

## **Opinion 07-01**

February 7, 2007

### **OPINION OF: GARY K. KING** Attorney General

**BY:** Zachary Shandler, Assistant Attorney General

**TO:** The Honorable Leonard Lee Rawson, State Senator, District 37, P.O. Box 996, Las Cruces, New Mexico 88004

### **QUESTION:**

Whether the legislative session fundraising prohibition in the State Campaign Reporting Act, NMSA 1978, Section 1-19-34.1 and the State Lobbyist Regulation Act, NMSA 1978 Section 2-11-8.1 apply to contributions to candidates for federal office?

### **CONCLUSION:**

Based on the doctrine of Federal Preemption, the prohibitions in the State Campaign Reporting Act and State Lobbyist Regulation Act do not regulate contributions to candidates for federal office.

### **FACTS:**

This is the second request to a state agency in the last four years to opine on the legislative session fundraising prohibition as it relates to a state elected official seeking federal office. In 2003, the Secretary of State's office was asked whether state Senator Richard Romero, as a candidate for United States Representative, was subject to the prohibition. The letter cited to a federal court case, Teper v. Miller, 82 F. 3d 989 (11th Cir. 1996), which stated that federal campaign finance laws preempted a Georgia state law that prohibited fundraising during a legislative session. The Secretary of State letter also cited to a section of the State Campaign Reporting Act, NMSA 1978, Section 1-19-37, and found that it did not apply to candidates for federal office. The Secretary of State's office concluded: "Senator Romero's congressional fundraising activities would appear to be exempt from Section 1-19-34.1." Letter to Mr. David Duhigg from Denise Lamb, Bureau of Elections, October 22, 2003.

In January 2007, Governor Bill Richardson announced that he is seeking the Office of President of the United States.<sup>1</sup> On January 30, 2007, our office received your letter regarding the legislative session fundraising prohibition under the State Campaign Reporting Act and State Lobbyist Regulation Act. The legislative session prohibition reads: "It is unlawful during the prohibited period for a state legislator or a candidate for state legislator ... to knowingly solicit a contribution for a political purpose." NMSA 1978, Section 1-19-34.1(A) (1995). "It is unlawful during the prohibited period for the governor ... to knowingly solicit a contribution for a political purpose." NMSA 1978, Section 1-19-

34.1(B) (1995). A "political purpose" is defined to mean attempting to influence an election covered under the Campaign Reporting Act. NMSA 1978, Section 1-19-26(M) (2003). The legislative session prohibition in the Lobbyist Regulation Act reads: "It is unlawful during the prohibited period for any lobbyist ... to contribute ... to the campaign funds of any statewide official or legislator or any candidate for those offices." NMSA 1978, Section 2-11-8.1(B) (1995).

### **ANALYSIS:**

The United States Federal Court of Appeals and United States Federal Election Commission ("FEC") have provided guidance on this issue. In 1996, Doug Teper, a Georgia state assemblyman, was weighing whether to run for United States Representative. See Teper at 992. However, Georgia law provides that: "No member of the General Assembly or ... or a public officer elected statewide ... shall accept a contribution during a legislative session." O.C.G.A. § 21-5-35(a) (amended through 2006). Assemblyman Teper faced the "dilemma of resigning from state office or foregoing his federal campaign" or going to court to challenge the provision. Teper at 992. He chose to seek an injunction against the state law in Federal District Court and the Federal Court of Appeals.

When a state law may be construed to attempt to govern a federal government process, it must undergo a preemption analysis. "Preemption doctrine is rooted in the Supremacy Clause and grows from the premise that when state law conflicts or interferes with federal law, state law must give way." Teper at 993. In fact, there is a federal law that governs a campaign for federal office. The Federal Election Campaign Act ("FECA") of 1971, as amended, expressly reads: "[t]he provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office." 2 U.S.C.A § 453 (amended through 2002). The Teper Court noted that FECA "creates an intricate federal statutory scheme governing campaign contributions and expenditures related to federal elections," and FECA has no prohibition period regarding a state legislative session. Teper at 994. 2. See also 11 CFR § 108.7(b)(3) (202) ("Federal law supersedes State law concerning the--(3) Limitation on contributions and expenditures regarding Federal candidates and political committees.") The Court further noted: "In this case, the effect of O.C.G.A. § 21-5-35 is to place a limitation on Teper's fundraising for his federal campaign...[thus] the state law, operates 'with respect to election to Federal office,' and thus falls within the FECA's express preemption provision." Teper at 995. The Court concluded that Assemblyman Teper was not subject to the Georgia legislative session prohibition.

"A fundamental rule of statutory construction is that all provisions of a statute, together with other statutes in pari materia, must be read together to ascertain the legislative intent." Roth v. Thompson, 113 N.M. 331, 334, 825 P.2d 1241 (1992). The New Mexico Campaign Reporting Act ("CRA") has several sections that cover campaign practices, but when read together, they demonstrate that the Act does not attempt to regulate candidates for federal office. For example, the Act regulates public officials and candidates, but only for "an office in an election covered by the Campaign Reporting

Act." NMSA 1978, Section 1-19-26(E), (P) (2003). The Act defines election as "any primary, general or statewide special election in New Mexico and includes county and judicial retention elections...." NMSA 1978, Section 1-19-26(H) (2003). Most importantly, the Act itself reads: "The provisions of the Campaign Reporting Act do not apply to any candidate subject to the provisions of the federal law pertaining to campaign practices and finance." NMSA 1978, Section 1-19-37 (1979). Therefore, the legislative session fundraising prohibition found in the CRA is not applicable to a candidate for federal office.<sup>2</sup>

The Federal Election Commission has issued several advisory opinions on the applicability of federal preemption on those state laws that attempt to regulate lobbyist contributions to candidates for a federal office. The Teper Court cited to these opinions and wrote the "FEC consistently expressed the opinion that FECA preempts state statutes limiting the time frame during which federal candidates may accept campaign contributions." Teper at 996. In 2002, the Commission opined on a fact pattern where a Maryland state assemblyman was running for United States Representatives and challenged a state law that prohibited lobbyists from soliciting or transmitting contributions from a person to a sitting assemblyman. See AO 2002-02, 2002 WL 431918 (F.E.C). The question was whether the state law validly restricted the lobbyist's activities on behalf of the announced congressional candidate. The Commission concluded that the state law was preempted and stated: "[T]he subject of solicitation and transmittal of contributions for Federal campaigns are within the field occupied by Federal law. The application, to your proposed activities on behalf of a Congressional candidate who is a General Assembly member, of the described Maryland Code prohibitions on solicitation or transmittal by regulated lobbyists is preempted by the provisions of the Act and Commission regulations." 2002 WL 431918 (F.E.C).

Similarly, in 1993, the Commission opined on a fact pattern where a Wisconsin state legislator was running for United States Senate and faced a state law that limited the time period during which a lobbyist might lawfully make a campaign contribution. See AO 1993-25, 1994 WL 59794 (F.E.C). The Commission concluded that federal law and regulations preempted state law because the Wisconsin law, as applied to Federal candidates, "does not regulate those areas defined [under 11 CFR 108.7 (c)] as interests of the state. Instead it places restrictions on the time period when contributions may be made to Federal candidates, an area to be regulated solely by Federal law". 1994 WL 59794.

The New Mexico Lobbyist Regulation Act ("LRA") has several sections that cover campaign practices, that when read together, demonstrate also that the Act does not attempt to regulate candidates for federal office. For example, the LRA defines "lobbying" as attempt to influence: "a decision related to any matter to be considered ... by the legislative branch of state government or any legislative committee or any legislative matter requiring action by the governor or awaiting action by the governor..." NMSA 1978, Section 2-11-2(D)(2) (1994) (emphasis added). Lobbying is also an attempt to influence the "action or nonaction of a state official or state agency, board or commission acting in a rulemaking proceeding." NMSA 1978, Section 2-11-2(G) (1994).

"No lobbyist may serve as a campaign chairman, treasurer or fundraising chairman for a candidate for the legislature or a statewide office." NMSA 1978, Section 2-11-8.1(A) (1995) (emphasis added). These sections are focused on state elected officials governing or campaigning for state office. Therefore, the legislative session fundraising prohibition found in the LRA is not applicable to a lobbyist making a contribution to a candidate for federal office, provided that contribution is not related to an attempt to influence a state action.

The state Governmental Conduct Act forbids a sitting state official from using his position of power to improperly solicit money or curry favor. "No legislator [or] public officer ... may request or receive, and no person may offer a legislator [or] public officer .. any money, thing of value or promise thereof that is conditioned upon or given in exchange for promised performance of an official [state] act." NMSA 1978, Section 10-16-3(D) (1993). In addition, state officials "shall use the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests incompatible with the public interest." NMSA 1978, Section 10-16-3(A) (1993). Therefore, current and future public officials seeking federal office must comply with the Governmental Conduct Act even though they are exempt from the legislative session fundraising prohibitions to the extent their fundraising concerns only a campaign for federal office.

Based on our examination of the relevant statutory and case law authorities, and on the information available to us, we conclude that the legislative session fundraising prohibition in the State Campaign Reporting Act, NMSA 1978, Section 1-19-34.1 and State Lobbyist Regulation Act, NMSA 1978 Section 2-11-8.1 does not apply to contributions to candidates for federal office based on the doctrine of Federal Preemption and because the State Campaign Reporting Act and State Lobbyist Regulation Act do not regulate contributions to candidates for federal office.

[1] "Richardson will file paperwork with the Federal Election Commission today to establish a presidential exploratory committee but will not formally announce his bid until New Mexico's legislative session ends in March." Chris Cillizza, "NM Governor Joins Presidential Race" Washington Post, A-6 (Jan. 22, 2007).

[2] If a presidential candidate has only formed an exploratory committee, but received contributions in excess of \$5,000, then it appears that his actions fall under the regulation of federal campaign law and federal preemption of state law is applicable. See 2 U.S.C. § 431 (2) (amended through 2002), 11 C.F.R. § 100.131 (amended through 2003) and 11 C.F.R. § 100.72 (amended through 2003).