

Independent Ethics Commission  
101 West Colfax Avenue  
Suite 500  
Denver, Colorado 80203

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*Via email [jane.feldman@state.co.us](mailto:jane.feldman@state.co.us)*

RE: REQUEST FOR AN ADVISORY OPINION REGARDING THE ESTABLISHMENT  
OF a LEGAL DEFENSE FUND FOR PUBLIC OFFICIALS

### **Question Presented**

In Colorado, Amendment 41 prohibits gifts to public officials to ensure they do not realize any personal financial gain through public office. Public officials are often sued solely because of decisions made in their official capacity, and incur significant legal expenses for which they are personally liable. Would donations to a legal defense fund violate Amendment 41's gift ban?

### **Short Answer**

No. First, donations to a legal defense fund fall outside of Amendment 41's gift ban because they do not result in any personal financial gain; rather, monies in such a fund would go directly to licensed attorneys to cover actual litigation costs. Second, even if donations to a legal defense fund did fall under the technical definition of gifts under Amendment 41, the donations are exempt as components of usual compensation or incentives given in the normal course of business, just as they are in many other states and at the federal level. Third, the donations are exempted under the special occasion gift exemption because the donations are personal in nature and raise no appearance of impropriety. And last, disallowing the establishment of, and donations to, a legal defense fund discourages bright and driven people from seeking or accepting public office.

## **Introduction**

Because public officials in Colorado are in the public eye, citizens often bring legal challenges against them for activities performed in furtherance of their public duties. Public officials make difficult decisions, decisions that often times please some while angering others. Because special interest groups and partisan organizations are permitted to file politically-driven and often-baseless claims, an elected official should be able defend him or herself without incurring crippling legal costs, costs for which the official is personally liable. Just like citizens, public officials are entitled to defend themselves. Often, the defense results in significant legal costs and public officials are left personally responsible for the payment, regardless of the outcome. The establishment of a legal defense fund would help to allay such litigation costs and encourage more participation in all levels of state government.

## **Discussion**

### **1. Donations to a legal defense fund do not fall under Amendment 41's gift ban.**

When Colorado citizens passed Amendment 41, they did so out of concerns about public officials realizing improper personal gain.<sup>1</sup> In adopting the amendment, however, the people did declare that “there are certain costs associated with public office” that public officials should not be expected to bear themselves.<sup>2</sup> In defending themselves in actions brought against them, public officials are not realizing any personal gain above and beyond their normal compensation; rather, the defense fund merely defrays a cost inherent in public service.

The Independent Ethics Commission (the “Commission”) has previously opined that “although public employees should not be rewarded because of their status as public employees,

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<sup>1</sup> Colo. Const. Art. XXIX, sec. (1) (d)

<sup>2</sup> Colo. Const. Art. XXIX, sec. (2)

neither should they be penalized.”<sup>3</sup> Currently, public officials who are targeted by special-interest groups are penalized in that they must expend their own money to defend actions taken in their official capacity. The establishment of a legal defense fund would allow public officials to serve without penalty, an ideal the Commission has embraced on several previous occasions.

In Advisory Opinion 10-18, the Commission approved the creation of a non-profit organization and the solicitation and acceptance of private donations for a gubernatorial transition.<sup>4</sup> Though the Commission expressed some initial misgivings, it ultimately ruled that “no covered individual will receive personal benefit from the contributions.”<sup>5</sup> As such, the Commission ruled the donations were not gifts under the meaning of Amendment 41. Private donations to a legal defense fund would be no different than the donations described in Advisory Opinion 10-18. That is, no public official would receive any personal benefit from the contributions. Rather, any monies in the fund would be paid directly to licensed attorneys who have incurred actual litigation costs in the course of defending a public official.

For the above reasons, the Commission should find that the establishment of, and donations to, a legal defense fund does not fall under Amendment 41’s gift ban: as expressed by the Commission in Advisory Opinion 10-04, public officials should not be penalized merely because they are public officials; and, donations to a legal defense fund are no different than the donations to a gubernatorial transition nonprofit that the Commission approved in Advisory Opinion 10-18.

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<sup>3</sup> IEC Advisory Opinion 10-04, citing IEC Position Statement 08-01

<sup>4</sup> IEC Advisory Opinion 10-18

<sup>5</sup> *Id.* at 4.

**2. Even if donations to a legal defense fund do fall under the general gift ban, they are exempt as components of usual compensation or incentives given in the normal course of business.**

Even if the Commission finds that donations to a legal defense fund are technically prohibited by Amendment 41's gift ban, the donations are still allowable under an exception that allows for things of value that are a "component of the compensation paid or other incentive given to the recipient in the normal course of employment."<sup>6</sup> In Advisory Opinion 10-04, the Commission approved the creation of a financial assistance project where people may donate money to an employee association, which would in turn make donations or grants to state employees experiencing financial difficulties due to mandatory furloughs and budget reductions.<sup>7</sup> The Commission found that the project fit squarely within the gift-ban exception allowing other incentives given in the normal course of employment. In approving the donations, the Commission stated its belief that the "situation does not give rise to the undue influences or appearance of impropriety that Article XXIX is designed to prevent."<sup>8</sup>

Donations to a legal defense fund are analogous to the donations in Advisory Opinion 10-04 in that their purpose is to help a public official whose finances are negatively impacted because he or she holds office. And, the donations to a legal defense fund would not give rise to undue influence because the public official would never receive the monies; any monies in the fund would be paid directly to the public official's legal counsel. Because the establishment of a legal defense fund is no different than the establishment of the financial assistance project in Advisory Opinion 10-04, the Commission should find that donations to such a fund are specifically exempted as incentives given in the normal course of employment.

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<sup>6</sup> Colo. Const. Art. XXIX, sec. (3) (h)

<sup>7</sup> IEC Advisory Opinion 10-04

<sup>8</sup> *Id* at 3.

Additionally, legal defense funds can be, and often are, considered a component of compensation. Indeed, many other states, and even the federal government, recognize legal defense funds as necessary aspects of public service. Many states, including Michigan and California, have detailed laws and rules regarding legal defense funds. A number of states, such as Florida, Maryland, and Ohio have recently addressed the funds through advisory opinions of ethics commissions. Legal defense funds are being recognized as a necessity even at the local government level. Like their colleagues around the country, Colorado's public officials should be free to serve the people of Colorado without incurring penalties.

**3. Donations to a legal defense fund are also exempt from the gift ban under the “special occasion” exemption.**

The Commission could also find that donations to a legal defense fund are exempt from Amendment 41's gift ban because the donations would undoubtedly be “[g]iven by an individual who is a . . . personal friend of the recipient on a special occasion.”<sup>9</sup> In Advisory Opinion 11-08, the Commission approved disbursements from a blind trust to help defray the medical expenses of a public official's spouse.<sup>10</sup> In approving the disbursements, the Commission highlighted language from an earlier Position Statement, stating, in essence, that the term “special occasion” should be broadly construed so as not to preclude public employees from enjoying certain benefits available to private citizens.<sup>11</sup> The Commission went on to state that “the term ‘special occasion’ should not be restricted to birthdays, anniversaries and holidays; nor should it necessarily mean events that are rare or unusual.”<sup>12</sup>

To determine whether an event is a special occasion, the Commission laid out a two-part test.

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<sup>9</sup> Colo. Const. Art. XXIX, sec. (3) (g)

<sup>10</sup> IEC Advisory Opinion 11-08.

<sup>11</sup> IEC Advisory Opinion 11-08 citing IEC Position Statement 08-01

<sup>12</sup> *Id.*

An event is a special occasion 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.<sup>13</sup>

Here, donations to a legal defense fund meet both prongs of the Commission's test. The first prong is met because the controlling factor is the fact that a public official has to pay for legal defense out of his or her own pocket. Donors would contribute money to the legal defense fund to help the personal finances of the public official, not to influence the public official. The situation is no different than the medical expense fund approved by the Commission.

A legal defense fund meets the second prong of the test because there would be no appearance that official is receiving any personal gain, giving any person preferential treatment, losing any independence or impartiality, or accepting gifts or favors for performing official duties. Again, a legal defense fund is analogous to a medical expense fund under the "special occasion" exemption and, as such, should be approved by the Commission.

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<sup>13</sup> *Id.*

**4. Without a legal defense fund, citizens are discouraged from seeking or accepting public office.**

In Position Statement 08-01, the IEC observed that public officials should not be penalized for holding public office:

[g]overnment 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.

Similarly, a government official should not be placed in a position of expending significant personal funds to defend against complaints and actions brought against them solely because of their status as a public official. In the current political environment, government officials and employees, whether elected or not, are often easy targets for individuals and groups who disagree with policy positions. These individuals and groups have little disincentive to sue or otherwise accuse government officials, and this causes incredible personal and financial distress to government officials and their families. A public official should be allowed to defend him or herself without incurring crippling legal costs, costs for which the official is personally liable. Without this ability, many talented and driven citizens are deterred from seeking public office or government employment for fear that they too will be financially ruined for no other reason than they exercised their public duties in the manner they saw fit. A legal defense fund guards against such a situation without encroaching on any particular group's right to sue.

**5. A properly structured legal defense fund avoids any appearance of undue influence.**

The legal defense could be structured to avoid any appearance of undue influence on an elected official. There are three options for structuring the fund:

### *No regulation*

If the Commission finds that the legal defense fund is not a gift under Amendment 41, there technically would be no need to subject the fund to regulations. Though this is an option, some regulation is certainly advisable to ensure that management of fund monies comports with the highest ethical standards. Some regulations would also alleviate any concerns of impropriety.

### *Blind trust*

Next, the fund could be set up and administered as a blind trust. The Commission has found that timely public disclosure of contributions is one way to assure the public that donations will not unduly influence a public official.<sup>14</sup> But the Commission has also permitted acceptance of money by way of a blind trust. In Advisory Opinion 10-18, the Commission “appreciate[d] that...the blind trust will be structured so that the member will not know who has given to this fund and in what amount, so that there is no possibility that these donations are made with the intent to influence the member in performance of his official duties.”<sup>15</sup> By setting up and administering a blind trust legal defense fund, the public can be assured no individual can unduly influence a public official.

If a legal defense fund is established as a blind trust, lobbyists, contractors, and individuals with current business before the public official should be allowed to donate to the fund. The Commission has made clear that lobbyists<sup>16</sup> and other individuals with business before the office should not contribute to a fund.<sup>17</sup> The blind trust’s administrator could require donors to affirm they are not lobbyists, contractors, or other individuals with pending business before

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<sup>14</sup> Advisory Opinion 10-18

<sup>15</sup> Advisory Opinion 11-08 at 4

<sup>16</sup> Advisory Opinion 10-4

<sup>17</sup> Advisory Opinion 10-18



the official. This will further ensure that no individual will donate to the fund in order to influence the behavior of the public official.

The fund could be administered using additional safeguards to ensure there is no influence, or the appearance of influence, over the public official. Specifically:

- The fund should be set up as a trust, administered by an independent trustee, who will oversee fund raising.
- The trustee will not have any family, business, or employment relationship with the trust's beneficiary.
- Trust funds will be used only for legal expenses (and expenses incurred in soliciting for and administering the trust). Any excess funds will be returned to contributors. Under no circumstances will the beneficiary of the fund convert the funds to any other purpose.
- The fund will not accept more than \$5,000 in a calendar year from any individual or organization.

#### *Quarterly disclosure and reporting*

Finally, in converse to a blind trust, a legal defense fund could be set up in such a manner that requires regular disclosure and reporting. There are currently two separate models for such a fund:

##### *1. Connecticut Model*

In Connecticut, legal defense funds are required to report quarterly. The reports must contain the following:

- The fund's officers and directors;
- An itemized accounting of each contribution to the fund, including the full name and complete address of each contributor and the amount of the contribution; and
- An itemized accounting of each expenditure, including the full name and complete address of each payee and the amount and purpose of the expenditure.

Such detailed disclosure lessens the any appearance of impropriety.

## 2. *Federal Model*

Legal defense funds are also allowed at the federal level. The U.S. House Committee on Standards of Official Conduct established the following guidelines for such funds:

- The officeholder should appoint a trustee to manage the account, who is charged with all responsibilities of administering the account, including the solicitation of contributions and the making of defense fund expenditures.
- The trustee should be a person with no authority over the employees of the executive agency of the government officeholder for whose benefit the fund is established.
- Contributions should not be received from “prohibited sources,” persons who have a vested interest in official actions by the officeholder or the officeholder’s agency.
- The officeholder of the executive branch should not personally solicit contributions to the account.
- The trustee should not solicit contributions specifically from employees of the officeholder’s agency.
- The government officeholder and the trustee of the account should make all reasonable efforts to keep the identities of the donors anonymous to the officeholder.
- Excess defense funds may not be transferred to any other account of the officeholder.

These two disclosure models, individually, do much to ensure the public official receives no personal gain. What’s more, the two models alleviate any public concerns about the administration of the fund.

### **Conclusion**

For the reasons detailed above, the undersigned respectfully requests a determination that Amendment 41 permits the establishment of, and donations to, a legal defense fund. First, donations to a legal defense fund fall outside of Amendment 41’s gift ban because they do not result in any personal financial gain; rather, monies in such a fund would go directly to licensed attorneys to cover actual litigation costs. Second, even if donations to a legal defense fund did fall under the technical definition of gifts under Amendment 41, the donations are exempt as

components of usual compensation or incentives given in the normal course of business, just as they are in many other states and at the federal level. Third, the donations are exempted under the special occasion gift exemption because the donations are personal in nature and raise no appearance of impropriety. And last, disallowing the establishment of, and donations to, a legal defense fund discourages bright and driven people from seeking or accepting public office.

Respectfully submitted,



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