



State of New Jersey

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September 20, 2001

BY FAX AND REGULAR MAIL

William E. Baroni, Esq.
Blank Rome Comisky & McCauley LLP
200 West State Street
Trenton, New Jersey 08608

Advisory Opinion No. 09-2001

Dear Mr. Baroni:

The Commission has considered your request for an advisory opinion, submitted on behalf of Schundler for Governor, Inc., the candidate committee of 2001 general election publicly-financed gubernatorial candidate Bret Schundler, and has directed me to issue this response.

Submitted Facts

The Commission notes that Bret Schundler, the Republican candidate for Governor in the 2001 general election, has applied for and been determined to be qualified to receive public matching funds, pursuant to the New Jersey Campaign Contributions and Expenditures Reporting Act, N.J.S.A. 19:44A-1 et seq. (hereafter, the Campaign Reporting Act), specifically N.J.S.A. 19:44A-3m and Commission regulation N.J.A.C. 19:25-15.3. Public matching funds in the amount of \$2,514,362.48 have to date been deposited into Candidate Schundler's public funds account established pursuant to N.J.A.C. 19:25-15.20. You state that the Campaign Reporting Act and Commission regulations strictly limit the use by Candidate Schundler of these public matching funds to an enumerated list of permitted purposes, which purposes include the purchase of rental space on outdoor signs and billboards (N.J.S.A. 19:44A-35a(2) and N.J.A.C. 19:25-24(a)2) and the purchase of advertising space in newspapers and regularly published magazines and periodicals (N.J.S.A. 19:44A-35a(3) and N.J.A.C. 19:25-24(a)3).

You state in your inquiry that Candidate Schundler wishes to pay for the cost of "airplane banner advertising," and associated production and placement costs, with funds that will be deposited in the public matching funds account. You indicate that this advertising involves a low-flying airplane that trails an "extended banner on which are placed letters which create a message" such as "End Tolls – Vote Schundler." You state that this type of advertising has many of the

characteristics of and is similar to billboards or outdoor signs, and is distinguishable from such advertising only because it is not stationary.

You have also asked whether or not public matching funds may be used to pay for “Internet Banner Advertising,” a new form of advertising available to readers of on-line newspapers and periodicals, and for costs associated with the production and placement of the Internet banner advertisements. You explain that Internet banner advertising runs “on the periphery of the [Internet] web page,” and is similar to newspaper advertising. You further state your belief that Internet Banner advertising is a “logical extension” of the existing permissible use of public matching funds to pay the cost of advertising in periodicals and newspapers.

In your request for an advisory opinion you have stated that public matching funds have not been used to date to pay for either airplane banner or Internet banner advertisements.

Question Presented

Pursuant to the Campaign Reporting Act and Commission regulations, may gubernatorial candidate Bret Schundler use public matching funds to pay for the costs of “airplane banner advertising” and “Internet banner advertising” and related costs of producing and placing such advertisements?

Commission Response

Airplane Banner Advertisements

The Campaign Reporting Act and Commission regulations specifically limit the use of public matching funds to paying for the costs of voter communications (including media time, outdoor signs, billboards, newspaper and magazine advertisements, and printing and mailing of campaign literature), legal and accounting costs incurred in complying with the public financing provisions of the Campaign Reporting Act and Commission regulations, and telephone costs; see N.J.S.A. 19:44A-35 and N.J.A.C. 19:25-15.24. Because an airplane banner advertisement is a method by which a gubernatorial candidate may communicate his or her message to New Jersey voters, the Commission concludes that it is a permissible use of gubernatorial public matching funds to pay for airplane banner advertising as described in your inquiry. The Commission concurs that advertisements that are delivered by means of an airplane banner do not differ in the type of content, only in delivery mechanism, from advertisements that may be placed on billboards and outdoor signs. N.J.S.A. 19:44A-35a(2) and N.J.A.C. 19:25-15.24(a)2 specifically permit the use of public matching funds to pay for rental space on outdoor signs and billboards, and the Commission can find no reason to distinguish advertisements by means of an airplane banner from advertisements placed on an outdoor sign or billboard. The Commission further concludes that because airplane banner advertisements are a method of voter communication that may be paid with public matching funds, the costs of producing and placing the airplane banner advertisements may also be paid with public matching funds pursuant to N.J.S.A. 19:44A-35a(4) and N.J.A.C. 19:25-15.24(a)4.

Please be advised that because the airplane banner advertisements you described are an expenditure by the candidate committee of Bret Schundler to finance a communication promoting his election, the communication must contain political identification information as required by N.J.S.A. 19:44A-22.3 and N.J.A.C. 19:25-13.1 et seq. The advertisement must clearly state the name and business address of the candidate committee, as that information appears on the Form D-1

filed with the Commission, and must also state that the candidate committee has paid for the communication.

Internet Banner Advertisements

The Commission similarly concludes that public matching funds may be used to pay for the Internet banner advertisements you have described in your inquiry because those advertisements are the functional equivalent of advertisements in newspapers or in regularly published magazines and periodicals; see N.J.S.A. 19:44A-35a(3) and N.J.A.C. 19:25-15.24(a)3. Section 35 of the Campaign Reporting Act (N.J.S.A. 19:44A-35), which specifically enumerates the permissible uses of public matching funds and includes the purchase of advertising space in newspapers and periodicals, was enacted before the advent of technological advances in communications such as the Internet. The Commission believes that Internet banner advertisements serve the same purpose of voter communication as advertisements in newspapers or regularly published periodicals that may be purchased by a candidate committee, and that the extension of the use of public matching funds to include this purpose is consistent with the intent of Section 35. The Commission further concludes that because public matching funds may be used to pay for Internet banner advertisements, the costs of producing and placing the Internet banner advertisements may also be paid with public matching funds pursuant to N.J.S.A. 19:44A-35a(4) and N.J.A.C. 19:25-15.24(a)4.

Please be advised that the Internet banner advertisements you have described are a form of advertising directed to the electorate that is delivered by electronic means, as defined in N.J.A.C. 19:25-13.1, and therefore the political identification requirements of N.J.S.A. 19:44A-22.3 and N.J.A.C. 19:25-13.1 et seq., discussed above, are applicable to Internet banner advertising that is paid for by Candidate Schundler's candidate committee.

Nothing contained in this advisory opinion is intended to express an opinion as to the legality of any specific expenditure by Schundler for Governor 2001, Inc., for airplane banner or Internet banner advertising.

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

Very truly yours,

Election Law Enforcement Commission

By: _____
NEDDA G. MASSAR
Deputy 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 or print) 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

Schundler for Governor, Inc.

Mailing Address

395 Pleasant Valley Way
West Orange, NJ 07502

Day Telephone No.

973-325-9700

Evening Telephone No.

973-325-9700

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

Joint candidates committee

Political committee

Continuing political committee

Political party committee

Legislative leadership committee

Recall committee

Recall defense committee

Lobbyist

Legislative agent

Personal finance disclosure statement

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:

c. If reports are or were filed under a different name than that appearing in 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).

This advisory opinion raises the issue of certain campaign expenditures which are not explicitly addressed by the Campaign Contributions and Expenditures Reporting Act, ("CERA") as to whether or not they can be paid for with "public funds" pursuant to N.J.A.C. 19:44A-35. See also, N.J.A.C. 19:25-15.24.

The relevant sections of the Commission's regulations include: N.J.A.C. 19:25-15.24 (use of public funds).

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:

Bret Schundler was nominated by the Republican Party to be its nominee for Governor of New Jersey in the General Election to be held on November 6, 2001. He intends to apply for participation in the states matching funds program pursuant to N.J.A.C. 19:25-17. Candidates who are participating in the matching funds program are held to certain expenditure limitations. Those limitations include an overall cap on spending, N.J.A.C. 19:25-15.11(a)(3); and limitations on the specific type of expenditure, N.J.A.C. 19:25-15.24.

That section enumerates specific, permissible uses of funds which have been generated by the matching funds program. These "public funds" are generated by a Commission-directed creation of a "public fund account", N.J.A.C. 19:25-15.20, and are solely those funds which are deposited into that account directly out of the State Treasury, N.J.A.C. 19:25-15.23.

The Commission indicates in its regulations that expenditures from the "public funds" account are "strictly limited" to the enumerated list of permitted uses. This list includes: "Purchase of rental space on outdoor signs or billboards," N.J.A.C. 19:25-15.24(a)(2); "Purchase of advertising space in newspapers and regularly published magazines and periodicals," N.J.A.C. 19:25-15.24(a)(3); "Payment of the cost of producing the material aired or displayed on radio, television, outdoor signs or billboards, and in newspapers, regularly published magazines and periodicals," N.J.A.C. 19:25-15.24(a)(4).

The Schundler campaign is seeking this Advisory Opinion in order to seek clarity as to whether or not two specific expenditures fall into the permitted uses as enumerated in N.J.A.C. 19:25-15.24.

Airplane Banner Advertising

The Schundler campaign is attempting to cover the cost of airplane banner advertising out of funds in its "public funds" account.

"Airplane Banner Advertising" is seen most often over shorelines and large public gatherings. It involves a low-flying plane which pulls an extended banner on which are placed letters which create a message; i.e., "Eat at Joe's" or more directly, "End Tolls - Vote Schundler."

This type of advertising seems highly similar to billboards or "outdoor signs," as enumerated in N.J.A.C. 19:25-15.24(a)(2). While a billboard is stationary, and presumably too an

“outdoor sign” this “airplane banner advertising” retains many of the same characteristics. For example, all of these contain a limited message that is directed at its viewer for a short period of time. Whether driving past a billboard or sitting as an “airplane banner advertisement” is pulled overhead, the message is likely similar. This campaign would submit the only difference is the terra firma based location of a billboard as opposed to a flight based location.

As such, because of the closeness of this type of advertising to billboard advertising, the campaign seeks approval to use “public funds” to cover these expenditures.

“Internet Banner Advertising”

The Schundler Campaign is attempting to use “public funds” to cover the expenditures of the placement of advertisements on the internet-version sites of newspapers and periodicals.

“Internet Banner Advertising” is a new form of advertising that permits an advertiser to reach potential voters who utilize the internet in order to review newspapers and periodicals. See, www.bergenrecord.com (website of The Record); See also, www.nj.com/news/ledger (website of The Star Ledger); www.politicsnj.com (Internet based New Jersey political news website).

An advertiser can purchase “banner advertising” which runs on the periphery of the web page. Similar to newspaper advertising which runs on the periphery of the news, these advertisements are run throughout the website. Viewers of these advertisements would be reading other advertisements located in the print version of the newspaper or periodical.

One of the permitted uses of “public funds” is the placement of “advertising in newspapers and periodicals”. Permitting the use of “public funds” to pay the cost of placing banner advertising on the websites of newspapers and periodicals is a logical extension of N.J.A.C. 19:25-15.24(a)(3) given the changing face of news delivery in the Internet age.

Cost of the Advertisement

The Schundler campaign is attempting to utilize “public funds” to cover the costs incurred in creating and placing both “Airplane Banner Advertising” and “Internet Banner Advertising”. The campaign believes that were the Commission finds that these expenditures could be paid for by “public funds” a logical corollary would be to find that the production and placement of these advertisements would necessarily fall under N.J.A.C 19:25-15.24(a)(4).

Statement:

On behalf of Schundler for Governor, Inc., I affirmatively state that the activities described above have not been funded out of the “public funds” account and that the Commission’s opinion will affect the application of several of the Act’s provisions to the Schundler campaign.

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

Schundler for Governor, Inc., seeks the Commission's approval to utilize funds in its "public funds" account to pay for "Airplane Banner Advertisements" and "Internet Banner Advertisements" pursuant to the permitted uses of "public funds" under N.J.A.C. 19:25-19.24.

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

Full Name: William E. Baroni, Jr., Esquire

Mailing Address:

BLANK ROME COMISKY & MC CAULEY,
200 West State Street
Trenton, NJ 08608

Day Telephone No.
609-278-2326
Evening Telephone No.
609-689-1670
Fax Number:
609-278-2323

a. Official Capacity of Persons Requesting Opinion:

Candidate

Treasurer


Organizational Treasurer

New Jersey Attorney representing requesting person, committee or entity

Other (please describe): _____

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

9/12/01
Dated


Signature