

## MEMORANDUM

To: Dianna Duran, Secretary of State  
From: Tania Maestas, Assistant Attorney General  
Date: March 23, 2012  
Re: Validity of Nominating Petitions

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### CONFIDENTIAL/ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

New Mexico and other courts have consistently held that "substantial compliance" with the statutory requirements of the Election Law as to form is acceptable. Settled New Mexico law provides that nominating petitions will be accepted if they give the filing officer sufficient information to determine its validity, even if they do not conform to the exact requirements of a statutory petition form. *See Woodruff v. Herrera*, 623 F.3d 1103, 1112 (2010), *citing State ex rel. Citizens for Quality Educ. v. Gallagher*, 102 N.M. 516, 697 P.2d 935, 939 (1985) (failure of signature on petition to conform with statutory form would not invalidate signature so long as information provided was sufficient to allow county clerk to determine that the signer was a qualified voter).

Courts have also repeatedly indicated that a statute is to be interpreted in a reasonable and sensible manner to fulfill the purpose for which the statute was designed. The purpose of the Election Code's requirements for nominating and other designating petitions is to provide assurance against fraud in connection with the collection of signatures. "Absolute compliance with every technicality should not be required in order to constitute substantial compliance, unless such complete and absolute conformance to each technical requirement of the printed form serves a public interest and a public purpose." *Stern v. Bd. of Elections*, 14 Ohio St. 2d 175, 180, 237 N.E.2d 313 (1968).

The New Mexico Supreme Court has said that it is "committed to examine most carefully, and rather unsympathetically any challenge to a voter's right to participate in an election, and will not deny that right absent bad faith, fraud or reasonable opportunity for fraud." *Ruiz v. Vigil-Giron*, 2008-NMSC-63, 145 N.M. 280, 196 P.3d 1286, 1288 (2008) (internal quotation marks omitted). *See also Woodruff v. Herrera*, 623 F.3d at 1112. Strict adherence to the requirements of Section 1-8-31(D), in the absence of fraud or misconduct, should not take precedence over the constitutional right of the electorate to fully exercise its franchise. New Mexico courts have shown an overriding concern with affording voters an opportunity to fully and freely exercise their electoral rights. *See Simmons v. McDaniel*, 101 N.M. 260, 263, 680 P.2d 977, 980 (1984) (holding that challenges to nominating petitions are not favored, and every precaution must be taken to protect the right of New Mexico citizens to vote for the candidate of their choice).

Although New Mexico courts have not yet reviewed a petition challenged under with Section 1-8-31(D), the Arizona Supreme Court dealt with a similar issue in *Clifton v. Decillis*, 927 P.2d 772 (Ariz. 1996). In that case, a candidate who was not a member of a political party failed to fill in a blank on a nominating petition that required the

equivalent of a party designation. The court held that the party designation on the nominating petition was simply for the benefit of the people signing the petitions and that filling in the required designation blank was not essential for candidacy. The Arizona Supreme Court found that the omission of the party designation was de minimis and that candidate had substantially complied with the statutory requirements. *Id.* at 776.

Under Section 1-8-31(D), the absence of the district of the office sought, if applicable, invalidates a nominating petition. The Legislature added Section 1-8-31(D) in 2011 after the New Mexico Supreme Court held in *Charley v. Johnson*, 2010-NMSC-24, 148 NM 246, 233 P.3d 775, that the Legislature intended a nominating petition to provide the division number associated with a magistrate position up for election. The Court reached this conclusion even though Section 1-8-30, which sets out the form for nominating petitions under the Election Code, did not expressly require a candidate to designate the district or division.

Despite the Charley decision and subsequent amendment to Section 1-8-31, there appear to be several extenuating circumstances that would allow you to accept the arguably noncompliant petitions at issue. First, as noted above, the amendment to Section 1-8-31(D) was enacted in 2011 and was applicable for the first time this year. Interestingly, although Section 1-8-31 was amended, no corresponding amendment was made to Section 1-8-30, the provision at issue in Charley. Thus, the form of nominating petition in the law and provided to candidates by your office does not indicate that a candidate should provide the district for the office sought.

Second, as you are aware, during the time frame within which most candidates were obtaining nominating signatures, the issue of redistricting was being litigated in New Mexico courts. Thus, even if they were aware of the new requirements, at least some of the candidates did not have sufficient information to designate a district at the time they circulated the petitions.

Finally, the absence of notice or knowledge about the new requirements is evidenced by the significant number of noncompliant petitions. I understand that at least 12 candidates filed nominating petitions that did not designate the district of the office sought. These petitions, if rejected, would effectively deny a substantial number of voters their right to participate in the election process through no fault of their own.

The Supreme Court's decision in Charley notwithstanding, because of the prevailing judicial authority on this issue and the specific circumstances described above, I believe that a New Mexico court reviewing the issue would not require the Secretary of State to reject an otherwise properly filed nominating petition solely because of the district was omitted. In the absence of any evidence of fraud or bad faith, it is unlikely that a court would require strict adherence to the statutory requirements at the cost of denying a significant number of voters their constitutional right to participate in the election process.