



State of New Jersey

ELECTION LAW ENFORCEMENT COMMISSION

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February 21, 2001

Peter G. Sheridan, Esq.
Graham, Curtin & Sheridan
50 West State Street
Trenton, New Jersey 08608

Advisory Opinion No. 01-2001

Dear Mr. Sheridan:

Your request for an advisory opinion, submitted on behalf of DiFrancesco for Governor, Inc. (hereafter, "DFG"), has been considered by the Commission, and the Commission has directed me to issue this response.

Submitted Facts

You write that the DFG is the gubernatorial campaign committee of Senate President Donald DiFrancesco, and that the committee will seek public funding in the 2001 gubernatorial primary election pursuant to N.J.S.A. 19:44A-29, *et seq.* Further, DFG has asked Lewis Eisenberg to serve as its chair in a part-time, voluntary capacity, and in that capacity Mr. Eisenberg will be asked to conduct fundraising for DFG but will not have any other duties or responsibilities. According to your request, the candidate, Senate President DiFrancesco, along with the campaign staff, will be making all campaign expenditure decisions and the persons listed as "staff" provided by the DFG do not include Mr. Eisenberg's name. You describe Mr. Eisenberg as a very successful Wall Street entrepreneur, who is chair of an investment firm, Granite Investment, which position is his full-time occupation. He also serves as chair of the Port Authority of New York and New Jersey, and has recently served on President George W. Bush's transition team.

The Commission records reflect that on January 5, 2001, Senate President (and currently Acting Governor) DiFrancesco filed with the Commission a Form D-1 designating DFG as his 2001 gubernatorial primary election candidate committee.

According to your request letter, Mr. Eisenberg was associated with an organization named the Republican Leadership Council (hereafter, "RLC") until Mr. Eisenberg resigned from

that body last year. You write: "Eisenberg wishes to resume some role at the RLC, and simultaneously raise money for the DFG." You also write: "In addition, Eisenberg has notified RLC that he would like to resume his participation in RLC, but he has specifically recused himself from all activities concerning New Jersey, if any, for the year 2001."

Attached to this request as an exhibit is a copy of what appears to be a letter over the apparent signature of Lewis M. Eisenberg, dated January 18, 2001, addressed to Mr. Mark Miller, Republican Leadership Council, in Washington, D.C. The letter advises the recipient that Mr. Eisenberg has taken a position as Finance Chair of Senator DiFrancesco's gubernatorial campaign in New Jersey, and therefore requests that should the RLC consider or in fact spend funds on "...issue ads or other expenditures regarding the upcoming campaign in New Jersey, you should not discuss those plans or expenditures with me. Likewise, I will not be initiating any conversations with you regarding any activities of the DiFrancesco campaign or suggestions for spending RLC funds in New Jersey."

At the Commission public meeting conducted on this date, you have amplified on that letter and represented to the Commission that Mr. Eisenberg will remove himself from all contribution or spending decisions of the RLC "...that have anything to do with New Jersey candidates."

You write that the RLC is "...a political committee which supports moderate republican candidates throughout the United States." You also have attached as an exhibit to this request a printout dated January 25, 2001, from the RLC website, which printout includes information and texts of recent television advertising apparently purchased by the RLC concerning the Republican political party and candidates of that party for several federal offices in New Jersey and other states. None of the advertisements refers to candidates for State offices in New Jersey under the jurisdiction of this Commission.

You write that Mr. Eisenberg has no knowledge that the RLC may or may not expend funds in New Jersey elections this year.

The Commission notes that its records show that an organization under the name 'Republican Leadership Council-State' filed on April 15, 1999, a Certification of Finalization (Form CPC-F) indicating cessation of that entity as a continuing political committee (hereafter, "CPC") in this State. The indicated chair at that time was Lewis M. Eisenberg, and Mark L. Miller was listed as Treasurer. Presumably, these are the same individuals that are described in this request. Commission records do not indicate any further reports filed by this CPC since its cessation as a CPC in this State.

Question Presented

As the Commission perceives the question presented by this request, it is: Do the dual roles of Mr. Eisenberg, as chair of DFG and as a participant in the RLC, establish *per se* campaign coordination between DFG and the RLC under the provisions of N.J.A.C. 19:25-16.30?

Commission Response

The question of “coordination” between a publicly financed gubernatorial candidate committee and an organization that may be undertaking an expenditure to make a public communication is a question of conduct, not appearance.

Under N.J.A.C. 19:25-16.30, Coordinated expenditures, an entity that expends funds to make a communication prior to a gubernatorial primary election is deemed to have undertaken that expenditure in coordination with a gubernatorial candidate if the following two conditions exist:

1. The communication makes a reference to the gubernatorial candidate in an audio, visual, printed, or electronic format which reference names, depicts, pictures, characterizes, represents, dramatizes, or in any written, spoken, visual or electronic manner represents a gubernatorial candidate or opponent; and
2. The gubernatorial candidate or his or her campaign committee has consented to, authorized, or exercised control over the production or circulation of the communication.

It is the opinion of the Commission that under the facts submitted the dual role of Mr. Eisenberg, as chair of DFG and as a participant in the RLC, do not establish coordination pursuant to the provisions of N.J.A.C. 19:25-16.30 (quoted above). The fact record for this request is that Mr. Eisenberg will avoid discussion of, and abstain from exercising any decision-making control or influence over, any expenditure made by the RLC for any communication that touches upon Senator DiFrancesco’s gubernatorial 2001 primary election candidacy. Under the submitted facts as the Commission understands them, Mr. Eisenberg will not serve the gubernatorial candidate or his campaign committee as a vehicle for consenting to, authorizing, or exercising control over the production or circulation of such a communication undertaken by the RLC. Accordingly, the conditions of N.J.A.C. 19:25-16.30 for a coordinated expenditure between the DFG and RLC are not met.

In offering this advisory opinion, the Commission observes that its effect is limited to the submitted facts of this request. Therefore, nothing contained in this opinion is intended to address any conduct by Mr. Eisenberg that does not entirely conform to that described in the submitted facts, and nothing contained in the opinion is intended to address any conduct by any other person that may be associated with RLC or DFG.

The Commission notes that this request cites the expenditure regulation (N.J.A.C. 19:25-15.29) that is pertinent to a gubernatorial general (rather than primary) election, see page 2, item 3, and page 4, item 5, of the request. However, because the date of this request precedes the primary election scheduled for June 5, 2001, the effect of this opinion is intended by the Commission to be applicable to the 2001 gubernatorial primary election. Also, should Senator DiFrancesco be a candidate in the 2001 gubernatorial general election and the same submitted facts are operable in that election, this opinion is intended to be effective for the 2001 gubernatorial general election also.

You have asked specifically: “Does the Commission adopt the standard for coordination as set forth in FEC v. Christian Coalition, 52 F. Supp. 2d 44 (DCC 1999).” The holding in that

case concerns federal statutes and regulations of the Federal Election Commission, and the facts and legal issues of that opinion do not appear to the Commission to be identical to those raised in this inquiry. Accordingly, this advisory opinion should not be construed to express any opinion concerning that holding.

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

Very truly yours,

GREGORY E. NAGY
Legal Director

ADVISORY OPINION REQUEST

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 be in writing (please type) and must include the following:

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

Full Name of Person, Committee or Entity

DiFrancesco for Governor, Inc.

Mailing Address

c/o Graham, Curtin & Sheridan
50 West State Street
Trenton, New Jersey 08608

Day Telephone No.
609-695-0098

[address for DiFrancesco for Governor, Inc. will be supplied to the commission as soon as it becomes available]

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COMMISSION

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

Yes X No

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

Candidate Committee	<u>X</u>	Recall Committee	—
Joint Candidate Committee	—	Recall Defense Committee	—
Political Committee	—	Lobbyist	—
Continuing Political	—	Legislative Agent	—
Political Party Committee	—	Personal Financial Disclosure statement	—
Legislative Leadership	—	Other (please describe)	—

- 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., 1992 general election) or calendar years, and identify filing capacity.

Not Applicable

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

Not Applicable

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

This firm represents DiFrancesco for Governor, Inc. (DFG). We are writing to request an opinion regarding Lewis Eisenberg's role as Finance Chair of DFG, and as a member of the Republican Leadership Council (RLC). Specifically, we request an opinion based upon the facts set forth herein as to whether Mr. Eisenberg's dual role would constitute coordination under New Jersey regulations N.J.A.C. 19:25-12.7 and 15.29.

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 reporting or other requirements under the Act (attach additional sheets if necessary).**

Parties

Lewis Eisenberg is a very successful Wall Street entrepreneur who is chair of a firm known as Granite Investment. This is his full time occupation. In addition to his work duties, Mr. Eisenberg has many civic responsibilities including being chair of the Port Authority of New York and New Jersey, and has recently served on the transition team of President George W. Bush on matters concerning transportation. On the political front, Mr. Eisenberg is well-known in republican political circles as a leading fundraiser. He has also been associated with a political committee known as the Republican Leadership Council ("RLC"), but last year he resigned his role with RLC in order to spend time on Victory 2000 which was instrumental in electing George W. Bush. Eisenberg is also an active fundraiser for republican gubernatorial and congressional candidates in New Jersey.

DFG has requested Eisenberg to devote some time to fundraising on its behalf, and to serve as chair in a part time voluntary capacity. Eisenberg has no other duties, or responsibilities for DFG. It is a limited role to suit Eisenberg's other substantial commitments.

Eisenberg's position is that he is willing to forego any involvement with RLC in New Jersey (due to the possibility, although he has no knowledge, that RLC may independently expend monies in New Jersey campaigns this year); but to totally ban his involvement in other campaigns of RLC outside of New Jersey unconstitutionally infringes upon his freedoms of association and speech.

DiFrancesco for Governor (DFG)

DFG is a gubernatorial campaign committee which will seek public funding. DFG has hired some staff and consultants to manage the campaign.

- * Charlie Smith is the Executive Director and is responsible for all aspects of the campaign.

- * Ron Gravino is the treasurer, and shall fulfill the statutory and regulatory responsibilities of treasurer of DFG including maintaining of records and accounting of monies.
- * Lysa Israel Associates is a political fundraising consultant who will set up fundraising events, and coordinate the efforts of people working on the fundraising committee.
- * Graham, Curtin & Sheridan is the legal counsel, and will provide representation and advice on all aspects of the campaign.

The candidate, Senate President DiFrancesco, along with the campaign staff will be making all campaign expenditure decisions.

Republican Leadership Council (RLC)

RLC is a political committee which supports moderate republican candidates throughout the United States.¹ Attached is a printout of the RLC informational website. (Exhibit A attached hereto)

The Problem

DFG has no idea regarding, and has had no conversations with, RLC about its 2001 program. Eisenberg wishes to resume some role at the RLC, and simultaneously raise money for DFG. To date, Eisenberg has had not conversations with RLC about New Jersey activities in 2001. The problem is that there is little case law in New Jersey or advisory opinions of the Commission which explain what constitutes "cooperation, prior consent or consultation with the candidate" (N.J.S.A. 19:44A-7) in the event RLC makes an independent expenditure.

In political realms, fundraising committees are always comprised of individuals who serve voluntarily, and who often serve on more than one committee. This usually poses no regulatory issue because it is well accepted that fundraisers have no input on expenditures, and therefore no coordination takes place. In this instance, the fact that Eisenberg is chair, although he has no decision making duties, may connote otherwise. The finance chair is more like a coordinator than a campaign decision maker. He has no authority or control over expenditures.

Proposed Safeguards to Prevent Coordination

DFG and Eisenberg have agreed to limit Eisenberg's role to fundraising. Eisenberg will have no input into campaign strategy or spending. He will have no role in the nature or substance of political communications. DFG has orally advised staff not to discuss or involve Eisenberg in any political strategy or spending decisions.

In addition, Eisenberg has notified RLC that he would like to resume his participation in RLC, but he has specifically recused himself from all activities concerning New Jersey, if any, for

¹ The RLC was incorporated in New Jersey by Graham, Curtin & Sheridan; however, Graham, Curtin & Sheridan has had no involvement with RLC or more than two years.

the year 2001. (See Exhibit B attached hereto)

5. **Please provide a statement of the result that the person, committee, or entity seeks, and a statement of the reasoning supporting that result.**

Discussion

Pursuant to the political communications rule (N.J.A.C. 19:25-15.29) any expenditure which depicts the image of a likeness of a gubernatorial candidate, and is made with the cooperation or prior consent of, or in consultation with the candidate or any person acting on behalf of the candidate shall be charged to a gubernatorial candidate as a contribution. See also, Friends of Governor Tom Kean v. New Jersey Election Law Enforcement Com'n, 114 N.J. 33, 38 (1989). In Kean, certain non-gubernatorial candidates over whom Kean's campaign had no control or authority utilized the Kean's name in their political communications. The court ruled that a Commission regulation which automatically allocated such expenditures against the gubernatorial candidate was in excess of the Commission's statutory authority. The Commission must show consent, consultation or control in order to require allocation Kean, supra, 114 N.J. at 38.

As such, a coordinated expenditure has been defined as a communication made with reference to a gubernatorial candidate or his or her opponent and the candidate or their committee has consented to, authorized, or exercised control over the production or circulation of the communication. N.J.A.C. 19:25-15.29.

Since the Kean decision, the federal law concerning independent expenditures has greatly evolved. Under the federal regulation, an expenditure by a third party spender is prohibited only when there is a showing of coordination and the expenditure expressly advocates the election or defeat of a clearly identifiable candidate. See, Buckley v. Valeo 424 U.S. 1 (1976); FEC v Massachusetts Right to Life, 479 U.S. 238 (1986); FEC v. Christian Coalition, 52 F. Supp. 2d 44 (DDC 1999).

One commentator has noted that determining what constitutes "coordination" is a thorny issue. In many instances "discussions between a spender and campaign with regard to candidate positions did not rise to the level of consultation or coordination". See Obstacles to Effective Enforcement of FECA, 52 Administrative Law Review 576, 599 (Spring 2000). It appears that coordination means some measure of collaboration beyond mere inquiry. See, Clifton v. FEC, 114 F. 3rd 1309, 1311 (1st Cir. 1997) cert. denied 118 S. Ct. 1036 (1998).

More emphatically, the Federal District Court for the District of Columbia adopted an "expressive coordinated expenditure standard". An expressive coordinated expenditure occurs where a candidate exercises control or where there has been a substantial discussion or negotiation between the spender and the campaign over the content, timing, location, or volume of a communication. FEC v. Christian Coalition, 52 F. Supp. 2d 45, 66 (DDC 1999). The novel issue explored in Christian Coalition was whether the Coalition's extensive consultations, meetings and discussions with campaign staff of certain candidates (including the Bush campaign) regarding distribution of voter guides and other materials turned otherwise permissible campaign related materials into illegal in kind contributions. Christian Coalition, supra, 52 F. Supp. 2d at 48-49. There was proof that representatives of the Christian Coalition regularly met with campaign officials of George Bush. In fact, George Bush met with Pat Robertson on several occasions. The Bush representatives always

accepted information provided by the Coalition, but the record was devoid of proof that Bush's representatives had any input into the plans of the Christian Coalition. Frequent contact between the Coalition's representatives and the campaign staffs of various candidates were not sufficient to treat expenditures as "coordinated". Id. at 92. The Court ruled that the First Amendment requires a strict scrutiny of what constitutes coordination, since anything less chills associational freedom. Thus, under Christian Coalition, coordination is substantial discussion or negotiation such that the candidate and spender emerge as partners or joint venturers in the expressive expenditure. Id. at 92.

Pursuant to the facts of the instant inquiry, it does not appear that any coordination will occur solely based upon Mr. Eisenberg's dual role with DFG and the RLC. As previously stated, Mr. Eisenberg's role with DFG is limited to raising funds in support of the gubernatorial race. He will have no input in campaign expenditures, and he has recused himself from New Jersey activities of RLC (although it is not known whether the RLC will have any New Jersey activity). He will have no control over campaign strategies and will not participate in deciding the campaign message. There are other consultants and employees in charge of these matters.

Based upon the aforementioned, DFG respectfully requests an advisory opinion on the following questions:

- a. Does the Commission adopt the standard for coordination as set forth in FEC v. Christian Coalition, 52 F. Supp 2d. 44 (DCC 1999).
- b. Whether the safeguards imposed, so long as they are strictly adhered to, are sufficient to avoid coordination, in the event RLC decides to independently expend funds.

6. Person who is submitting request on behalf of committee or entity listed in item 1 above;

Full name: Peter G. Sheridan, Esq.

Day Telephone: 609-695-0098

Mailing Address:

Evening Telephone: 609-275-4903

Graham, Curtin & Sheridan
50 West State Street
Trenton, New Jersey 08608

Fax No.: 609-695-0697

a. Official capacity of person requesting opinion:

- Candidate
- Treasurer
- Organizational Treasurer

New Jersey Attorney representing person,

committee or entity: **Attorney for DiFrancesco for Governor, Inc.**

Other _____

7. ~~I hereby consent to an extension of the 10-day response period provided in N.J.S.A. 19:44A-8F to a 30-day period for Commission response, which period shall start on the date of Commission receipt of the completed advisory opinion request (Cross out paragraph if consent is withheld).~~

We respectfully request that the Commission make a determination as soon as possible.

8. **A request for an advisory opinion will not be considered filed until a fully completed and signed application is received by the Commission**

1/26/01
Dated:

Peter G. Sheridan
Peter G. Sheridan, Esq.