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## ***Advisory Opinion 14-10***

(Acceptance of Travel Expenses Paid By a Third Party)

**SUMMARY:** It would not be a violation of Colorado Constitution Art. XXIX for the Colorado Secretary of State to accept a registration waiver to the Republican National Lawyer Association's ("RNLA") National Election Law Seminar, food and beverage at the event, airfare costing approximately and one night of lodging, based on the facts presented to the Commission. The Secretary may also use state staff time to prepare the Secretary for the event at which he plans to speak and to organize his travel.

### **I. BACKGROUND**

Secretary of State Scott Gessler<sup>1</sup> has submitted a request to the Independent Ethics Commission (the "IEC" or "the Commission") asking three questions: (1) "Does RNLA's waiver of Secretary Gessler's \$239.00 registration fee and the Secretary's acceptance of travel and lodging accommodations in consideration for speaking at the seminar violate Amendment 41's gift ban?" (2) "If the registration-fee waiver and the accommodations do not violate the gift ban, is the Secretary required to report the waived fee and accommodations as gifts and honoraria under Colorado law?" and (3) "Does Amendment 41 prohibit me, the Deputy Secretary of State, and other policy staff within the Secretary of State's office, from using state time to prepare briefing packets on election-law policy, draft talking points for the Secretary's presentation, and generally organize his travel for the seminar?" The dollar figures from the RNLA website and Secretary Gessler include a registration fee waiver of \$239.00, airfare in the amount of approximately \$250.00 and accommodations for one night at \$150.00.

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<sup>1</sup> Secretary Gessler has waived confidentiality relating to this request.

The RNLA is a non-profit organization, which receives more than 5% of its funds from for-profit entities. Secretary Gessler does not pay membership dues to the organization.

The RNLA has invited Secretary Gessler to speak at its National Election Law Seminar (“Seminar”) that is being held in Las Vegas this year. According to a letter from the RNLA to Secretary Gessler provided to the Commission, the Seminar is a day and a half long session for the purpose of orienting “legal professionals and volunteers to the election law systems utilized in the United States and the manner in which election integrity can be encouraged and protected.” The Requestor provided the RNLA’s Events web page, which shows the Seminar being, “All you need to know about election law from petitions to campaign finance to recounts at the RNLA’s one-of-a-kind annual Seminar.”

Additional materials provided to the Commission by the Requestor show there is a “beginner track” and an “advanced election law training” at the Seminar. The latter “emphasizes the lawyering strategies and techniques that can be utilized for protecting the ballot access of a candidate (or referendum committee), protect the integrity of the election day process through ethical and effective accessing of law enforcement and judicial authorities, defense or prosecution of post-election recount administrative and judicial cases, the filling of vacancies in public or political offices, the redrawing or consolidation of election precincts, the administration and counting [of various types] of absentee ballots not normally executed in-precinct, the operations of ballot counting and tabulation equipment, and the organization of non-lawyer volunteers in the provision of election services (such as volunteer assistance in a ballot recount).”

Secretary Gessler’s invitation from the RNLA indicates that he has been invited to address ethics in election law panel at the Seminar. The Requestor also informed the Commission that the focus of the Secretary’s presentation will be the prosecution of standards of conduct and reporting requirements for partisan gain. The presentation will include topics such as the abuse of the Grand Jury process, Due Process requirements, First Amendment issues and comparative analysis of cases from other states. Because the RNLA had not finalized the

agenda as of July 7, 2014, Secretary Gessler was unable to provide the Commission with any more information about the specific topics to be addressed at the Seminar.

## **II. JURISDICTION**

The IEC finds that the Secretary of State of Colorado is a public official and subject to the Commission's jurisdiction. See CO Const. Art. XXIX, sec. 2(1) 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, 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:

(e) Admission to, and the cost of food or beverages consumed at, a reception, meal or meeting by an organization before whom the recipient appears to speak or to answer questions as part of a scheduled program;

## **IV. DISCUSSION**

Section 3 of Article XXIX provides that gifts valued in excess of \$50 (now \$53 as adjusted by inflation)), are prohibited gifts. Reimbursement by professional lobbyists, either directly or on behalf of any other person or entity, is completely prohibited. However, reimbursement that is supported by consideration of equal or greater value from the recipient of the reimbursement is

permissible.

To evaluate the propriety of reimbursement of travel expenses to covered individuals, the Commission starts with the question of whether the gift is to a covered individual. Only gifts to covered individuals, which include public officers, members of the General Assembly, local government officials and government employees, are subject to the Commission's jurisdiction pursuant to Article XXIX.

**A. Is This a Gift to a Covered Individual?**

To determine whether travel is permissible under Article XXIX the Commission must evaluate whether the gift is to a covered individual. Only gifts to covered individuals are subject to the Commission's jurisdiction pursuant to Article XXIX. See Position Statement 12-01, page 5. Reimbursement of travel expenses to covered individuals is a prohibited gift unless it is established that such reimbursement does not inure to the benefit of the covered individual but rather to the governmental entity, department, agency, or institution that employs the covered individual. *Id.* The Commission has set forth the following factors to consider when determining whether the gift is to a covered individual or to a governmental entity:

1. Is the gift to a specific individual or to the designee of an agency?
2. Is the offer made *ex officio*?
3. Is the travel related to the public duties of the traveler?
4. Is there a potential conflict of interest or appearance of impropriety in acceptance of this gift?
5. Is the purpose of the trip primarily educational or a networking opportunity for the covered individual or the donor?

The Commission addresses each factor below.

1. Is the offer to a specific individual or to a designee of an agency or governmental entity?

Offers to specific individuals more likely inure to the personal benefit of the individuals rather than to the agency or governmental agency; whereas offers to designees of an agency or governmental entity indicate an institutional benefit. Among the duties conferred to the Secretary of State pursuant to section 1-1-107(1), C.R.S., are the following: to supervise the conduct of primary, general, congressional vacancy, and statewide ballot issue elections in Colorado; to coordinate the responsibilities of the state of Colorado under the federal "National Voter Registration Act of 1993"; to serve as the chief state election official within the meaning of the federal "Help America Vote Act of 2002" and, in that capacity, to coordinate the responsibilities of the state of Colorado under the federal act in accordance with the requirements of this code; and to enforce the provisions of the election code.

According to the facts presented by the Requestor, the RNLA Seminar will address election related topics such as election day processes, defense or prosecution of post-election recount administrative and judicial cases, the redrawing or consolidation of election precincts and absentee ballot issues, among others. It would appear that the invitation to Secretary Gessler to speak at the RNLA Seminar is an invitation to the Colorado Secretary of State and not to Scott Gessler the individual. By virtue of the fact that the Colorado Secretary of State is the chief election official for the state of Colorado, charged with overseeing the state's elections and complying with federal election laws, the Secretary of State has valuable knowledge and insight regarding matters relevant to this Seminar. As a result, the Commission finds that the RNLA's offer to speak at its Seminar is directed to the chief election official of Colorado and not to a specific individual.

2. Is the offer made *ex officio*?

Offers of reimbursement to individuals by virtue of their specific position or area of responsibility or expertise are indicative of institutional benefit. Topics that will be

covered in the seminar include petitions, campaign finance, voting, recounts and other current issues. The Secretary of State, by virtue of his role as the chief elections official of Colorado, is uniquely positioned to discuss these topics. The Commission believes that this invitation went to the Secretary *ex officio*, and based on the Secretary's expertise in these areas. According to the request, Secretary Gessler has a nationwide reputation on elections law issues and the request relates to the public duties of the Secretary of State. From these facts as presented the Commission believes the offer is *ex officio*.

3. Is the travel related to the public duties of the traveler?

The invitation went to the Secretary of State *ex officio*, based on his position within Colorado government and his knowledge and expertise regarding campaign and election issues. These issues are clearly within his public duties. Based on the information provided, the Commission finds this trip would be educational. The Commission finds the trip is related to the public duties of the Secretary.

4. Is there an existing or potential conflict of interest or appearance of impropriety in acceptance of this gift?

The offer of reimbursement is from an entity that does not have financial or regulatory interests that can be affected by the covered individual. In this matter there has been no information presented that any entities will be present that will or may have a financial or regulatory interest that may be affected by the Requestor. The Seminar itself has an educational purpose and is organized to allow experts to present information based on previous experiences. From the facts presented, the Commission does not believe that acceptance of reimbursement for these expenses present a conflict of interest or an appearance of impropriety.

5. Is the purpose of the trip primarily educational or a networking opportunity for the covered individual or donor?

The requestor is no longer running for governor, having lost the primary election.

He is not running for reelection as Secretary of State. Instead, as the Secretary of State, he is faced with midterm elections in less than 4 months. The topics presented in this seminar are relevant and are primarily educational to the Secretary of State as chief elections officer for the state.

In sum, based on the facts presented to the Commission by the Requestor, it appears that the offer to pay the Secretary's travel is not a gift to a covered individual. The Secretary of State, by virtue of his role as the chief elections official of Colorado, is uniquely positioned to discuss the subject matter of the Seminar including voting, campaign finance, and other current election year issues. The Commission believes that this invitation went to the Secretary *ex officio*, and is based on the Secretary's expertise in these areas.

The IEC believes that the travel described in the request is the sort of travel which should be permissible under Article XXIX. Under the facts presented in this request, the Commission finds that payment of these expenses is not a gift to a covered individual, and therefore permissible under Article XXIX.

The IEC reminds the Secretary that permission to accept the travel reimbursement does not mean permission to attend entertainment or social events unrelated to the conference. Covered individuals are reminded that they should not attend any social events outside of the conference or they should pay their own way (assuming that the event is valued at over \$53). These events need to be individually evaluated and may be impermissible gifts.

**B. Application of Article XXIX, section 3(3)(e)**

Article XXIX, section 3 (3) (e) exempts from the Gift Ban, "Admission to, and the cost of food or beverages consumed at, a reception, meal or meeting by an organization before whom the recipient appears to speak or to answer questions as part of a scheduled program." The Secretary has provided to the Commission a letter from the

RNLA asking the Secretary to speak as part of a panel addressing ethics in election law. Based on these facts, the Commission finds that the Secretary's acceptance of a waiver of registration fees to the Seminar, as well as the Secretary's consumption of food and beverage at the event, is permissible under the Gift Ban because Secretary Gessler will be a speaker at the Seminar. The registration fee and food and beverages fall within exception 3(3)e.

**C. "If the registration-fee waiver and the accommodations do not violate the gift ban, is the Secretary required to report the waived fee and accommodations as gifts and honoraria under Colorado law?"**

The Commission finds this question may be answered by the Secretary of State pursuant to his authority under the Fair Campaign Practices Act, § 1-45-101, et. seq., C.R.S.

**D. "Does Amendment 41 prohibit me, the Deputy Secretary of State, and other policy staff within the Secretary of State's office, from using state time to prepare briefing packets on election-law policy, draft talking points for the Secretary's presentation, and generally organize his travel for the seminar?"**

The use of *de minimis* state resources to prepare briefing packets for a seminar in which the requestor was invited to speak as part of a panel addressing ethics in election law during an election year does not violate any ethical standard. *Cf. Matter of Dick Sargent v. Governor Romer, OS 97-14.*

## **V. CONCLUSION**

It would not be a violation of Colorado Constitution Art. XXIX for the Secretary of State to accept a gift of travel under the circumstances of this request. 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**

Rosemary Marshall, *Chairperson* (dissenting)

Matt Smith *Vice Chairperson* (dissenting)

Bob Bacon, *Commissioner*

William J. Leone, *Commissioner*

Bill Pinkham, *Commissioner*

### **Commissioners Marshall and Smith dissenting in part and concurring in part to the Advisory Opinion.**

It would not be a violation of Article XXIX for the Secretary to accept a registration waiver, and food and beverages during the panel discussion, for speaking at the National Election Law Seminar under exception 3(3)(e). It would be a violation of Article XXIX for the Secretary to accept travel and lodging from the Republican National Lawyer's Association ("RNLA") as he is a covered individual under the gift ban and no exceptions apply.

The subject matter of the RNLA Election Law Seminar very well may be beneficial to the Secretary of State in his work for the State of Colorado in so far as it relates to election laws and enforcement. However, we disagree that the invitation was made to "a governmental entity, department, agency, or institution" as required under Advisory Opinion 12-01. Rather, the invitation in this instance has been made to inure to the benefit of the Secretary of State personally. The benefit of the travel inures to the Requestor as a Republican attorney serving as the Secretary of State. He is not required to be an attorney. Further, no benefit to a governmental agency was articulated by the Requestor. The subject matter of his speech fails to address the subject matter of the conference - election laws and instead, "relates to the administration of his office" as set forth by the Secretary in his request.

While the Commission, including those members in dissent, cares not as to the topic of the Secretary's speech, we have difficulty applying the provisions of Advisory Opinion 12-01 where there is no relationship to the election law conference. Perhaps this matter will receive further

attention from those that accredit the election law conference.

The Secretary appears to be a speaker who is a part of the scheduled National Election Law Seminar program and thus may accept the registration fee waiver, and food and beverages consumed during the one and a half hour panel discussion. The Secretary may not accept other travel and lodging expenses as he is covered by the gift ban and no exceptions apply in this case. For these reasons, we respectfully dissent in part and confirm part in the issuance of the Advisory Opinion.

Dated: July 23, 2014