

State of Colorado



Nancy E. Friedman, *Chairperson*
Matt Smith, *Vice-Chairperson*

Sally H. Hopper, *Commissioner*
Larry R. Lasha, *Commissioner*
Roy Wood, *Commissioner*

Jane T. Feldman, *Executive Director*

INDEPENDENT ETHICS COMMISSION

633 17th St., Ste. 1300, Denver, CO 80202

Ph.: 303/866-5727

Fax: 303/866-3777

E-mail: jane.feldman@state.co.us
www.colorado.gov/ethicscommission

I. Introduction

The Colorado Constitution authorizes the Independent Ethics Commission ("IEC" or "Commission") to give advice and guidance on ethics issues arising under Article XXIX of the Colorado Constitution and any other standards of conduct and reporting requirements as provided by law. The IEC issues this Position Statement for the purpose of clarifying the provisions of Section 3(1) and (2) of Article XXIX of the Colorado Constitution ("Section 3"). In this Position Statement, the Commission responds to the uncertainty surrounding Section 3(1) and (2), relating to gifts. It is the Commission's hope that this Position Statement will increase the awareness of public officials and employees and the public at large. The Commission encourages public employees and officials to request further clarification if needed, through a request for advisory opinion.

II. Guiding Principles

Article XXIX is a voter-approved amendment (Amendment 41) to the Colorado Constitution. There is confusion regarding the provisions of the Article and what the intent of the voters of Colorado was in approving Amendment 41. Although the Commission is not a court of law, it is charged with interpreting the provisions of Article XXIX. "The purpose of the independent ethics commission shall be to ...issue advisory opinions on ethics issues arising under this article and under any other standards of

conduct and reporting requirements as provided by law.” Section 5(1). “(T)he language of the Amendment creates a super-agency, a commission set apart from the legislative and executive branches of government so as to supervise the ethical conduct of both branches, and given the authority to administer, implement, and enforce the Amendment’s provisions.” Developmental Pathways v. Ritter, 178 P.3d 524, 527 (Colo. 2008).

The Commission is mindful of several standards established by the Colorado Supreme Court in interpreting voter-initiated constitutional amendments. To the extent possible, courts should “ascertain and give effect to the intent of the electorate adopting the amendment.” Bolt v. Arapahoe County Sch. Dist. No. Six, 898 P.2d 525, 532 (Colo. 1995). To determine the intent of the voters, courts should look at the plain meaning of the words used, and if the intent of the voters is not clear from the language, an amendment should be construed in light of the objective sought to be achieved, and the “mischief to be avoided by the amendment.” Zaner v. City of Brighton, 917 P.2d 280, 283 (Colo. 1996), citing People in the Interest of Y.D.M., 197 Colo. 403, 407 (1979). Further, ...”in construing constitutional language, each clause and sentence must be presumed to have purpose and use.” In re: Interrogatories relating to the Great Outdoors Colorado Trust Fund, 913 P. 2d 533, 542 (Colo. 1996). “Courts should consider the amendment as a whole and, when possible, adopt an interpretation which harmonizes different constitutional provisions rather than an interpretation which would create a conflict between such provisions.” Zaner, 917 P.2d at 283. In reviewing a voter-initiated amendment, the Court stated, “(c)ourts should not engage in a narrow or technical reading of the language contained in the initiated constitutional amendment, if

to do so would defeat the intent of the people.” Zaner, 917 P. 2d at 283. Further, any interpretation of a constitutional amendment that results in an “absurd result” should be avoided. In re Interrogatories on House Bill 99-1325, 979 P.2d 549, 557 (Colo. 1999); Bolt, 898 P.2d at 532.

The Commission is also cognizant of the legal principle that when there is more than one way to interpret a legal provision, the interpretation that makes the provision constitutional, rather than one that does not, must be chosen. Harris v. United States, 536 U.S. 545, 555 (2002). And finally, the Commission determined that it would employ a reasonable, common sense approach to interpreting the issues raised by Article XXIX of the Colorado Constitution.

In this Position Statement, the Commission attempts to follow these constitutional guidelines, and to interpret Article XXIX in a manner that preserves the intent of the electorate. The Commission believes that the voters of Colorado approved Amendment 41 in order to improve and promote honesty and integrity in government and to assure the public that those in government are held to standards that place the public interest above their private interests.

The Commission believes that the statements contained in Section 1, Purposes and Findings, reflect the intent of the voters. That section provides:

- (a) The conduct of public officers, members of the general assembly, local government officials, and government employees must hold the respect and confidence of the people;
- (b) They shall carry out their duties for the benefit of the people of the state;
- (c) They shall, therefore, avoid conduct that is in violation of their public trust or that creates a justifiable impression among members of the public that such trust is being violated;

(d) Any effort to realize personal financial gain through public office other than compensation provided by law is a violation of that trust; and

(e) To ensure propriety and to preserve public confidence, they must have the benefit of specific standards to guide their conduct, and of a penalty mechanism to enforce those standards.

The intent of the voters to deter any breach of the public trust for private gain is reinforced in Section 6, which states that those who breach the public trust for private gain or induce such breach shall be liable for monetary penalties.

The Commission interprets the term “public trust” to mean that government employees and officials shall carry out their duties for the benefit of the people of Colorado.¹

In its deliberations, the IEC also reviewed the history of the Amendment, including the Review and Comment hearing before Colorado Legislative Council and the Office of Colorado Legislative Legal Services, the various versions of the “Blue Book,” the “Blue Book” hearing before the Committee on Legislative Council, and public comments of the proponents of the Amendment. The IEC studied advice given on Article XXIX by several sources, including the Colorado Attorney General, Denver City Attorney, and staff to the General Assembly. In addition, the IEC reviewed the laws and advisory opinions of numerous states and municipalities across the country, including those on which Amendment 41 was reportedly based. Finally, the IEC examined relevant court documents, oral arguments, and decisions, including the Colorado Supreme Court’s opinion in Developmental Pathways v. Ritter, 178 P.3d 524 (Colo.

¹ See, e.g., 24-18-103, C.R.S., “The holding of public office or employment is a public trust, created by the confidence which the electorate reposes in the integrity of public officers, members of the general assembly, local government officials, and employees.”

2008). Review of these materials was valuable in giving members of the Commission insight into the intent of the voters.

III. Applicable Law

Section 3 of Article XXIX reads in relevant part:

(1) No public officer, member of the general assembly, local government official, or government employee shall accept or receive any money, forbearance, or forgiveness of indebtedness from any person, without such person receiving lawful consideration of equal or greater value in return from the public officer, member of the general assembly, local government official, or government employee who accepted or received the money, forbearance or forgiveness of indebtedness.

(2) No public officer, member of the general assembly, local government official, or government employee, either directly or indirectly as the beneficiary of a gift or thing of value given to such person's spouse or dependent child, shall solicit, accept or receive any gift or other thing of value having either a fair market value or aggregate actual cost greater than fifty dollars (\$50) in any calendar year, including but not limited to, gifts, loans, rewards, promises or negotiations of future employment, favors or services, honoraria, travel, entertainment, or special discounts, from a person, without the person receiving lawful consideration of equal or greater value in return from the public officer, member of the general assembly, local government official, or government employee who solicited, accepted or received the gift or other thing of value.

(3) The prohibitions in subsections (1) and (2) of this section do not apply if the gift or thing of value is:

(g) Given by an individual who is a relative or personal friend of the recipient on a special occasion.

IV. Discussion

Section 3 prohibits a public official or employee from soliciting, accepting or receiving any gift or other thing of value worth more than \$50 in any calendar year, from a person, without that person receiving lawful consideration of equal or greater value in return, unless it falls under a listed exception. This prohibition extends to the

solicitation, acceptance or receipt, either directly or indirectly, as the beneficiary of a gift or thing of value given to a spouse or dependent child.

A. The Commission finds that acceptance of the following “things of value” is permissible because there is lawful consideration of equal or greater value.

1. Scholarships

There has been considerable discussion regarding whether Article XXIX (3) prohibits a public employee or official, or that person’s spouse or dependent child, from accepting a scholarship. The IEC has determined that, in most circumstances, the acceptance of scholarships is permissible for the following reasons:

a. Section 3(2) prohibits the solicitation, acceptance or receipt of any gift or other thing of value worth more than \$50 from a person, without that person receiving lawful consideration of equal or greater value in return. Although scholarships are generally awarded based upon past performance or need, they are also conditioned on some sort of future performance, which, in the IEC’s opinion, constitutes lawful consideration; e.g., attending an in-state college or university, maintaining a certain grade point average, satisfying a curriculum course load, attending class, meeting the school’s minimum academic standards. In addition, the grantor of the scholarship usually has the discretion to withdraw the scholarship if the minimum requirements are not met.

b. In the Commission’s view, there is no violation of the public trust provided that the scholarship is awarded using objective criteria and is available to all those who meet those criteria.

c. Section 3 provides that no public employee or official may directly or indirectly be the beneficiary of a gift or other thing of value given to that person's spouse or dependent child. The Commission believes that receipt of a scholarship would not be a direct or indirect benefit to the public employee or official because there is no legal obligation to pay for a college education.

2. Honoraria

The Commission has determined that public employees and officials generally may accept honoraria for speaking before business or civic groups or writing publications. An honorarium is distinguished from a consulting or speaking fee, in that it is a token payment in exchange for speaking before a particular group or preparing a publication. However, in some situations, receipt of an honorarium could create ethical problems. To help public employees and officials distinguish between permissible and impermissible honoraria, the Commission has established the following guidelines to identify when an honorarium of more than \$50 may be accepted. Where there is a question on a specific case, a request for advisory opinion is encouraged.

Honoraria of more than \$50 are permissible, provided that:

- a. Delivering the speech or writing the publication is not part of the public official's or employee's official duties;
- b. Public resources are not used in the preparation of the speech or publication (including computers, telephones, staff, etc.);
- c. Government time is not used for the preparation or delivery of the speech or publication;
- d. The amount of the honorarium is reasonably related to the services the public employee or official is being asked to perform. (This can be deemed to be lawful consideration of equal or greater value); and

e. Neither the sponsor of the speech nor the source of the honorarium is a person or entity with whom the public official or employee has had, or reasonably expects to have, dealings in his or her official capacity.

3. Insurance Proceeds

In the case of insurance proceeds, there is usually lawful consideration provided by the public employee or official because they have paid premiums to an insurance company, just like other customers. With regard to a life insurance policy, where the beneficiary has not paid premiums, there is no breach of the public trust if payment is based upon the personal relationship of the parties. For example, a public official or employee may be the beneficiary of a parent's or spouse's life insurance policy, and this would not raise any ethical concerns. Reduced premiums are also permissible, provided that they are offered to all similarly situated.

B. The Commission finds that acceptance of the following things of value is not a breach of the public trust and is therefore permissible.

The Commission believes that government officials and employees should not be prohibited from accepting offers and benefits given to the general public or a class of people under circumstances where others receive the same opportunity. It would be unfair to penalize people because they are in government, any more than they should not be rewarded for being in government.

1. Prizes

If a prize is awarded to a public official or employee, then, assuming that the competition was fair, was open to everyone similarly situated, that it was not rigged in favor of the public employee or official, and that there is no evidence that the prize is

being given based upon the official's or employee's governmental status, acceptance of a prize is not a breach of the public trust and is therefore permissible. This includes scholarly recognition such as the Nobel Prize, where the Prize is awarded based upon extraordinary achievement, and not to influence a particular official decision.

2. Raffles, Lotteries and Silent Auctions

Acceptance of winnings in raffles, lotteries or silent auctions is not a violation of the public trust and is therefore permissible. There may be lawful consideration -- to enter a lottery or raffle, one might purchase a ticket in exchange for the opportunity to win; the highest bidder wins the item in a silent auction. In those situations where a ticket was not purchased (e.g., a card put into a fishbowl), a public employee or official has an equal opportunity to win as the other entrants. Therefore, the Commission finds that the acceptance of winnings in raffles, lotteries and silent auctions is permissible, provided that these contests are not rigged in favor of the public employee or official based upon his or her governmental status.

C. The Commission finds that acceptance of the following things of value is not a violation of the public trust and is therefore permissible, because it is the family or personal relationship, rather than the potential to influence official action, that is the controlling factor.

1. Inheritances

The Commission believes that inheritances are usually given because of the close personal relationship of the people involved, rather than the public status of the recipient. There is no violation of the public trust, because it is that close personal

relationship that controls. Therefore, the Commission believes that inheritances do not raise any ethical issues. This does not apply, of course, to those situations in which there is undue influence, coercion, or other circumstance that would cause a breach of the public trust.

2. "Special Occasion"

One of the exceptions to the Section 3 gift ban is a gift or thing of value "given by an individual who is a relative or personal friend of the recipient on a special occasion." The term "special occasion" is not defined in the Article. The Commission believes that the term "special occasion" should be broadly construed so as not to preclude public employees and officials from enjoying social situations available to other citizens. The term "special occasion" should not be restricted to birthdays, anniversaries and holidays; nor should it necessarily mean events that are rare or unusual. A special occasion may occur on a regular basis, such as a weekly meal with friends or family.

Therefore, the Commission finds that gifts or other things of value given by relatives or personal friends are not a breach of the public trust and are therefore permissible provided that:

1. It can be shown under all of the relevant circumstances that it is a family or personal relationship rather than the governmental position that is the controlling factor; **and**
2. The public official's or employee's receipt of the gift or other thing of value would not result in or create the appearance of:
 - a. Using his or her office for personal benefit;
 - b. Giving preferential treatment to any person or entity;
 - c. Losing independence or impartiality; or
 - d. Accepting gifts or favors for performing official duties.

The Commission recognizes that it has not addressed all of the issues raised by Section 3, Article XXIX of the Colorado Constitution. However, these are among the most frequently raised issues since the passage of Amendment 41. The Commission intends to issue additional Position Statements on other topics within the coming weeks and months. This, as all Position Statements, is intended to give broad guidance to government officials and employees and the public. The Commission encourages individuals with particular questions to request more fact-specific advice through requests for advisory opinion and letter ruling.

The Independent Ethics Commission

Nancy E. Friedman, Chairperson

Matt Smith, Vice Chairperson, dissenting in part, concurring in part

Sally H. Hopper, Commissioner, dissenting in part, concurring in part

Larry R. Lasha, Commissioner

Roy Wood, Commissioner

October 6, 2008

Commissioners Smith and Hopper dissent from Section IV (A) (1) Scholarships.

We conclude that the plain and ordinary language of the gift ban contained in Section 3, Article XXIX clearly and unambiguously includes scholarships. Scholarships were expressly included in the gift ban as shown in the 2006 State Ballot Information Book (“Blue Book”) published by the legislature and distributed to voters prior to the 2006 General Election.

In construing Article XXIX, the Independent Ethics Commission must ascertain and give effect to the intent of the electorate adopting the amendment by first giving the words of the amendment their ordinary and popular meaning. Havens v. Board of County Commissioners, 924 P.2d 517, 522 (Colo. 1996); Davidson v. Sandstrom, 83 P.3d 648, 654 (Colo. 2004); Bruce v. City of Colorado Springs, 129 P.3d 988, 992 (Colo. 2006).

The gift ban, Section 3, Article XXIX, states:

- (1) “No public officer, member of the general assembly, local government official or government employee shall accept or receive any money, forbearance or forgiveness of indebtedness . . .
- (2) . . . either directly or indirectly as the beneficiary of a gift or thing of value given to a person’s spouse or dependent child . . . having either a fair market value or aggregate actual cost greater than fifty dollars (\$50) in any calendar year... Section 3, Article XXIX, Colorado Constitution.

The plain and ordinary meaning of the “gift ban” is that scholarships (above \$50 per year) to these officers, officials and employees, their spouses and dependent

children are banned along with the broad definition of other gifts in Section 3, subsections 1 and 2.

Although the ban on gifts is broadly inclusive, a series of exceptions to “gifts” or “things of value” are specifically exempted from the ban in subsection 3, paragraphs (a) through (h). A review of exceptions (a) through (h) identifies no specific exemption for scholarships from the gift ban. In plain and ordinary terms, subsections 1, 2 and 3 of the gift ban must be read consistently, giving purpose to every word, to mean that scholarships are banned under Section 3, Article XXIX of the Colorado Constitution. Thus, scholarships (above \$50 per year) to officers, officials and employees, their spouses and dependent children are banned. When the language of the constitutional amendment is clear and unambiguous, it must be enforced as written. Davidson v. Sandstrom, 83 P.3d 648, 654 (Colo. 2004).

The Blue Book provides important insight into the understanding of the electorate and their intent regarding the adoption of an amendment. Grossman v. Dean, 80 P.3d 952, 962 (Colo. App. 2003); Rocky Mountain Animal Defense v. Colorado Division of Wildlife, 100 P.3d 508, 514 (Colo. App. 2004); Davidson v. Sandstrom, 83 P.3d 648, 655 (Colo. 2004). The Blue Book outlining Amendment 41 (Article XXIX to the Constitution) expressly included the following statement in the first argument contained in “Arguments Against” the Amendment for the 2006 General Election:

...Furthermore, it would prohibit most governmental employees, including entry-level local and county government employees and higher education faculty and employees, from accepting or receiving, among other things, educational scholarships for themselves, their dependent children or their spouse. 2006 State Ballot Information Book (“Blue Book”, Page 3).

The Blue Book was clear that scholarships would be included in the gift ban should the Amendment 41 ultimately pass. It is difficult for us now to ignore that 1.725 million Blue Books were published by the legislature and mailed to voter households with this express statement prior to passage of Amendment 41 during the 2006 General Election.

While the language of Article XXIX as passed in the 2006 General Election may guide us today, it would be naïve to believe that either the public or the legislature will leave the amendment unchanged. This will happen despite the fact that Section 9, Article XXIX attempts to restrict the subsequent involvement of the legislature.

We specifically reject a series of cases entered by consent decree that conclude that lawful consideration is provided because a scholarship recipient either exchanges a life of physical labor (without such scholarship) or promises to perform the future obligation to maintain a high grade point averages in order to hold onto the scholarship. See, Boettcher Foundation v. Ritter, 2007 CV 1131 (Den. Dist. Ct.); Denver Foundation v. Ritter, 2007 CV 4466 (Den. Dist. Ct.); Daniels Fund v. Ritter, 2007 CV 1537 (Den.

Dist. Ct.). We simply conclude that the scholarship is the benefit. If a scholarship recipient truly wants a life of physical toil, then why would they apply for or accept a scholarship in the first place. Forbearance in this case would be equal in value to what you would get if you did not win the scholarship (i.e. “nothing”) versus the value of the scholarship. Comparing the small modicum of future performance such as maintaining a grade point average or maintaining a full semester of classes hardly equates with the gift of the scholarship.

We acknowledge that should there be an occasion where one meaning of a constitutional amendment is clear under its terms and another absurd, that the absurd reading should be avoided. Harwood v. Senate Majority Fund, LLC, 141 P.3d 962, 964 (Colo. App. 2006). However, neither is it proper to label a provision as “absurd” simply because we may disagree with the outcome. Our duty is to read and apply Article XXIX of the Constitution as written and approved by the voters.

We further believe that it is incumbent on the Independent Ethics Commission to apply Colorado law when interpreting Article XXIX. Our first charge will always be to provide the plain and commonly understood meaning of the amendment as applied by the electors when they adopted it. Zaner v. Brighton, 917 P.2d 280, 283 (Colo. 1996). While ethics codes from around the country may provide insight as to a particular meaning of a phrase or term, the Commission should refrain from searching through a smorgasbord of ethics provisions trying to find a “better” or “different” rule.

We believe that it is paramount to interpret Article XXIX as it was intended by the electors. Officers, elected officials and state and local employees from around the state will have to interpret the amendment on a daily basis as they perform their jobs. As a matter of fairness, they should have an ethics code that is plain, simple, and which does not change every time the Ethics Commission meets.

As we seek to determine fairness in the amendment, we cannot overlook the fact that the same level of fairness we seek to review is closely akin to that which may be required in “over breadth” and “vagueness” tests that may ultimately be placed before the courts of this state. See, LDS, Inc., 589 P.2d 490, 491 (Colo. 1979); Loonan v. Woodley, 882 P.2d 1380, 1389 (Colo. 1994); Board of Education of Jefferson County v. Wilder, 960 P.2d 965, 703 (Colo.1998). For the time being, we do not presume to pass judgment on the constitutionality of Article XXIX, but rather leave that to the courts. However, just because we do not issue a constitutional finding today, does not foreclose the possibility that the commission may do so in the future. See, Developmental Pathways v. Ritter, 178 P.3d 524, 532 (Colo. 2008).

Commissioners Smith and Hopper concur in Section IV (C) concerning Inheritances and Special Occasions.

While we agree with the conclusion of the Commission regarding inheritances and special occasions, we do not reach the conclusion using the same rationale. Furthermore, we recognize Section 3, Subsection 3(g) of Article XXIX as a major exception to the gift ban, so much so, that this exception swallows a major portion of the gift ban altogether.

First, the Commission must give effect to the intent of the electorate adopting the amendment by first applying the words of the amendment with their ordinary and popular meaning. Havens v. Board of County Commissioners, 924 P.2d 517, 522 (Colo. 1996); Davidson v. Sandstrom, 83 P.3d 648, 654 (Colo. 2004); Bruce v. City of Colorado Springs, 129 P.3d 988, 992 (Colo. 2006). There are three key phrases to Subsection 3 (g), including “relative,” “personal friend” and “special occasion”. None of these terms appear in any way to be constrained as terms of law, but rather as terms better defined by a dictionary or common meaning.

For instance, the term “relative” is not bound to blood relation or to a given degree of kinship. “Personal friend” would appear facially to require that it be a person rather than an entity, but like the term “relative” it must be judged from the point of view of the recipient.² Lastly, the term “special occasion” can only mean what the parties

² Amendment XXIX would appear to promote “friendship” among participants. It is indeed a rarity for the law to encourage “friendship”, but it certainly seems more likely that the amendment will encourage more friendships than it will discourage. However, grantors should stand forewarned that recipients have the final word as to whether the giver is family, friend or foe.

involved understand it to mean. The point is that these key terms make exception 3(g) highly subjective, relying on the parties involved for interpretation.

Exception 3(g) is so subjective that it is impossible to ascertain a circumstance where gifts to personal friends or family members, whether *inter vivos* or *causa mortis*, would not meet a test for a “special occasion” as between the parties. Likewise, it would appear equally a “special occasion” for any testamentary bequest, or intestate proceeding, where property is transferred from a relative or personal friend to a recipient. The Ethics Commission would be well advised to waste little time on such cases when elements of these highly subjective terms become apparent in a proceeding.

For all practical purposes, inheritance and transfers of property between friends and family are exempt under Subsection 3(g). The term “special occasion” potentially has no limit short of the imagination of the participants. The term is not limited to social occasions. The exception was made intentionally broad and should be respected.

Had the drafters intended to narrow the scope of exception 3 (g), they would have done so. By way of contrast, Subsection 4, Article XXIX, limits professional lobbyists to only giving gifts, things of value, meals, beverages or other items to their immediate family members that are otherwise regulated by the amendment.