



STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by THOMAS C. HORNE ATTORNEY GENERAL September 18, 2013	No. I13-009 (R13-014) Re: Lobbying
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To: Ken Bennett
Arizona Secretary of State

Question Presented

You have asked whether a lobbyist's anonymous contribution to a legal defense fund on behalf of an Arizona legislator constitutes a "gift" to that legislator under Arizona Revised Statute ("A.R.S.") § 41-1231(9).

Summary Answer

A lobbyist's anonymous contribution to a legal defense fund on behalf of an Arizona legislator falls within the broad definition of "gift" in A.R.S. § 41-1231(9). Though somewhat ambiguous and pursuant to the rule of lenity, subsection (9)(d)'s exception to the definition of gift appears to allow this type of contribution. However, subsection (9)(d) allows such contributions to the extent that they are "not rendered to provide a benefit." The term "not rendered to provide a benefit" raises significant factual questions that can only be dealt with on a case-by-case basis.

Analysis

A. An anonymous contribution to a legislator's legal defense fund falls within the broad definition of "gift" in A.R.S. § 41-1231(9).

In 1991, in reaction to the AZSCAM scandal, the Arizona Legislature "establishe[d] a study committee . . . to consider and evaluate a wide variety of . . . proposals in the area of campaign finance and election reform." 1991 Ariz. Sess. Laws, ch. 241, § 1. This study committee addressed, *inter alia*, "[g]ift . . . limitations for lobbyists." ELECTION REFORM STUDY COMMITTEE, FINAL REPORT 2-3 (1991). The committee ultimately recommended, *inter alia*, that the Legislature "prohibit . . . giving a state officer . . . gift(s) worth more than \$100 in one year," "prohibit . . . giving a gift through another person or organization for the purpose of disguising the identity of the person making the gift," and "defin[e] . . . 'gift' to mean, with some exceptions, a payment, distribution, expenditure, advance, deposit or donation of money" *Id.* at 7.

The Legislature adopted most of these recommendations with S.B. 1002 in the Third Special Session of the Fortieth Legislature. This was the first time that the Legislature specifically defined "gift" in the lobbying context. In that version of the statute, a gift was broadly defined as "a payment, distribution, advance, deposit or donation of money or any kind of tangible personal or real property." Laws 1991 Third. Spec. Sess. Ch. 2 (S.B. 1002) § 1, codified as A.R.S. § 41-1231(4). In the 1991 legislation and thereafter, the Legislature enacted numerous exceptions to the definition of gift, which exceptions are discussed later in this Opinion. The threshold question is whether a contribution to a legislator's legal defense fund meets the definition of gift.

In 1993, the Legislature amended that basic definition of gift to include intangible property. Laws 1993 Ch. 146 (S.B. 1367). In 2000, the Legislature again amended the definition of gift to include “expenditures,” which is itself a defined term:

A payment, distribution, loan, advance, deposit or gift of money or anything of value and includes a contract, promise, or agreement, whether or not legally enforceable, to make an expenditure that provides a benefit to an individual state officer or state employee and that is incurred by or on behalf of one or more principals, public bodies, lobbyists, designated public lobbyists or authorized public lobbyists.

Laws 2000 Second Reg. Sess. Ch. 364 (H.B. 2554), codified as A.R.S. § 41-1231(6). Since 2000, the basic definition of gift has been unchanged.

You have asked whether an anonymous contribution to a legal defense fund on behalf of an Arizona legislator constitutes a gift to that legislator under A.R.S. § 41-1231(9). If the contribution to the legal defense fund involves a financial donation, then it is a payment and therefore falls within the statutory definition of gift. Additionally, even if the contribution to the fund does not involve a financial donation, it nevertheless falls within the statutory definition of “gift” because the definition encompasses “money” and “*any* intangible personal property” and “*any* kind of tangible personal property or real property.” (Emphasis added.) In addition, any contributions that would also meet the definition of expenditure, such as a loan to the legal defense fund, would qualify as a gift.

B. The contribution qualifies as an exception to the definition of a “gift” under A.R.S. § 41-1231(9)(d) (subject to issues pertaining to “benefit,” discussed below).

Subsections (a) through (l) of A.R.S. § 41-1231(9) identify various exceptions to the statutory definition of “gift,” including among other things family gifts, honorary recognition, and informational materials. Subsection (d) – the only arguable exception under the scenario contemplated by your question – provides that a “gift” does not include:

The value, cost or price of professional or consulting services that are not rendered to obtain a benefit for any registered principal, public body, lobbyist, designated public lobbyist or authorized public lobbyist or the clients of a principal or lobbyist.

This language appears to be open to at least two different interpretations. First, the contribution might be the provision of professional services themselves by the professional, such as time and expertise provided by an attorney. The phrase “value, cost or price” in such a situation would then represent the quantified value of that attorney’s services. Second, the “cost or price” might be reasonably interpreted as money provided in order to retain professional services, such as the legal defense fund contemplated by your question.

Arizona’s lobbying statutes are criminal statutes. A.R.S. § 41-1237 provides that any person who knowingly violates any provisions of the article is guilty of a class 1 misdemeanor and may be investigated and prosecuted by the attorney general or county attorney.

The goal in interpreting statutes is to ascertain and give effect to the legislature’s intent and the plain language is often the best indicator of that intent. *State v. Lockwood*, 222 Ariz. 551, 553 ¶ 4, 218 P.3d 1008, 1010 (App. 2009). But, when the meaning of a criminal statute is unclear or subject to more than one interpretation, the rule of lenity requires the ambiguity to be resolved in favor of a potential criminal defendant. *Id.* The rule of lenity applies because “[t]he first essential of due process is fair warning of the act which is made punishable as a crime.” *Id.* quoting *Vo v. Superior Court*, 172 Ariz. 195, 200, 836 P.2d 408, 413 (App. 1992).

Here, because two reasonable and possible interpretations of A.R.S. § 41-1231(9)(d) exist, the rule of lenity resolves the ambiguity in favor of treating an anonymous contribution as falling within the exception. Accordingly, the statute should be read as manifesting the Legislature’s intent to exclude monetary donations for the purpose of retaining professional

services from the definition of “gift.” As a result, such contributions are not subject to the reporting requirement. A.R.S. § 41-1232.02(E).

But subsection (d) contains another phrase that prompts us to caution lobbyists who seek to establish such a legal defense fund on behalf of a particular legislator — “not rendered to obtain a benefit.” An anonymous contribution to a legislator’s legal defense fund, even viewed as “services” under subsection (d), could be construed as “rendered to obtain a benefit” for a member of the lobbying community,¹ in which case the contribution would not qualify as an exception to “gift” under A.R.S. § 41-1231(9)(d). Whether a particular service is intended to promote the well-being of a member of the lobbying community would require case-specific factual analysis. *Cf.* Ariz. Att’y Gen. Op. I90-076 (concluding that “the determination of when a device is employed to circumvent the campaign contribution limitations . . . can only be made on a case-by-case basis after careful investigation and evaluation”). We decline to answer questions of fact. *See* A.R.S. § 41-193(A)(7) (authorizing the Arizona Attorney General to answer “question[s] of law”); *see also* Ariz. Att’y Gen. Op. I80-236 (declining to answer question requiring “an analysis of individual fact situations”).

If an anonymous contribution to a legislator’s legal defense fund benefits a member of the lobbyist community, and that benefit was intended, the contribution would not qualify as an exception to “gift” under A.R.S. § 41-1231(9)(d) and would be subject to other limitations contained in the article, such as reporting requirements.

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¹ We assume, as the question implies, that the person making the contribution is a lobbyist.

Conclusion

An anonymous contribution by a lobbyist to a legal defense fund on behalf of an Arizona legislator falls within the broad definition of “gift” in A.R.S. § 41-1231(9). However, pursuant to the rule of lenity, such anonymous contributions are within the exception under A.R.S. § 41-1231(9)(d) to the extent they constitute the value, cost or price of professional services. Whether a legal defense fund can be created in such a way as to not be “rendered to obtain a benefit for” the contributor raises factual questions that cannot be resolved in the context of an Attorney General Opinion.

Thomas C. Horne
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