



January 22, 2013

Colorado Independent Ethics Commission  
1300 Broadway, 12th floor  
Denver, CO 80203

**Re: Comments regarding the Request for an Advisory Opinion Regarding the Establishment of a Legal Defense Fund for Public Officials**

Colorado Common Cause is a nonpartisan, nonprofit organization that is dedicated to restoring the core values of American democracy, reinventing an open, honest and accountable government that serves the public interest, and empowering ordinary people to make their voices heard in the political process.

Colorado Common Cause opposes allowing covered officials to establish legal defense funds and believes that it would be a violation of the gift ban in Amendment 41. In the Secretary of State's advisory opinion request, Deputy Secretary of State Suzanne Steiert offered several possible rationales as to how the establishment of a criminal legal defense fund would be acceptable. Our analysis on why those rationales are in conflict with Amendment 41 follows.

**1. Donations do not fall under the gift ban**

The advisory opinion request misquotes the purposes and findings of Amendment 41. The full statement is that "there are certain costs associated with holding public office and that to ensure the integrity of the office, such costs of a reasonable and necessary nature should be born by the state or local government" (emphasis added).<sup>1</sup> The voters clearly indicated that appropriate costs should be borne by the state; it is also clear that the purpose of the amendment was to *prevent* costs being paid by private interests. Allowing contributions in excess of the gift limit would be a clear violation of the plain language and intent of Amendment 41.

The goal of Amendment 41 is to ensure the public's respect and confidence for those in public office by avoiding situations that violate the public trust. The public's trust is violated by permitting public officials to realize personal financial gain as a result of their office. On page 6 of the request, the Secretary of State concedes that the Secretary would benefit personally from the establishment of a fund, noting that "donors would contribute

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<sup>1</sup> Colo. Const. Art. XXIX, sec (2)

money to the legal defense fund to help the personal finances of the public official”. Soliciting funds to cover expenses that would otherwise be the obligation of the public official is a clear financial benefit to that covered official.

The request also argues that the legal defense fund is analogous to the gubernatorial transition approved in Advisory Opinion 10-18,<sup>2</sup> but the discussion in that opinion makes clear that the situations are quite different. The nonprofit organized to support the transition was fulfilling a function recognized as necessary by the state and the opinion noted that the transition “process, ideally, would be a public process, sustained by public resources”. That is not true in this instance, as the Secretary of State’s need for a criminal defense is not due to a lack of state resources, but rather the state’s practice to not cover those costs.

## **2. Donations are exempt as components of usual compensation or incentives given in the normal course of business**

The Secretary of State’s request fails to make the case that the legal defense fund should be considered exempt as a component of usual compensation or incentives given in the normal course of business. There is currently no provision in Colorado law that allows for the establishment of a legal defense fund as part of a compensation package for state officials and the example offered by the Secretary of State in the request is, again, quite different than the request before the Commission. In Advisory Opinion 10-04,<sup>3</sup> the donations were from state employees to a fund created to provide financial relief to state employees impacted by Colorado’s involuntary furlough program. A separate committee was tasked with making disbursements. In this instance, the Secretary of State is seeking permission to raise funds for his personal criminal defense, not a fund with broader purposes.

Guidance provided by the Wisconsin ethics board with regard to legal defense funds in that state may be instructive. The purpose and findings of Amendment 41 declared that “any effort to realize personal financial gain through public office other than compensation provided by law is a violation of [the public] trust.” Wisconsin’s ethics law states that “[n]o state public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family”.<sup>4</sup> The Wisconsin Government Accountability Board found that:

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<sup>2</sup> Independent Ethics Commission Advisory Opinion 10-18 (Organization and Funding of Gubernatorial Transition)

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<sup>3</sup> Independent Ethics Commission Advisory Opinion 10-14 (Acceptance of a Luncheon from a Political Subdivision)

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<sup>4</sup> Wisconsin Statute 19.45(2)

An official's use of the title or prestige or power of government office to obtain money from others in order to pay the official's private, personal expenses would be patently offensive and illegal.

The statutes that the Government Accountability Board administers create no exception for a "legal defense fund". It is equally improper for a state government official to make use of his or her government position to obtain money for the official's vacation fund, please-pay-my-home-mortgage fund, who-will-pay-my-child's-tuition fund, or I-would-like-to-remodel-my-house fund.<sup>5</sup>

### **3. Donations are exempt under the "special occasion" exemption**

Deputy Secretary of State Steiert argues that the legal defense fund qualifies as an acceptable gift under the special occasion exception since "donors would contribute money to the legal defense fund to help the personal finances of the public official, not to influence the public official". Contrary to the Deputy's claim, the request is not analogous to the situation presented in Advisory Opinion 11-08,<sup>6</sup> where friends and colleagues requested permission to establish a blind trust to help support medical expenses.

In this instance, the Secretary is seeking to establish a fund to defray the legal costs incurred as a result of a criminal investigation, and Deputy Secretary Steiert indicated during the January 7, 2013 meeting of the Independent Ethics Commission that the office planned to solicit donors who had contributed to the Secretary's campaign committee. Unlike the situation in 11-08, which was clearly a personal situation, the Secretary is attempting to use his office to solicit funds from donors with whom he has a professional relationship.

### **4. Without the fund, citizens are discouraged from seeking or accepting public office**

Colorado already provides legal defense for state officials who are sued in their official capacity. This circumstance is somewhat unusual in that it involves the possibility of criminal charges being filed against a state official, which according to Deputy Secretary of State Steiert, are not covered by the state.

It may be appropriate to have a policy debate about the circumstances when, if it all, the state should cover the costs of a state official's criminal defense, but the appropriate solution is not to allow private interests to cover those expenses.

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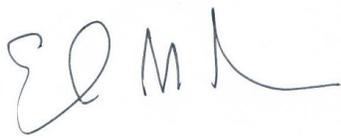
<sup>5</sup> Wisconsin Government Accountability Board, General Rule "Legal defense funds"  
[http://gab.wi.gov/sites/default/files/guideline/24/1281\\_legal\\_defense\\_funds\\_pdf\\_97449.pdf](http://gab.wi.gov/sites/default/files/guideline/24/1281_legal_defense_funds_pdf_97449.pdf)

<sup>6</sup> Independent Ethics Commission Advisory Opinion 11-08 (Acceptance of Disbursements through a Blind Trust for Payment of Certain Expenses)  
<http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251714537538&ssbinary=true>

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

As described above, Colorado Common Cause does not believe that allowing a public official to solicit funds for private gain is permissible under Amendment 41. If the Commission disagrees and decides to allow public officials to establish legal defense funds, we encourage the Commission to establish strong guidelines for the fund, to mitigate both actual corruption and the appearance of corruption.

Thank you for your consideration of our comments. Please let me know if you have questions or would like additional information.

A handwritten signature in black ink, appearing to read 'EN', with a stylized flourish extending to the right.

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