



State of New Jersey

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August 25, 1994

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Advisory Opinion No. 10-1994

Dear Mr. McCormack:

The Commission has directed me to issue this response to your recent request for an advisory opinion. Your inquiry contains several questions concerning raising of funds for payment of unanticipated postelection litigation expenses arising from legal actions brought to determine the outcome of the 1994 Democratic primary election for Essex County Executive between candidates Cardell Cooper and Thomas Giblin.

You have written that you are counsel to the campaign of Cardell Cooper in the 1994 Democratic primary election. You have further indicated that as a result of a "recount recheck" pursuant to N.J.S.A. 19:28-1, et seq., that election was declared a tie between Candidates Cardell Cooper and Thomas T. Giblin and an election contest proceeding has been undertaken pursuant to N.J.S.A. 19:29-1, et seq. You have also advised that separate litigation was conducted to resolve an issue concerning rejection by the County Board of Elections of emergency ballots cast in the 1994 primary election.

The Commission notes that the Cardell Cooper candidate committee filed a 20-day postelection report for the 1994 primary election on June 27, 1994, disclosing outstanding obligations in the amount of \$15,590.03 and a closing cash balance of \$7,617.94. Based upon that report, the committee presumably is in a "net liability" position for the 1994 primary election (i.e. outstanding obligations exceed cash on hand and other assets held by the committee). In addition, you anticipate further costs or obligations associated with the postelection litigation to resolve the outcome of the election.

Your request for an advisory opinion raises the questions discussed below.

1. Are contributions received and expenditures made to pay the costs of the postelection litigation you have described subject to the reporting requirements of the New Jersey Campaign Contributions and Expenditures Reporting Act, N.J.S.A. 19:44A-1 et seq. (hereafter, the Act)?

For the reasons expressed below, the Commission is of the opinion that funds raised and expenditures made to support the postelection litigation you have described are required to be reported pursuant to the Act; see N.J.S.A. 19:44A-16.

In response to an inquiry from a 1991 general election candidate whose election was contested in Superior Court pursuant to N.J.S.A. 19:29-1, the Commission concluded that "financial activity undertaken to pay for litigation expenses arising out of such a contest is election-related and must be subject to all of the provisions of the Reporting Act" (emphasis added); see Advisory Opinion No. 01-1992 (copy enclosed).

Disclosure on campaign reports of the identity of all contributors, including those whose postelection contributions are used to pay for unanticipated postelection litigation, is required because it:

... permits voters and the citizenry at large to have access to information in regard to possible sources of influence over an elected officeholder. A postelection contribution that may enable an elected candidate to defend the legality of his election generates a similar public disclosure interest as exists for a preelection contribution that enables a candidate to solicit a winning total of votes.... (Advisory Opinion No. 01-1992, at page 2).

The express public policy of the Act is to require reporting of all contributions received and expenditures made which aid or promote the nomination, election or defeat of any candidate for public office; see N.J.S.A. 19:44A-2. The Commission concludes therefore that since an election contest proceeding pursuant to N.J.S.A. 19:29-1 can determine the ultimate outcome of the 1994 primary election (see N.J.S.A. 19:29-8 and 19:29-9), contributions received and expenditures made to conduct and litigate an election contest must be reported on quarterly postelection campaign reports for that election.

2. Are post-primary election contributions received by the Cooper campaign to pay the costs of the unanticipated postelection litigation subject to contribution limits, and how are such limits applied to such contributions?

These questions must be answered in the context of the 1993 amendments to the Act (Laws of 1993, chapter 65, hereafter "1993 amendments") which for the first time imposed "per election" contribution limits upon New Jersey candidates for public office (other than gubernatorial candidates); see

N.J.S.A. 19:44A-11.3.

The express statutory purpose of the 1993 amendments is to "limit political contributions" to candidates; see N.J.S.A. 19:44A-2 as amended by P.L. 1993, c.65. Such limitations on contributions to candidates are designed to foreclose the possibility of undue influence which may be associated with unlimited large contributions. Therefore, in Advisory Opinion 11-1993, the Commission permitted a gubernatorial candidate who had incurred unanticipated postelection expenses to continue receiving contributions after the date of that election subject to the condition that all contributions raised conformed to the applicable contribution limit for gubernatorial candidates. Therefore, the total amount that the candidate could accept from a contributor was \$1,800.00 (the 1993 gubernatorial contribution limit), and as a result any contributor who had contributed that maximum amount prior to the election was precluded from any further contribution in the postelection setting.

Applying that analysis to the Cooper 1994 primary election campaign, if an individual contributed \$1,500 prior to the filing of the 20-day postelection report, that individual could not contribute any further amount to the Cooper 1994 primary campaign. However, if that individual had contributed \$1,000.00 prior to the filing of the 20-day postelection report, that individual could contribute an additional \$500.00 to meet the postelection litigation costs. All contributions from a contributor in the 1994 primary election must be aggregated to maintain the contribution limits for the 1994 primary election.

In order to preserve the integrity of the statutory contribution limits, the Commission concludes that the postelection contributions raised by the Cooper campaign to pay for its litigation expenses are subject to the contribution limit provisions of the Act; see N.J.S.A. 19:44A-11.3. Any other result would create the possibility for undue influence from an unlimited postelection contribution to meet the unexpected litigation expenses.

In Advisory Opinion 05-1994 the Commission applied the 1993 amendments to the Act to permit a candidate committee to continue to raise contributions and make expenditures after the filing of a 20-day postelection report for an election if the 20-day postelection report discloses outstanding liabilities in excess of the cash balance and other assets held by the committee. As indicated above, the 1994 primary election 20-day postelection report filed by the Cardell Cooper candidate committee disclosed outstanding obligations in excess of cash-on-hand, i.e. "net liability" in the amount of \$7,972.09, and additionally it anticipates incurring further liability in connection with the election context.

The Commission therefore concludes that the Cardell Cooper candidate committee may continue to raise contributions in the 1994 primary election setting for the limited purposes of paying for "net liability" reported on the 1994 primary election 20-day postelection report and for meeting the unanticipated postelection litigation expenses associated with resolution of the 1994 primary election for Essex County Executive. These contributions must be deposited into 1994 primary election campaign account maintained by the Cardell Cooper candidate committee and are subject to the following

requirements:

- Each contributor must designate in writing that the contribution is specifically for the 1994 primary election;
- A contribution designated for the 1994 primary election must be aggregated with any other contributions made by that contributor for that election and the aggregate of the contributions cannot exceed the applicable contribution limit for the 1994 primary election; and,
- The total amount of contributions received for the 1994 primary election cannot exceed the amount of the net liabilities, including postelection litigation expenses, for that election.

Contributions received by the Cardell Cooper candidate committee which are designated for the 1994 primary election and expenditures made from those contributions for the specific purposes discussed above must be reported to the Commission in quarterly reports for the 1994 primary election to be filed beginning on October 17, 1994.

At the August 24, 1994 Commission meeting, you orally suggested that an election contest proceeding held pursuant to N.J.S.A. 19:29-1 could be treated for contribution limit purposes as a separate election. Under your proposal, an individual contributor would be permitted to contribute a maximum \$1,500.00 contribution to Candidate Cardell Cooper in each of the following: the 1994 primary election, the election contest proceeding, and the 1994 general election. The Commission cannot agree that the postelection litigation you have described can be characterized as a separate election thereby creating a separate contribution limit for the purpose of paying litigation-related expenses. An election is defined as "the procedure whereby the electors of this State or any political subdivision thereof elect persons to fill public office or pass on public questions," see N.J.S.A. 19:1-1. The Commission finds that under this the definition, an election contest proceeding cannot be deemed a separate election for application of the "per election" contribution limits contained in the Act; see N.J.S.A. 19:44A-11.3.

3. What provisions of the Act control "in-kind" services which may be provided to the Cooper campaign by attorneys and other professionals assisting in the litigation you have described?

Where an individual provides voluntary uncompensated personal services to a campaign, including legal and accounting services, those services are not considered contributions for the purposes of the Act and the services are not included in a calculation of the contribution limit applicable to the contributor; see N.J.S.A. 19:44A-3(f) and N.J.A.C. 19:25-11.5(c). Therefore, in Advisory Opinion No. 14-1984, the Commission held that professional services performed by an individual on a voluntary basis are not reportable contributions, but those services performed by non-volunteering,

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compensated attorneys or accountants or other persons compensated by a contributing professional are "paid personal services" under the statute and must be reported as contributions and are subject to the contribution limit.

The Commission therefore similarly concludes that if professional legal, accounting, or support services are provided as "in-kind" contributions to the Cooper campaign by individuals in connection with postelection litigation or proceedings, that is such services are not voluntarily provided, the value of those services must be counted as contributions subject to the 1994 primary election \$1,500 contribution limit.

Under the Act, a corporation, including a professional corporation, is considered a contributor; see N.J.S.A. 19:44A-11.3. Therefore, each legal or accounting firm which is a corporation may contribute no more than the \$1,500 maximum contribution permitted in the 1994 primary election.

The Commission thanks you for your inquiry.

Very truly yours,

ELECTION LAW ENFORCEMENT COMMISSION

By: 

NEDDA GOLD MASSAR
Deputy Legal Director

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