



State of New Jersey

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June 21, 2006

BY FAX (973-533-1112) & FIRST CLASS MAIL

Angelo J. Genova, Esq.
Genova, Burns & Vernoia
Eisenhower Plaza II
354 Eisenhower Parkway
Livingston, New Jersey 07039-1023

Advisory Opinion No. 05-2006

Dear Mr. Genova:

The Commission considered your request for an advisory opinion at its meeting yesterday and directed me to issue this response. Your request is submitted on behalf of Joseph DiVincenzo, a 2006 general election candidate for Essex County Executive, and Armando Fontoura, a 2006 general election candidate for Essex County Sheriff.

Question Presented

You have asked whether or not Candidates DiVincenzo and Fontoura are permitted by the New Jersey Campaign Contributions and Expenditures Reporting Act, N.J.S.A. 19:44A-1 et seq., (hereafter, the Act or the Campaign Reporting Act) to form a joint candidates committee for the 2006 general election.

Commission Response

For the reasons discussed below, the Commission advises you that it is without statutory authority to authorize the establishment of a joint candidates committee (hereafter, JCC) consisting of candidates for the offices of county executive and sheriff within a county. The Commission believes that the result you have requested requires the Legislature to amend the definition of a JCC in the Campaign Reporting Act, at N.J.S.A. 19:44A-3r, to permit candidates for county executive and sheriff to form a JCC. The Commission observes that there is no provision in the Act to preclude Candidates DiVincenzo and Fontoura from engaging in joint campaign activities. They may use the funds in their separate candidate

committee accounts to pay for joint events and to produce jointly and mail campaign literature. They may jointly appear at and participate in events. Further, the Commission is unaware of any provision of the Act that would prevent them from presenting themselves to the public as a “slate” for election purposes or from appearing together on the general election ballot.

Submitted Facts and Argument

Joseph DiVincenzo and Armondo Fontoura were successful Democratic candidates in the 2006 primary election for nomination for election to the offices of Essex County Executive and Essex County Sheriff, respectively.

As you have noted, the Campaign Reporting Act does not contain any text to explicitly permit candidates for the offices of county executive and county sheriff in a county to form a JCC. As discussed further below, the definition of JCC, at N.J.S.A. 19:44A-3r, authorizes candidates for freeholder and county executive to form a JCC, but does not similarly authorize candidates for county executive and sheriff to form a JCC.

You have therefore advanced several reasons to support your request that Candidates DiVincenzo and Fontoura be permitted to form a JCC pursuant to Section 9 of the Act (N.J.S.A. 19:44A-9). You urge that the definition of the term “joint candidates committee” in the Act requires that Candidates DiVincenzo and Fontoura be permitted to form a JCC in the 2006 general election because Section 9 “provide[s] candidates with broad associational discretion in selecting their running mates and establishing joint candidate funding vehicles.” You argue that to construe the definition of JCC to only permit freeholder and county executive candidates to form a JCC would “have the unintended result of excluding other county candidates from exercising the option of participating in a JCC.” You state further that you are “unaware of any expressed legislative intention [in P.L.1995, c.194] to preclude a candidate for county executive from including candidates for other county-wide offices in the same election in a JCC.”

You have also stated that a JCC consisting of candidates for county executive and sheriff would not seem to “compromise any of the other purposes of the Act. Specifically it would not compromise the integrity of contribution limits because of the equal attribution rules.” The Commission notes that the equal attribution rule requires that contributions to a candidate’s single candidate committee and his or her JCC be aggregated to observe the applicable contribution limit; see N.J.S.A. 19:44A-11.3e and N.J.A.C. 19:25-11.4 and 19:25-11.5

Lastly, you ask the Commission to consider the associational rights of candidates under the First and Fourteenth Amendments as a basis for authorizing candidates for county executive and sheriff to form a JCC. You have relied upon Eu v. San Francisco County Dem. Cent. Comm., 489 U.S. 214 (1989) and Lautenberg v. Kelly, 280 N.J. Super. 76 (Law Div. 1994), as discussed further below, to support your position.

Discussion

Administrative Agency Authority

The Commission concludes that it does not have the authority as an administrative agency of State government to permit Candidates Joseph DiVincenzo and Armondo Fontoura to form a JCC because to

do so would effectively expand the scope of the Act by adding the office of sheriff to the definition of “same elective offices” in a county in N.J.S.A. 19:44A-3r.

N.J.S.A. 19:44A-9a provides that “each candidate . . . shall . . . establish (1) a candidate committee, (2) a joint candidates committee, or (3) both, for the purpose of receiving contributions and making expenditures.” As it currently appears in the Act, N.J.S.A. 19:44A-3r defines the term “joint candidates committee” and limits the candidates who may form a JCC, as follows:

The term "joint candidates committee" means a committee established pursuant to subsection a. of section 9 . . . by at least two candidates for the same elective public offices in the same election in a legislative district, county, municipality or school district, but not more candidates than the total number of the same elective public offices to be filled in that election, for the purpose of receiving contributions and making expenditures. For the purpose of this subsection: the offices of member of the Senate and members of the General Assembly shall be deemed to be the same elective public offices in a legislative district; the offices of member of the board of chosen freeholders and county executive shall be deemed to be the same elective public offices in a county; and the offices of mayor and member of the municipal governing body shall be deemed to be the same elective public offices in a municipality. (Emphasis added.)

The Commission notes that the definition of JCC was amended in 1995 to add the underlined text, above; see P.L.1995, c.194, §1. Prior to 1995, there was no identification of specific county elective offices that were deemed to be the “same elective public offices.” As you have noted, the 1995 amendment deemed that the offices of freeholder and county executive are “the same elective public offices.” To read the Act as you have suggested would require that the Commission ignore the limiting text inserted in 1995. The Legislature not only did not include the office of sheriff in the definition of “same elective public offices in a county” in 1995, it also did not include the offices of county clerk and surrogate.

The Commission is “authorized to render advisory opinions as to whether a given set of facts and circumstances would constitute a violation of any of the provisions of this [A]ct, or whether a given set of facts and circumstances would render any person subject to any of the reporting requirements of this [A]ct.” See N.J.S.A. 19:44A-6f. The advisory opinion function requires the Commission to interpret and apply existing statutory and regulatory text to a set of facts. If the Commission were to approve the formation of a JCC consisting of candidates for the offices of county executive and county sheriff, it would not be interpreting or clarifying the Act. The Commission believes that it would be extending the Act beyond its current limits and expanding impermissibly the class of candidates who are permitted to form a JCC. The Commission can find no provision in the Act to authorize such a JCC and therefore declines your request.

While courts typically defer to an administrative agency’s expertise, an agency cannot “extend a statute to include persons not intended, nor may it give the statute any greater effect than its language allows.” Kingsley v. Hawthorne Fabrics, Inc., 41 N.J. 521, at 528 (1964). In Kingsley, the Court considered the definition of a class of persons, the “immediate family,” covered by a specific portion of the tax law and found that the Division of Taxation incorrectly expanded the definition to include adult siblings living outside the residence of the taxpayer. Similarly, the New Jersey Supreme Court held that even though

the Department of Environmental Protection intended to expand wetlands protection in its “residential development project” rules, it could not do so if the regulations exceeded the express terms of the enabling statute. In the Matter of Freshwater Wetlands Protection Act Rules, 180 N.J. 478 (2004). The “decision whether to provide that additional [wetlands] protection resides with the Legislature.” *Id.* at 491.

You have suggested that by reading the provisions of the Act *in pari materia*, the statute permits the formation of a JCC by Candidates DiVincenzo and Fontoura. “It is a canon of construction that statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject.” Black’s Law Dictionary 807 (8th ed. 2004). However, “[s]tatutory canons are suggestive tools” State of New Jersey, Township of Pennsauken v. Schad, 160 N.J. 156, at 173 (1999). The Commission therefore concludes that while the canon you have cited allows the meaning of ambiguous text to be clarified by reading it together with another part of the law, it should not be applied in this case to insert into the Campaign Reporting Act a definition that does not currently exist when there are no clear inconsistencies in the Act.

Legislative Intent

You have asked the Commission to permit the formation of a JCC consisting of candidates for county executive and sheriff because you are “unaware of any expressed legislative intention to preclude a candidate for county executive from including candidates for other county-wide offices in the same election in a JCC.”

By amending the definition of “joint candidates committee” in 1995, as set forth above, the Legislature chose to identify and limit the candidates at the county level who could participate in a JCC to candidates for member of the board of chosen freeholders and county executive. The Legislature had the opportunity to include candidates for sheriff, clerk, and surrogate, but did not do so. The Commission can find no evidence to indicate that the Legislature intended to permit the expansion of JCCs beyond the specific text added in 1995. The Statement which accompanied A-1840, later enacted as N.J.S.A. 19:44A-3r (P.L.1995, c.194), included the following text:

This bill amends “The New Jersey Campaign Contributions and Expenditures Reporting Act” to (1) permit candidates for the office of freeholder and county executive of a county, and candidates for the offices of mayor and member of the governing body of a municipality, to establish a joint candidates committee for campaign finance purposes

The identical text appeared in the Assembly State Government Committee Statement to the bill (June 9, 1994) to explain the expanded definition of “joint candidates committee” to include specifically candidates for freeholder and county executive. The statements are void of any reference to inclusion or exclusion of other candidates from JCCs. The Commission therefore concludes that there is no basis in the legislative history to depart from the specific definition of JCC which currently appears at N.J.S.A. 19:44A-3r.

The Commission has reviewed the contribution limit provisions of the Act to assess your statement that a JCC comprised of candidates for county executive and sheriff would not “compromise any of the other purposes of the Act.” The Commission believes that the existence of a restriction upon candidate-to-candidate contributions, enacted in 1993, is evidence that a JCC comprised of candidates for county

executive and sheriff would compromise the existing contribution limits in the Act; see N.J.S.A. 19:44A-11.3.

If candidates for county executive and sheriff are not candidates “for the same office” in the 2006 general election, the maximum amount that either candidate is permitted to contribute or transfer to the other is \$8,200.00; see N.J.S.A. 19:44A-11.3, as adjusted pursuant to N.J.S.A. 19:44A-7.2b(9), and N.J.A.C. 19:25-11.2. While the equal attribution rule prevents a single contributor from giving more than the contribution limit to a candidate who has both a candidate committee and a JCC, you have not examined the effect of N.J.S.A. 19:44A-11.3c(4), which permits unlimited transfers of funds between two candidates who are candidates “for the same office in the . . . same political subdivision . . .” (Emphasis added.) Also see N.J.A.C. 19:25-11.3(c). If the Commission were to permit Candidates DiVincenzo and Fontoura to form a JCC because they are candidates for the “same office” in a county, the candidates would presumably be permitted to make unlimited transfers of money to each other and to make unlimited “in-kind” contributions for each other pursuant to N.J.S.A. 19:44A-11.3c(4). The Commission believes this result would undermine the candidate-to-candidate contribution limits enacted in 1993.

Limits on contributions to candidates, other than gubernatorial candidates, were a major innovation of the 1993 amendments to the Campaign Reporting Act; see N.J.S.A. 19:44A-11.3 (P.L.1993, c.65, §18). With the exception of candidates for the “same elective offices,” the Act, as amended in 1993, not only limited the amount that individuals, corporations, unions, associations, groups, political committees, and continuing political committees could contribute to a candidate, but also established a limit on the amount that one candidate committee could contribute to another. As a result, the Commission understands that the 1993 amendments to the Act reflect a Legislative purpose to restrict the flow of money between and among candidates. The effect of a JCC comprised of county executive and sheriff candidates in a county would permit the unlimited transfer of campaign funds between the candidates for county executive and sheriff. Because this result appears inconsistent with the Legislative intent to limit candidate-to-candidate contributions, the Commission finds that the decision whether or not to permit the JCC structure you have suggested should be made by the Legislature.

Associational Rights of Candidates

You have argued that the inability to form a JCC would restrict the constitutional associational rights of Candidates DiVincenzo and Fontoura. The Commission does not read the restriction on forming a JCC to prohibit or interfere with either candidate’s constitutionally protected associational rights.

It is the express public policy of the Campaign Reporting Act “to limit political contributions and to require the reporting of all contributions received and expenditures made to aid or promote the nomination, election or defeat of any candidate for public office . . .” N.J.S.A. 19:44A-2. To give effect to this policy, the Act requires that a candidate keep records of and file reports of contributions received and expenditures made. A JCC is a means by which candidates collect contributions, report contributions and expenditures, and maintain bank accounts. Participation in a JCC does not dictate how the candidates associate to present themselves to the voting public. Even though certain candidates may not join together in a JCC, the Act does not prohibit those candidates, including Candidates DiVincenzo and Fontoura, from using their campaign funds to host joint events or to jointly produce and mail campaign literature. The candidates may jointly appear at and participate in events. Further, no provision of the Act limits whether or not candidates may join together in a “slate” for election purposes or appear together on the ballot.

The Commission does not read either the Eu or Lautenberg case to support the right of a candidate to participate in a JCC. In Eu, the United States Supreme Court found unconstitutional a California statute that forbade the official governing bodies of state political parties from endorsing party candidates. The law also regulated the internal governance of political party committees. The Court found that the California law impermissibly burdened parties' freedom of association by infringing upon the political party's right to identify like-minded candidates to represent the party and by interfering in the internal governance of the parties. *Id.* at 229, 232. In Lautenberg, the court found unconstitutional a statute which prohibited a United States Senate candidate from having his name placed in the same column on the primary election ballot as other Democratic candidates endorsed by the party, a practice called "bracketing." Plaintiffs argued and the court agreed that the statute impermissibly interfered with a candidate's constitutional right of free speech and association. *Id.* at 84. However, the composition of a JCC does not limit the freedom of a political party committee to endorse candidates, nor does it dictate or control appearance or placement of a candidate's name on the ballot. Moreover, such composition does not prohibit or interfere in any way with either candidates' constitutionally protected associational rights.

Conclusion

For the reasons expressed above, the Commission declines your request to authorize the formation of a JCC by Joseph DiVincenzo and Armando Fontoura, 2006 general election candidates for Essex County Executive and Essex County Sheriff, respectively.

Thank you for your inquiry and for your interest in the work of the Commission.

Very truly yours,

ELECTION LAW ENFORCEMENT
COMMISSION

By: _____
NEDDA G. MASSAR, ESQ.



**Advisory Opinion Request
For Candidates and Committees**

NEW JERSEY ELECTION LAW ENFORCEMENT COMMISSION
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PLEASE PROVIDE THE INFORMATION REQUESTED BELOW

A person, committee or entity subject to, or reasonably believing he, she or it may be subject to, any provision or requirement of the Campaign Reporting Act may request that the Commission provide an advisory opinion pursuant to N.J.S.A. 19:44A-6. Such request must include the following:

1. This request for an Advisory Opinion is being submitted on behalf of:

Full name of Person, Committee, or Entity:
 Joseph DiVincenzo; Armando Fontoura

Mailing Address:
 530 Beardsley Avenue; 292 Lafayette Street

*Day Telephone Number:

Bloomfield, NJ 07003; Newark, NJ 07105

*Evening Telephone Number:

2. Indicate if the above named person, committee, or entity currently files reports with the Commission:

Yes No

a. If yes, indicate in what capacity it is filing:

- | | | | |
|----------------------------------|-------------------------------------|-----------------------------------------|--------------------------|
| Candidate committee | <input checked="" type="checkbox"/> | Recall committee | <input type="checkbox"/> |
| Joint candidates committee | <input type="checkbox"/> | Recall defense committee | <input type="checkbox"/> |
| Political committee | <input type="checkbox"/> | Personal financial disclosure statement | <input type="checkbox"/> |
| Continuing political committee | <input type="checkbox"/> | Other (please describe): _____ | <input type="checkbox"/> |
| Political party committee | <input type="checkbox"/> | | |
| Legislative leadership committee | <input type="checkbox"/> | | |

b. If no, indicate if the above named person, committee, or entity has in the past filed reports with the Commission, giving elections (i.e., 2005 general election) or calendar years, and identify filing capacity:

c. If reports are or were filed under a different name than that appearing in Question #1 above, provide that name:

3. Please provide below a statement of the cognizable question of law arising under the Campaign Reporting Act, including specific citations to pertinent sections of the Campaign Reporting Act and Commission regulations (if known).

Our clients respectfully seek a determination of whether a candidate for county executive and a candidate for county sheriff in the same election can create a joint candidates committee pursuant to Section 9 of the Campaign Reporting Act.

4. Please provide below a full and complete statement of all pertinent facts and contemplated activities that are the subject of the inquiry. Your statement must affirmatively state that the contemplated activities have not already been undertaken by the person, committee, or entity requesting the opinion, and that the person, committee, or entity has standing to seek the opinion, that is the opinion will affect the person's or committee's reporting or other requirements under the Act. Attach additional sheets if necessary.

Statement of Facts:

Joseph DiVincenzo is a Democratic candidate for nomination for election in the 2006 primary election for the office of County Executive in Essex County, and Armando Fontoura is a Democratic candidate for nomination for election in the 2006 primary election for the office of Sheriff of Essex County. In anticipation of winning the nominations in their party's primary election, Mr. DiVincenzo and Mr. Fontoura are contemplating forming a joint candidates committee pursuant to Section 9 of the Reporting Act for the 2006 general election for those respective offices.

RE: Advisory Opinion Request of Candidates DiVincenzo/ Fontoura
Question 5

Our clients, Joseph DiVincenzo, candidate for Essex County Executive, and Armando Fontoura, candidate for Essex County Sheriff, in the 2006 primary election, will be candidates for those offices in the 2006 general election if successful in their primary elections. They respectfully submit that pursuant to the Campaign Contributions and Expenditures Reporting Act ("the Act"), as a matter of law, they should be permitted to establish and maintain a joint candidates committee ("JCC") as provided under Section 9 of the Act (*N.J.S.A.* 19:44A-9) in the 2006 general election. We believe this result is compelled under Subsection 3r of the Act (*N.J.S.A.* 19:44A-3r) and further by application of the pertinent case law cited below.

It is a canon of statutory construction that the provisions of the Act must be read *in pari materia*, that is the provisions must be read together to carry out the legislative purposes of the Act. Subsection 3r defines a JCC to mean a committee established pursuant to Section 9 of the Act. Section 9 promotes one of the fundamental objectives of the Act, that is to provide candidates with broad associational discretion in selecting their running mates and establishing joint candidate funding vehicles. Thus, in a statutory structure that appears unique to New Jersey, a candidate may choose to finance his or her campaign as a sole candidate committee, as one of two or more candidates in a JCC, or as both a sole candidate and as a participant in a JCC.

As enacted in 1993, Subsection 3r explicitly permitted candidates for the same elective public offices in the same election in a county to form a JCC. In 1995, Subsection 3r was amended to include as the "same elective public offices" county candidates for freeholder and county executive. In reviewing the legislative history of P.L. 1995, c. 194, we are unaware of any expressed legislative intention to preclude a candidate for county executive from including candidates for other county-wide offices in the same election in a JCC.

If the 1995 amendment is strictly construed to permit solely the establishment of a JCC by candidates for county executive and county freeholders, such a construction would have the anomalous and we believe unintended result of excluding other county candidates from exercising the option of participating in a JCC. Thus, a candidate for county sheriff or county clerk would have no option to form a JCC with any other county candidate. In this respect, candidates for county sheriff or county clerk would suffer a disadvantage that no other candidate (other than a candidate for Governor, who enjoy the option of public financing) has, that is they have no option to form a JCC. That result is contrary to the legislative objectives promoted in Section 9.

Inclusion of a candidate for county sheriff in a JCC thus promotes the legislative purposes of the Act, and does not appear to compromise any of the other purposes of the Act. Specifically it would not jeopardize the integrity of contribution limits because of the equal attribution rules. *See N.J.A.C.* 19:25-11.5. Also, a JCC consisting of county executive and county sheriff candidates would not appear to be precluded on the basis that those elective positions have different terms of office. We note that for purposes of Subsection 3r, candidates in the same legislative district for Senate and Assembly may form a JCC notwithstanding those offices have different terms.

The Supreme Court has held in the context of political party endorsements that the associational rights of candidates are constitutionally protected under the First and Fourteenth Amendments. In Eu v. San Francisco County Dem. Cent. Comm., 489 U.S. 214 (1989), the Court applying strict scrutiny held that a candidate's right to free association with a political party outweighs any state interest in a stable political party organization.

Similarly, our State courts have relied on the reasoning expressed in Eu to protect the associational rights of candidates in ballot placement. In Lautenberg v. Kelly, 280 N.J. Super. 76 (Law Div.1994), the Court held that simplified voting was not a compelling enough reason to prevent a candidate from being bracketed with the political party of his choice. We are unaware of any rational basis that would justify different treatment of candidate associational rights in the context of ballot placement from the exercise of those associational rights in the context of formation of candidate committees. Therefore, we respectfully urge the Commission to construe Subsection 3r to permit the association of a candidate for county executive and county sheriff in the same county in the same election for the purposes of establishing and maintaining a JCC.