

## **Amendment 41: When is a Gift a Thing of Value?**

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### **Introduction**

The Colorado electorate adopted Amendment 41 to the Colorado Constitution on November 7, 2006. It became effective on January 1, 2007.

This initiated measure added a new Article XXIX to the Colorado Constitution entitled "Ethics in Government" (the "Amendment"). In general, the Amendment bans public officials and employees from receiving gifts and other items of value, whether or not connected with their public duties. It establishes stringent controls on gifts, entertainment and other forms of activity engaged in by private organizations lobbying public officials. It also provides that a "thing of value" received by the spouse or dependent of the public official is also prohibited, unless equal value is given in return. Further, the Amendment creates as a penalty an amount double the amount of the gift or thing of value, which penalty must be paid to the jurisdiction. It also sets up a state commission to hear and decide upon complaints of violations of the Amendment by any state or local official.

The scope of this article is to:

- Describe the sections of the Amendment applicable to local government officials and employees
- Review implementing legislation adopted by the General Assembly
- Review decisions by the Independent Ethics Commission created by the Amendment
- Review case law decided under the Amendment
- Make some recommendations regarding how local governments, and in particular home rule municipalities, might react to the Amendment

### **Key Definitions**

- Gift or thing of value: not formally defined but described in Section 3(2) to include but not be limited to gifts, loans, rewards, promises or negotiations of future employment, favors or services, honoraria, travel, entertainment or special discounts.
- Government employee: means any employee, including independent contractors, of . . . any local government . . .
- Local government: restricted to a county or municipality

- Local government official: an elected or appointed official of the local government but not including a local government employee [covered under "government employee"].
- Person: Any individual, corporation, business trust, estate trust, limited liability company, partnership, labor organization, association, political party, committee, or other legal entity.

For ease of reference in this paper, we refer to "covered official" to include elected and appointed officials and employees.

The most important sections of the Amendment of interest to local governments are Section 2 (definitions), subsections (1) through (3) of Section 3 (gift ban), and Section 7 (application to local governments). The Amendment also governs the activities of professional lobbyists (subsection 4) and establishes an independent ethics commission (Section 5) with broad powers.

### **Section 3: Receiving Money and Gifts Prohibited**

Money: Section 3(1) prohibits covered officials from accepting or receiving any:

- money;
- forbearance" (not defined); or
- forgiveness of indebtedness.

Gifts: Section 3(2) broadens the prohibition by including those which the covered official shall not "solicit, accept or receive" either "directly or indirectly" through that person's spouse or dependent child.

The list of items prohibited under Section 3(2) is similarly broadened to include any "gift or other thing of value having either a fair market value or aggregate actual cost greater than \$50 in any calendar year," including but not limited to the list of items described under the definition of "gift or thing of value" above: gifts, loans, rewards, promises or negotiations of future employment, favors or services, honoraria, travel, entertainment or special discounts.

### **Reading the Prohibition Tea Leaves**

- First, and significantly, the gift ban contains as an exception that the covered official may receive the given money, forbearance, gift or thing of value if the giver of the same receives "lawful consideration of equal or greater value" in return.
- The prohibition is essentially a status crime, in that it is immaterial whether the gift or benefit is provided to obtain or influence official action by a covered official. The prohibition is simply on covered officials, as officials, receiving these items.

- The \$50 limitation in Section 3(2) (gift or thing of value) is measured by the fair market value or "aggregate actual cost" of gifts received by the covered official from a "person" in any calendar year: per year per donor per covered official or employee.
- The definition of "person" raises additional issues since the definition includes both corporations and natural persons. The question becomes how to interpret the \$50 limitation in the context of multiple natural persons representing a single corporation, each of which natural persons wishes to give a gift. The conservative answer is obvious: only receive \$50 from any representative of the corporation, then consider that you have reached. For group events to which a large number of covered officials are invited, it would seem that the total cost of the event can properly be divided by the number of covered officials to obtain a per-covered official number that must necessarily be less than \$50.

### **Exceptions**

Subsection 3(3) lists exceptions to the prohibitions in subsections (1) and (2):

- Campaign contributions, as defined by law (see Colorado Constitution Article XXVIII Section 2(5)).
- An unsolicited item of trivial value less than \$50, such as a pen, calendar, plant, book, notepad or other similar item.
- An unsolicited token or award in the form of a plaque, trophy, desk item, wall memento or similar item.
- Unsolicited informational material, publications, or subscriptions related to the recipient's performance of official duties.
- Admission to and the cost of food and beverages at a "reception, meal or meeting . . . where the recipient appears to speak or answer questions as a part of a scheduled program."
- "Reasonable expenses" paid by a nonprofit organization or a state or local government for attendance at a convention, fact-finding mission or trip or other meeting are exempt, but only if the covered official is scheduled to deliver a speech, presentation, participate on a panel, or represent that government, and in the event a nonprofit organization is the sponsor, that organization must receive less than 5% of its funding from for-profit entities.
- A gift or thing of value from a relative or "personal friend" on a "special occasion," neither of which terms are defined. The Independent Ethics Commission created by the Amendment has issued helpful interpretation of this exception. See below.

### **Section 4: Limitations on the Revolving Door**

This section imposes a two-year limitation on professional lobbying by state level elected officials following their leaving office. Permits, but not require local governments to enact their own restrictions.

## **Section 5: Independent Ethics Commission**

Section 5 creates a five-member unpaid ethics commission, one member of whom must be a local government official or employee. The Commission has the authority to hear complaints, issue findings, assess penalties and issue advisory opinions. The Commission's jurisdiction extends to doing these things "on ethics issues arising under [the Amendment] and under any other standards of conduct and reporting requirements as provided by law:" the statutory standards of conduct found at C.R.S. 24-18-101, et seq. the gifts and honorary reporting statute at 24-6-203, C.R.S. and the voting disclosure and abstention statute at 31-4-404 C.R.S.

As permitted by Section 9 of the Amendment, the Colorado General Assembly acted in 2007 to enact C.R.S. 24-18.5-101, a new article 18.5 in Title 24 entitled "Independent Ethics Commission." The statute makes provision for appointment of the members appointed by the House and Senate.

### **Complaints**

Any "person" (we assume the broad definition of person contained in Section 2) may file a complaint in writing to request the Commission to determine whether a covered official or employee failed to comply with the Amendment or the "other standards of conduct or reporting requirements as provided by law," within the preceding 12 months.

Commission may dismiss "frivolous" complaints without hearing and assess penalties for violations found after a hearing. C.R.S. 24-18.5-101(5)(a) narrows the scope of the Amendment's reach in two significant ways:

- The Commission is required to dismiss as frivolous any complaint that fails to allege that the covered official or employee has received any gift or other thing of value for "private gain or personal financial gain."
- Private gain" or "personal financial gain" is defined by the statute as follows:  
[a]ny money, forbearance, forgiveness of indebtedness, gift or other thing of value given or offered by a person seeking to influence an official act that is performed in the course and scope of the public duties of a public officer, member of the general assembly, local government official or government employee.

The effect of these two portions of the statute is significant. They change the nature of the gift ban in Section 3 of the Amendment from a "status" crime, whereby covered officials are in violation simply by receiving a gift or thing of value, whether or not related to their public position or activities, and replaces it with a standard restricting the prohibition to such items only when given to influence an official act within the scope of duties of the covered official.

The statute recognizes that this change carries with it the risk of being declared unconstitutional and in conflict with Amendment Section 8 (conflicting provisions declared inapplicable) and Section 9 (legislation to facilitate article "but in no way shall

such legislation limit or restrict the provisions of this article") of Amendment 41, declaring, at Section 24-18.5-101(5)(c), that subsection 5 is repealed if the Colorado Supreme Court holds that the standard created by the Legislature is inconsistent with the Amendment.

### **Advisory Opinions and Letter Rulings**

The Amendment and statute at C.R.S. 24-18.5-101(3)(b) authorize the Commission to issue, upon request by covered officials, advisory opinions on whether given conduct would constitute a violation of the Amendment or any of the standards of conduct or reporting requirements within the Commission's jurisdiction as granted by the Amendment. The statute at C.R.S. 24-18.5-101(3)(b) requires such opinions to be issued not more than 20 business days after the request is made.

The statute also obliges the Commission to issue "letter rulings" upon request by any other person concerning whether potential contact conduct of the person making the request satisfies the requirements of the Amendment. In general, letter rulings would apply to lobbyists or other potential contributors wishing to determine whether their contribution would violate the Amendment.

To date, the Commission has issued 14 advisory opinions, six letter rulings, and eight "position statements," which last are not mentioned in either the Amendment or the enabling legislation, but which appear to function substantially the same as an advisory opinion or letter ruling.

The Commission has also promulgated detailed rules of procedure governing its activities, requests for advisory opinions and letter rulings, the filing of complaints, and conduct of hearings.

The Commission has used its self-assumed ability to issue position statements to considerable effect, dealing with issues which have been raised in public discussion and in *Developmental Pathways v. Ritter*, but which have not been brought to the Commission in the form of a complaint or request for an advisory opinion or letter ruling. The Commission's website contains a listing of and the full text of all these opinions, letters, and statements, at [www.Colorado.gov/ethicscommission](http://www.Colorado.gov/ethicscommission).

### **Position Statement 08-01**

- **Scholarships**: not considered a direct or indirect benefit to the public employee or official.
- **Honoraria**: Both employees and officials generally may accept honoraria for speaking before business or civic groups or writing publications. Honoraria of more than \$50 are permissible provided that the speech or publication is not part of the covered officials duties, public resources or government time is not used in its preparation, the amount of the honoraria is reasonably related to the services being performed and neither the sponsor of the speech nor the source of the

honoraria is a person or entity with whom the covered official has had or expects to have dealings in his or her official capacity.

- Insurance proceeds: exempt because there is usually lawful consideration and no breach of the public trust where, for example a public official or employee is a beneficiary of a parent or spouse's life insurance policy.
- Prizes: permissible so long as the competition was fair and open to everyone similarly situated and not given based upon the covered official's governmental status and not to influence a particular official decision.
- Raffles, lotteries and silent auctions: considered not a violation of the public trust and permissible; lawful consideration paid and in the cases where not, so long as the public employee or official has an equal opportunity to win as other entrants, participation is permissible.
- Inheritances: based upon the close personal relationship of the people involved, rather than the public status of the recipient, no violation of the public trust.
- Special occasions: "Should not be restricted to birthdays and anniversaries and holidays nor should it necessarily mean events that are rare or unusual." Things of value and gifts given by relatives or personal friends on special occasions are permissible provided that: (1) it is a family or personal relationship rather than the governmental position that is the controlling factor; and (2) would not result in or create the appearance of using the office for personal benefit or favors for performing official duties.

**Travel**: While expressly included on the list of prohibited "things of value" in the Amendment, the Commission's Position Statement 08-02 states that acceptance of travel-related expenses may be considered as a gift to the state or local government rather than to the covered official and therefore permissible when the travel is: (1) for a legitimate government purpose; (2) appropriate to that purpose [fly coach]; (3) no longer than reasonably necessary to accomplish its business purpose; (4) the covered official was, is and will not be in a position to take direct "official action" (see C.R.S. 24-18-102(7) with respect to the donor; and (5) the covered official verifies compliance with conditions above.

**Gifts from lobbyists**: Position Statement 09-01 concerns gifts from lobbyists and organizations represented by lobbyists. The Amendment imposes an absolute prohibition on gift giving by professional lobbyists. See Section 3(4). Position Statement 09-01 draws a distinction between professional lobbyists, subject to the absolute prohibition, and organizations or groups that might be represented by professional lobbyists or whose industry may be represented by a professional lobbyist. In these latter situations, the Commission holds that the \$50 gift threshold and its relevant exceptions as described above apply.

**Acceptance of a prize by government employees**: Advisory Opinion 09-07 holds that it is not a violation for government employees to accept a cash prizes from professional organizations in their fields of employment, assuming that the prize is

available to all individuals similarly situated. The Commission relied on its Position Statement 08-01 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.

**Definition of “person” - Position Statement 09-04:** The Commission holds that a government agency is a “person.” A public official or employee therefore may not accept gifts valued in excess of \$50 from governmental agencies or institutions, unless the gift falls under another specified exception.

**Luncheons - Letter Ruling 09-02:** Unless appearing as a speaker, panelist or representing the local government, the \$50 prohibition applies to luncheons. The Commission “believes that there is a burden of inquiry placed upon each government official and employee to ascertain the value of items being offered to them as gifts . . . This is especially applicable in the scenario presented here, where the value of a meal may not be readily apparent.” Note, this letter ruling does not appear to recognize the exception in Section 3 subsection (3)(f) in which the official or employee represents the state or local government. It would seem that such a luncheon would be permissible in the context of attendance at a convention, fact-finding mission, or trip, if sponsored by a nonprofit organization.

### **Section 6: Penalties**

Basic penalty for any covered official or employee is to pay to the state or local jurisdiction, as appropriate, “double the financial equivalent of any benefits obtained by such [illegal] actions.” Extends to persons or entities that “induce” a breach of the public trust, clearly concerning lobbyists.

### **Section 7: County and Municipal Authority**

This Section allows Counties and municipalities may adopt local provisions more stringent than those contained in the Amendment. The entire Amendment is not applicable to home rule counties or municipalities “that have adopted charters, ordinances or resolutions that address the matters covered by this Article.” The key term in this sentence is “covered.” The proper and conservative advice to a home rule municipality or county is to adopt a local ordinance or charter provision that touches upon all of the subjects contained in the Amendment, and that expressly declares the intention of the home rule municipality to fully occupy the field. This has been done by many Colorado municipalities already.

### **Developmental Pathways v. Ritter, 178 P.3d 524 (Colo.2008)**

After the passage of the Amendment, but prior to the appointment of all five members of the Independent Ethics Commission a combination of plaintiffs brought suit against the Governor, challenging the gift bans contained in the Amendment as being overbroad and vague and in violation of their first amendment rights. The plaintiffs included a lobbyist, a legislator, a county commissioner, a university professor, an appointed board

member for a statutory city, nonprofit organizations and government employees and their families.

The Denver district court issued a preliminary injunction finding that the gift bans in the Amendment impermissibly chilled the plaintiffs' first amendment rights. Governor appealed, and the Colorado Supreme Court held that because the injunction was issued before the Independent Ethics Commission came into existence and before it had the authority to act in furtherance of the Amendment, the plaintiffs failed to present a ripe as-applied constitutional challenge. The Supreme Court reversed the district court's order on that ground alone, specifically refraining from considering the merits of the plaintiffs' constitutional claims.

Nevertheless, the Supreme Court opinion is significant for a number of points.

First, the Governor argued that the penalty provision of Section 6 which states that a covered official "who breaches the public trust for private gain" is subject to penalty, essentially modified the gift ban provisions of Section 3 by relating them to gifts intended to influence the public official or employee's official actions, thereby narrowing their scope. The Governor also argued that the passage of C.R.S. 24-18.5-101(5) which expressly links the gift ban to attempts to influence the covered official's official actions, similarly cured any constitutional over-breadth problems. Finally, the Governor argued that the Amendment was not self-executing and would not be in effect until the Commission was formed and adopted rules governing the process of hearing complaints and assessing penalties.

The Supreme Court held that the Amendment is self-executing and does not require any further action by the General Assembly to be effective. Nevertheless, the Court also held that because the Commission had not yet been formed there had not yet been an actual application or at least a reasonable possibility or threat of enforcement, and therefore the plaintiffs had failed to present a ripe as-applied constitutional challenge. It is difficult to understand how the court could that the Amendment is self-executing and, over a year after the supposedly self-executing Amendment became effective, could also hold that the existence of the Independent Ethics Commission is necessary to present an as-applied challenge. This in light of the fact that individuals and organizations had altered their behavior already based upon their understanding that the Amendment was self-executing and that they would be subject to penalty, by someone, for failing to comply with its limitations.

### **Recommendations**

1. As a home rule municipality, act under Section 7 of the Amendment to address all the "matters covered," such as to displace the Amendment entirely.
2. Grant yourself exclusive authority to enforce your own ethics rules, unless you are comfortable with the Independent Ethics Commission conducting an investigation of a complaint filed by a resident or other "person." Consider



shortening the period for complaints to much less than one year following the act complained of.

3. As a statutory municipality, ask for an advisory opinion or letter ruling under C.R.S. 24-18.5-101(4)(b)(I) to obtain the Commission's blessing of your local ordinance.

### **Decision Tree for Amendment Compliance**

1. Is the official covered by the Amendment an elected / appointed employee of state or local government?
2. If so, is the donation a "gift or thing of value"?
3. If so, do any of the following apply:
  - equal value given in return
  - under \$50 in value
  - given by relative, personal friend on special occasion
  - part of normal compensation
4. If not, do any of the following apply:
  - other item of trivial value
  - campaign contribution
  - unsolicited token or award (plaque)
5. If not, and event is a reception, meal or meeting:
  - Is official scheduled to speak?
  - Is official scheduled to answer questions?
6. If not, and event is a convention, fact finding mission or trip and sponsoring organization is a nonprofit (as defined) or state or local government:
  - Is official delivering a speech?
  - Is official participating on a panel?
  - Is official representing the state or local government?
7. If none of the above, was gift to influence an "official action"?
8. If official is an elected, appointed or employee of home rule jurisdiction, does local code allow?