Subcommittee Report on Gifts

Suellyn Scarneccia

W. Ken Martinez

Matt Brix

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Governor’s Ethics and Campaign Finance Reform Task Force Subcommittee
Report on Gifts

Group Leader: Dean Suellen Scarneccia
Other Task Force Participants: Representative W. Ken Martinez, Matt Brix

1. Issue Identification: How does the issue relate to ethics or campaign finance reform?

The giving of gifts to show ones appreciation is a valued tradition in New Mexico. However, the giving of gifts to public officials by persons financially interested in their official actions may have a corrupting influence. A clear statutory bright line definition as to when gifts are not acceptable, beyond the current quid pro quo standard, would provide a necessary foundation for effective regulation of lobbying and campaign finance. A clear definition would also make it easier for both public officials and citizens to comply, and thus increase the public’s confidence in its government.

New Mexico law requires registered lobbyists to report all their gifts to legislators and other officials, but that requirement may be evaded and therefore ineffective in the absence of any specific prohibition, bright line test or reporting rule for gifts from other persons. A lobbyist who does not wish to report a gift to an official may simply tell his/her client, who presumably is not a registered lobbyist, to make the gift directly instead of through the lobbyist, thus neatly sidestepping the reporting requirement. Similarly, although our law requires reporting of all campaign contributions (defined as contributions made for the purpose of “influencing or attempting to influence an election”), this requirement is likewise easily evaded. A donor who wishes to keep his/her contribution to a candidate hidden from public view may simply accompany the gift with a statement that it is not intended to influence an election but is instead given simply as a token of the donor’s esteem and in exchange for the recipient’s “good will” toward the donor. Therefore, the matter of gifts is of the utmost importance to ethics and campaign finance reform.

2. Options: What options for reform might the task force consider? Options should be very specific.

Every state, including New Mexico, prohibits the giving and receiving of gifts in exchange for a promise to take or refrain from some official action. It is seldom possible to prove the kind of direct and immediate quid pro quo that is required for a bribery conviction, so most states extend gifts restriction statutes in one of three ways; an outright ban on gifts (so-called “zero tolerance” laws), a bright line test (allowing gifts up to a certain amount), or complete disclosure of all gifts with no limit on said gifts. There are no statutory limits on gifts and no statutory requirements for the disclosure of gifts in New Mexico.

The options for the task force to consider fall into three rather straightforward categories. First, the task force may wish to recommend an outright ban on gifts, with the
notable exception of campaign contributions, which are regularly reported. Second, the task force may wish to recommend a bright line test, which would permit gifts up to a specified monetary figure. Finally, the task force may wish to recommend full disclosure of all gifts.

A. What are the pros and cons of each option?

**Gift Ban Pros:** Comprehensive and understandable for both officials and the public. May inspire greater confidence in the political process.

**Gift Ban Cons:** Would not allow for even small gifts, which may not have a corrupting influence.

**Bright Line Pros:** Sensitive to the role small gifts might play in the political process. Places a reasonable limit on gifts.

**Bright Line Cons:** Still allows some gifts; many small gifts may have a cumulative effect over time.

**Full Disclosure Pros:** All gifts are disclosed, giving the public full information.

**Full Disclosure Cons:** Disclosure would not prevent the giving and receiving of large, potentially corrupting gifts. Effective full disclosure would require timely reporting.

B. Does the option for reform meet the option evaluation criteria?

Yes.

3. **Recommendations of Subcommittee:** Which options does the subcommittee recommend?

Any discussion of recommended reform in the area of gifts must begin with a comprehensive definition of a gift. For the purposes of our recommendations, the following definition will apply:

A “gift” means any donation or transfer to a public official, public employee, or immediate family member\(^1\) without commensurate consideration, of money, property, service, loan, promise or any other thing of value, including food, lodging, transportation and tickets for entertainment or sports events, but does not include any of the following:

(1) a campaign contribution, for which a definition exists in the Campaign Practices Act and for which regular reporting is required;

\(^1\) Gift definition has been borrowed from existing statutory language in Iowa.
(2) a gift from a relative which is customary on family or social occasions and is unrelated to the recipient's position as a legislator, public officer or public employee;

(3) compensation for services rendered or capital invested which is (a) normal and reasonable in amount, (b) commensurate with the value of the services rendered or the magnitude of the risk undertaken on the investment, (c) in no way increased or enhanced by reason of the recipient's position as a legislator, public officer or public employee, and (d) not otherwise prohibited by law;

(4) payment for a sale or lease of tangible or intangible property which is commensurate in amount with the value of the property and is in no way increased or enhanced by reason of the recipient's position as a legislator, public officer or public employee;

(5) a commercially reasonable loan made in the ordinary course of the lender's business on terms which are available to all similarly qualified borrowers; or

(6) reimbursement for out-of-pocket expenses actually incurred in the course of performing a service for the person or entity making the reimbursement.

With the working definition of a “gift” in place, the subcommittee recommends a hybrid of the three previously discussed options (gift ban, bright line and disclosure).

- First, all gifts having a fair market value greater than $100 shall be disclosed by the public official who is the recipient of the gift.
- Second, a public official is prohibited from receiving an individual gift having a fair market value greater than $250.
- Third, during a regular, special, or extraordinary legislative session, a public official shall be banned from accepting individual gifts having a fair market value greater than $100.
- A gift to a public official's favorite charity by a donor who wishes to influence that public official. The prohibition could be phrased: "A prohibition on gifts to a public official's favorite charity from a donor where it can be reasonably concluded that the gift was given to the charity by the donor to influence the official actions of the public official, or given to the charity on behalf of the public official."
- The subcommittee recommends a fall and spring reporting date for public officials who receive gifts, and regular reporting during campaign cycles (following the reporting dates provided for in current statute).
- Based upon existing statute found in the Campaign Reporting Act, the subcommittee recommends a civil and criminal penalty component for violations of new gift restrictions. The civil penalty for a violation would amount to forfeiture of the gift and a $500 fine per violation, not to exceed $5,000. The criminal penalty would be as follows: A person who knowingly
violates the gift restriction statute is subject to a fine of not more than $1,000, or imprisonment for up to one year.

The persons covered by these restrictions would include any public official who either accepts or solicits a proscribed gift and any person who makes such a gift. In addition, the restrictions should extend to gifts made to or solicited by declared candidates for public office as well as by incumbent officials. Otherwise, the restrictions would confer a substantial fund-raising advantage on the challenger in any election, because the incumbent would be prohibited by his/her status as a public official from accepting gifts other than contributions regulated by campaign finance laws, while the challenger would be perfectly free to accept such gifts. To level the playing field, therefore, any declared candidate should be subject to the gift ban to the same extent as an incumbent.

4. **Method of Implementation:** Includes an estimate of costs and analysis of statutory changes, etc. Background materials may be included in an appendix to the report.

To incorporate the statutory changes recommended by the subcommittee, legislation would be needed to amend the Governmental Conduct Act. There could be costs associated with updating New Mexico’s electronic reporting system to account for reporting gifts.

In addition to the recommendation of a hybrid system, the subcommittee believes the task force may wish to vote on all, or some of the following items. Should the task force vote to recommend one or more of the following items, they will simply be incorporated into the final hybrid recommendation.

1. Ban all gifts from registered lobbyists during the legislative session.
2. Allow public officials to receive large gifts (presumably those above $250) on behalf of the state of New Mexico, and then store said gifts in some sort of repository.
3. An annual cap on gifts.