



Matt Smith, *Chairperson*
Rosemary Marshall, *Vice-Chairperson*
Dan Grossman, *Commissioner*
Sally H. Hopper, *Commissioner*
Bill Pinkham, *Commissioner*

Jane T. Feldman, *Executive Director*

INDEPENDENT ETHICS COMMISSION

1300 Broadway, 12th floor, Denver, CO 80203

Ph.: 720.625.5697

Fax: 720.625.5696

Email: jane.feldman@state.co.us

www.colorado.gov/ethicscommission

Advisory Opinion 13-01

(Solicitations and Acceptance of Funds for Defense in Criminal Actions)

SUMMARY: It would not be a violation of Colorado Constitution Art. XXIX for a public officer to establish a criminal legal defense fund and to allow an administrator to solicit funds to defray costs for defending a criminal proceeding against the officer. Neither the officer nor the administrator of the fund may solicit funds from professional lobbyists or others doing business with the agency. Contributions to this fund, including the name of donors, the relationship of the donor to the officer, and the amounts of the donations and expenditures must be publicly disclosed.

I. BACKGROUND

The Deputy Secretary of State has submitted a request, on behalf of the Colorado Department of State, to the Independent Ethics Commission (“IEC” or “Commission”) asking whether it is permissible to establish a trust fund, and solicit donations for that fund, to offset expenses the Secretary of State has incurred and may

continue to incur in a pending criminal investigation.¹ Although the written request is not limited to funds for defense of a criminal action, the requestor stated at the IEC meeting of January 7, 2013 that the fund would be used exclusively for criminal defense purposes, acknowledging that the State does provide funds for representation in administrative and civil cases. (The Deputy Secretary of State represented that she had been informed by a Deputy Attorney General that “legal services funds” made available to the Department could not be used for criminal investigations or defense. Further, the Deputy Secretary of State has confirmed that campaign accounts may not be used for the defense of elected officials.) The request also leaves up to the Commission whether the names and amounts of donation should be known to the Secretary of State and the public, or should be confidential.

II. JURISDICTION

The IEC finds that the Secretary of State is a public officer and is subject to the jurisdiction of the Commission. See CO Const. Art. XXIX, sec. 2(6) and sec. 3.

III. APPLICABLE LAW

Section 3 of Article XXIX (Gift ban) reads in relevant part:

(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,

¹The Commission notes that it is the person of the Secretary of State, and not the Department of State who is the subject of a potential criminal investigation. The Commission therefore views this as a request by the Secretary of State as an individual. The IEC further notes that some of the issues raised in this opinion may not apply to public officials and employees who are not elected officials.

gifts, loans, rewards, promises or negotiations for 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.

(4) Notwithstanding any provisions of this section to the contrary, and excepting campaign contributions as defined by law, no professional lobbyist, personally or on behalf of any other person or entity, shall knowingly offer, give, or arrange to give, to any public officer, member of the general assembly, local government official, or government employee, or to a member of such person's immediate family, any gift or thing of value, of any kind or nature, nor knowingly pay for any meal, beverage, or other item to be consumed by such public officer, member of the general assembly, local government official, or government employee, whether or not such gift or meal, beverage or other item to be consumed is offered, given or paid for in the course of such lobbyist's business or in connection with a personal or social event; provided, however, that a professional lobbyist shall not be prohibited from offering or giving to a public officer, member of the general assembly, local government official, or government employee who is a member of his or her immediate family any such gift, thing of value, meal, beverage, or other item.

IV. DISCUSSION

In order to answer this question, the Commission must decide first if the funds are a gift under Article XXIX, and if so, whether the gift falls under an enumerated exception.

a. Donations to a Criminal Legal Defense Fund are gifts to a covered individual under Article XXIX

Article XXIX, section 3(2) lists numerous examples of gifts which are prohibited if not supported by consideration. Included in that list is a “service”. The IEC maintains that legal representation is a service, receipt of which without consideration of equal or greater value is therefore a prohibited gift. The Commission is not persuaded that because no money will be made available directly to the Secretary, this would not be a gift to a covered individual. The Secretary is the beneficiary, in that he would receive legal services, perhaps valued in the tens of thousands of dollars, without providing consideration.

Neither is the Commission persuaded by the letter submitted by the Attorney General stating that a contribution is not meant to “influence an official act.” That letter cites the statute and provides no additional analysis. The Commission believes that any time an elected official is the recipient of funds, donors could be motivated by a variety of factors, including: support for the official and his or her policies; support for a political party; support for the official as a personal friend; a belief that public officials should have the necessary funds to defend themselves; or an attempt to influence a public official in performance of duties.

Advisory Opinion 10-18 (Organization of Funding of a Gubernatorial Transition), cited by the requestor is not relevant to this particular inquiry. In that opinion, the Commission was presented with the question of whether a nonprofit organization created for a special purpose could solicit funds to aid in a gubernatorial transition. The

Commission determined that the Governor-elect was not a covered individual prior to his inauguration and thus not under the IEC's jurisdiction. The IEC believed moreover, that he was not the primary beneficiary of the funds, and that the State of Colorado had an interest in a smooth transition and the hiring of appropriate cabinet members. Furthermore, the Commission was assured that no covered individuals would solicit funds.

Although the Commission is bound by the precise language of Article XXIX, it reviewed the laws of other states. Whether a public official may solicit funds for legal defense varies from jurisdiction. Some states permit the use of campaign funds for legal defense (*see, e.g.* Texas Ethics Opinions 433 and 334). Other states have specific statutes addressing the question (*see, e.g.* 19.45(2)(3) Wisconsin Statutes, stating that legal defense funds are not permissible except in election law cases, in which case campaign funds may be used. Connecticut codified a previously issued Advisory Opinion with significant differences, Conn.Gen. Stat.Sec. 1-86d.². The IEC has reviewed advisory opinions from three additional states regarding donations to legal defense funds. In each of these opinions, the respective Commissions found that donations are gifts under their relevant statutes, but permitted donations up to a statutory level and/or required the donations to be recorded on disclosure forms. *See, Ohio Ethics Opinion 2006-03, Florida Ethics Commission CEO 98-8, and Maryland Ethics Commission Opinion 93-5.* Although the statutes involved in these cases differ from Article XXIX, the Commission agrees that donations to a legal defense fund would

² Advisory Opinion 2004-4 authorized then Governor John Rowland to establish a legal defense fund as a blind trust. Three months later a statute was enacted specifically authorizing the solicitation of legal defense funds, but mandating a public reporting system, and reducing the permissible donation amount from \$2500 to \$1000.

be a gift under section 3(2).

b. Donations to the Criminal Legal Defense Fund Qualify under the “Special Occasion” exception with Restrictions³

The Requestor maintains, and the majority of the Commission agrees, that donations to this fund would qualify under the “special occasion” exception contained in Article XXIX section 3(3)(g). The Commission previously noted the broad language of the special occasion exemption in both the majority and minority concurring positions contained in Position Statement 08-01.

While the commencement of criminal action may not fall under a generally accepted definition of “happy occasion,” a majority accepts a broader understanding that the commencement of a criminal proceeding meets the “special occasion” exception set forth in Section 3(3)(g). Presumably, the commencement of a criminal action will be rare given the fact that public officials sworn to uphold the law will conduct thorough investigations of covered individuals also sworn to uphold the law before such actions might be filed. Notwithstanding the unlikely probability of such suits, the potential exists that covered individuals may be sued criminally. This understanding is especially important in the context of a society where individuals, including covered individuals, are presumed to be innocent until proved guilty.

The question before the Commission is whether, and if allowable, how covered individuals may collect funds to mount a legal defense to a criminal matter. As

³ The request states that defense funds could fall under Article XXIX, section 3(3)(h), which excludes from the definition of a gift, “a component of the compensation paid or other incentive given to the recipient in the normal course of employment.” The Commission disagrees that defense funds are within the “normal course of employment”, and Colorado Constitution article V, section 28 specifically proscribes extra compensation to public officers without consideration.

previously noted, a covered individual is not entitled to use public funds or campaign accounts to establish a criminal defense in Colorado. Nothing in Amendment XXIX or the history of its adoption suggests that covered individuals would be deprived of their right to legal representation or to be a party to an action. To suggest that the only alternatives available for a public official to be represented in a criminal proceeding are 1) to either consume their personal resources, if available, or 2) to resign their office to gain outside assistance for their defense is beyond the language or purpose of Amendment XXIX.

The Commission appreciates that it is easier to accept the birth of a child than the birth of a lawsuit when describing “special occasions.” However, the Commission reaffirms that it is the “relevant circumstances” and “the family or personal relationship” that defines the special occasion. Position Statement 08-01, page 10. The Commission finds that it is both reasonable and logical that a covered individual would turn to friends and family to raise funds to mount a criminal defense, as would individuals not covered by the amendment. “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.” Position Statement 08-01, page 10.

As the Commission has previously stated, the special occasion exception applies only if:

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. (Emphasis added).

See Advisory Opinion 11-08 (Acceptance of Funds for a Blind Trust) at page 4 and Position Statement 08-01 at page 10. Advisory Opinion 11-08 presented the Commission with a unique situation. The request came, not from the individual involved, or his employee, but rather from the Office of Legislative Legal Services asking whether friends and colleagues of a member of the General Assembly could establish a blind trust to help pay medical and other expenses for the member and his terminally ill wife. The member involved was not aware of the request until after the opinion was issued. The Commission did not know the identity of the member. The request came to the Commission after the *sine die* of the General Assembly, so the opportunity to exert improper influence was minimized. In the present situation the request is made by the person seeking the opinion. The Secretary of State has broad jurisdiction relating to lobbyists, nonprofits and charities, elections, campaign finance, bingo and raffles, business organizations, notaries public, and many other areas. Thus, as noted above, there could be a variety of reasons for a donation to his legal defense fund, only one of which, a relative or personal friendship, would be permissible.

Although the Commission generally has interpreted the special occasion exception broadly, rejecting limits on the definitions of friends and relatives or a list of permissible occasions, the IEC believes that a more stringent adherence to the special occasion criteria is warranted. Therefore, to avoid questions of improper influence,

donations may only be accepted from persons who as individuals are either related to the Secretary by blood or marriage, or are personal friends. These persons must be able to show the nature of the family or personal friendship as well as evidence a donation from this person does not cause an appearance of impropriety.

In addition, professional lobbyists, because they are prohibited from giving any gift to a public official or employee, unless they are a member of the official's immediate family, clearly are barred from making a contribution, unless they are members of the Secretary's immediate family. See Article XXIX, section 3(3)(4).

If all these limitations and restrictions are met, then the special occasion exception applies, and personal friends and relatives of the Secretary in excess of \$53 would be permissible. Someone not a relative or personal friend could only give up to \$53 in a calendar year. See also, 24-18-103, 104, C.R.S.

c. The Names and Amounts of Donations should be public.

Because of the concern that persons with business before the Secretary of State may try to influence official actions, the Commission finds that unlike the situation presented in Advisory Opinion 11-08, the names and donation amounts should be publicly available. The request suggests that public disclosure could be achieved by use of disclosure of contributors, their relationship to the Secretary; , contributions and expenditures could be maintained and reported quarterly under C.R.S. Section 24-6-203 for gifts, honoraria and other benefits. The IEC acknowledges that this existing reporting structure might be suitable, but expresses concern that violations for reporting are directly

under the supervision of the Secretary.⁴ All funds should be collected in a single account maintained by the administrator for providing the criminal defense of the Secretary of State.

The IEC believes that all donations should flow through an independent administrator who is not an employee or otherwise affiliated with the Secretary. Each donor relying on the special occasion exception should specify in an affidavit the nature of his or her family or friendship relationship with the Secretary of State, and that he or she has no pending or foreseen business with the Office of the Secretary of State. The amounts collected by the administrator may be more than or less than the costs of the defense of the criminal action. At the conclusion of such criminal defense efforts, including motions and appeal rights, the administrator should return any unused funds in the criminal defense account to the contributors on a *pro rata* basis or donate any unclaimed or unused amounts to charities established for legal services.

d. Applicability of section 24-6-203(3.5)(a), C.R.S.

The Commission was asked to consider whether section 24-6-203(3.5)(a), C.R.S., of the Colorado Sunshine Act applies to prohibit the establishment of a criminal legal defense fund in this case. The special occasion exemption in Article XXIX, section 3(3)(g) of the Colorado Constitution, as interpreted by the IEC, preempts the provisions of section 203(3.5)(a) of the Colorado Sunshine Act.

e. Definition of Imminent Criminal action.

The Commission limits the use of funds obtained under exemption 3(g) for this Advisory Opinion for the sole purpose of “criminal legal defense funds.” The

⁴ The Deputy Secretary of State has represented to the IEC that the Secretary does not have access to manipulate any data in the TRACER system. This advisory opinion is contingent on the Secretary’s continuing inability to manipulate these data.

Commission further determines that no funds may be solicited or received until and unless the covered individual has been formally charged pursuant to C.R.S. 16-5-101, or comparable federal statutes.

IV. CONCLUSION

It would not be a violation of Colorado Constitution Art. XXIX for the Secretary of State to establish a legal defense fund subject to the conditions set forth in this opinion. The Commission cautions public officials and employees that this opinion is based on the specific facts presented in this request, and that different facts could produce a different result. The IEC therefore encourages individuals with particular questions to request more fact-specific advice through requests for advisory opinions and letter rulings.

The Independent Ethics Commission

Matt Smith, *Chair*
Rosemary Marshall, *Vice Chairperson* (dissenting)
Dan Grossman, *Commissioner* (dissenting)
Sally H. Hopper, *Commissioner*
Bill Pinkham, *Commissioner*

Dated: May 6, 2013

Commissioner Grossman *dissents* in the Advisory Opinion. Commissioner Marshall joins in this dissent.

It is beyond reasonable dispute that contributions to a legal defense fund for a public official will inure to the personal benefit of the public official. Therefore, the gift ban of Article XXIX precludes such contributions in the following circumstances:

- Contributions in any amount from a registered lobbyist;
- Contributions from any individual in excess of \$53 in a calendar year

The Secretary of State's contention that contributions to his legal defense fund should be excepted from the gift ban because being charged with a crime constitutes a special occasion is far-fetched.

As the Commission stated in Position Statement 12-01, exceptions to the gift ban contained in the constitution should be narrowly construed:

Because Article XXIX is a remedial provision intended to ensure propriety and to preserve public confidence in public officers, members of the General Assembly, local government officials and government employees, its prohibitions must be interpreted broadly and its exceptions must be interpreted narrowly.

Position Statement 12-01, *citing Quaglia v. State Ethics Commission*, 986 A.2d 974, 979 (Pa. Cmwlth. 2010).

Section 3(3)(g) provides an exception to the prohibition for gifts or things of value “[g]iven 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 Article XXIX, and it is doubtful that the people of Colorado, in adopting Article XXIX, intended that term to include criminal indictments.

Moreover, as the majority opinion acknowledges, the Commission has previously ruled that the special occasion exception should be “construed so as not to preclude public employees and officials from enjoying social situations available to other citizens.” Position Statement 08-01, *quoted at p.7, supra*. It is absurd to characterize a criminal indictment as such a social occasion at which the exception to the gift ban is targeted.

The equitable argument posed by the Secretary in support of his request is that public service uniquely exposes high-profile officials to the risk of politically-motivated, harassing litigation and that a legal defense fund would help protect the personal assets of such officials from frivolous claims.ⁱ

However, counsel for the Secretary conceded upon further examination that his request is limited to a legal defense fund to assist in compensating him for defense of a potential criminal action. Criminal actions are initiated by public prosecutors based upon law, evidence and the pursuit of justice. Whatever vagaries of motivations that may be present in world of civil litigation certainly do not apply in the context of a criminal prosecution.

Should the Secretary find himself charged with the commission of a crime, the costs of his defense are appropriately his to bear. He should not be permitted to use his status as a public official to raise money for his defense in violation of the clear language of Article XXIX.

ⁱ It should be noted that civil litigants may avail themselves of the provisions of C.R.C.P. 11 if they find themselves defending frivolous claims and seek reimbursement for legal expenses incurred in such defense.