

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO</p> <p>1437 Bannock Street Denver, CO 80202</p> <hr/> <p>COLORADO ETHICS WATCH</p> <p>Plaintiff,</p> <p>v.</p> <p>COLORADO INDEPENDENT ETHICS COMMISSION</p> <p>Defendant.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>JOHN W. SUTHERS, Attorney General LISA BRENNER FREIMANN, Assistant Attorney General* JACK WESOKY, Senior Assistant Attorney General* ERIC MAXFIELD, First Assistant Attorney General* 1525 Sherman Street, 7th Floor Denver, CO 80203 Telephone: 303-866-5519 FAX: 303-866-5395 E-Mail: Lisa.Brenner.Freimann@state.co.us Registration Numbers: 31175, 6001, 29485 *Counsel of Record</p>	<p>Case No.: 2009CV4989 Division: 5</p>
<p>MOTION TO DISMISS</p>	

The Colorado Independent Ethics Commission (the “Commission”), by and through its counsel and pursuant to C.R.C.P. 12(b)(1) and 12(b)(5), hereby moves

to dismiss Plaintiff's First Claim for Relief. As grounds for this Motion, the Commission states as follows.

I. Introduction

Amendment 41 of the Colorado Constitution ("Amendment 41"), now codified as Article XXIX of the Colorado Constitution, was an initiative enacted by Colorado voters in November 2006. Section 5 of Amendment 41 creates the Commission "to hear complaints, issue findings, and assess penalties, and also to issue advisory opinions, on ethics issues arising under this article and under any other standards of conduct and reporting requirements as provided by law."

Colo.Const. art. XXIX, § 5(1). Amendment 41 authorizes the Commission to adopt reasonable rules necessary for the purpose of administering and enforcing the provisions Amendment 41. *Id.*

A. Advisory Opinions

Any public officer, member of the general assembly, local government official, or government employee may submit a written request to the Commission for an advisory opinion on whether any conduct by that person would constitute a violation of Amendment 41, or any other standards of conduct or reporting requirements as provided by law. Colo.Const. art. XXIX, § 5(5). The

Commission must render advisory opinions pursuant to written rules adopted by the Commission. *Id.*

Pursuant to the Commission's rules, an "advisory opinion" is defined as an opinion by the Commission addressing ethical issues in response to a written request by a public officer, member of the General Assembly, local governmental official, or government employee. Commission Rule 3.A.1. Additionally, the Commission's rules provide that certain government officials, members and employees may submit a request for an advisory opinion as to whether any particular action by that person would constitute a violation of Article XXIX or another ethics violation. Commission Rule 5.A. The Commission's Rules are attached to this Motion as **Exhibit A**.

Advisory Opinions must be submitted in writing, be fact specific and narrowly framed. Commission Rule 5.C. The Commission may request information and documents from the advisory opinion requestor. Commission Rule 5.D. Once an advisory opinion is reached, the Commission publishes it on its website with appropriate redactions of identifying information. Commission Rule 5.F. The Commission's rules neither provide for a right of judicial review of advisory opinions nor do the rules provide that advisory opinions are final agency decisions.

Amendment 41 also authorizes legislation to facilitate the operation of Amendment 41, but the legislation cannot limit or restrict the provisions of Amendment 41. Colo. Const. art. XXIX, § 9. Pursuant to this grant of authority, the General Assembly enacted C.R.S. § 24-18.5-101 which provides that the Commission's powers and duties include the issuance of advisory opinions. *See* C.R.S. § 24-18.5-101(4)(b)(I). While the legislation specifically provides for a right of judicial review by the district court for a final action of the Commission concerning a *complaint* (C.R.S. § 24-18.5-101(9)), the legislation neither provides for a right of judicial review of an advisory opinion nor states that an advisory opinion is a final agency decision.

B. Advisory Opinion 09-04

In response to a request made by a member of the General Assembly, the Commission issued Advisory Opinion No. 09-04, which addresses the issue of whether the requestor and her spouse may accept travel related expenses of accommodations, meals, ground transportation, and museum visits while participating in an intercultural trip to Turkey. The Commission advised that it would not be a violation of Amendment 41 for a member of the General Assembly to accept such travel related expenses. The Commission issued this opinion on April 16, 2009.

II. Standard for Motion to Dismiss

In order to withstand challenge, plaintiff's claim must assert a remedial interest, which the law can recognize and enforce. *See Nelson v. Nelson*, 31 Colo.App. 63, 66 (1972). The Commission seeks to dismiss the First Claim for Relief pursuant to C.R.C.P. Rule 12(b)(5) because plaintiffs have failed to state a claim upon which relief can be granted. In ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, the court accepts the facts of the complaint as true and must determine whether, under any theory of law, plaintiff is entitled to relief. *Flatiron Linen, Inc. v. First American State Bank*, 1 P.3d 244, 249 (Colo. App. 1999). If not, the claim must be dismissed. *See Ft. Collins-Loveland Water Dist. V. City of Ft. Collins*, 482 P.2d 986, 989 (Colo. 1971). Against this standard, the Commission's motion to dismiss Plaintiff's First Claim for Relief should be granted.

The Commission also seeks to dismiss the First Claim for Relief under C.R.C.P. 12(b)(1) for lack of jurisdiction should this Court find there is a judicial right to review an advisory opinion.

III. Argument

Plaintiff's First Claim for Relief requests judicial review of Advisory Opinion 09-04 and/or declaratory relief, either under C.R.S. § 24-4-106 and/or C.R.C.P. 57. More specifically, Plaintiff's claim requests that this Court declare Advisory Opinion 09-04 unlawful and that the Court order that the Advisory Opinion be set aside.

Plaintiff's First Claim for Relief should be dismissed because: (1) there is no right to judicial review of an advisory opinion, which is not a final agency action; and (2) even if an advisory opinion is a final agency action, the Complaint was not filed timely and Plaintiff is not adversely affected or aggrieved by Advisory Opinion 09-04.

Plaintiff's First Claim for Relief requesting declaratory relief also should be dismissed because the claim is not justiciable as there is no actual controversy.

A. There Is No Right to Judicial Review of an Advisory Opinion.

C.R.S. section 24-4-106 governs judicial review under the Administrative Procedures Act. Only "final agency action" is subject to judicial review. *See* C.R.S. § 24-4-106(2). Action is defined to include "the whole or any part of an agency rule, order, interlocutory order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." C.R.S. § 24-4-102(1).

In general, two conditions must be met for agency action to be final: (1) the action must mark the consummation of the agency's decision making process; and (2) the action must be one by which rights or obligations have been determined or from which legal obligations will flow. *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997).

An "advisory opinion" simply is *an opinion* by the Commission addressing ethical issues in response to a written request by a public officer, member of the General Assembly, local governmental official, or government employee.

Commission Rule 3.A.1. An advisory opinion neither is binding legally on the requestor of the advisory opinion nor anyone who relies on the advisory opinion. Advisory opinions do not fix rights or obligations and legal obligations do not flow from advisory opinions.

Neither Amendment 41, the Commission's Rules nor legislation regarding Amendment 41 provide for a right of judicial review of an advisory opinion. In marked contrast, C.R.S. § 24-18.5-101(9) specifically provides for judicial review of any final action of the Commission concerning a *complaint*.

Unlike an advisory opinion, the Commission's decision regarding a complaint is a final agency action because legal rights and obligations flow from the Commission's decision concerning a complaint. The Commission is

authorized to assess penalties in connection with a complaint. *See e.g.* Colo. Const. art. XXIX, § 3(d).

In addition, unlike complaints, advisory opinions generally are issued before the requestor takes any action which is the subject of the advisory opinion.

Advisory Opinion 09-04 was issued before the requestor and her spouse traveled to Turkey, the subject of the opinion. No legal right or obligation should attach to an advisory opinion rendered before any action is taken by the opinion's requestor.

For these reasons, advisory opinions are not final agency actions subject to judicial review.

B. Even if an Advisory Opinion is a Final Agency Action Subject to Judicial Review, the Complaint Was Not Filed Timely and Plaintiff is Not Adversely Affected or Aggrieved by Advisory Opinion 09-04.

1. *The Complaint Was Not Filed Timely.*

Judicial review actions under the Administrative Procedures Act must be filed within thirty days after the agency action becomes effective. C.R.S. § 24-4-106(4); *Buzick v. Public Employees' Retirement Association of Colo.*, 849 P.2d 869, 871 (Colo.App. 1992). Failure to seek timely review deprives the district court of jurisdiction. *Allen Homesite Group v. Colo. Water Quality Control Comm.*, 19 P.3d 32, 34 (Colo.App. 2000).

Advisory Opinion 09-04 was issued by the Commission on April 16, 2009. Plaintiff's Complaint was not filed until May 18, 2009, 32 days after Advisory Opinion 09-04 became "effective". As such, Plaintiff's failed to seek timely review of the Advisory Opinion and this court lacks jurisdiction over Plaintiff's First Claim for Relief.

The fact that the 30th day following the Advisory Opinion's "effective" date is a Saturday (May 16, 2009) does not cure the jurisdictional defect. *Cf., Industrial Claim Appeals Office v. Zarlingo*, 57 P.3d 736 (Colo. 2002) (holding that a party seeking judicial review in an order of the Industrial Claims Appeals Office is not entitled to the additional three days for mailing provided for under general appellate rule where the specific worker's compensation statute governing review of Industrial Claims Appeals Office decisions provides that appeals must be filed within 20 days after the date of mailing of the decision). Here, C.R.S. § 24-4-106(4) specifies that judicial review actions under the Administrative Procedures Act must be filed within thirty days after the agency action becomes effective. Permitting an additional two days for Plaintiff to file the Complaint would contradict the 30 day rule requirement set forth in C.R.S. § 24-4-106(4).

The fact that Plaintiff's First Claim for Relief also is based on C.R.C.P. 57 does not cure this jurisdictional defect. When an administrative remedy has not

been sought in a timely manner, C.R.C.P. 57 does not provide jurisdiction for judicial review. *Jefferson County School Dist. R-1 v. Div. of Labor in the Dept. of Labor and Employment*, 791 P.2d 1217, 1220 (Colo.App. 1990).

2. *Plaintiff is Not Adversely Affected or Aggrieved by Advisory Opinion 09-04.*

Only persons adversely affected or aggrieved by final agency action may commence an action for judicial review. C.R.S. § 24-4-106(4). Advisory Opinion 09-04 concerns a request made by a legislator as to whether she and her spouse may receive travel related expenses on a trip to Turkey.

Plaintiff is not a legislator. Plaintiff is not a public officer, member of the General Assembly, local governmental official, or government employee. Plaintiff cannot request an advisory opinion.

Plaintiff is not be adversely affected or aggrieved by Advisory Opinion 09-04. Plaintiff is not the subject of Advisory Opinion 09-04. Plaintiff is not even subject to Amendment 41. Compare with *CFI Steel Corp. v. the Colo. Air Pollution Control Comm.*, 610 P.2d 85, 91-92 (Colo. 1980) (finding that the Administrative Procedures Act does not deny standing to an individual to initiate a pre-enforcement challenge to the validity of a regulation, *if the individual is subject to its demands.*)

C. Plaintiff's First Claim for Declaratory Relief is Not Justiciable.

Plaintiff claims its interests are harmed by the issuance of Advisory Opinion 09-04 because Plaintiff “has an interest in preserving its right under the Colorado Constitution to file complaints” and “the [Commission] can be expected to summarily dismiss complaints asking whether the conduct described in Advisory Opinion 09-04 violates the gift ban of Article XXIX.” Complaint, paras. 18 and 19.

Plaintiff has not yet filed a complaint. Plaintiff may or may not file a complaint in the future. If Plaintiff chooses to file a complaint, Plaintiff wants to ensure that the Commission does not summarily dismiss the complaint based on Advisory Opinion 09-04. Plaintiff's First Claim for Relief is not justiciable because there is no actual controversy.

A request for declaratory judgment must be based upon an actual controversy and cannot be used to obtain an advisory opinion based upon the possibility of a future controversy. *CFI Steel Corp. v. the Colo. Air Pollution Control Comm.*, 610 P.2d 85, 92 (Colo. 1980); *Farmers Elevator Co. of Sterling v. First National Bank of Fleming*, 489 P.2d 318, 319 (Colo. 1971); *Burkett v. Amoco Production Company*, 85 P.3d 576, 578 (Colo.App. 2003). The controversy presented must be current rather than one that may arise at some point in the

future. *Burkett*, 85 P.3d at 578. Absent a present conflict, a declaratory claim under C.R.C.P. 57 is not justiciable. *Id.* at 579.

Plaintiff's First Claim for Relief is not based on an actual controversy, but rather is a request for an advisory opinion based upon the possibility of a future controversy. For these reasons, Plaintiff's First Claim for Relief should be dismissed because it is not justiciable.

WHEREFORE, for the reasons and authorities set forth herein, the Commission requests that its motion to dismiss be granted and Plaintiff's First Claim for Relief be dismissed.

Respectfully Submitted this 17th day of July, 2009.

JOHN W. SUTHERS
Attorney General

/s/Lisa Brenner Freimann

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COMMISSION and JANE T. FELDMAN,
in her official capacity as Executive Director
of the Independent Ethics Commission
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **MOTION TO DISMISS** upon all parties herein via the LEXIS E-filing service and by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 17th day of July, 2009 addressed as follows:

Chantell Taylor
Luis Toro
Colorado Ethics Watch
1630 Welton Street, Suite 415
Denver, Colorado 80202

*Original signature of Dorothy Mashburn on file at
the Office of the Attorney General*

/s/Dorothy Mashburn