



## STATE ETHICS COMMISSION

### **ADVISORY OPINION NO. 2022-08**

August 5, 2022<sup>1</sup>

#### **QUESTION PRESENTED<sup>2</sup>**

May a political committee make a coordinated expenditure on an advertisement that advocates both the election of clearly identified candidates and the passage of a clearly identified ballot question?

#### **ANSWER**

Yes.

#### **ANALYSIS**

##### **I.**

This advisory opinion concerns a political committee that pays for advertisements advocating for candidates and ballot questions in New Mexico elections. The political committee engages in both coordinated expenditures and independent expenditures. In so doing, the political committee says that it separates its coordinated expenditure campaigns from its independent expenditure

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<sup>1</sup> This is an official advisory opinion of the State Ethics Commission. Unless amended or revoked, this opinion is binding on the Commission and its hearing officers in any subsequent Commission proceeding concerning a person who acted in good faith and in reasonable reliance on the opinion. NMSA 1978, § 10-16G-8(C).

<sup>2</sup> The State Ethics Commission Act requires a request for an advisory opinion to set forth a “specific set of circumstances involving an ethics issue.” NMSA 1978, § 10-16G-8(A)(2) (2019). On July 5, 2022, the Commission received a request for an advisory opinion that detailed the issues as presented herein. *See* 1.8.1.9(A) NMAC. The request was submitted by a person with authority to request an opinion. *See generally* NMSA 1978, § 10-16G-8(A)(1); 1.8.1.9(A)(1) NMAC.

campaigns, so that the staff and money used for one type of expenditure is not used on the other, and vice versa. The political committee also uses segregated bank accounts to fund its coordinated expenditure campaigns and its independent expenditure campaigns, respectively.

The 2022 general election involves each of New Mexico’s statewide elected officials and seats in the New Mexico House of Representatives. The election also includes a ballot question proposing to amend Article IX, Section 14 of the New Mexico Constitution. In anticipation of the upcoming general election, the political committee plans to send advertisements to non-members listing the political committee’s endorsements. The political committee intends to send the advertisement through its coordinated expenditure arm and to fund the advertisement with funds it uses for coordinated expenditures.

In its advertisement, the political committee will endorse its favored candidates. The political committee also would like to endorse the constitutional amendment in the same advertisement and to pay for that advertisement using funds it uses for coordinated expenditures. The political committee has requested an advisory opinion from this Commission as to whether or not it may do so.

## II.

Apart from requiring certain, limited disclaimers, the Campaign Reporting Act, NMSA 1978, §§ 1-19-26 to -37 (1976, as amended through 2021), generally does not purport to regulate the contents of a political committee’s advertisements. *See, e.g.*, NMSA 1978, § 1-19-26.4 (2019) (regarding disclaimers in advertisements). However, depending on whether the political committee’s advertisement is coordinated or independent, the Act imposes different expenditure limitations and disclosure requirements. Accordingly, we review the distinction between a “coordinated expenditure” and an “independent expenditure” in the Campaign Reporting Act.

A political committee makes a “coordinated expenditure” if it makes an expenditure

- (2) at the request or suggestion of, or in cooperation, consultation or concert with, a candidate, campaign committee or political party or any agent or representative of a candidate, campaign committee or political party; and

- (3) for the purpose of:
  - (a) supporting or opposing the nomination or election of a candidate; or
  - (b) paying for an advertisement that refers to a clearly identified candidate and is published and disseminated to the relevant electorate in New Mexico within thirty days before the primary election or sixty days before the general election in which the candidate is on the ballot[.]

NMSA 1978, § 1-19-26(I)(2)–(3) (2019); *see also generally* 1.10.13.28(D) NMAC (providing factors to be considered when determining coordination); State Ethics Comm’n Adv. Op. 2022-05, at 7–9 (Apr. 1, 2022) (discussing instances of coordination between political committees and candidates). Coordinated expenditures are “contributions” under the Campaign Reporting Act, Section 1-19-26(H)(2), and, as such, are subject to the contribution limits set forth in NMSA 1978, Section 1-19-34.7 (2019).<sup>3</sup> Political committees must also regularly report coordinated expenditures as provided by Sections 1-19-27(A), 1-19-29, and 1-19-31, and the rules promulgated by the Secretary of State, 1.10.13 NMAC. *See generally* 1.10.13.28 NMAC (coordinated expenditures).

By contrast, a political committee makes an “independent expenditure” if it makes an expenditure that is:

- (2) not a coordinated expenditure as defined in the Campaign Reporting Act; and
- (3) made to pay for an advertisement that:

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<sup>3</sup> The Campaign Reporting Act limits the amounts persons may contribute to candidates, candidates’ campaign committees, and political committees to \$5,200 during a primary election cycle and \$5,200 during a general election cycle. *See* NMSA 1978, § 1-19-34.7(A)(1). The contribution limits are doubled for candidates seeking election to the office of governor, *see* § 1-19-34.7(B), and the contribution amounts increase over time in step with inflation. *See* § 1-19-34.7(F). The per-election contribution limit is currently \$5,200. *See* New Mexico Secretary of State, Campaign Contribution Limits, <https://www.sos.state.nm.us/candidate-and-campaigns/how-to-become-a-candidate/campaign-contribution-limits/> (last accessed July 11, 2022).

- (a) expressly advocates the election or defeat of a clearly identified candidate or the passage or defeat of a clearly identified ballot question;
- (b) is susceptible to no other reasonable interpretation than as an appeal to vote for or against a clearly identified candidate or ballot question; or
- (c) refers to a clearly identified candidate or ballot question and is published and disseminated to the relevant electorate in New Mexico within thirty days before the primary election or sixty days before the general election at which the candidate or ballot question is on the ballot;

NMSA 1978, § 1-19-26(N)(2)–(3) (2019). The Campaign Reporting Act imposes no limitations on the amount a political committee may either expend on independent expenditures or receive for the purpose of making independent expenditures. *See* NMSA 1978, § 1-19-34.7(I); *see also generally* *Republican Party of N.M. v. King*, 741 F.3d 1089, 1103 (10th Cir. 2013) (holding that, under the First Amendment, the Campaign Reporting Act’s contribution limits do not apply to contributions that are “to be used solely for independent expenditures”). The Act, however, carries specific reporting requirements for persons who make independent expenditures. *See* NMSA 1978, § 1-19-27.3 (2019).

We observe that the definition of “independent expenditure” includes advertisements referring to a “ballot question,” while the definition of “coordinated expenditure” does not. *Compare* § 1-19-26(N)(3)(c), *with* § 1-19-26(I)(3). We understand that this difference might raise questions for persons subject to the Campaign Reporting Act and, likely, gave rise to the instant request. And, so, we clarify that whether or not an advertisement refers to a ballot question is immaterial to its classification as a coordinated or independent expenditure.

If a political committee funds and creates an advertisement in consultation or concert with a candidate or political party, and if the advertisement is for the purpose of supporting the candidate’s election, then the political committee has made a coordinated expenditure. *See* § 1-19-26(I). It is plausible that an advertisement that a political committee coordinates with a candidate or political party might refer to a ballot question: the candidate or political party with which the political committee is coordinating might publicly support or even be closely aligned with the ballot question. But, irrespective of whether the advertisement

refers to a ballot question, if the advertisement satisfies the elements of Section 1-19-26(I), then the advertisement is a coordinated expenditure.

Conversely, an advertisement's reference to a ballot question does not automatically convert it into an independent expenditure. By definition, independent expenditures necessarily exclude coordinated expenditures. *See* § 1-19-26(N)(2). An advertisement that advocates for the passage or defeat of a ballot question is a coordinated expenditure if the advertisement satisfies the elements of Section 1-19-26(I). Such an advertisement, because it is a coordinated expenditure, would not be an independent expenditure—whether or not it makes mention of a ballot question. *See* § 1-19-26(N)(2).

A political committee may disseminate an advertisement publicizing the political committee's endorsements—both as to candidates and positions on ballot questions. If, on the one hand, the advertisement satisfies the elements of Section 1-19-26(I), then the advertisement is a coordinated expenditure. For that expenditure, the political committee would be subject to contribution limits and disclosure requirements of Sections 1-19-27(A), 1-19-29, and 1-19-31. If, on the other hand, the advertisement does not meet the elements of Section 1-19-26(I), then the advertisement is likely an independent expenditure. *See* § 1-19-26(N). For that expenditure, the political committee would be subject to the disclosure requirements of Section 1-19-27.3.

## CONCLUSION

A political committee may make a coordinated expenditure on an advertisement that advocates both the election of clearly identified candidates and the passage of a clearly identified ballot question

**SO ISSUED.**

**HON. WILLIAM F. LANG, Chair**

**JEFFREY L. BAKER, Commissioner**

**STUART M. BLUESTONE, Commissioner**

**HON. GARREY CARRUTHERS, Commissioner**

**HON. CELIA FOY CASTILLO, Commissioner**

**RON SOLIMON, Commissioner**

**JUDY VILLANUEVA, Commissioner**