

Advisory Opinion 10-03, Nov. 10, 2010.

Exhibit 1



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November 10, 2010

OPINION
OF
GARY K. KING
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Opinion No. 10-03

BY: Phillip P. Baca
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TO: The Honorable Rod Adair
New Mexico State Senator
P.O. Box 1796
Roswell, New Mexico 88202

QUESTIONS:

1. Is the Republican National Committee prohibited from contributing to the Republican Party of New Mexico ("RPNM") in amounts greater than those set forth in the Campaign Reporting Act?
2. Under the Campaign Reporting Act, is a person who controls a corporation prohibited from contributing under the corporation she controls and contributing personally if such aggregate contributions would be in excess of the limits for either a primary or a general election? Would the corporate donation be considered an indirect or earmarked contribution under the Campaign Reporting Act?
3. If a person who controls a corporation does not intend to violate the Campaign Reporting Act by contributing under the corporation she controls and contributing personally in amounts that, in the aggregate, exceed the limits for either a primary or a general election, is that a violation of the Campaign Reporting Act?
4. Under the Campaign Reporting Act, if a person spends money for a political purpose related to a candidate but does not coordinate that spending with a candidate, does that spending qualify as an in-kind contribution to the candidate?

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5. Would contributions to the RPNM in excess of the various contribution limits in the Campaign Reporting Act subject the contributor and the RPNM to criminal penalties or sanctions? Under the Campaign Reporting Act, would the state be required to demonstrate that the purpose of the contribution was to circumvent the Campaign Reporting Act?

CONCLUSIONS:

1. Yes. Contributions the Republican National Committee makes to the RPNM are subject to the campaign contribution limits specified in the Campaign Reporting Act.
2. If an individual makes a campaign contribution personally and transfers money to a corporation she controls for the purpose of making another campaign contribution, the contributions likely would be attributed to the individual for purposes of the campaign contribution limits.
3. Yes. A person who exceeds the campaign contribution limits may violate the Campaign Reporting Act even if the person does not intend to violate the Act.
4. No. An expenditure for a political purpose made separately and independently of a candidate is not, by itself, an in-kind contribution to the candidate.
5. A person who "knowingly and willfully" violates the Campaign Reporting Act may be subject to criminal penalties.

FACTS:

In 2009, the legislature enacted Senate Bill 116, which amended the Campaign Reporting Act, NMSA 1978, §§ 1-19-25 to -36 (1979, as amended through 2009), to impose limits on campaign contributions. See 2009 N.M. Laws, ch. 68. The bill's effective date was November 3, 2010. Id. § 6.

ANALYSIS:

1. Is the Republican National Committee prohibited from contributing to the RPNM in amounts greater than those set forth in the Campaign Reporting Act?

Section 1-19-34.7(A)(2)(b) of the Campaign Reporting Act prohibits contributions:

from a political committee to...another political committee in an amount that will cause that political committee's total contributions to the political committee to exceed five thousand dollars (\$ 5,000) during a primary election or five thousand dollars (\$ 5,000) during a general election.

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The Campaign Reporting Act's definition of "political committee" specifically includes "political parties." See NMSA 1978, Section 1-19-26(L). Consequently, the Campaign Reporting Act prohibits the Republican National Committee from contributing to the RPNM in an amount greater than five thousand dollars during a primary election or during a general election.

- 2. Under the Campaign Reporting Act, is a person who controls a corporation prohibited from contributing under the corporation she controls and contributing personally if such aggregate contributions would be in excess of the limits for either a primary or a general election? Would the corporate donation be considered an indirect or earmarked contribution under the Campaign Reporting Act?**

The applicability of the Campaign Reporting Act in the scenario described above depends on the source of the contributions. In the eyes of the law, an individual and a bona fide corporation are separate entities, even if the individual controls the corporation. The Campaign Reporting Act would not prohibit an individual and a corporation controlled by the individual from making separate contributions in their own names up to the limits set out in the Act.

If, instead of separate contributions by the individual and corporation, the individual made a personal contribution and transferred funds to the corporation she controlled for purposes of making another contribution, the Campaign Reporting Act would attribute both contributions to the individual for purposes of the Act's contribution limits. Specifically, under Section 1-19-34.7(B):

All contributions made by a person to a candidate, either directly or indirectly, including contributions that are in any way earmarked or otherwise directed through another person to a candidate, shall be treated as contributions from the person to that candidate.¹

Thus, the Campaign Reporting Act prohibits an individual from making contributions directly or indirectly through a corporation that, in the aggregate, exceed the statutory limits for contributions from the individual.

The Act precludes evasion of the contribution limits by prohibiting a person from making contributions in any amount in the name of another person. Section 1-19-34.3 of the Campaign Reporting Act provides:

It is unlawful for a person to make a contribution in the name of another person, and no person shall knowingly accept a contribution made by one person in the name of another person.

¹ For purposes of the Campaign Reporting Act, the term "person" includes an "individual or entity." See NMSA 1978, § 1-19-26(K).

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The dollar amount of a person's contribution is not material for purposes of Section 1-19-34.3. A violation will occur if a person makes a contribution in the name of another person, regardless of whether the aggregate contributions exceed or are within the specified limits for an election.

Under Section 1-19-34.3, an individual who controlled a corporation would be prohibited from directly or indirectly making a contribution in the name of the corporation. In particular, the individual could not contribute to a campaign and falsely represent that the contribution was from the corporation or use the corporation as a "straw donor" by contributing through the corporation ostensibly in the corporation's name. See United States of America v. O'Donnell, 608 F.3d 546, 548-549 (9th Cir. 2010) (interpreting a substantially similar prohibition in the Federal Election Campaign Act).

3. If a person who controls a corporation does not intend to violate the Campaign Reporting Act by contributing under the corporation she controls and contributing personally in amounts that, in the aggregate, exceed the limits for either a primary or a general election, is that a violation of the Campaign Reporting Act?

Section 1-19-34.7(A) prohibits contributions by a person in "an amount that will cause that person's total contributions" to exceed the specified limits. For purposes of calculating a person's "total contributions," Section 1-19-34.7(B), as discussed above, includes contributions the person makes "indirectly, including contributions that are in any way earmarked or otherwise directed through another person to a candidate." For a person who receives contributions, Subsection (C) of Section 1-19-34.7 provides that the "person ... shall not knowingly accept or solicit a contribution, directly or indirectly, including a contribution earmarked or otherwise directed or coordinated through another person ... that violates the contribution limits provided for in this section" (emphasis added).

Under the applicable rules of statutory construction, "the plain language of the statute" is "the primary indicator of legislative intent." State v. Juan, 2010-NMSC-41, ¶ 37 (citations omitted). Absent evidence that the legislature intended otherwise, the words used in a statute are given their ordinary meaning, id., and it is assumed "that the legislature used specific language for a reason." Pueblo of Picuris v. New Mexico Energy, Minerals & Natural Res. Dep't, 2001-NMCA-84, ¶ 14, 33 P.3d 916, 919.

Based on the plain language of Section 1-19-34.7, it appears that the legislature intended to apply a different standard for violations of the contribution limitations depending on whether a person was receiving or making a contribution. While a person must "knowingly" accept or solicit a contribution that exceeds the limits, the person making a contribution can violate Section 1-19-34.7 without knowing or intending to exceed the limits. Accordingly, we conclude that an individual will violate the Campaign Reporting Act if she, directly and indirectly through a corporation she controls, makes contributions that exceed the limitations specified in Section 1-19-34.7(A), even if the violation was not intentional.

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4. **Under the Campaign Reporting Act, if a person spends money for a political purpose related to a candidate but does not coordinate that spending with a candidate, does that spending qualify as an in-kind contribution to the candidate?**

The Campaign Reporting Act defines “contribution,” in pertinent part, as “a gift, subscription, loan, advance or deposit of money or other thing of value, including the estimated value of an in-kind contribution, that is made or received for a political purpose....” NMSA 1978, § 1-19-26(F). An “expenditure is “a payment, transfer or distribution or obligation or promise to pay, transfer or distribute any money or other thing of value for a political purpose.” *Id.* § 1-19-26(J). A contribution or an expenditure is “for a political purpose” if it is made “to influence or attempt to influence an election.” *Id.* § 1-19-26(M). The Campaign Reporting Act requires a candidate and other “reporting individuals” to file reports of expenditures made and contributions received. *Id.* § 1-19-29.

For purposes of this opinion, we assume the question above concerns what are often referred to as “independent expenditures.” Under the Campaign Reporting Act, an expenditure made by a person separately and independently of a candidate, even for a political purpose, is not, without more, a contribution to a candidate. If, however, the person gives the goods, services or other product of the expenditure to the candidate, the product will constitute an in-kind contribution. For example, a public opinion poll that is paid for independently and later given to the candidate for his or her use would constitute an in-kind contribution, the “estimated value” of which would be used for purposes of complying with the Act’s reporting requirements and contribution limits.

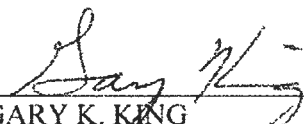
5. **Would contributions to the RPNM in excess of the various contribution limits in the Campaign Reporting Act subject the contributor and the RPNM to criminal penalties or sanctions? Under the Campaign Reporting Act, would the state be required to demonstrate that the purpose of the contribution was to circumvent the Campaign Reporting Act?**

Section 1-19-36 of the Campaign Reporting Act provides:

Any person who knowingly and willfully violates any provision of the Campaign Reporting Act is guilty of a misdemeanor and shall be punished by a fine of not more than one thousand dollars (\$1,000) or by imprisonment for not more than one year or both.

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The phrase “knowingly and willfully violates” in Section 1-19-36 suggests that the legislature intended to subject a person to criminal penalties only if the person intentionally violated the Campaign Reporting Act, including the limits on campaign expenditures.



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