

State of Colorado



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Advisory Opinion No. 09-02 (ALJ Bar Membership)

SUMMARY: It would not be a violation of Colorado Constitution Art. XXIX for an administrative law judge to accept free membership in the Colorado Bar Association from his or her employer. It would, however, be a violation to accept free membership in the Denver Bar Association from the Association.

I. BACKGROUND

The Independent Ethics Commission (“IEC” or “Commission”) has received a request for advisory opinion, asking whether an administrative law judge (“ALJ”) employed by the Office of Administrative Courts (“OAC”) may accept free membership in the Denver Bar Association. The Commission has learned that OAC pays administrative law judges’ membership dues in the Colorado Bar Association for the purpose of, according to OAC, providing the judges with Casemaker, a legal research tool. Because the Colorado Bar Association requires its members to also be members of a local bar association, OAC enrolls its ALJs as members of the Denver Bar Association. The Denver Bar Association waives the membership fee for all judges, including ALJs, it has stated, to encourage participation by the judiciary in its programs.

II. JURISDICTION

The IEC finds that administrative law judges employed in the Office of Administrative Courts are “government employees” subject to the jurisdiction of the Commission. CO Const. Art. XXIX (2)(1).

III. APPLICABLE LAW AND PRECEDENT

Section 3 of Article XXIX (Gift ban) 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, 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:

* * *

(h) A component of the compensation paid or other incentive given to the recipient in the normal course of employment.

In Position Statement 08-01 (Gifts), as in all subsequent position statements and opinions rendered by this body, the Commission interpreted Article XXIX in a manner that preserves what it believes was the intent of the electorate - "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 also referenced Section 6, which provides that those who breach the public trust for private gain or induce such breach shall be liable for monetary penalties.

In Position Statement 08-02 (Travel), the Commission recognized that travel that is not expressly exempted from Sec. 3 may nonetheless be permissible in certain circumstances as a gift to the State or local government, rather than to the public official or employee, when certain specified conditions are met.

In Position Statement 08-03 (Special Discounts), the Commission stated its belief that "government employees and officials may generally accept certain opportunities

and benefits that are available to ... a subset of employees and officials, so long as the opportunity is uniformly offered and the group is large enough that it is unlikely that the discount would in any way influence the recipients in the performance of their official duties.”

IV. DISCUSSION

The ALJs in OAC are receiving free membership in the Colorado Bar Association, which is valued at more than \$50. They are receiving that free membership from OAC, their government employer. Because all ALJs in that agency are offered the free membership and because OAC’s stated purpose in giving that membership is to provide a well-regarded legal research tool to its employees, the Commission believes that OAC’s payment of membership dues in the Colorado Bar Association for all of its ALJs is part of each ALJ’s compensation package in the normal course of employment. Therefore, the gift prohibitions do not apply because the paid bar membership is “a component of the compensation paid or other incentive given to the recipient in the normal course of employment” under exception “h”.

The free membership in the Denver Bar Association, however, requires a different analysis. In this instance, the Denver Bar Association is waiving its membership dues for all judges, including administrative law judges. It is unknown whether or not OAC would pay for the individual Denver Bar Association membership dues in the event the dues were not waived. Therefore, exception “h” is not readily applicable here.

Under Article XXIX Sec. 3(1), government officials and employees are barred from accepting or receiving any forgiveness of indebtedness, without giving lawful consideration of equal or greater value in return, unless it falls under a listed exception. Sec. 3(2) prohibits government officials and employees from soliciting, accepting or receiving any gift or other thing of value worth more than \$50 in any calendar year, from a person¹, without that person receiving lawful consideration of equal or greater value in

¹ The constitutional definition of “person” includes entities and associations.

return, unless it falls under a listed exception. Free bar membership can be viewed as a “forgiveness of indebtedness,” or alternatively, as a “gift”.

As none of the exceptions listed in Sec. 3(3) apply here, the next issue to be determined is whether or not the ALJs are giving “lawful consideration of equal or greater value in return.” This would need to be examined on an individual basis, taking into account whether a particular ALJ were leading continuing legal education (CLEs), participating on panels, and were otherwise involved in bar association activities in furtherance of the bar association’s stated goal to encourage participation by the judiciary in its programs. The Commission believes that this type of active volunteer involvement could constitute lawful consideration depending upon the degree of participation. However, in the absence of this active involvement, the Commission finds no lawful consideration of equal or greater value being given to the Denver Bar Association.

The Commission took note of its Position Statement 08-02 (Travel), in which travel otherwise prohibited by Article XXIX might nonetheless be permissible in certain circumstances as a gift to the State or local government, rather than to the particular public official or employee, to see whether this, too, could be considered a gift to the State. Here, however, the Commission determined that this is a gift to the individual ALJ, rather than a gift to the State, because 1) it is unknown whether OAC would decide to pay the membership in the event it were not waived, or if it would pass the expense on to the individual ALJs; and 2) the Commission is unaware of any other local bar associations in Colorado that waive payment of bar dues for ALJs.

The Commission also examined its Position Statement 08-03 (Special Discounts), which allowed government employees and officials to accept benefits and opportunities available to the general public, or a large class of government employees or officials. The Commission believes it inappropriate to determine whether a class of government employees may accept a benefit based solely upon the number of employees in that class. See Position Statement 08-03: “The Commission, however, also recognizes that the size of the group may be irrelevant in some situations...” Rather, such a determination should be made based upon several factors including

number, degree of discretion inherent in the official position, and the degree to which employee decisions can benefit or harm the provider of the discount. In this instance, the Commission was presented with no information on the degree to which ALJ decisions can affect the DBA. Accordingly, the Commission has decided the issue on the previously stated grounds.

V. CONCLUSION

The ALJs' acceptance of free membership in the Colorado Bar Association is permissible under Article XXIX of the Colorado Constitution because it is "a component of the compensation paid or other incentive given to the recipient in the normal course of employment" under exception "h". However, it would be a violation of Colorado Constitution Article XXIX for an administrative law judge to accept free membership in the Denver Bar Association from the Association, absent active volunteer participation in the Association's activities and programs sufficient to constitute lawful consideration.

The Commission also notes that ALJs, as attorneys and judges, are subject to other codes of conduct in addition to CO Const. Art. XXIX. The Commission recommends that the ALJs consult those other applicable codes and seek interpretive guidance from the appropriate governing entity or entities.

The Independent Ethics Commission

Nancy E. Friedman, Chairperson

Matt Smith, Vice Chairperson

Sally H. Hopper, Commissioner

Larry R. Lasha, Commissioner

Roy Wood, Commissioner

Dated: April 6, 2009