



Elizabeth Espinosa Krupa, *Chair*
William Leone, *Vice-Chair*
Selina Baschiera, *Commissioner*
Debra Johnson, *Commissioner*
Yeulin Willett, *Commissioner*

Independent Ethics Commission
1300 Broadway, Suite 240
Denver CO 80203
Phone: (720) 625-5697
www.colorado.gov/iec

Dino Ioannides, *Executive Director*

Advisory Opinion 19-05 (Negotiations of Future Employment)

Summary: It would constitute a violation of Article XXIX for the Requester to seek out-of-state contracts and/or employment under the facts and circumstances of the request.

I. Background

A state employee (“Requester”) of the Colorado Department of Revenue, in the Marijuana Enforcement Division (“MED”), submitted a request for an advisory opinion concerning the propriety of obtaining future employment and/or contract opportunities outside Colorado while continuing to work for MED. Requester lists three types of proposed opportunities for which he seeks approval, all of which are contemplated to be engaged in outside of Requester’s scheduled work hours with MED:

- (1) Webinar speaking engagements, in which Requester will provide services that generally address financial risks in the marijuana industry;
- (2) Risk assessments for financial institutions, in which Requester will provide advice to financial institutions about “how to conduct customer due diligence and enhanced due diligence on cannabis companies” that the financial institutions are considering as clients; and
- (3) Accounting/bookkeeping services for businesses outside of Colorado, some of which may be in the cannabis industry.

MED indicates that Requester’s assignment is as a compliance investigator in the Financial Investigation Unit of MED’s Licensing Investigations Section. The Section is responsible for conducting due diligence investigations of new and renewal applicants for business licenses in the commercial marijuana market in Colorado. Requester’s assigned duties include evaluating the financing and business structure of applicants and business owners. The evaluation involves an analysis of the capital structure of a business entity to identify all parties that may have a claim to the business’ assets, including those entities whose ownership may not have been declared to the Division. Requester also supports other MED units in the financial aspects of other investigations, including financial statements analysis and reviews, accounting systems reviews, general ledger analysis and reviews, and documentary reviews of financial instruments, placement memoranda, and other legal documents. Requester also plans and conducts

investigations of Colorado’s marijuana regulatory and criminal laws and assists with and prepares written background and investigative reports.

MED describes Requester’s regulatory decision-making role as follows: “[Requester] plays a critical role in identifying areas of inquiry on assigned applications, renewals and other cases. Although he does not make a final determination on licensing eligibility, his analysis and summary, along with his recommendations, play an important role in the ultimate approval of applications assigned to him.”

II. Jurisdiction

The IEC has jurisdiction over government employees, including employees of the state executive branch. Colo. Const. art. XXIX § 2(1). Requester is a government employee within the meaning of Article XXIX.

The IEC has jurisdiction over “ethical standards of conduct relating to activities that could allow individuals to improperly benefit financially from their public employment,” including certain state statutes setting forth ethical standards. *Gessler v. Smith*, 419 P.3d 964, 969 (Colo. 2018); Colo. Const. art. XXIX, § 5(1).

III. Applicable Law

Section 5(5) of Article XXIX of the Colorado Constitution provides:

Any public officer, member of the general assembly, local government official, or government employee may submit a written request to the independent ethics commission for an advisory opinion on whether any conduct by that person would constitute a violation of this article, or any other standards of conduct or reporting requirements as provided by law...

Section 24-18-103, C.R.S., provides:

(1) 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. A public officer, member of the general assembly, local government official, or employee shall carry out his duties for the benefit of the people of the state.

(2) A public officer, member of the general assembly, local government official, or employee whose conduct departs from his fiduciary duty is liable to the people of the state as a trustee of property and shall suffer such other liabilities as a private fiduciary would suffer for abuse of his trust. The district attorney of the district where the trust is violated may bring appropriate judicial proceedings on behalf of the people. Any moneys collected in such actions shall be paid to the general fund of the state or local government. Judicial proceedings pursuant to this section shall be in addition to any criminal action which may be brought

against such public officer, member of the general assembly, local government official, or employee.

Section 24-18-104, C.R.S., provides in relevant part:

(1) Proof beyond a reasonable doubt of commission of any act enumerated in this section is proof that the actor has breached his fiduciary duty and the public trust. A public officer, a member of the general assembly, a local government official, or an employee shall not:

(a) Disclose or use confidential information acquired in the course of his official duties in order to further substantially his personal financial interests....

IV. Discussion

Requester sets forth three separate categories of sought-after employment opportunities that he wishes to pursue within the Missouri cannabis industry. The Commission addresses each of those categories in turn.

Webinar Speaking Engagements

First, Requester seeks to provide webinar speaking engagements, in which Requester will provide services that generally address financial risks in the marijuana industry. The request does not specify to whom those webinars would be targeted. Requester's job duties include evaluating the financing and business structure of license applicants, as well as assisting in the financial aspects of investigations. According to Requester's employer, his position is specifically directed at reviewing and evaluating financing and business structure of business applicants and owners. The Commission believes this overlap in job duties with outside employment presents a potential violation of the public trust in contravention of section 24-18-103, C.R.S.

There is a risk that Requester would no longer carry out his duties in license application review wholly for the benefit of the state, but instead be influenced by his outside employment. Specifically, Requester's review and evaluation of business applicants' financing and business structure may be impacted by advice he has given in webinars regarding financial risks in the marijuana industry.

Risk Assessments for Financial Institutions

Requester seeks to provide risk assessments for financial institutions, in which Requester will provide advice to financial institutions about "how to conduct customer due diligence and enhanced due diligence on cannabis companies" that the financial institutions are considering as clients. In many ways, that role would advise banks on the duties Requester performs for the State of Colorado, which includes evaluating the financing and business structure of license applicants, including an analysis of financial statements, capital structure, accounting systems reviews, and review of other financial instruments. The duality of those

roles could constitute a violation of the public trust in contravention of section 24-18-103, C.R.S.

If Requester conducts risk assessments for financial institutions, it is quite likely that Requester's analysis of the financing and business structure of license applicants will be influenced by his private sector work in the event his regulatory role involves review of the same businesses—or even affiliates or competitors of those businesses. Thus, there is a significant risk that Requester's outside employment could inhibit Requester's ability to carry out his duties for the benefit of the state.

In this case, the separation of jurisdictions on which Requester relies is insufficient to protect against violations of the public trust. The landscape of marijuana regulation is rapidly changing on both the federal and state levels, and there may be significant cross-over between Missouri and Colorado markets, including companies that have a presence in both states. As Requester's employer notes, Colorado law now allows direct equity investment from out of state. It is unlikely that the services Respondent seeks to provide would be limited to financial institutions that service Missouri businesses only.

Accounting/Bookkeeping Services

Third, Requester seeks to provide accounting and/or bookkeeping services for businesses outside of Colorado, some of which may be in the cannabis industry. Requester is a certified CPA, a license he does not use in his current position for the State of Colorado. To the extent Requester provides accounting/bookkeeping services to businesses outside of Colorado that are not in the cannabis industry and not regulated by Requester's employer, such employment does not constitute an ethical violation.

However, to the extent such businesses are within the cannabis industry, there is a potential for a violation of the public trust under section 24-18-103, C.R.S. According to Requester's employer, Requester gains information in the course of his official duties regarding regulated entities' financial statements, accounting systems, and financial instruments. There is a significant risk that Requester would provide accounting services either (1) to an entity subject to regulation in Colorado; or (2) to a competitor of an entity that his employer regulates. In either scenario, Requester's private sector work would inhibit his ability to carry out his regulatory duties in an impartial manner for the benefit of the state. Requester cannot reasonably carry out his duties for the benefit of the state as a financial regulator of the industry with detailed knowledge as to regulated entities' finances, while also involved in the financial side of the industry.

Other Considerations

Undoubtedly, Requester must avoid a conflict that would result in him using confidential information to benefit financially from outside employment. § 24-18-104(1)(a), C.R.S. But the Commission lacks sufficient information to identify either a conflict or an absence thereof. With the exception of providing accounting and/or bookkeeping services to businesses outside Colorado that are also outside the cannabis industry, each of the prospective employment opportunities listed by Requester presents a potential conflict. Further, the Commission finds it

significant that Requester’s employer recognizes a “potential for actual conflict.”

As Requester notes, the State Personnel Board has rules preventing conflicts of interest and requiring written preapproval for outside employment. Requester’s employer may find that certain outside employment does not “interfere[] with the performance of the state job” and is not “inconsistent with the interests of the state, *including raising criticism or appearance of a conflict.*” State Personnel Board Rule 1-14 (emphasis added). Those standards are more stringent than the conflict of interest laws found in state statute. It is between Requester and his employer whether those standards are met. However, given the vagueness of the request, such outside employment cannot be sanctioned by this Commission without more detail as to the services provided, the entity to whom the services are provided, and the potential impact on the people of Colorado.

V. Conclusion

Under the facts presented in this request, with the exception of accounting/bookkeeping services to entities outside Colorado and outside the cannabis industry, the Requester’s proposed out-of-state employment and/or contracts could constitute a violation of the public trust pursuant to section 24-18-103, C.R.S. The Commission provides no opinion as to whether such employment would also violate State Personnel Board rules.

The Commission cautions that this opinion is based on the specific facts presented herein, and that different facts could produce a different result. The Commission encourages individuals with particular questions to request more fact-specific advice through requests for advisory opinions and letter rulings related to their individual circumstances.

The Independent Ethics Commission

Elizabeth Espinosa Krupa, *Chair*
William Leone, *Vice-Chair*
Selina Baschiera, *Commissioner*
Debra Johnson, *Commissioner*
Yeulin Willett, *Commissioner*

Dated: January 14, 2020