



STATE ETHICS COMMISSION
MEETING

April 1, 2022

PUBLIC MATERIALS

PUBLIC MATERIALS

TABLE OF CONTENTS

(1) Agenda for 2022-4-1 Commission Meeting	1
(2) Minutes of February 4, 2021 Commission Meeting	4
(3) Advisory Op. 2022-03	10
(4) Advisory Op. 2022-04	14
(5) Advisory Op. 2022-05	19



STATE ETHICS COMMISSION

Hon. William F. Lang, Chair
Jeffrey L. Baker, Member
Stuart M. Bluestone, Member
Hon. Garrey Carruthers, Member
Hon. Celia Foy Castillo, Member
Ronald Solimon, Member
Dr. Judy Villanueva, Member

Friday, April 1, 2022, 9:00 a.m. to 12:00 p.m. (Mountain Time)

Public Meeting (via Zoom):

Join Zoom through internet browser: <https://us02web.zoom.us/j/84510625751>

Meeting ID: 845 1062 5751

Dial In Number: (346) 248-7799

One-tap Dial in Number: 13462487799

Chairman Lang Calls the Meeting to Order

1. Roll Call
2. Approval of Agenda
3. Approval of Minutes of February 4, 2022 Commission Meeting

Commission Meeting Items

Action Required

- | | |
|---|-----|
| 4. Overview of 2022 projects: office growth, Financial Disclosure Act & Campaign Reporting Act compliance
(Farris) | No |
| 5. Advisory Opinion 2022-03
(Farris) | Yes |
| 6. Advisory Opinion 2022-04
(Farris) | Yes |
| 7. Advisory Opinion 2022-05
(Farris) | Yes |

Upon applicable motion, Commission goes into executive session under NMSA 1978, §§ 10-15-1(H)(3) (administrative adjudicatory proceedings) & 10-15-1(H)(7) (attorney client privilege pertaining to litigation)

8. Discussion regarding current and potential litigation:
 - a. *State Ethics Comm'n v. Vargas & Double Eagle Real Estate LLC*, D-202-CV-2021-06201 (2d Jud. Dist. Ct.)
 - b. *In re State Ethics Commission Petition for Issuance of a Subpoena Duces Tecum Pursuant to NMSA 1978, 10-16G-10(J)*, No. A-1-CA-39841 (N.M. App.), and *Dow v. Martin*, No. S-1-SC-38928 (N.M.)
 - c. *State v. Gutierrez, et al.*, No. S-1-SC-38367, consolidated with No. S-1-SC-38368 (N.M.)
 - d. Commission authorization of demand and civil enforcement action regarding violation of Section 10-16-3(A) by an elected official
 - e. Commission authorization and demand of civil enforcement action regarding violation of Section 10-16-3 by an elected official
9. Discussion regarding administrative matters under Revised Uniform Law on Notarial Acts:
 - a. *In re notary public commission of Romero*, 2022-NP-02
 - b. *In re notary public commission of Samaniego*, 2022-NP-03
 - c. *In re notary public commission of Kiro* 2022-NP-06
 - d. *In re notary public commission of Bratcher*, 2022-NP-08
 - e. *In re notary public commission of Mates*, 2022-NP-09
10. Discussion regarding administrative matters under State Ethics Commission Act:
 - a. Administrative Complaint No. 2021-017
 - b. Administrative Complaint No. 2021-026
 - c. Administrative Complaint No. 2021-027
 - d. Administrative Complaint No. 2021-028
 - e. Administrative Complaint No. 2021-038
 - f. Administrative Complaint No. 2022-002
 - g. Administrative Complaint No. 2022-004
 - h. Administrative Complaint No. 2022-005

Upon applicable motion, Commission returns from executive session

-
- | | |
|---|-----|
| 11. Actions on Administrative Complaints
(<i>Farris</i>) | Yes |
|---|-----|

Administrative Matters under State Ethics Commission Act:

- a. Administrative Complaint No. 2021-017
- b. Administrative Complaint No. 2021-026

- c. Administrative Complaint No. 2021-027
- d. Administrative Complaint No. 2021-028
- e. Administrative Complaint No. 2021-038
- f. Administrative Complaint No. 2022-002
- g. Administrative Complaint No. 2022-004
- h. Administrative Complaint No. 2022-005

Administrative Matters under Revised Uniform Law on Notarial Acts:

- a. *In re notary public commission of Romero*, 2022-NP-02
- b. *In re notary public commission of Samaniego*, 2022-NP-03
- c. *In re notary public commission of Kiro*, 2022-NP-06
- d. *In re notary public commission of Bratcher*, 2022-NP-08
- e. *In re notary public commission of Mates*, 2022-NP-09

- | | |
|--|-----|
| 12. Resolutions related to commission authorization of demand and civil enforcement actions
(<i>Farris</i>) | Yes |
| 13. Discussion of next meeting
(<i>Lang</i>) | No |
| 14. Public Comment | No |
| 15. Adjournment | |

For inquires or special assistance, please contact Sonny Haquani at Ethics.Commission@state.nm.us

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Albuquerque, NM 87106



Hon. William F. Lang
Jeffrey L. Baker
Stuart M. Bluestone
Hon. Garrey Carruthers
Hon. Celia Foy Castillo
Ronald Solimon
Judy Villanueva

STATE ETHICS COMMISSION

Commission Meeting Minutes of February 4, 2022 | 9:00AM-2:00PM

Virtually Via Zoom

[View Recording Here](#)

[SUBJECT TO RATIFICATION BY COMMISSION]

CALL TO ORDER AND ROLL CALL

- The meeting was called to order by Chair Lang. The roll was called; the following Commissioners were present:

Jeffrey Baker, Commissioner
Stuart Bluestone, Commissioner
Hon. Garrey Carruthers, Commissioner
Ronald Solimon, Commissioner
Hon. Celia Foy Castillo, Commissioner
Judy Villanueva, Commissioner
Hon. William Lang, Chair

1. APPROVAL OF AGENDA

- Chair Lang sought a motion to approve the agenda. Commissioner Carruthers moved to approve the agenda; Commissioner Baker seconded. Hearing no discussion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative and approved the agenda unanimously.

2. APPROVAL OF DECEMBER 3, 2021 COMMISSION MEETING MINUTES

- Chair Lang sought a motion to approve the minutes of the December 3, 2021 Commission meeting. Commissioner Foy Castillo moved to approve the minutes; Commissioner Bluestone seconded. Hearing no discussion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative and approved the minutes unanimously.

3. UPDATE ON LEGISLATIVE SESSION

Director Farris provided an overview of the 2022 legislative session and highlighted the following updates relevant to the Commission:

- **HB 2 (The General Appropriations Act of 2022):**

Director Farris provided an overview of HB 2 noting that it is responsible for the

Commission's FY 23 annual budget and, as drafted, it benefits the Commission for the following reasons:

- Section 4 of HB 2 provides a 26% increase in funding for the Commission over the previous fiscal year appropriation. The amount appropriated is \$1.193 million and is equivalent to 93% of the Commission's request.
- Section 8 of HB 2 includes a compensation increase which provides for a 7% salary increase for all state employees (implemented in a staggered manner with a 3% increase in April and another 4% in July).
- Sections 12 and 13 of HB 2 includes "BAR authority provisions" that will allow the Commission to request budget adjustment increases of up to \$30,000 that the Commission receives from civil penalties, court ordered judgements or sanctions, and settlement payments derived in the course of its enforcement of the state's ethics laws.

- **The Disclosure Act:**

Director Farris provided an overview of the Disclosure Act and its status in the legislative session:

- The Disclosure Act was introduced this legislative session as HB 149 by Representative McQueen, and co-sponsored by Representatives Garrett, and Townsend, as well as Senator Tallman.
- The bill does not include an appropriation meaning that it is not germane to the budget-centric short session.
- The fact that the bill received sponsorship and was worked on by members of the Legislature, however, bodes well for the Commission in the upcoming 60-day session with respect to moving the bill forward.

- **HJR 9 and SJR 8:**

Director Farris provided the following updates regarding HJR 9 and SJR 8:

- HJR 9 would create an Independent Redistricting Commission and the Ethics Commission would have an appointment role, similar to its appointment role regarding the Citizen Redistricting Committee.
- SJR 8 would authorize the State Ethics Commission to set and review salaries for state elected officers. The bill has received a do-pass recommendation from the Senate Rules Committee and waits in the Senate Judiciary Committee. Director Farris noted that he has not and likely will not appear before any committees to provide commentary on the bill.

4. ADVISORY OPINION 2022-01

- Director Farris provided an overview of advisory opinion 2022-01, which addresses the following question:

A Member of the House of Representatives is contracted to do project work through his local Soil and Water Conservation District. The project is funded with federal funds and is located on federal land. As a Member of the House of Representatives, he has no voice

in determining project funding or other project details. Yet, the Member would like to be certain that no conflict of interest exists in regards to his position as a member of the House of Representatives. Please provide your opinion on this matter.

(To read the full opinion, visit www.NMOnesource.com).

- Chair Lang sought a motion to adopt advisory opinion 2022-01. Commissioner Carruthers moved to adopt the opinion; Commissioner Bluestone seconded. After a discussion on the merits of the opinion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative and approved advisory opinion 2022-01 unanimously.

5. ADVISORY OPINION 2022-02

- Director Farris provided an overview of advisory opinion 2022-02 which addresses the following question:

A candidate sought a municipal, school district, or special district elected office, and the candidate received contributions to support the candidate's election to that office. Does the Campaign Reporting Act, NMSA 1978, Sections 1-19-1 to -37 (1979, as amended through 2021) ("CRA"), prohibit the candidate from retaining and using those contributions to support the candidate's subsequent campaign for an office covered by the CRA?

(To read the full opinion, visit www.NMOnesource.com).

- Chair Lang sought a motion to adopt advisory opinion 2022-02. Commissioner Carruthers moved to adopt the opinion; Commissioner Bluestone seconded. After a discussion on the merits of the opinion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative and approved advisory opinion 2022-02 unanimously.

6. PROPOSED PROCESS FOR INVESTIGATING MATTERS ARISING FROM UNALLEGED CLAIMS DISCOVERED IN ADMINISTRATIVE COMPLAINTS

- Director Farris provided background on the matter and described the proposal for a process that should control instances where the General Counsel discovers a violation of an ethics law during the investigation of an administrative complaint where the violation is outside of the scope of the complaint. Commissioner Bluestone made additional comments as to the importance and relevance of the proposal by pointing to the Commission's publicly-released administrative case No. 2020-031. After additional discussion on the proposal, no action was taken.

7. RESOLUTION No. 2022-01 (Administrative cases arising under RULONA)

- Director Farris provided an overview of the staff's Resolution No. 2022-01, which relates to the Commission's process for addressing complaints arising under the Revised Uniform Law on Notarial Acts. Director Farris noted that the procedures established by the resolution will ultimately lead to a formal rulemaking to establish the procedures in the New Mexico Administrative Code.
- Chair Lang sought a motion to approve No. Resolution 2022-01. Commissioner Bluestone moved to approve Resolution No. 2022-01; Commissioner Foy Castillo seconded. After a discussion to clarify elements of the resolution, all Commissioners voted in the affirmative and approved Resolution No. 2022-01 unanimously.

8. EXECUTIVE SESSION

- Chair Lang sought a motion to enter executive session under NMSA 1978, §§ 10-15-1(H)(2) (limited personnel matters), 10-15-1(H)(3) (administrative adjudicatory proceedings), and 10-15-1(H)(7) (attorney-client privilege pertaining to litigation). Commissioner Carruthers moved to enter executive session; Commissioner Foy Castillo seconded. Hearing no discussion, Chair Lang conducted a roll-call vote. All Commissioners voted in the affirmative and entered executive session.

---BEGINNING OF EXECUTIVE SESSION---

- The following matters were discussed in executive session:
- Discussions regarding administrative complaints:

Administrative Matters under State Ethics Commission Act:

- a. Administrative Complaint No. 2021-010
- b. Administrative Complaint No. 2021-012
- c. Administrative Complaint No. 2021-020
- d. Administrative Complaint No. 2021-029
- e. Administrative Complaint No. 2021-037
- f. Administrative Complaint No. 2021-039

Administrative Matters under Revised Uniform Law on Notarial Acts:

- a. 2022-NP-04, *In re notary public commission of Stewart*
- b. 2022-NP-06, *In re notary public commission of Kiro*
- c. 2022-NP-07, *In re notary public commission of Rivera*

- Discussions regarding pending civil litigation
- The matters discussed in the closed meeting were limited to those specified in the motion to enter executive session. After concluding its discussion of these matters, the Commission resumed public session upon an appropriate motion.

---END OF EXECUTIVE SESSION---

9. ACTIONS ON ADMINISTRATIVE CASES Nos. 2021-10, 2021-12, 2021-20, 2021-29, 2021-37, & 2021-39

- Director Farris asked the Commission for the following motions on the following administrative cases:
 - **In administrative case 2021-010, motion to dismiss the appeal.**
 - Commissioner Baker moved as stated above; Commissioner Foy Castillo seconded as stated above. All Commissioners voted in the affirmative and approved the motion.
 - **In administrative case 2021-012, motion to extend the investigation period.**
 - Commissioner Carruthers moved as stated above; Commissioner Baker seconded as stated above. All Commissioners voted in the affirmative and approved the motion.
 - **In administrative case 2021-020, motion to dismiss the complaint for being filed pseudonymously.**

- Commissioner Carruthers moved as stated above; Commissioner Baker seconded as stated above. All Commissioners voted in the affirmative and approved the motion.
- **In administrative case 2021-029, motion to dismiss the complaint for lack of personal and subject matter jurisdiction.**
- Commissioner Baker moved as stated above; Commissioner Solimon seconded as stated above. All Commissioners voted in the affirmative and approved the motion.
- **In administrative case 2021-037, motion to dismiss the case pursuant to Section 1-19-34.4(C) NMSA 1978 because the Secretary of State certified voluntary compliance with the Campaign Reporting Act.**
- Commissioner Carruthers moved as stated above; Commissioner Baker seconded as stated above. All Commissioners voted in the affirmative and approved the motion.
- **In administrative case 2021-039, motion to dismiss the complaint for lack of jurisdiction and referral to the Carlsbad Municipal School District.**
- Commissioner Foy Castillo moved as stated above; Commissioner Baker seconded as stated above. All Commissioners voted in the affirmative and approved the motion.
- **ADMINISTRATIVE MATTERS UNDER RULONA**
- Director Farris sought motions on the following cases regarding Notaries Public:
 - **In 2022-NP-04, *In re notary public commission of Stewart*, motion to dismiss because the notary no longer lives in New Mexico, and to refer the matter to the Arkansas Secretary of State.**
 - Commissioner Baker moved as stated above; Commissioner Solimon seconded as stated above. All Commissioners voted in the affirmative and approved the motion.
 - **In 2022-NP-06, *In re notary public commission of Kiro*, motion to instruct the staff to send the notary a notice of contemplated action**
 - Commissioner Foy Castillo moved as stated above; Commissioner Bluestone seconded as stated above. All Commissioners voted in the affirmative and approved the motion.
 - **In 2022-NP-07, *In re notary public commission of Rivera*, motion to dismiss the complaint because the Commission lacks jurisdiction for a notary commission that expired prior to January 1, 2022.**
 - Commissioner Carruthers moved as stated above; Commissioner Foy Castillo seconded as stated above. All Commissioners voted in the affirmative and approved the motion.

10. SELECTION OF NEXT MEETING

- Chair Lang confirmed that the next meeting would take place on April 1, 2022.

11. COMMENTS

- Members of the public were invited to address the Commission.
- No public comments were offered.

12. ADJOURNMENT

- Chair Lang raised adjournment of the meeting. With no objections made, the meeting was adjourned.

[SUBJECT TO RATIFICATION BY COMMISSION]



STATE ETHICS COMMISSION

[Draft] ADVISORY OPINION NO. 2022-03

April 1, 2022¹

QUESTIONS PRESENTED²

1. A Member of the House of Representatives has a son who is a fencing and welding contractor. Can the son legally bid on state projects like right-of-way fences for the Department of Transportation or other state projects?
2. The son of the spouse of the Member is a building contractor who holds a GB-98 license and a degree in engineering. Can the son bid on state funded jobs that are offered by schools, cities, villages, state agencies, *et al.*?

¹ 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).

² The State Ethics Commission Act requires a request for an advisory opinion to set forth a “specific set of circumstances involving an ethics issue.” *See* NMSA 1978, § 10-16G-8(A)(2) (2019). “When the Commission issues an advisory opinion, the opinion is tailored to the ‘specific set’ of factual circumstances that the request identifies.” State Ethics Comm’n, Advisory Op. No. 2020-01, at 1-2 (Feb. 7, 2020) (quoting § 10-16G-8(A)(2)). For the purposes of issuing an advisory opinion, the Commission assumes the facts as articulated in a request for an advisory opinion as true and does not investigate their veracity. On January 31, 2022, the Commission received a request for an advisory letter that detailed the issues as presented herein. *See* 1.8.1.9(B) NMAC. The request was submitted by a public official who has the authority to submit a request. *See generally* NMSA 1978, § 10-16G-8(A)(1); 1.8.1.9(B)(1) NMAC. The executive director provided an advisory letter in response to the request on February 1, 2022. Commissioner Bluestone subsequently requested that the advisory letter be converted into an advisory opinion. *See* 1.8.1.9(B)(3) NMAC. The Commission now issues the guidance as an advisory opinion. *See id.*

ANSWERS AND ANALYSIS

1. **Yes.** So long as the conditions of Section 10-16-9(A) are satisfied, the Member's son can bid on invitations to bid issued by state agencies for goods, services, and construction.

This question mainly calls for application of NMSA 1978, Section 10-16-9(A) (2007), the provision of the Governmental Conduct Act, NMSA 1978, §§ 10-16-1 to -18 (1967, as amended 2019), governing contracts between state agencies and legislators' family members. Section 10-16-9(A) provides:

A state agency shall not enter into a contract for services, construction or items of tangible personal property with a legislator, *the legislator's family* or with a business in which the legislator or the legislator's family has a substantial interest unless the legislator has disclosed the legislator's substantial interest and unless the contract is awarded in accordance with the provisions of the Procurement Code, except the potential contractor shall not be eligible for a sole source or small purchase contract. A person negotiating or executing a contract on behalf of a state agency shall exercise due diligence to ensure compliance with the provisions of this subsection.

§ 10-16-9(A) (emphasis added). The Governmental Conduct Act defines "family" to mean "an individual's spouse, parents, children or siblings, by consanguinity or affinity." NMSA 1978, § 10-16-2(E) (2011). The Act also defines "substantial interest" to mean "an ownership interest that is greater than twenty percent." § 10-16-2(L).

Under these provisions, a state agency (including the Department of Transportation) can enter into a contract (for right-of-way fencing) with either the Member's son or a fencing-and-welding business in which the son has a substantial interest, so long as: (1) the Member has disclosed any substantial interest that the Member might have in the son's business; (2) the state agency awards the contract in accordance with the provisions of the Procurement Code; and (3) the state agency does not award the contract to the Member's son or the son's business as

either a sole source or a small purchase contract. If those conditions are met, the Member's son can bid on (and be awarded) a state agency contract.³

2. **Yes.** So long as the conditions of Section 10-16-9(A) are satisfied, the son of the Member's spouse can bid on invitations to bid issued by state agencies for goods, services, and construction. The above analysis that applies to the Member's son applies equally to the son of the Member's spouse.

The above analysis that applies to the Member's son (the fencing and welding contractor) applies equally to the son of the Member's spouse (the GB-98 licensed commercial building contractor). Section 10-16-9(A) governs contracts between state agencies and legislators' family members, and the Governmental Conduct Act defines "family" to mean "an individual's spouse, parents, *children* or siblings, *by consanguinity or affinity*." § 10-16-2(E) (emphasis added); *see also* Affinity, *Black's Law Dictionary* (11th ed.) ("The relation that one spouse has to the blood relatives of the other spouse; relationship by marriage.").

The request also asks whether the son may seek state funded jobs that are offered by schools, cities, and villages. Section 10-16-9(A) does not constrain the ability of the son of the Member's spouse to bid on projects issued by political subdivisions, such as counties, school districts, or other local governments. Section 10-16-9(A) imposes constraints on contracts between a legislator's family and state agencies, and the Governmental Conduct Act distinguishes between state agencies and local government agencies. *Compare* NMSA 1978, § 10-16-2(K) (2011) (defining "state agency" as "any branch, agency, instrumentality or institution of the state"), *with* NMSA 1978, § 10-16-2(G) (2011) (defining "local government agency" as "a political subdivision of the state or an agency of a political subdivision of the state"). While other general procurement rules still apply, *see, e.g.,* note 2, *supra*, the Member's seat in the House of Representatives does not constrain the Member's spouse's son (or his company) from seeking contracts with political subdivisions.

³ To be sure, other statutory provisions apply to bids on state-agency contracts. For example, under NMSA 1978, Section 10-16-13 (2011), "[n]o state agency or local government agency shall accept a bid or purpose from a person who directly participated in the preparation of specifications, qualifications or evaluation criteria on which the specific competitive bid or proposal was based." § 10-16-13. The facts presented in the request, however, do not suggest that Section 10-16-13—or other provisions that apply to conflicts of interest in procurement, *e.g.,* NMSA 1978, §§ 13-1-190 through -195 (1984, as amended 2009)—are relevant to this guidance.

CONCLUSION

The Member's son and son-in-law (and their businesses) may bid on state agency construction projects so long as: (i) the Member has disclosed any substantial interest that the Member might have in the business of the son or son-in-law; (ii) the state agency awards the contract in accordance with the provisions of the Procurement Code; and (iii) if the state agency awards the contract to the Member's son or son-in-law (or their businesses), the state agency does not award the contract as either a sole source or small purchase contract.

SO ISSUED.

HON. WILLIAM F. LANG, Chair

JEFFREY L. BAKER, Commissioner

STUART M. BLUESTONE, Commissioner

HON. GARREY CARRUTHERS, Commissioner

HON. CELIA FOY CASTILLO, Commissioner

JUDY VILLANUEVA, Commissioner



STATE ETHICS COMMISSION

[Draft] ADVISORY OPINION NO. 2022-04

April 1, 2022¹

QUESTION PRESENTED²

The Taos County Cooperative Weed Management Area (“Taos CWMA”) has applied for a \$19,949 grant from the Forestry Division of the New Mexico Energy, Minerals and Natural Resources Department to address noxious weeds on forest-adjacent land located in Taos County and owned by Southern Methodist University. The Taos Chapter of the Native Plant Society of New Mexico (“Taos NPSNM”), a 501(c)(3) organization, is one of the members of the Taos CWMA and has agreed to be the fiscal sponsor for the project. If the Forestry Division grants the funds, the Taos CWMA members (which include several governmental entities) and the Southern Methodist University will provide matching in-kind contributions valued at \$19,949. Under the match, the Southern Methodist

¹This 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).

²The State Ethics Commission Act requires a request for an advisory opinion to set forth a “specific set of circumstances involving an ethics issue.” *See* NMSA 1978, § 10-16G-8(A)(2) (2019). “When the Commission issues an advisory opinion, the opinion is tailored to the ‘specific set’ of factual circumstances that the request identifies.” State Ethics Comm’n, Advisory Op. No. 2020-01, at 1-2 (Feb. 7, 2020) (quoting § 10-16G-8(A)(2)). For the purposes of issuing an advisory opinion, the Commission assumes the facts as articulated in a request for an advisory opinion as true and does not investigate their veracity. On January 26, 2022, the Commission received a request for an advisory letter that detailed the issues as presented herein. *See* 1.8.1.9(B) NMAC. The request was submitted by a public official who has the authority to submit a request. *See generally* NMSA 1978, § 10-16G-8(A)(1); 1.8.1.9(B)(1) NMAC. The executive director provided an advisory letter in response to the request on January 28, 2022. Commissioner Bluestone subsequently requested that the advisory letter be converted into an advisory opinion. *See* 1.8.1.9(B)(3) NMAC. The Commission now issues the guidance as an advisory opinion. *See id.*

University will provide all of the labor to complete the project. The Forestry Division “has indicated that the proposal has been approved, but they are concerned that this project might in some way violate NM’s anti-donation law.” The request asks the Commission’s attorney staff to provide an opinion.

ANSWERS AND ANALYSIS

The Anti-Donation Clause provides, “Neither the State nor any county, school district or municipality . . . shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation,” except as permitted by the Constitution. N.M. Const. Art. IX, § 14. “The Anti-Donation Clause . . . prohibits the use of state or local governmental funds to benefit private organizations.” *City of Raton v. Ark. River Power Auth.*, 600 F. Supp. 2d 1130, 1147 (D.N.M. 2008) (quoting H. Stratton & P. Farley, *Office of the Attorney General, State of New Mexico, History, Powers & Responsibilities, 1846–1990* at 125 (Univ. of N.M. Printing Servs. 1990)).

More specifically, the Anti-Donation Clause prohibits two kinds of transactions, and anti-donation claims correspondingly fall into one of two types. *See City of Raton*, 600 F. Supp. 2d at 1160 (citing N.M. Attorney General Op. No. 85-27, at 3, 1985 WL 204889 (October 22, 1985)). The first type involves government-funded “donations”—*i.e.*, transfers of property or money by a government entity to a private person for which the government entity receives nothing of value in return. *See, e.g., State ex rel. Mechem v. Hannah*, 1957-NMSC-065, 63 N.M. 110 (invalidating state-backed certificates issued to cattle ranchers to defray cost of hay during drought). The second type involves transactions in which a governmental entity has pledged its credit for the benefit of private enterprise. *See, e.g., Hutcheson v. Atherton*, 1940-NMSC-001, 44 N.M. 144 (invalidating a statute purporting to authorize counties to issue bonds for construction of auditoriums to be used by the New Mexico Centennial Coronado Corporation). The question presented is a type-one question: May the Forestry Division transfer \$19,949 to a 501(c)(3) organization for a project to address noxious weeds on forest-adjacent land owned by Southern Methodist University, a private corporation?

The answer depends on whether the Forestry Division enters a contract with Taos NPSNM (or another contracting party), such that, in exchange for the \$19,949 transfer, Taos NPSNM (or another contracting party) agrees to provide the Forestry Division with valuable consideration in return. The Anti-Donation Clause prohibits outright gifts of money or property to a private entity “with no exchange

of adequate consideration.” *City of Raton*, 600 F. Supp. 2d at 1147 (citations omitted). But where a governmental entity contracts to receive something of value in exchange for the transfer of money or property, there is no constitutional violation. *See City of Raton*, 600 F. Supp. 2d at 1161 (“The Court does not believe that the Anti-Donation Clause is implicated when there is true consideration—money exchanged for a real product.”); *State ex rel. Office of State Engineer v. Lewis*, 2007-NMCA-008, ¶ 51, 141 N.M. 1 (appropriation to purchase and retire water rights no violation of the Anti-Donation Clause, because state received water rights in return for payment).³

The request for guidance did not include a copy of a draft agreement, either between the Forestry Division and NPSNM or between the Forestry Division and Taos CCWA. As a result, there is no language for the Commission to scrutinize as to whether the State is receiving something valuable in exchange for the \$19,949 transfer.⁴ However, we can imagine a circumstance in which the State would receive consideration: suppose, for example, that the State has an interest in the forest land adjacent to the Southern Methodist University property on which there is a noxious weed infestation. A promise by NPSNM to remediate noxious weeds on the university’s property could be of value to the State’s interest in the adjacent forest land. In that circumstance, the \$19,949 transfer to NPSNM would not be a donation; it would be a payment under contract for consideration.

We can also imagine a circumstance where the State would not receive consideration: for example, Southern Methodist University may be required to remove noxious weeds by law. *See, e.g.*, Taos County, N.M., Ordinance 2018-2 App’x 3 § 5(A) (Sept. 4, 2018) (prohibiting “use of any species [of plant] considered noxious, or a weed species that could enhance the distribution of undesirable species” in areas subject to a special use zoning permit or major

³ The focus is on whether the government receives consideration in exchange for its transfer; donations (i.e., transfers without consideration) do not escape constitutional prohibition simply because the donation furthers a public purpose. *See State ex rel. Sena v. Trujillo*, 1942-NMSC-044, ¶ 30, 46 N.M. 361 (“The constitution makes no distinction as between ‘donations’, whether they be for a good cause or a questionable one. It prohibits them all.”).

⁴ In *City of Raton*, the Court observed that a review of contracts for consideration is often part of an analysis for conformity with the Anti-Donation Clauses:

New Mexico courts, and the New Mexico Attorney General’s Office, have generally, in analyzing the state’s Anti-Donation Clause, scrutinized contracts for consideration. If the courts or the Attorney General’s office finds consideration, the courts and the Attorney General’s office generally end their review. Courts and third-party lawyers are reluctant to wade into the thicket of determining whether the consideration is adequate or fair.

City of Raton, 600 F. Supp. 2d at 1160.

development zoning permit requirement); *see also* Restatement (Second) of Contracts § 73 (1981) (“Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration”). If the State is paying Southern Methodist University to do something Southern Methodist University is already required to do by law, then the State is not receiving anything of value in exchange. Where the State is *not* receiving anything of value in exchange for the \$19,949, the transfer is more in the nature of a gift to NPSNM and Southern Methodist University. In that event, the Constitution prohibits the transfer. *See Village of Deming v. Hosderg Co.*, 1956-NMSC-111, ¶ 36, 62 N.M. 18 (concluding that the term “donation” in Article IX, Section 14 “has been applied, in its ordinary sense and meaning, as a ‘gift,’ an allocation or appropriation of something of value, without consideration”).

We observe that if the purported grantee were not a 501(c)(3) organization but rather a governmental-entity member of the Taos CWMA—such as the Taos Soil and Water Conservation District, the Town of Taos, Taos County, or NMSU Cooperative Extension Service—then there would be no immediate issue under the Anti-Donation Clause. The Anti-Donation Clause is not implicated when the parties involved in a donative transfer are a state agency and another governmental entity. *See City of Gallup v. N.M. State Park & Recreation Comm’n*, 1974-NMSC-084, ¶ 11, 86 N.M. 745 (holding that the anti-donation prohibition “is inapplicable . . . when the parties involved are the State and its subordinate governmental agencies”); *Wiggs v. City of Albuquerque*, 1952-NMSC-013, ¶ 20, 56 N.M. 214 (“[W]e have held this provision has no application where the lending of credit is under legislative sanction by one subordinate governmental agency to another. Accordingly, if this be a lending of credit by the City of Albuquerque to the University as claimed, it constitutes no violation of this constitutional provision.”) (citing *Harrington v. Atteberry*, 21 N.M. 50 (N.M. 1915); *White v. Bd. of Educ. of Silver City*, 42 N.M. 94 (N.M. 1938); and *Hutcheson v. Atherton*, 44 N.M. 144 (N.M. 1940))). The Forestry Division can transfer funds to another governmental entity without implicating the Anti-Donation Clause.

We further observe, however, that the Anti-Donation Clause issue might reappear, even where the Forestry Division grants the projects funds to a governmental entity. Suppose, for example, that (i) the Forestry Division granted \$19,949 to Taos County to address noxious weed infestations on land within the county; and (ii) Taos County wanted to grant the same funds to Taos NPSNM (or another 501(c)(3) organization) to remediate noxious weeds on private land. In that circumstance, the relevant anti-donation analysis would look to the agreement between Taos County and Taos NPSNM to confirm that Taos County is receiving

valuable consideration in exchange for the \$19,949 payment to the 501(c)(3) organization. (Perhaps it is Taos County who has the interest in the adjacent forest land.) In any event, where a private party (such as, in this matter, Taos NPSNM) receives public funds from a state agency, a county or a municipality, the Anti-Donation Clause generally requires scrutiny into whether the funds are transferred as part of a contract in which a New Mexico governmental entity receives consideration.

Last, the request indicates that CWMA members would provide in-kind contributions valued at \$19,949, at least part of which is labor provided by Southern Methodist University. Because the request does not detail (i) what in-kind contributions might be provided by governmental entity members of the CWMA, such as the Town of Taos and Taos County; (ii) to whom the in-kind contributions are directed; and (iii) the terms of any agreement governing the provision of the CWMA-member contributions, we not provide additional guidance as to the application of the Anti-Donation Clause beyond what we have provided above.

CONCLUSION

Under the Anti-Donation Clause, whether the Forestry Division may grant \$19,949 to the Taos NPSNM, a 501(c)(3) organization, depends on whether the State receives valuable consideration in exchange for the granted funds.

SO ISSUED.

HON. WILLIAM F. LANG, Chair

JEFFREY L. BAKER, Commissioner

STUART M. BLUESTONE, Commissioner

HON. GARREY CARRUTHERS, Commissioner

HON. CELIA FOY CASTILLO, Commissioner

JUDY VILLANUEVA, Commissioner



STATE ETHICS COMMISSION

[Draft] ADVISORY OPINION NO. 2022-05

April 1, 2022¹

QUESTION PRESENTED²

1. May New Mexico political committees that make contributions to candidates, officeholders, and candidates solicit unlimited contributions from allowable persons on behalf of political committees that make only independent expenditures?
2. If the answer to question 1 is yes, may candidates and officeholders solicit unlimited contributions from allowable persons for an independent expenditure committee that will make expenditures to

¹ 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).

² The State Ethics Commission Act requires a request for an advisory opinion to set forth a “specific set of circumstances involving an ethics issue.” *See* NMSA 1978, § 10-16G-8(A)(2) (2019). “When the Commission issues an advisory opinion, the opinion is tailored to the ‘specific set’ of factual circumstances that the request identifies.” State Ethics Comm’n, Advisory Op. No. 2020-01, at 1-2 (Feb. 7, 2020) (quoting § 10-16G-8(A)(2)). For the purposes of issuing an advisory opinion, the Commission assumes the facts as articulated in a request for an advisory opinion as true and does not investigate their veracity. On March 16, 2022, the Commission received a request for an advisory letter that detailed the issues as presented herein. *See* 1.8.1.9(B) NMAC. The request was submitted by counsel for a political committee subject to the Campaign Reporting Act and, thus, could submit a request. *See generally* NMSA 1978, § 10-16G-8(A)(1); 1.8.1.9(B)(1) NMAC. The executive director provided an advisory letter in response to the request on March 25, 2022. Commissioner Bluestone subsequently requested that the advisory letter be converted into an advisory opinion. *See* 1.8.1.9(B)(3) NMAC. The Commission now issues the guidance as an advisory opinion. *See id.*

support the candidate or officeholder who is soliciting funds on the committee's behalf?

ANSWERS AND ANALYSIS

1. *May New Mexico political committees that make contributions to candidates, officeholders, and candidates solicit unlimited contributions from allowable persons on behalf of political committees that make only independent expenditures?*

Yes.

- A. A political committee (that is not a political party) may solicit unlimited contributions from allowable persons on behalf of a political committee that makes independent expenditures only.

The Campaign Reporting Act, NMSA 1978, §§ 1-19-25 to -36 (1979, as amended through 2021), 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).³ To ensure that persons who contribute money or other things of value to influence the outcomes of elections observe these limits, Section 1-19-34.7(E) further prohibits persons (including political committees) from knowingly soliciting or accepting contributions from other persons (including political committees) that exceed the \$5,200 limit per election cycle. § 1-19-34.7(E). These limits and prohibitions serve New Mexico's interests to deter *quid pro quo* corruption and the appearance thereof.

But Section 1-19-34.7's limits and prohibitions do not apply to all persons. Some persons participate in elections only by making "independent expenditures"—*i.e.*, payments for advertisements that support a candidate but are

³ The contribution limits are doubled for candidates seeking election to the office of governor, *see* Section 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 Mar. 18, 2022).

not coordinated with a candidate, a candidate’s campaign, or a political party.⁴ In *Republican Party of New Mexico v. King*, the United States Court of Appeals for the Tenth Circuit—following the Supreme Court’s decision in *Citizens United*—held that New Mexico’s contribution limits and corresponding prohibitions on the solicitation and acceptance of contributions violated the First Amendment as applied to contributions to political committees where the contributions were “to be used *solely* for independent expenditures.” *Republican Party of N.M. v. King*, 741 F.3d 1089, 1103 (10th Cir. 2013) (emphasis added); *see also Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010). To align the Campaign Reporting Act with these federal court decisions, in 2019, the Legislature enacted Senate Bill 3, providing that:

The limitations on contributions to political committees provided for in Subsection A of this section shall not apply to a political committee that makes only independent expenditures or to a contribution to a political committee that is deposited in a segregated bank account that may only be used to make independent expenditures.

2019 N.M. Laws, Ch. 262, § 12 (S.B. 3), *compiled at* § 1-19-34.7(I).

Given this background, the request’s first question asks whether political committees that contribute to candidates may solicit *unlimited* contributions on behalf of political committees that make independent expenditures only—also known as “Super PACs.”⁵ To visualize the question, consider the following scene: At a fundraising gala attended by many business representatives and high-net-worth individuals, the president of “New Mexicans for New Mexico,” a political committee that contributes to the campaign of a candidate for governor, informs the assembled crowd that they each may contribute only \$5,200 during the primary election cycle to New Mexicans for New Mexico. But the president then asks the

⁴ The CRA provides a precise definition of “expenditure” and “independent expenditure.” *See* § 1-19-26(M) & (N). Roughly, an independent expenditure is a payment for election-related advertising made by a person other than a candidate or their campaign and which is not coordinated with the candidate, their campaign, or their political party. *See id.*

⁵ In the federal context, political committees that make independent expenditures only have come to be known as “Super PACs.” *See, e.g., Fund for Louisiana’s Future v. Louisiana Bd. of Ethics*, 17 F. Supp. 3d 562, 565 (E.D. La. 2014). In this advisory opinion, we refer to political committees that make independent expenditures only as “Super PACs” or “IE-only political committees.”

attendees also to give additional contributions—at any amount—to “Super New Mexicans for New Mexico,” a political committee that makes independent expenditures only. The request queries whether the CRA allows that latter fundraising ask.

It does. Ordinarily, Section 1-19-34.7(E) prohibits one political committee from soliciting, on behalf of another political committee, contributions in excess of contribution limits. § 1-19-34.7(E). But those limits “[do] not apply to a political committee that makes only independent expenditures . . .” § 1-19-34.7(I). Thus, an IE-only political committee may indirectly solicit unlimited contributions through a political committee that makes contributions to candidates. And, looking to the other side of the same coin, a political committee that makes contributions to candidates may solicit unlimited contributions on behalf of an IE-only political committee. *See* §§ 1-19-34.7(E) & (I).⁶

B. Subject to the caveats outlined in this opinion, an officeholder and candidate may solicit unlimited contributions from allowable persons on behalf of a political committee that makes independent expenditures only.

For similar reasons, an officeholder and a candidate may ask third-party donors to contribute at any amount to a political committee that makes independent expenditures only. Section 1-19-34.7(E) contemplates that a person, which the CRA defines as “an individual or entity,” may solicit contributions directed to another person, but subject to contribution limits. *See* §§ 1-19-26(P); 1-19-34.7(E). Because Section 1-19-34.7’s contribution limits and associated prohibitions on the solicitation of contributions beyond those limits do not apply to IE-only political committees, persons may solicit unlimited contributions to IE-

⁶ This conclusion is consistent with the development of campaign finance law as to “hybrid PACs,” which are political committees that, from one bank account, make contributions to candidates and, from a segregated bank account, make independent expenditures. *See, e.g.,* § 1-19-34.7(I) (allowing political committees to have segregated bank accounts “that may only be used to make independent expenditures”). In *Republican Party of New Mexico*, the Tenth Circuit overturned limits on contributions to a hybrid PAC for independent expenditures, but noted that hybrid PACs “must respect both direct contribution limits and anti-coordination laws.” 741 F.3d at 1101. As a result, a hybrid PAC could solicit (i) contributions up to the limit for the bank account it uses for contributions for candidates and, then, (ii) unlimited amounts for its segregated bank account, from which it makes “independent expenditures” only. This ability of a hybrid PAC—recognized both by the *Republican Party of New Mexico* and Section 1-19-34.7(I)—is consistent with the ability of one political committee, which makes contributions, to raise funds at any amount for another political committee, which makes independent expenditures only.

only political committees. *See* §§ 1-19-34.7(E), (I). “Persons” include candidates and officeholders and, unlike federal law as to federal elections, the CRA does not specifically limit the amount of contributions candidates and officeholders can solicit for political committees in regard to New Mexico elections. *Compare* § 1-19-34.7, *with* 52 U.S.C. § 30125(e)(1), *and* 11 CFR § 300.61.

The significance of this implication, however, ultimately depends on whether the political committee’s expenditures are “independent expenditures” under Section 1-19-26(N) or coordinated expenditures under Section 1-19-26(I). To be sure, one category of a political committee’s potential expenditures are unquestionably “independent expenditures” and not “coordinated expenditures”—namely, those expenditures to pay for advertisements advocating for the passage or defeat of a clearly identified ballot question. The definition of “independent expenditure” encompasses such payments, whereas the definition of “coordinated expenditure” does not. *Compare* § 1-19-26(N), *with* § 1-19-26(I).

Suppose that “Super New Mexicans for New Mexico” makes expenditures to support a ballot question—a constitutional amendment to allow for legislative compensation or the repeal of the Anti-Donation Clause, for example. Super New Mexican’s expenditures are independent expenditures and, because they concern a ballot question, cannot be coordinated expenditures. *See* § 1-19-26(N)(3). So even if a candidate or officeholder who agrees with Super New Mexicans on the ballot question fundraises for Super New Mexicans, that fundraising cannot make the expenditures coordinated. By the CRA’s definitions and independent of the status of Super New Mexican’s fundraisers, because Super New Mexican’s expenditures support a ballot question, they are “independent expenditures.”

If a candidate, however, raises funds for a political committee that makes expenditures for the purpose of supporting or opposing the nomination or election of a candidate, whether the candidate may solicit *unlimited* contributions for that political committee depends on whether the political committee’s expenditures are coordinated under Section 1-19-26(I)(2). We turn to this topic next.

2. *If the answer to question 1 is yes, may candidates and officeholders solicit unlimited contributions from allowable persons for an independent expenditure committee that will make expenditures to support the candidate or officeholder who is soliciting funds on the committee's behalf?*

No.

A. A candidate may not solicit unlimited contributions for a political committee that makes expenditures to support the candidate's election.

The request next queries whether a candidate may solicit unlimited contributions to an IE-only political committee that will use those contributions to pay for advertisements supporting the candidate's election. To picture the question, return to the hypothetical fundraising gala: May the gubernatorial candidate address the room, asking attendees to give contributions—*at any amount, including amounts exceeding the CRA's contribution limits*—to “Super New Mexicans for New Mexico,” where Super New Mexicans will make expenditures to support the candidate's election? The answer is no.

The CRA's contribution limits and associated prohibitions on fundraising do not apply to IE-only political committees. But if a candidate solicits contributions to be given to a political committee, and the political committee uses contributions to pay for advertisements supporting the candidate's election (or opposing her opponent's election), then the political committee no longer makes independent expenditures only—it has made a coordinated expenditure.

Under the CRA, an “independent expenditure” is defined to *exclude* “a coordinated expenditure.” § 1-19-26(N). And a “coordinated expenditure” is defined as:

[A]n expenditure that is made:

(1) by a person other than a candidate or campaign committee;

(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.

§ 1-19-26(I) (emphasis added). There are many ways a political committee might coordinate expenditures with a candidate, a campaign committee, or a political party.⁷ When a political committee coordinates its expenditures with a candidate, the law generally treats the coordinated expenditures as contributions from the political committee to the candidate. *See, e.g.*, § 1-19-26(H)(2) (defining “contribution” to include a coordinated expenditure).

If (i) a candidate (or their campaign committee, political party or agent thereof) asks persons to make contributions to a political committee and (ii) the political committee uses those contributions to pay for advertisements that support the candidate, then the political committee makes expenditures “at the . . . suggestion of” or “in . . . concert with” the candidate (or their campaign committee, political party or agent thereof). § 1-19-26(I)(2). This sequence of the candidate’s solicitation and the political committee’s expenditure of received funds on advertisements supporting the candidate’s election constitutes coordination—*even if* the candidate is not involved in the creation, production, or placement of the advertisements and has not communicated with the political committee about

⁷ Here is a sampling of different kinds of coordination: (i) the candidate plays a role in the design or placement of the advertisement; (ii) the political committee pays for the advertisement following a discussion with the candidate; (iii) the political committee makes expenditures to a commercial vendor that the candidate or the candidate’s campaign committee has also paid to support the candidate’s election; and (iv) the political committee pays a commercial vendor to use information in advertisements that the vendor previously used in advertisements supporting the candidate’s election. *See, e.g.*, 1.10.13.28(D) NMAC; *see also* 11 CFR § 109.21(d)(2)–(4).

those topics.⁸ The text and purpose of Section 1-19-26(I)(2) and the accompanying NMAC provision support the conclusion that the political committee's expenditure under those circumstances is a coordinated expenditure, for three reasons.

First, by expressly soliciting funds for a political committee whose purpose includes making expenditures to support the candidate's election (and, as the request posits, "will" make those expenditures), the candidate indirectly "suggest[s]" to contributors and to the political committee that those contributions be used on expenditures that support her election. § 1-19-26(I)(2). A suggestion need not be overt to constitute coordination. Moreover, by soliciting funds for a political committee that makes expenditures to support her election, the candidate consents to the political committee's using the funds she raises on its behalf for expenditures supporting her election. *Cf. Buckley v. Valeo*, 424 U.S. 1, 47 n.53 (1976) (concluding that the coordination standard of the Federal Election Campaign Act ("FECA") treats "all expenditures placed in cooperation with or with the consent of a candidate . . . as contributions subject to [contribution] limitations"); *cf. also McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 221–22 (2003), *overruled on other grounds by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) ("[E]xpenditures made after a 'wink or nod' often will be 'as useful to the candidate as cash.' For that reason, Congress has always treated expenditures made 'at the request or suggestion of' a candidate as coordinated." (citations omitted)).

Second, when the political committee makes expenditures supporting the candidate's election after receiving contributions the candidate solicited, the political committee makes those expenditures "in . . . concert with" the candidate. § 1-19-26(I)(2). The candidate's solicitation of funds for the political committee and the political committee's expenditures to support the candidate's elections are actions that are in "concert" under a normal and traditional meaning of the term. *Id.*; *see also Concert*, Merriam-Webster's Collegiate Dictionary (10th ed.) ("to make a plan for; to act in harmony or conjunction"). The candidate asks donors to

⁸ If the candidate and the political committee have communicated about those topics related to the political committee's expenditures and the candidate then solicits funds for the political committee, then there is also coordination. *See* § 1-19-26(N). The request, in framing its second question, posits that the political committee "will make expenditures to support the candidate or officeholder who is soliciting funds on the committee's behalf." Request, Mar. 16, 2022 (emphasis added). The premise suggests that the candidate knows the political committee plans to spend funds to support her candidacy; if so, the grounds of the candidate's knowledge likely satisfies Section 1-19-26(I)(2)'s definition of coordination in other ways.

make contributions and the political committee receives those contributions from donors to fund expenditures supporting the candidate. These actions in conjunction further a shared goal of the candidate's election to office and thus are in concert. Because the political committee makes expenditures that are in concert with the candidate, those expenditures are coordinated expenditures. § 1-19-26(I)(2).

Third, when considering whether an expenditure is coordinated, 1.10.13.28(D)(6) NMAC instructs consideration of:

whether the reporting individual [i.e., the candidate] and the person making the expenditure [i.e., the political committee] have each . . . been in communication with the same third party or parties, if the reporting individual knew or should have known that the reporting individual's communication or relationship to the third party or parties would inform or result in expenditures to benefit the reporting individual.

1.10.13.28(D)(6) NMAC.⁹ The Office of the Secretary of State, in promulgating this rule, framed it broadly enough to capture the circumstance of a candidate fundraising for a political committee that makes expenditures supporting her election.¹⁰ The candidate and the political committee communicate with the same third-party donors: the candidate solicits their contributions, and the political committee receives them. *See id.* And where the political committee's purpose is to make expenditures supporting her election, the candidate should know that her solicitations to the third-party donors will "result in expenditures to benefit [her]." *Id.*

Consistent with this interpretation of the CRA, local campaign finance ordinances in New Mexico and statutes of other states provide that coordinated expenditures include an entity's expenditures in support of a candidate's election where those expenditures are derived from funds the candidate raises for the

⁹ This factor is just one in a series of "non-exhaustive" factors that may be considered in determining whether an expenditure is coordinated. *See* 1.10.13.28(D) NMAC.

¹⁰ In this advisory opinion, we do not address the circumstance of a candidate fundraising for a political committee that makes expenditures only supporting the election of *another* candidate.

entity.¹¹ The provisions of campaign finance law that outline coordinated expenditures—together with both the definition of “contribution” to include coordinated expenditures and contribution limits—work to deter *quid pro quo* corruption and the appearance thereof. If a candidate asks a wealthy individual to contribute sums in excess of contribution limits to a political committee that will expend those sums on advertisements supporting her election (as the request posits), and if the individual does as the candidate asks, then the individual, at the candidate’s solicitation, has effectively circumvented the contribution limits. In that instance, the public might reasonably suspect that when the candidate wins election and the government acts in favor of that individual, the state action was based on a *quid pro quo* agreement. *Cf. Citizens United*, 558 U.S. at 345 (“The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger the expenditures will be given as a *quid pro quo* for improper commitments from the candidate.” (quoting *Buckley*, 424 U.S. at 47)); *Republican Party of N.M.*, 741 F.3d at 1102 (“As long as the PAC does not . . . coordinate with candidates in making expenditures, there is no possibility that unlimited contributions for independent expenditures will enable donors to skirt otherwise valid contribution limits.”). Like with other jurisdictions’ campaign finance laws, the CRA’s purpose to prevent such corruption and its appearance supports the foregoing interpretation of “coordinated expenditure.” § 1-19-26(I).

¹¹ See, e.g., City of Santa Fe Municipal Code § 9-2.3(K)(2)(c) (“Coordinated expenditure means an expenditure made: . . . [i]n cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his/her representatives or agents or the candidate’s political committee, including but not limited to, the following examples . . . : *The candidate, candidate’s political committee or his/her representatives or agents has solicited funds or engaged in other fundraising activities on behalf of the person or entity making the expenditure during the twelve-month (12) period preceding the date of the expenditure.* Fundraising activities include, but are not limited to, exchanging names of potential donors or other lists to be used in engaging in fundraising activity, regardless of whether or not the individual or entity pays fair market value for the names or lists provided; or being a featured guest or speaker at a fundraising event for the benefit of the entity making the expenditure.” (emphasis added)); see also, e.g., Conn. Gen. Stat. Ann. § 9-601c(c)(3) (“[T]he following shall not be presumed to constitute evidence of consent, coordination or consultation within the meaning of subsection (a) of this section: . . . financial support for, or solicitation or fundraising on behalf of the entity by a candidate or an agent of the candidate, *unless the entity has made or obligated to make independent expenditures in support of such candidate in the election or primary for which the candidate is a candidate.*” (emphasis added)).

- B. If a candidate raises funds for a political committee that spends those funds to support the candidate's election, then the political committee does not make independent expenditures only and, therefore, the contribution limits apply when the candidate or other persons raise funds on the political committee's behalf.

“Coordinated expenditure” reaches coordinated fundraising and expenditures between a candidate and a political committee that supports her election, and therefore entails consequences under the CRA for the political committee's other fundraising activities. If a candidate raises funds for a political committee that spends those funds to support the candidate's election, then the political committee makes *some* coordinated expenditures and, therefore, does not make independent expenditures *only*. Because it does not make independent expenditures only, the exception to contribution limits that Section 1-19-34.7(I) reserves for IE-only political committees does not apply. Consequently, Section 1-19-34.7(A)'s contribution limits apply to that political committee, as do Section 1-19-34.7(E)'s prohibitions on the solicitation and acceptance of contributions. As a result, the candidate and other persons may still solicit funds for the political committee that makes expenditures to support the candidate's election, but subject to the contribution limits. *See* § 1-19-34.7(E).

- C. This analysis differs from Federal Election Commission Advisory Opinion 2011-12, which considered a separate question.

The request cites the Federal Election Commission's Advisory Opinion 2011-12. In Advisory Opinion 2011-12, the Federal Election Commission (“FEC”) concluded that candidates for federal office remain subject to the FECA limitations and source prohibitions when they solicit contributions on behalf of IE-only political committees. *See* Fed. Elec. Comm'n, AO 2021-11, 2011 WL 2662413, at *1. The FEC noted that Section 441i of the Federal Election Campaign Act limits the amount of contributions that a candidate for federal office may solicit in connection with an election for federal office (\$5000 per calendar year). *See id.* at *3; *see also* 52 U.S.C. § 30125(e)(1)(A). The FEC reasoned that, because Section 441i was not abrogated by *Citizens United* or the federal court decisions in its wake, Section 441i's limitations continue to apply; accordingly, federal candidates “may only solicit contributions of up to \$5000 from individuals (other than foreign nationals or [f]ederal contractors) and [f]ederal political action committees for an [independent expenditure-only political committee].” 2011 WL 2662413, at *3. Given these limitations, when a candidate for federal office raises money for Super PACs at a fundraising event at which individual, corporate and

labor organizations contributions are solicited in unlimited amounts, the candidate for federal office must be careful to limit their solicitation to contributions of \$5000 or less. *See id.* at *3–*4; *see also* Fed. Elec. Comm’n, “Fundraising for Super PACs by federal candidates,” available at <https://www.fec.gov/help-candidates-and-committees/making-disbursements-pac/fundraising-super-pacs-federal-candidates-nonconnected-pac/> (last accessed Mar. 24, 2022). In sum, the FEC concluded that FECA’s limits on a federal candidate’s solicitation of *contributions* from individuals and political committees for a Super PAC continue to apply, because *Citizens United* and its progeny did not disturb those limits.

The analysis under New Mexico law differs. In Section 1-19-34.7(E), New Mexico has an analogous provision to Section 441i(e)(1)(A) of FECA.¹² But unlike with FECA, New Mexico amended Section 1-19-34.7 in 2019 to align New Mexico statutory law with federal court decisions in *Citizens United* and *Republican Party of New Mexico*. To this end, the Legislature added Subsection 1-19-34.7(I), which provides that “[t]he limitations on contributions to political committees . . . shall not apply to a political committee that makes only independent expenditures” § 1-19-34.7(I). Accordingly, unlike the FEC’s analysis of the effect of *Citizens United* on extant federal statutes, this advisory opinion does not directly consider what effect *Citizens United* had on New Mexico law. Rather, this advisory opinion focuses on the application of what the Legislature enacted because of *Citizens United*—namely, Section 1-19-34.7(I)—and whether, under that provision, a political committee makes an “independent expenditure” when the political committee expends contributions, which a candidate solicited on its behalf, to support that candidate’s election. Because those expenditures are “coordinated expenditures” and thus not “independent expenditures,” the political committee does not make independent expenditures “only,” and therefore the CRA’s limitations regarding the amount of contributions that a candidate may solicit on the political committee’s behalf continue to apply. *See* § 1-19-34.7(A) & (E).

The request also notes that federal law differs from New Mexico law “in that federal campaign law places restrictions on officeholders and candidates raising or

¹² Compare 52 U.S.C. § 30125(e)(1)(A) (“A candidate . . . shall not . . . solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act”), with § 1-19-34.7(E) (“A person, including a political committee, shall not knowingly accept or solicit a contribution, directly or indirectly, including a contribution earmarked or otherwise directed or coordinated through another person, including a political committee, that violates the contribution limits provided for in this section.”).

spending money as well as restrictions on the source of such contributions.” It is true that the federal law is more stringent, both as to contribution limits (\$2,900 per election), and who may not directly contribute to candidates (including for-profit corporations, nonprofit corporations, and labor organizations). *See* 11 CFR § 114.2; *see also generally* Federal Election Commission, “Who can and can’t contribute,” available at <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/who-can-and-cant-contribute/> (last accessed Mar. 24, 2022). By contrast, New Mexico has higher contribution limits (\$5,200 per election) and, unlike federal law, does not impose absolute prohibitions on direct contributions from corporations and labor organizations to candidates. *See* §1-19-34.7; 1.10.13.20 NMAC. It is unclear, however, that these differences alter our analysis regarding when, following fundraising efforts by a candidate, a political committee’s expenditure to support that candidate constitutes a coordinated expenditure.

- D. This analysis does not address when a candidate (or officeholder) asks third-party donors to contribute to a political committee that will make expenditures supporting *another* candidate in another election.

Our analysis focuses on the question the request poses: whether a candidate may solicit unlimited contributions on behalf a political committee that makes expenditures supporting that same candidate. This analysis does not address whether a candidate (or officeholder) may solicit unlimited funds on behalf of a political committee that makes expenditures supporting another candidate. Whether a candidate (or officeholder) may solicit unlimited funds depends, again, on whether the political committee’s expenditures are independent or coordinated. That question, however, depends on a factual analysis that would consider the conduct of (i) the candidate (or officeholder) soliciting the funds, (ii) the political committee expending the funds, and (iii) the candidate(s) who benefit from the political committee’s expenditures. And that conduct—including conduct related to the fundraising—would be considered in the light of the definition of coordination in Section 1-19-26(I)(2), the factors outlined in 1.10.13.28(D) NMAC, and the other indicia of coordination, *see, e.g.*, 11 CFR § 109.21.

CONCLUSION

For the foregoing reasons and subject to the caveats expressed above, New Mexico political committees that make contributions to candidates, officeholders, and candidates may solicit unlimited contributions from allowable persons on behalf of IE-only political committees. A candidate, however, may not solicit

unlimited contributions from allowable persons for a political committee that will make expenditures to support that same candidate who is soliciting funds on the political committee's behalf.

SO ISSUED.

HON. WILLIAM F. LANG, Chair

JEFFREY L. BAKER, Commissioner

STUART M. BLUESTONE, Commissioner

HON. GARREY CARRUTHERS, Commissioner

HON. CELIA FOY CASTILLO, Commissioner

JUDY VILLANUEVA, Commissioner