

May 19, 2008 Permissible Campaign Expenditures

The Honorable Debbie A. Rodella
New Mexico State Representative
P.O. Box 1074
Ohkay Owingeh, NM 87566

Re: Opinion Request – Permissible Campaign Expenditures

Dear Representative Rodella:

You have asked whether a state legislator's use of campaign funds to make small purchases that benefit voters and potential voters, with the intent of garnering their good will, constitutes legitimate campaign expenditures under Section 1-19-29.1(A)(1) of the Campaign Reporting Act, NMSA 1978, Sections 1-19-25 through 1-19-36 (the "Act") (as amended through 2003). More specifically, you ask whether (1) distributing calling cards to voters and potential voters who are in the National Guard and being deployed to Iraq, (2) handing out phone cards to students leaving for college, (3) paying the lunch tab of a group of persons at a restaurant, and (4) hosting a pizza party or holiday party are permissible campaign expenditures. You also ask what distinctions may be made between these and other types of expenditures, such as the difference, if any, between giving persons at a campaign event ten-dollar (\$10.00) phone cards versus giving persons ten-dollar bills (\$10.00). Finally, you ask whether the answer to your questions depends on the kind of campaigning associated with the gift. As discussed below, we conclude that even if the expenditures you describe are permissible under the Campaign Reporting Act, they may constitute illegal bribes under the Election Code.

The Campaign Reporting Act makes it unlawful for any candidate to make an expenditure of contributions received, except for the purposes specified or otherwise provided in the Act. See NMSA 1978, § 1-19-29.1 (1995). "[E]xpenditures of the campaign" are among the expenditures expressly allowed by the Act. Id. The Act defines "expenditures" as a payment, transfer, distribution or obligation or promise to pay, transfer or distribute *any money or other thing of value for a political purpose*. See NMSA 1978, § 1-19-26(J) (1995) (emphasis added). A "political purpose" means "influencing or attempting to influence an election or pre-primary convention" NMSA 1978, § 1-19-26(M) (1995). The Act does not define the term "campaign" or distinguish between different types of campaign events.[1]

A plain reading of the Campaign Reporting Act is that any expenditure made for the purpose of electing a person to office is a legitimate campaign expenditure, including, arguably, expenses related to the distribution of calling cards to voters and potential voters, phone cards to college students. Similarly, paying the costs of a meal for a group of persons at a restaurant or hosting a pizza or holiday party for voters and potential voters also appear to be permissible campaign expenditures. At no time, however, should there be any understanding, express or implied, that voters should vote in a certain manner or for a certain candidate in exchange for the gifts. See Berry

v. Hull, 6 N.M. 643, 674-5 (1892) (decided under former law) (offer to build county seat and other public structures on newly purchased land, platted as a city where none previously existed, was a direct and unequivocal inducement to voters to vote for county seat at that location.)

The provisions of the Campaign Reporting Act must be read against the backdrop of Section 1-20-11(A) of the Election Code, relating to offering bribes. Section 1-20-11(A) expressly prohibits a legislator from “willfully advancing, paying ... directly or indirectly, *any money or other valuable consideration* ... to any person ... to induce such person, if a voter, to vote or refrain from voting for or against any candidate” See NMSA 1978, § 1-20-11(A) (1969) (emphasis added). An offer to do so is a fourth degree felony. See id.

We note that the language of Sections 1-19-26(J) and 1-20-11(A), defining expenditure and bribery, respectively, is similar. Both involve two elements. First, the object being distributed must be money or some other valuable thing. Neither statute places a minimum value or exempts objects of nominal value. Hence, if there is any value attributable to a thing, no matter how trivial, the distribution of the thing to influence a vote may violate Section 1-20-11(A), even if it appears to be a permissible expenditure under Section 1-19-26(J). See Del. Op. Atty. Gen. 04-IB03 (2004) (distribution of a single flower, food item, or other object that is not strictly campaign literature violates state constitutional provision prohibiting payment of money or other thing of value to influence or induce a vote).

The second element involves intent. “[T]he corrupt use of money by candidates is as much to be feared as the corrosive influence of large contributions. There are many illegal ways of spending money to influence elections. One would be blind to history to deny that unlimited money tempts people to spend it on *whatever* money can buy to influence an election.” Buckley v. Valeo, 424 U.S. 1, 264-265, 96S.Ct. 612, 747-748 (1976) (White, J. dissenting) (citation omitted). There is a significant difference between the distribution of objects with the intent to procure votes and the distribution of objects with the intent to campaign. See Del. Op. Atty. Gen. 04-IB03, *supra*. The former practice is unlawful whereas the latter is not. Id.

Unfortunately, there is no bright line that distinguishes these two types of distributions. There are several factors, however, that suggest whether a distribution is procuring votes or campaigning. These include the value of the object being distributed and the timing and location of the distribution. For example, distributing refrigerator magnets or other campaign event trinkets with a ten-dollar value and inscribed with “Vote for Candidate X” is more likely to be viewed as campaigning than procuring votes. The distribution of cash, on the other hand, is more likely to be viewed as evidence of intent to buy votes than intent to campaign. See id. We emphasize again that in any event there should be no understanding that voters should vote in a certain manner or for a certain candidate in exchange for the gifts.

The public disclosure requirements of the Act provide the checks-and-balances on campaign expenditures. The primary purpose of requiring candidates to disclose expenditures is to deter the improper influencing of voters. See *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 95, 103 S. Ct. 416, 422 (1982). By requiring candidates to disclose campaign expenditures, the Legislature acknowledges that corruption of the electoral process can take many forms: the actual buying of votes, the use of “slush funds;” dirty tricks and bribes of poll watchers and election officials. See *id.* Under NMSA 1978, Section 1-19-29 (1997), every public official, candidate, or treasurer of a campaign or political committee must file a report of all expenditures made and contributions received. The reports must be filed annually on the second Monday in May and, in election years, periodically, on the second Monday in October, and before and after a primary, general or statewide special election. See NMSA 1978, §§ 1-19-19 (A) and (B).

In summary, depending on the circumstances, a payment or gift of money or other thing of value to an individual may be an illegal inducement, even if it is a permissible campaign expenditure. The closeness of the question makes it imperative for each legislator to evaluate the particular facts and circumstances involved when he or she spends campaign contributions and avoid expenditures that may be construed as illegal bribes to voters.

Your request to us was for a formal Attorney General’s Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General’s Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Very truly yours,

SALLY MALAVÉ
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General

[1] Generally, however, we understand “campaign” in the context of the Campaign Reporting Act to mean running for office, candidacy for office, or any number of activities or planned course of action for obtaining a majority of the votes cast. See Black’s Law Dictionary 205 (6th ed. 1990). See also NMSA 1978, § 1-19-26(D) (defining “campaign committee” as persons who raise and spend contributions “for the purpose of electing ... [a candidate] to office”).