only in connection with the official responsibilities of that office, such as campaign finance complaints ("Ritter aide misspent $300,000," p. 26), certifying voting systems ("Secretary of State, counties work to certify vote machines," p. 25) and lobbying complaints like the Yellow Cab complaint ("Yellow Cab eyed in lobbying violation," p. 27). None of these or countless other bylines in Exhibit D evince a partisan attack against Mr. Coffman.

At the hearing, Mr. Coffman and his counsel referenced a report published by Ethics Watch that identifies Mr. Coffman as one of many corrupt public officials. Mr. Coffman easily could have, but did not, however, offer the report as an exhibit. Ethics Watch has submitted the report, without its voluminous exhibits (which can be viewed at www.coloradoforethics.org) at Exhibit 49. The officials identified in the report are listed according to status of their office held, not in rank of most or least corrupt as Mr. Coffman's counsel suggested. Also plain to see is that Ethics Watch heavily sourced its report and, contrary to opposing counsel's assertions, raised questions without concluding that any violations of law occurred. *See e.g.*, Exhibit 49 at p. 4. Moreover, Ethics Watch also listed two Democrats, including one who represents a State House district in rural southeastern Colorado, and two unaffiliated public officials in the same report.

In January 2009, Ethics Watch published a report of Colorado's Top Ten Ethics Scandals of 2009. Exhibit 50. Although reported chronologically, using Mr. Coffman's logic it named two Democratic scandals – one involving former Representative Michael

Garcia and another involving Governor Bill Ritter – as the top two scandals of the year. The remaining scandals refer to the city of Black Hawk, the Colorado Department of Health Care Policy and Financing, the Mineral Management Service of the U.S. Department of Interior, former State Elections Director Holly Lowder, U.S. District Court Judge Nottingham, a lobbyist, and Mr. Coffman for purging voting rolls. Notably, Ethics Watch has not filed a complaint against Coffman over the purge that landed him on the Top Scandals list.

Not only does Mr. Coffman's own "evidence" fail to support his partisan attack defense, Ethics Watch's record of nonpartisanship wholly contradicts his theory. Ethics Watch is organized and registered as a nonprofit, nonpartisan organization under section 501(c)(3) of Internal Revenue Code. In the 2 ½ years since it opened its doors, Ethics Watch has filed complaints and taken actions against Republicans, Democrats and unaffiliated public officials, agencies and organizations, and engaged in a plethora of entirely nonpartisan lobbying, advocacy and public education activities. *See e.g.*, Exhibit 51.

Ethics Watch filed a complaint against Denver District Attorney Mitch Morrissey, a Democrat, for his refusal to prosecute official misconduct crimes. Exhibit 52. During the course of the lawsuit, Ethics Watch sharply and publicly criticized Morrissey for making ethics a low enforcement priority and turning a "blind eye to official misconduct." Exhibit KK.

Ethics Watch has also separately sued the City of Lakewood and the City and County of Broomfield, alleging violations of the Fair Campaign Practices Act's prohibition of the use of public funds to influence elections. *See* Decisions of the Office

of Administrative Courts, case numbers OS2007-0018 and OS2007-0019. Ethics Watch also publicly criticized Colorado Springs Memorial Hospital's contribution to an issue committee and announced that it was considering filing a campaign finance complaint. Exhibit 53. Promptly thereafter, then-Representative Douglas Bruce filed his own complaint, which was dismissed only because the statute of limitations had run before the contribution became public. *See Bruce v. Memorial Hospital*, Office of Administrative Courts Case No. 2008-0039 (Final Agency Decision, November 18, 2008). Surely a partisan group bent on destroying Republicans would not agree with Mr. Bruce on a campaign finance issue.

Ethics Watch has also filed IRS complaints against other nonprofit organizations that appear to have violated their tax status by becoming primarily involved in election-related activities. Exhibit 54. As the Commission is well aware, Ethics Watch is currently in a lawsuit with the IEC regarding the application of the Colorado Open Records Act to certain documents submitted to or transmitted by the IEC. Exhibit 55. None of these lawsuits targeted Mr. Coffman or the Republican Party.

Ethics Watch staff have spent countless hours tracking the establishment, rulemaking and official activities of the IEC. Ethics Watch developed a separate webpage devoted exclusively to the IEC, which it updates constantly. Exhibit 56.

Ethics Watch has worked hard to bring accountability to the City of Black Hawk regarding its misuse of limited gaming tax funds, and called for criminal investigations of Black Hawk officials, including Mayor David Spellman (who is not a Democrat or a Republican) and former City Manager Richard Lessner (whose party affiliation is

unknown to Ethics Watch). Exhibit 57. Ethics Watch also called on the state legislature to reform how the state limited gaming fund is managed. Exhibit 58.

Ethics Watch has taken public actions regarding the Lake County Board of County Commissioners (all of whom are reportedly Democrats), the Colorado Community College System, the proposed expansion of a military site in Piñon Canyon, the City of Longmont's annexation agreement with LifeBridge Church, the Department of Revenue's failure to collect $40 million in coal severance taxes, the Colorado Department of Corrections' improper contract with the GEO Group for the Ault Prison, and three state agencies identified in a state performance audit for mismanaging federal homeland security funds. *See* Exhibit 51. Ethics Watch called for the resignation of Jefferson County School Board Member and Democratic candidate for the state house, Vince Chowdhury, after he was charged with assault on his daughter, resulting in a restraining order. Exhibit 59.

Ethics Watch has also spent significant resources in pursuit of a more transparent state government. Through phone interviews and open records requests, Ethics Watch researched and analyzed state and local governmental policies regarding the retention of electronic records. Based on its research, Ethics Watch called on the state legislature to adopt its own uniform email retention policy and pass stricter legislation for state agencies and local governments. Exhibit 60.

In addition, Ethics Watch attorneys spend a significant amount of time educating the public. Last year Ethics Watch sponsored two accredited continuing legal education seminars and Ethics Watch's director presented at two similar seminars sponsored by Lormen Education Services. *See* Exhibit 61. Ethics Watch attorneys also research and

prepare speeches and articles on ethics issues, including a recent article regarding the significance of the IEC and its rules that was published in the Colorado Lawyer this month. *See* Exhibit 62.

When a joint committee of the legislature recently convened to investigate violations of ethics standards by a state registered lobbyist, Ethics Watch obtained all relevant documents through open records requests and published those documents on its website for public scrutiny. Exhibit 63. Ethics Watch issued a public statement to the press commending Republican Representatives Mike May and Cindy Acree for reporting the violation. Exhibit 64.

Just last week, Ethics Watch appeared on a Channel 7 news report criticizing Governor Ritter for using over $70,000 of taxpayer resources on a trade mission to Asia. According the news report, "Colorado Ethics Watch and Republican lawmakers criticized the timing and the spending on the trip." Exhibit 65. This was not the first time Ethics Watch publicly criticized Governor Ritter. In the wake of revelations regarding his misuse of campaign funds, Ethics Watch called for a "formal investigation." Exhibit 66.

None of the aforementioned actions can reasonably be interpreted as evidencing some partisan animus against Mr. Coffman or Republicans in general.

In fact, if Ethics Watch were nothing more than a partisan attack against Mr. Coffman, it would have filed a complaint based on the 2008 audit (mistakenly submitted by Mr. Coffman's defense and now filed as Exhibit 67), which found that under Mr. Coffman's watch, the secretary of state's office gave preferential treatment to certain lobbyists in enforcing lobbyists disclosure requirements.

The evidence is overwhelming – Ethics Watch has a proven record of nonpartisanship. Ethics Watch therefore asks the IEC to make an express finding that it is a nonpartisan organization that filed this case for proper motives, and deny Mr. Coffman's motion to dismiss on that basis.

2. Purported Evidence of Improper Motive is Legally Irrelevant and Inadmissible.

As set forth above, Ethics Watch has amply refuted Mr. Coffman's assertion that it targeted him merely to harass him. Nevertheless, any documents and testimony related to Ethics Watch's alleged partisan motive should be disregarded by the Commission as irrelevant and inadmissible.

The threshold inquiry in any dispute over the admissibility of evidence is whether the evidence is relevant. *See Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1246 (10th Cir. 2000). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." C.R.E. 401 (emphasis added). Similarly, evidence of a party's other acts is only admissible in civil cases to prove motive *if* the evidence is relevant to the issues. *See* C.R.E. 404(b); *People v. Spoto*, 795 P.2d 1314, 1318 (Colo. 1990), *College v. Scanlan*, 695 P.2d 314 (Colo. App. 1985). Evidence which is not relevant is not admissible. C.R.E. 402.

Any documents or testimony regarding Ethics Watch's supposed partisan motive is in no way germane to the question whether Mr. Coffman violated any ethical standard of conduct. In other words, Ethics Watch's other actions do not tend to make it more or less probable that Mr. Coffman allowed Mr. Kopelman to engage in an unlawful outside business or concealed a conflict of interest with a state vendor.

Even if Mr. Coffman could overcome the relevance threshold, which he cannot, evidence of Ethics Watch's "other acts" is only admissible if: (1) the evidence relates to a material fact; (2) the evidence has logical relevance in that the evidence adds to the probability that the material act is true; (3) the logical relevance of the evidence does not depend upon an intermediate inference that the litigant has a bad character, which would be employed to support a further inference that the litigant acted in conformity with his bad character; and (4) the probative value of the evidence is not substantially outweighed by the evidence's prejudicial impact. *Hock v. N.Y. Life Ins. Co.*, 876 P.2d 1242, 1250 (Colo. 1994). None of these criteria are met here.

The burden is on Mr. Coffman to demonstrate that the proffered evidence is relevant to an issue other than character and must "articulate precisely the evidentiary hypothesis by which a fact of consequence may be inferred" from the other acts evidence. *See United States v. Youts*, 229 F.3d 1312, 1317 (10th Cir. 2000). Neither Mr. Coffman nor his defense has provided any legitimate basis for this evidence. Since evidence of Ethics Watch's alleged motives and other acts are irrelevant to any material issue in the complaint, the evidence is inadmissible under rules of evidence.

3. Ethics Watch's motive is not a viable defense because the IEC determined that the complaint is non-frivolous.

Because the complaint was already deemed non-frivolous, Ethics Watch has a constitutionally protected right to utilize the administrative and legal processes of government for the redress of legal grievances without the fear of retaliatory litigation. *Concerned Members of Intermountain Rural Electric Ass'n v. District Court*, 713 P.2d 923, 924 (Colo. 1986) (because filing suit is an activity protected by the constitutional right to petition, a defendant in an abuse of process case is entitled to summary dismissal

if the underlying complaint had a factual and legal basis); *Protect Our Mountain Environment, Inc. v. District Court, (POME),* 677 P.2d 1361, 1366 (Colo. 1984) (the right to seek judicial relief for redress of grievances is too fundamental in character to permit petitioning activity to be turned against the petitioning party absent a showing of baseless litigation). Colorado courts take pains to ensure that a person's right to petition the government for redress of grievances is not burdened by having to respond to claims based on the alleged improper motives of the petitioner. *See POME,* 677 P.2d at 1368 ("It cannot be denied that suits filed against citizens for prior administrative or judicial activities can have a significant chilling effect on the exercise of their First Amendment right to petition the courts for redress of grievances.") Thus, in district court litigation, attempts to question the motive of a plaintiff may not proceed without a showing that the underlying action had no factual or legal support. *Concerned Members of Intermountain Rural Electric Ass'n*, 713 P.2d at 924. No lesser standards should apply here.

Moreover, the Commission should consider the chilling effect of such evidence on future complainants. Without an express ruling from this Commission that such defensive counter-attacks are intolerable, particularly in non-frivolous complaints, citizens will justifiably fear expensive litigation and harsh retaliation for daring to question the conduct of government before the IEC.

Based on the foregoing, it is not enough for the Commission to merely deem the evidence irrelevant. In order to redress the prejudice against Ethics Watch and restore confidence in the complaint process, the Commission should expressly find that Ethics Watch filed this case for a proper purpose, while also making it clear that in future cases evidence of the sort proffered by Mr. Coffman will be deemed irrelevant.

F. Findings and Sanctions.

According to section 5(3) of Article XXIX of the Colorado Constitution, the Commission "shall… render findings on each non-frivolous complaint" and "may assess penalties for violations as prescribed by this article and provided by law." Accordingly, if the Commission agrees with the uncontroverted evidence that Mr. Coffman violated standards of conduct then it shall make such findings and may or may not impose a penalty, such as public or private censure.

As Ethics Watch argued in response to Mr. Coffman's motion to dismiss, it is "well-established that agencies possess implied and incidental powers filling the interstices between express powers to effectuate their mandates. Thus, the lawful delegation of power to an administrative agency carries with it the authority to do whatever is reasonable to fulfill its duties." *Hawes v. Colo. Div. of Insurance*, 65 P.3d 1008, 1016 (Colo. 2003) (citation omitted). As a "super-agency" that was established to independently "supervise the ethical conduct" of the legislative and executive branches, the IEC has at a minimum the same implied authority that is enjoyed by executive branch agencies. See *Developmental Pathways v. Ritter*, 178 P.3d 524, 534 (Colo. 2008). In the context of an ethics commission, the power to entertain resolutions of censure and admonishment is as inherent as the power to entertain a motion to adjourn – no specific provision need lay out the obvious.

Regardless of whether the Commission decides to issue penalties, it *shall* issue findings. With respect to those findings, Ethics Watch submits that the Commission's determination of the issues presented in this case will have tremendous precedential value that should not be taken lightly. No doubt the Commission is aware of the import of its

decision. This case, being the first complaint heard by the Commission, will be heavily referenced by public servants under the Commission's jurisdiction for the foreseeable future.

Accordingly, the Commission should find that Mr. Coffman violated standards of conduct. There is sufficient evidence in the record to find that Mr. Coffman was aware of Mr. Kopelman's partisan outside business, did nothing to prevent him from running the business, and as a result Mr. Kopelman was able to continue his side business benefiting Mr. Coffman and other Republicans while drawing a steady payroll from the state. The Commission's finding of wrongdoing would be supported by the findings of the state auditor. Article XXIX is broadly written, giving the Commission authority to find that this conduct violated the standards of conduct discussed above.

There is also sufficient evidence in the record, including an admission from Mr. Coffman himself, that it was ultimately his decision as secretary of state to determine which voting systems would be certified and that when he made the decision to certify Premier he was fully aware that Phaseline was lobbying for Premier and consulting for his campaign at the same time. Trans. at p. 288-291. Mr. Coffman called for the recusal of Commissioner Wood claiming he had an incurable conflict of interest based on a tenuous, decade-old property dispute. Mr. Coffman is not beyond reproach; he should be held to the same standard he expects of others and the standard required by law.

A finding by this Commission that excuses Mr. Coffman's patent conflicts would nullify voters' intent expressed in Section 1 of Article XXIX, that public officials should "avoid conduct that is in violation of their public trust or that creates a justifiable impression among members of the public that such trust is being violated." Colo. Const.

art. XXIX, § 1(c). At a minimum, the IEC should render findings that Mr. Coffman's conduct violated standards of conduct because even the appearance of impropriety undermines the public trust.

In addition to a finding of wrongdoing, the Commission may issue a penalty of censure or admonishment to Mr. Coffman. In the case of the standard of conduct requiring the secretary of state to be accountable for tolerating conflicts of interest in his office, there is no State Personnel Board jurisdiction and this Commission is the only body with the power to hold the secretary of state accountable. In the case of the misdemeanor criminal law standards of conduct, the fact that a district attorney could theoretically file charges does not mean that the IEC lacks the power to take actions that are within its mandate. *See* Colo. Const. art. XXIX, § 3(c) (providing that the IEC shall hear complaints alleging ethical violations of "other standards of conduct" in law); *see also State Bd. of Cosmetology v. Maddux*, 428 P.2d 936 (Colo. 1967) (fact that statute regulating practice of cosmetology prescribed only misdemeanor criminal penalties did not prevent Board of Cosmetology from using its inherent authority to revoke a license for violation of the statute).

V. CONCLUSION

As the IEC makes its final decision on this year-old complaint, it ought to consider the precedent it will establish for Colorado public officials to follow in the future. The Commission ought not to set a precedent that there is no ethical problem with having the secretary of state tolerate a flagrantly incompatible, partisan outside business in his office or certify a voting machine vendor while at the same time doing business with that vendor's lobbyist. It is never easy to question the acts of a popular elected