



State of New Jersey

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June 23, 2004

Bret Schundler
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299 Varick Street
Jersey City, New Jersey 07502

Advisory Opinion No. 01-2004

Dear Mr. Schundler:

Your request for an advisory opinion on behalf of your 2001 gubernatorial primary and general election candidate committees was considered by the Commission at its meeting of June 22, 2004, and the Commission directed me to issue the following response pursuant to N.J.S.A. 19:44A-6f.

You were a candidate for nomination for election to the office of Governor in the 2001 primary election and for election to the office of Governor in the 2001 general election. In both the 2001 primary and general elections, you participated in the gubernatorial public financing program established pursuant to the New Jersey Campaign Contributions and Expenditures Reporting Act, N.J.S.A. 19:44A-1, et seq. (hereafter, the Act). You were determined to be a "qualified candidate," pursuant to N.J.S.A. 19:44A-3m, and received gubernatorial public matching funds totaling \$3.7 million in the 2001 primary election and \$5.6 million in the 2001 general election.

On the most recent 2001 Gubernatorial Election Financial Summary Reports (Forms G-1) filed on April 26, 2004, by Schundler for Governor, Inc., your 2001 primary and general election candidate committees, you report total outstanding debts on Table III, Line 3, and on Schedule 10, Loans and Obligations, in the amounts of \$181,102.55 and \$82,145.66, for the primary and general elections, respectively. Your reports further indicate that you have a closing cash balance in the amount of \$20,498.49 in the primary election and no cash-on-hand in the general election.

You have described the efforts you have undertaken to raise funds to satisfy the outstanding obligations from your 2001 candidacies. You have further indicated that you are "considering running for the office of governor in the 2005 election" and would like to "open a candidate's account for that election."

You have asked four questions concerning the disposition of the 2001 primary and general election outstanding obligations you have reported. For the purposes of this response, the Commission will use

the terms "outstanding obligations" and "debts" to refer to the transactions you have reported on Schedules 10 of Form G-1.

Gubernatorial Public Financing Program

In order to respond to your questions, it is necessary to understand that candidates who participate in the gubernatorial public financing program are subject to requirements and restrictions in the Act and Commission regulations that do not apply to any other New Jersey candidates. The program, as administered by the Commission, distributes public matching funds at a ratio of \$2 in public funds for each \$1 in qualified private contributions, up to a statutory maximum amount. As indicated above, you received the maximum in public funds in the 2001 primary and general elections and are therefore subject to the public financing program restrictions. Further, a publicly financed gubernatorial candidate is subject to a separate expenditure limit in each election; see N.J.S.A. 19:44A-7, as adjusted pursuant to N.J.S.A. 19:44A-7.1; also see N.J.A.C. 19:25-15.11(a)3 and 16.9(a)3.

Postelection contribution and expenditure activity by publicly financed candidates is strictly limited by the Act and Commission regulations. Because each publicly financed candidate is under a statutory duty to return all unspent funds to the State, no funds remaining at the conclusion of the campaign may be transferred to a future election or to any other candidate or committee, and each publicly financed candidate committee must function as an autonomous and independent committee; see N.J.S.A. 19:44A-34 and N.J.A.C. 19:25-15.7 and 16.15. Separate bank accounts must be established for each election, and commingling of contributions between a candidate's primary and general election candidate committees is specifically prohibited; see N.J.S.A. 19:44A-32 and N.J.A.C. 19:25-15.7 and 16.15. After the date of the election, publicly financed candidates are not permitted to spend campaign funds for the purposes that are available to other candidates pursuant to N.J.S.A. 19:44A-11.2. Postelection contributions to each 2001 candidate committee are subject to the \$2,600 contribution limit and must be spent only for liquidating obligations and paying expenses remaining from that election; see N.J.S.A. 19:44A-35c and N.J.A.C. 19:25-15.45 and 15.47 and N.J.A.C. 19:25-16.33 and 16.34.

Question 1

You have asked whether or not you may establish a candidate committee for nomination for the office of Governor in the 2005 primary election while continuing to file quarterly reports which disclose outstanding obligations for your 2001 gubernatorial primary and general election candidacies.

Commission Response

The Commission finds that there is no statutory basis to prohibit you from establishing a candidate committee for a 2005 primary election gubernatorial candidacy while you continue to file quarterly reports which disclose outstanding obligations remaining from your 2001 gubernatorial primary and general election candidacies. You must continue to observe the postelection restrictions on contributions and expenditures applicable to a publicly financed candidate, and, pursuant to N.J.S.A. 19:44A-16, your 2001 primary and general election candidate committees must continue to file postelection quarterly reports for your primary and general election candidacies until such time as each candidate committee has wound up its business and been dissolved.

Discussion

As indicated above, a publicly financed candidate is under a continuing obligation to return to the State any funds remaining at the dissolution of the campaign. However, no provision of the Act or Commission regulations mandates the dissolution at any particular time of a publicly financed gubernatorial candidate committee which has net liabilities, that is, the committee's outstanding obligations exceed its total assets, including cash-on-hand in all depositories.

The Commission advises that if you establish a candidate committee for the 2005 primary election, or for any other future election, and continue any further fundraising activity to pay the debts of your 2001 primary and general election candidacies, as you have suggested in your inquiry, you must observe the requirements of N.J.A.C. 19:25-8.7A(a) for each 2001 primary or general election contribution received. The rule requires that the contributor specifically designate the contribution for the past election and that it be aggregated with other contributions toward the 2001 contribution limit. N.J.A.C. 19:25-8.7A(a) is intended to protect the integrity of the 2001 gubernatorial contribution limit and to ensure that the contributor is aware that his or her contribution has been made for a past election.

Question 2

You have asked whether or not you may transfer the outstanding obligations from your 2001 primary and general election candidate committees to a future gubernatorial election candidacy.

Commission Response

The Commission concludes that, as a candidate who accepted gubernatorial public matching funds in 2001, you may not transfer the outstanding obligations of your 2001 gubernatorial primary or general candidate committee to your candidate committee for a future election.

Discussion

Unlike candidates for other New Jersey elective offices, publicly financed gubernatorial candidates are under a statutory mandate to preserve unspent funds for return to the State and therefore may not transfer any remaining funds to a future election. Commingling of contributions between candidate committees is specifically prohibited. The Commission believes that a prohibition on the transfer of unpaid 2001 primary and general election debts to a future election is necessary to safeguard the autonomous nature of a publicly financed candidate committee.

Further, permitting a publicly financed gubernatorial candidate to transfer debts to a future election for payment with future funds raised for a new election would seriously undermine an express public policy of the gubernatorial public financing program to level the playing field and permit candidates of limited financial means to "seek election to the State's highest office." See N.J.S.A. 19:44A-27. To achieve this goal, publicly financed candidates are prohibited from spending more than \$25,000 of their own funds in an election and are subject to a separate statutory expenditure limit for each election. The level playing field of public financing would be upset because a candidate who could transfer debt to a future election would be at an advantage in dealing with vendors over a candidate with limited finances who was not contemplating a future candidacy.

Question 3

- (a) You have asked whether or not you may "settle the debts" reported on your 2001 primary and general election reports for less than the full amount reported as owed to the creditors.
- (b) In the alternative, you have asked whether or not the "creditors' personal services can be donated to the campaign pursuant to N.J.A.C. 19:25-10.4." The Commission presumes that by "donated to the campaign" you mean that you wish to consider the creditors' services voluntary, non-compensated services which are not required to be reported as contributions pursuant to N.J.A.C. 19:25-10.4(c).

Commission Response

- (a) There is no statutory basis to conclude that settlement of or forgiveness of a debt in an amount in excess of \$2,600 is distinguishable from any other contribution in excess of the \$2,600 limit, and the contribution limit requirements of the gubernatorial public financing program would be undermined by permitting a candidate committee to "settle debts" for less than the full amount owed to creditors.
- (b) The Commission concludes further that you may not convert outstanding obligations which have been billed to your campaign to non-compensated, unreported, voluntary personal services.

However, the Commission finds that each individual or corporation that is a creditor may make a contribution to your respective primary or general election candidate committee by forgiving a portion of the reported debt, which when combined with other contributions to the 2001 primary or general election, must not exceed \$2,600. Any such forgiveness must be reported on Form G-1 as a contribution. Remaining outstanding obligations must continue to be reported to the Commission. The Commission suggests that you may wish to resubmit your request concerning the unpaid obligations of your 2001 primary and general election candidate committees at a point in time when they are no longer enforceable under New Jersey law.

Discussion

- (a) The first limits on political contributions in New Jersey were imposed upon gubernatorial candidates in the 1977 general and 1981 primary elections. N.J.S.A. 19:44A-29 (L.1974, c. 26, §4 and L.1980, c. 74, §5). A contributor to a gubernatorial candidate in the 2001 primary or general election was subject to a \$2,600 limit. The definition of "contribution" in the Act includes any "thing of value" to a candidate or candidate committee; see N.J.S.A. 19:44A-3d. When a creditor forgives the unpaid portion of an outstanding obligation, the amount forgiven is a "thing of value," that is, an in-kind contribution to the gubernatorial candidate. Forgiveness of a debt in excess of the amount of the contribution limit would provide an opportunity to circumvent the gubernatorial contribution limit and the express public policy to permit gubernatorial candidates to conduct their campaigns free from the improper influence of large contributions; see N.J.S.A. 19:44A-27. There is no statutory basis to conclude that settlement of or forgiveness of a debt in an amount in excess of \$2,600 is distinguishable from any other contribution in excess of the \$2,600 limit.

You have noted in your inquiry that the regulations of the Federal Election Commission contain provisions regarding settlement of debt. Please be advised that Federal Election Campaign Act specifically authorizes the Federal Election Commission to establish procedures for determining whether or not a committee is insolvent and for liquidation of such a committee; see 2 U.S.C. §433(d). No similar provision exists in the gubernatorial public financing provisions of the Campaign Reporting

Act. The Commission believes that the public financing provisions of the Act dictate the opposite result and interprets Section 35 of the Act to require that forgiveness of or settlement of a debt for less than its full amount by a publicly financed gubernatorial candidate must be reported as a contribution subject to the gubernatorial contribution limit. Section 35 directs that "all obligations having been liquidated," a publicly financed candidate must return unspent funds to the State and makes no reference to or provision for discharge or forgiveness of outstanding obligations. This section was enacted in 1974 at the same time as the gubernatorial contribution limit and recognized that settlement of a debt for less than its full amount presented the opportunity to undermine the contribution limit. The Commission therefore concludes that any arrangement to settle a debt must observe the gubernatorial contribution limit and be reported.

(b) In your inquiry, you listed several creditors who provided personal services to your primary and general election candidate committees and stated that "the vendors did not intend to volunteer their services at the time [the services] were rendered." You have indicated further that the creditors "continue to invoice the campaign and otherwise keep in contact with the campaign regarding the outstanding debts." You have asked that you be permitted to consider the "personal services of the creditors as voluntary" services "donated" to the campaign.

The Act defines "paid personal services" as services "performed other than on a voluntary basis. . . ." See N.J.S.A. 19:44A-3f (emphasis added). Commission regulations provide that "[p]ersonal services performed by an individual on a voluntary, non-compensated basis do not constitute a reportable contribution." See N.J.A.C. 19:25-10.4(c) (emphasis added). The Commission believes that the word "performed," appearing in the Act and the regulations, mandates that the services be voluntary at the time the decision was made to provide them in order to be non-reportable voluntary services. Further, the Commission believes that the behavior of the creditors described in your facts, who continue to "invoice the campaign," is evidence that their services were not intended to be voluntary, non-compensated services.

To permit a candidate committee to change a debt owed to a vendor into unreported volunteer services after the services were performed would provide an opportunity to circumvent not only the contribution limit, but also to avoid counting expenditures toward the gubernatorial expenditure limit. For example, if a candidate could convert a \$10,000.00 obligation owed to a campaign consultant into volunteer services, that would make \$10,000.00 available for other expenditures and would encourage disregard of the statutory expenditure limit.

Question 4

Lastly, you have asked whether or not specific "disputed debts" may be "discharged" if the vendor is no longer seeking payment. In your inquiry, you have provided a list of 10 items that are reported on the 2001 general election Form G-1, Schedule 10, filed on April 24, 2001.

Commission Response

The Commission finds that you may terminate reporting of several of these items, as discussed below, after filing the July, 2004, quarterly report for 2001 general election. Should the creditors for these goods or services submit bills to your candidate committee at a later date, please be advised that you must resume reporting these items as outstanding obligations.

Discussion

The outstanding obligations reported on the 2001 general election Form G-1, Schedule 10, included the following: \$1,816.72 to "Blackberry" for equipment that was returned, \$1,600.00 to "El Nuevo Cocqui" and \$971.81 to "Verizon" for services you state were incorrectly billed to your candidate committee, \$57.60 to "New York Times" and \$100.10 to "The Star Ledger" for subscription renewals that you state were "never commenced," and \$1,125.00 to "Urban League of Metro Trenton" for the purchase of tickets that was later cancelled. You have further indicated that two of the reported outstanding obligations (to "Comcast" and "Master Communications Corp") include amounts for services billed for the month of December, 2001 (\$580.00 and \$1,056.00, respectively), at which time the campaign office was "shut down."

Because these services or items were either returned by or not received by your candidate committee, or were the obligations of entities other than your candidate committee, the Commission concludes that after explaining their disposition on Schedule 10 of your next quarterly report, due for filing on July 15, 2004, you are no longer required to report them as outstanding obligations on subsequent quarterly reports. The remaining items must continue to be reported on Schedule 10.

Thank you for submitting this request and for your interest in the work of the Commission.

Very truly yours,

ELECTION LAW ENFORCEMENT
COMMISSION

By: _____
NEDDA G. MASSAR

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N.J. ELECTION
LAW ENFORCEMENT
COMMISSION **New Jersey Election Law Enforcement Commission**

Advisory Opinion Request from Schundler for Governor, Inc. (2001 Primary and General Candidate Campaign Committees)	AO Request (June 2, 2004) No. _____
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Supplemental Memorandum Regarding Advisory Opinion Request

An advisory opinion request dated June 2, 2004 (signed by Bret Schundler), has been filed with the Election Law Enforcement Commission ("ELEC"). A hearing is scheduled for June 22, 2004. This memorandum supplements the statements filed with the advisory opinion and is offered to assist the ELEC in its decision. The four issues are treated seriatim.

Issue 1: May a New Committee Be Established While Terminating an Old One?

Former gubernatorial candidate Bret Schundler and his 2001 candidate committee ask whether he may form a new gubernatorial candidate committee while his prior committee still exists because of unresolved debts. The New Jersey Administrative Code provides that "[a] candidate who . . . is maintaining a candidate committee . . . may not establish . . . another candidate committee . . . for that office in any other election," N.J.A.C. § 19.25-4.1(c), but provides the following applicable exception: "The candidate is maintaining a committee for that office in a past election for the sole purpose of receiving contributions to satisfy net liabilities of that past election pursuant to N.J.A.C. 19:25-8.7A." N.J.A.C. § 19.25-4.1(c). The applicable exception is straightforward, indicating no different applicability to publicly-financed gubernatorial elections, so that an affirmative answer is required. This outcome is

further required by N.J.A.C. § 19.25-8.7A(d), which provides that “[a] candidate committee . . . which receives contributions under the provisions of (a) above [permitting ongoing existence of a candidate committee ‘to receive contributions to satisfy . . . net liabilities’] may establish a candidate committee . . . and receive contributions for future elections, provided that [it meets the requirements of § 19:25-8.7A(d)1-3].”

Issue 2: May Prior Committee Debts Be Transferred to a New Committee?

The second issue is whether the liabilities of the 2001 candidate committee may be transferred to a 2005 candidate committee. The ELEC’s *Compliance Manual for Campaign Reporting* (2002), at 14-15, provides two ways to do this

One option is “[t]o transfer net liabilities,” in which “the treasurer must list the outstanding obligations on Schedule E of the Form R-1 on the first quarterly report filed for the next election.” The example given relates to a primary-election net liability carried into a general election.

The second option is where the Committee “keeps the depository for the past election open and opens a new depository (and files . . . Form D-1 . . .) for the next election. The committee must begin to file quarterly reports for the past election as well as reports for the next election.” *Id.* at 15. The example given relates to a primary-election net liability carried into a general election, but there is no reason the same principle would not apply between election cycles. The *Manual* sets out the regulations for keeping the accounts and contributions separate.

Neither option makes any exception for publicly-funded gubernatorial elections. Consequently, an affirmative answer is required as to the second issue.

Issue 3: May the Committee Settle Debts or Treat as Voluntary Services Rendered?

This request essentially asks the Commission whether post-election candidate campaign committees that have exhausted their fund-raising capacity can extinguish outstanding financial obligations by settlement agreements with creditors for less than the full amount owed by the campaign. Such an arrangement is plainly contemplated by N.J. Stat. § 19:44A-16(b), which allows the termination of post-election campaign reporting when outstanding obligations "are likely to be discharged or forgiven," and is a common means of resolving such debts in the world outside of campaign finance because it enables creditors to trade an unrecoverable full payment for a recoverable partial one. Without such settlement or forgiveness, the debt may linger into perpetuity.

Such arrangements would be thwarted if the forgiven portion of the debt were treated as a contribution subject to contribution limits. In Mr. Schundler's case, transforming debt into maximum \$2,600 contributions from each of his campaign's six primary and general creditors would eliminate only \$15,600 of the more than \$200,000 owed to these creditors. In order to facilitate the desired settlement, it is necessary to exclude such arrangements from the contribution limit.

Such application of contribution limits is inappropriate because the proposed arrangement is in no sense a gift to the campaign, but is rather a business exchange. Although an overly literal reading of the statutory and regulatory definition of contributions might encompass such loan forgiveness, both definitions rest on the assumption that the funds are provided as a means of aiding the campaign rather than any sort of business exchange. See N.J. Stat. § 19:44A-3(d); N.J.A.C. § 19:25-1.7. Indeed, the constitutional justification for contribution limits depends upon this distinction as such limits are allowed only as a palliative to "a

concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 389 (2000). Someone who gives a candidate money before the election may be hoping to get his payment in favors once the candidate is elected. The vendor who grudgingly agrees to accept partial payment for his services long after payment is due and after attempts to collect full payment are exhausted poses no such threat.

Not surprisingly, exempting such arrangements from contribution limits would follow the example of the federal government, which allows commercial vendors to forgive or settle debts owed by a candidate committee without incurring a contribution where, as here, (1) credit was initially extended in the ordinary course of business (2) the committee undertook all reasonable efforts to satisfy the outstanding debt, and (3) the vendor made the same efforts to collect the debt as it would to collect from a nonpolitical debtor. See Chapter 15 of the FEC Campaign Guide, attached to Advisory Opinion Request.

Alternatively, much the same result could be reached in this case by allowing Mr. Schundler's creditors to re-cast their invoices as personal services valued according to the calculation methods authorized by N.J.A.C. § 19:25-10.4. Much of the outstanding debt reflects personal services by attorneys, accountants, and others who, under § 19:25-10.4(c) could have volunteered their time without constituting a reportable contribution. Additional amounts could have been provided as a "paid personal services" contribution that, under § 19:25-10.4(b) could have been reported "in an amount equal to the amount of salary, compensation or consideration for said services paid by the contributor to the individual performing said services." This method would surely calculate the contribution as being far smaller than the retail price for the services reflected in the creditors' invoices, and would

thereby provide considerable flexibility for the settlement or forgiveness of these debts.

Notably, this commission's regulations "shall be liberally construed to permit the commission to discharge its statutory functions and to secure a just and speedy determination of all matters before it." N.J.A.C. § 19:25-1.3. Such a just determination could and should be reached by construing the contribution definitions to exclude post-election debt settlements in the above-described circumstances. Alternatively, this commission also possesses the power to "relax the application of this chapter whenever the interest of justice shall so require."

N.J.A.C. § 19:25-1.4.

Issue 4: May Disputed Debts Be Discharged if Payment Is No Longer Sought?

Issue 4 asks, "Can disputed debts be discharged if the vendor no longer seeks payment?" New Jersey statutory law provides that "[t]he requirements to file quarterly reports after the first post-election report may be waived by the commission . . . if the commission determines . . . that the outstanding obligations of the . . . candidate committee . . . are likely to be discharged or forgiven." N.J. Rev. Stat. § 19:44A-16.b. This is reflected in the ELEC's *Compliance Manual for Campaign Reporting*, at 14, which provides that (emphasis added):

In order to terminate further reporting for an election, both of the following conditions must be met:

- 1) there must be no remaining balance . . . ; and
- 2) any outstanding obligations have been resolved as follows:
 - a. the outstanding obligations have been transferred to the committee's future election; or,
 - b. *written evidence is provided that existing obligations are likely to be discharged or forgiven.*

As stated in the initial memorandum provided with the Advisory Opinion Request, there is a listed collection of debts, "most of [which] is disputed or was improperly reported and none of the creditors" have sent bills "since shortly after the election in 2001." In its initial

mcmorandum, the Schundler Campaign Committee has presented "written evidence" about each of these listed debts, as required in the quoted portion of the *Manual, supra*, and "respectfully requests that the Commission permit it to treat these debts as discharged." Specifically, the Committee requests that Commission expressly provide the Committee written permission to terminate reporting these listed debts as Committee obligations in further reporting to the Commission, based on the cited authority.

Respectfully submitted,

Schundler for Governor, Inc.



Bret Schundler