State of Colorado

INDEPENDENT ETHICS COMMISSION
633 17th St., Ste. 1300, Denver, CO 80202
Ph.: 303/866-5727
Fax: 303/866-3777
E-mail: jane.feldman@state.co.us
www.colorado.gov/ethicscommission

Position Statement 10-01

(Conferences and Travel paid for by a state or local government or governmental entity or by a nonprofit which receives less than 5% of its funding from a for profit source Article XXIX Section 3(3)(f))

I. Introduction

The Colorado Constitution authorizes the Independent Ethics Commission ("IEC" or "Commission") to give advice and guidance on ethics issues arising under Article XXIX of the Colorado Constitution and any other standards of conduct and reporting requirements as provided by law.

Many individuals covered by Article XXIX have historically participated in events sponsored by organizations whose mission is to bring policymakers together at conferences for networking and exchanging ideas. For example, the National Conference of State Legislatures sponsors conferences every year and invites legislators and staff from around the country to attend. The Western Governor's Association also sponsors conferences to address issues unique to the executives of Western states. At the local level, Colorado Counties, Inc., and the Colorado Municipal League both hold events to bring officials from their member counties and municipalities together. Many of these government exchange organizations ("GEOs") are supported, in part, by dues paid by their member government entities.

Covered individuals have sought clarification from the Commission as to whether or not Article XXIX prohibits the acceptance of payment of expenses for Colorado's officials and employees by GEOs to attend these conferences. Without a specific case or controversy before us, we cannot make a determination as to the legality of any particular organization paying for such expenses. However, we can provide guidance for covered individuals in determining whether or not to accept such payments or attend events sponsored by GEOs. The Commission encourages public employees and officials to request further clarification if needed, through a request for advisory opinion.

II. Applicable Law

Section 3 of Article XXIX reads in relevant part:

> (1) No public officer, member of the general assembly, local government official, or government employee shall accept or receive any money, forbearance, or forgiveness of indebtedness from any person, without such 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 accepted or received the money, forbearance or forgiveness of indebtedness.
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> (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, rewards, promises or negotiations of future employment, favors or services, honoraria, 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.
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> (3) The prohibitions in subsections (1) and (2) of this section do not apply if the gift or thing of value is:
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(f) Reasonable expenses paid by a **nonprofit organization or other state or local government** for attendance at a convention, fact-finding mission or trip, or other meeting if the person is scheduled to deliver a speech, make a presentation, participate on a panel, or represent **the state or local governmen**t, **provided that the non-profit organization receives less than five percent (5%) of its funding from for-profit organizations or entities.** (Emphasis supplied)

III. Discussion

Section 3 prohibits a public official or employee from soliciting, accepting or receiving any gift or other thing of value worth more than $50 in any calendar year, from a person, without that person receiving lawful consideration of equal or greater value in return, unless it falls under a listed exception.

Section 3(3) provides exceptions to the gift ban, including paragraph (f), which provides a carve-out for expenses incurred by covered individuals in attending some conventions, fact-finding missions, and other meetings.[1] It is this exception that provides the framework for analyzing the legality of payments of expenses by GEOs related to their events and conferences.

The Commission determines that payments of reasonable expenses are permissible under Article XXIX so long as the expenses are paid by either a non-profit

[1] Section 3(f) is broader in terms of permissible activities than Section 3(e). Section 3(e) requires the participant to "speak or to answer questions as part of the scheduled program." Exception 3(f), however, includes the phrase "represent the state or local government" and requires a less active role. There is no requirement in Section 3(f) that there be active participation in the meeting. The Commission finds that representation may include an exchange of information or merely sitting in the audience. If a public employee or official is representing a state or local government, mere presence, without more, may be sufficient. At this time, the Commission believes that the state or local agency which has selected the representatives of the agency to attend the meeting should determine the appropriateness of such travel and should determine whether the public employee or official attending the event is representing the state or local government as well as whether such expenses are reasonable. The Commission believes that obtaining supervisory approval, or satisfying one of the means described in Condition 5 in Position Statement 08-02 (Travel) is sufficient to satisfy the requirement of "representing the state or local government" and whether such expenses are reasonable. The Commission has received several inquiries related to Condition 5 of Position Statement 08-02 at page 5. If a public employee or official does not have a supervisor, for example if he or she is an elected official, a memorandum to the file outlying compliance with the five conditions is sufficient. The memorandum should be retained by the official.

organization that receives less than 5% of its funding from for-profit sources OR a state or local government. Finally, if the payments for expenses are supported by lawful consideration, then they would be exempt from the prohibitions contained in Section 3 of Article XXIX. A more detailed explication of this framework follows.

A. Definition of a Nonprofit Organization

Article XXIX does not contain a definition of nonprofit organization. Neither the Colorado Revised Nonprofit Corporations Act nor the Colorado Corporations and Associations Act provides a specific definition of nonprofit organization. *c.f.,* C.R.S. § 7-90-102(38), 102(39) and 102(40) and C.R.S. §7-121-401(26).

However, a provision of Colorado law creating statutory immunity from liability for directors, officers and trustees of nonprofits does venture to define the term :

> any organization which is exempt from taxation pursuant to section 501(a) of the federal 'Internal Revenue Code of 1986', 26 U.S.C. sec. 501(a) as amended, or which is listed as an exempt organization in section 501(c), (2), (3), (4), (5), (6), (7), (8), (11) or (19) of the federal 'Internal Revenue Code of 1986', 26 U.S.C. sec. 501(c), as amended.

C.R.S. § 13-21-115.7(1)(b).

For purposes of interpreting and applying Article XXIX, Section 3(3)(f), the Commission will rely on this definition of nonprofit organization. The Commission acknowledges that additional organizations may be recognized as tax exempt by the federal government, however, we are bound by the definition of nonprofit organization provided by Colorado law with its references to the Internal Revenue Code..

2. Five Percent Rule:

In order to meet the payment test for nonprofits under exception 3(f) there are two criteria. First, payment must be made by a nonprofit organization, and secondly

such nonprofit organization must receive less than 5% of its funding from for-profit organizations or entities[2]. The Commission is aware that many nonprofit entities cannot meet this second prong. The Commission is constrained, however, by the plain language of Article XXIX (3)(f), which limits the application of the exemption to nonprofit entities that receive less than 5% of revenue from for-profit sources.[3] The Commission states for emphasis that the phrase should be applied as passed by the voters; the term does not mean "5% or less".

As a practical matter, public officers, members of the General Assembly, local government officials and government employees attempting to utilize exception 3(f) need to verify in advance that an organization purporting to meet the 5% test meets this criterion prior to participation in such activity. A written statement obtained in good faith prior to participation in an event supported by such an organization should prove sufficient evidence for compliance with the exception. Because a determination of funding may be requested mid-year, it would also appear practical to the Commission that a statement from a recognized "nonprofit" could include a good faith assertion that the entity received less than 5% of its funding from for-profit sources in its previous annual tax cycle and that it is currently anticipated that it will not likely receive 5% of its funding from for-profit sources in the current cycle.

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[2]The 5% requirement applies to the organization as a whole, and not to the funding for a particular event.

[3]The 5% term may have past historical application in the determination of activities of certain "tax-exempt" organizations. The Commission notes in particular references contained in materials presented by Karen E. Leaffer, "Types of Tax Exempt Organizations", Chapter 10, page 10-24, presented as part of a CLE on Advising Nonprofits, May, 2008, and, Rosemary E. Fei "What's Lobbying and Who Wants to Know?" presented May 8, 2009, by ABA Section of Taxation, 2009 ABA Tax CLE 0508031, page 2. (WESTLAW) The Commission publicly acknowledges the assistance of the Colorado Bar Association and the Internal Revenue Service for their assistance in reviewing these terms and extends its gratitude for the assistance.

B. Expenses paid by other state or local government

Exception "f" also exempts reasonable expenses paid by "other state or local government". Therefore, if a covered individual is invited to attend an event put on by a GEO and their expenses are either paid by the governmental entity for which they work or by another state or local government, such payments would not violate the gift ban of Article XXIX.

Some members of the Commission argue that GEOs should be considered "other state or local governments" for purposes of Section 3(f). They rely primarily upon a state statute that designates the American Legislative Exchange Council (ALEC), the National Council of State Legislatures (NCSL) and Council on State Governments (CSG) as "joint governmental agencies." C.R. S. § 2-3-311(2). This statute was enacted prior to the passage of Article XXIX and, therefore, could not have been intended to exempt these organizations from the gift ban provisions.

In addition, Section 3(f) does not exempt payments from "joint governmental agencies." The language of the exception is clear and concise. It exempts payments of expenses made by state and local governments. This exception is a rational expression of the intent of Amendment XXIX that public service should be subsidized by public resources rather than private resources that may be perceived to be unduly influencing public policy. Additionally, the Commission notes Article XXIX section 1(2) explicitly states that the "costs of a reasonable and necessary nature should be born (sic) by the state or local government." [4]

[4] The Commission notes, furthermore, that several states specifically exclude travel and conference costs from these organizations from the definition of a prohibited gift. For example, in Florida, the exclusion includes "Gifts provided directly or indirectly by a state, regional or national organization which promotes the exchange of ideas between, or the professional development of, governmental officials or employees,

C. Lawful Consideration

Finally, regardless of whether or not the GEO meets the nonprofit and 5% rule, payments for expenses by the GEO are permissible under Article XXIX if supported by lawful consideration of equal or greater value.

Many GEOs require their member governmental entities to pay membership dues. If such dues are invoiced expressly to cover travel and other expenses for representatives from the member entity to attend GEO events, then the payment of such expenses would be supported by consideration and, therefore, not prohibited by the gift ban in Section 3 of Article XXIX. In the absence of such express and itemized invoicing, however, it would be impossible to verify that separate consideration supports the payment and the GEO would have to meet the nonprofit and 5% rule set forth above.

The Commission believes that in the circumstance in which the state is paying dues, a substantial portion of the cost of operating these organizations is borne by the state members, constituting lawful consideration of the payment of expenses related to GEO events. In such a circumstance, acceptance of the payments and attendance at the events would be permissible, even if the overall funding of the non-profit GEO exceeds 5% from for-profit sources.

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and whose membership is primarily composed of elected or appointed public officials or staff, to members of that organization or officials or staff of a governmental agency that is a member of that organization."§ 112.312(12)(b)(8), Florida Statutes. Similarly, Iowa exempts from its gifts provisions, "items or services solicited by or given to a state, national, or regional government organization in which the state of Iowa or a political subdivision of the state is a member for purposes of a business or educational conference, seminar, or other meeting..." Iowa Code §68B.22(4)(j)(2007). See also, Conn. Gen. Stat. § 1-79(e)(13) (Connecticut), K.S.A. 46-237(h) (Kansas), Maryland Code § 15-505(4)(vii), and Ohio R.C. 102.02 (A)8). Had the drafters and proponents of Article XXIX intended to exempt GEOs from the gift ban, they could have followed the lead of these other states in expressly doing so. The Commission refuses to divine such intent from the "other state or local government" exception contained in Section 3(f).

IV. Conclusion

Although participation in government exchange organizations may be beneficial to the covered individuals and the governments they serve, such benefits arguably are greater when not subsidized by special interests that seek to use the organizations as a mechanism to purchase access to and influence of our public officials. Therefore, it is important that the Commission narrowly construe the exceptions to the gift ban provisions of Article XXIX, as set forth herein.

This, as all Position Statements, is intended to give broad advice to government officials and employees and the public. The Commission encourages individuals with particular questions to request more fact-specific advice through requests for advisory opinion and letter ruling.

The Independent Ethics Commission

Matt Smith, Chairperson, dissenting
Roy V. Wood, Vice Chairperson
Dan Grossman, Commissioner
Sally H. Hopper, Commissioner
Larry R. Lasha, Commissioner

January 6, 2010

Commissioner Matt Smith, dissenting:

A. Non Profit

In addition to the explanation of nonprofit and federally tax exempt organizations identified by other members, I would also allow out of state nonprofit organizations

authorized to conduct business in Colorado pursuant to C.R.S §70-90-102(28), *et seq*. and nonprofit organizations operating in other states where Colorado officials participate.

B. Other State and local Government

Colorado state and local governments have long been members of associations of other state and local governments. The term "other state and local government" when viewed to mean an association of other states and local governments provides an express, reasonable, practical and complete understanding of what was intended by drafters and voters with the passage of Amendment XXIX. The term provides an additional exception to the gift ban and should be applied independent of the nonprofit and 5% provisions contained in Section 3f.

Section 3f is not written as clearly as it might have been. However, it does include the express term "other state and local government" as fully as it contains "nonprofit" and "5%". While the Commission has endeavored to find a reasonable understanding of the term nonprofit to include certain federally tax exempt organizations, it is far more difficult to understand why the drafters of Section 3f included a reference to 5% for for-profit organizations and entities at a time when this practice had been abandoned by the federal government.[5] It does not appear that the term other state and local government was tied to the 5% limitation. However, it would make sense to add the term other state and local government, if it was understood that certain state and local government entities, intended for exemption, could not meet the 5% rule, each and every year.

[5] Rosemary E. Fei "What's Lobbying and Who Wants to Know?" presented May 8, 2009, by ABA Section of Taxation, 2009 ABA Tax CLE 0508031, pages 2-5. (WESTLAW).

The logical conclusion is that the term other state and local government included entities known and understood to exist at the time Amendment XXIX passed. If an investigation had been made regarding the existing associations of state and local governments, such study would have discovered that most, if not all, rely on contributions from for profit sources in addition to the membership dues they receive from member governments. For profit contributions may account for less than 5% of revenue in some years and more in others. The percentage of annual receipts may turn on whether member governments can pay dues and the amount of funds received from other sources such as the federal government, other nonprofit or for profit organizations or entities. Realistically, associations of state and local governments are more likely to turn to for profit contributions in times of economic downturn when their member budgets are tight.

While it may be argued that the drafters of Amendment XXIX did not understand the complexities involving associations of state and local government, Legislative Council which reviews the Blue Book was clearly familiar with these entities. There is no evidence to suggest that the passage of Amendment XXIX intended to change the operation or funding mechanisms of Colorado's associations of state and local government.[6]

While it is likely true that most Colorado voters do not know all of the associations that Colorado state and local governments have chosen to join, some are

[6] While the Blue Book itself offers no interpretive guidance, it does include the statement that Article XXIX might make it more difficult for elected officials and public employees to participate in educational seminars sponsored by private organizations. See Blue Book, page 10. In the initial draft of Article XXIX, the relevant phrase read "expenses paid by a nonprofit organization or other government…" At the Review and Comment Hearing, Martha Tierney, one of the proponents of the Amendment, was asked about the meaning of the term "other government." She responded that they meant "other state or local government", and that it would be clarified. See, *Transcript of Review and Comment Hearing, May 4, 2006* at page 21

well known and publicly reported. Four state associations are identified as joint governmental agencies in C.R.S. 2-3-311(2). These entities were identified prior to passage of Amendment XXIX, including: the National Council of State governments (NCSG), the American Legislative Exchange Council (ALEC), the National Conference of State Legislatures (NCSL)[7], and the Energy Council. Colorado's membership in these associations with other state governments was secured by publicly debated legislation, and the dues for Colorado's membership in these associations is debated annually as part of the state budget.

Within the executive branch of state government, the best known state associations include, the National Governor's Conference and Western Governor's Association.[8] Colorado statewide elected officials also participate in the National Association of Attorneys General, the National Associations of Secretary of State and the National Association of State Treasurers.

Colorado local governments have long participated in the Colorado Municipal League (CML) and Colorado Counties, Inc. (CCI). CML is currently composed of 265 of Colorado's 271 municipalities, nearly all in the state. All of the 64 counties in Colorado are members of CCI.

Associations of state and local governments share common standard operating practices. These practices insure a governmental purpose for the association. Similar standards of association include:

[7] NCSL has also been designated an "instrumentality of the states" by the I.R.S. See, letter dated Nov. 28, 1978 from IRS to NCSL.

[8] These organizations are supported by membership dues, grants from federal agencies and nonprofit agencies, as well as money from the private sector. The website for the Western Governors Association states that approximately 10% of its funding comes from private sources. www.westgov.org.

1) Membership requires the public approval of dues or a public declaration of association by member governments;
2) Association activities are consistent with the permissible activities set forth in exception 3f (See footnote 1);
3) Representatives to the association activities are selected by virtue of their election to office or by selection by the member state or local government; and
4) Association activities promote the exchange of information between governmental official and any action taken by the association is not binding on member government jurisdictions.

After the passage of Amendment XXIX, it would appear proper to insist that Colorado participants to association events should abide by the Amendment XXIX gift ban for all non-association activities and when lobbyists are involved.

Some members suggest that the term other state or local government may mean only another state or local government. While such a reading may be plausible, such practice was not common prior to the passage of Amendment XXIX. It would seem burdensome to place the financial responsibility for one state to host a conference for all 50 states or to require one local government to pay the cost for a statewide gathering of all other local governments. Smaller conferences might be possible for single member governments to finance, but they would be less practical than sharing member dues or costs for full membership meetings.

This position joins with other members placing their understanding of governmental dues as an important factor in interpreting Section 3f. Consideration as

an exception to the gift ban is expressly contained in provisions 1 and 2 of Section 3. If the only way to analyze a member's participation for an association activity is through additional accounting and invoicing practices, these financial reports will likely be generated after attendance and will provide little guidance to officials prior to the event. Such tasks will be difficult to administer. Such a practice would be burdensome to associations, not to mention that they may result in harsh consequences to Colorado participants.[9]

[9] Hypothetically, Colorado state and local representatives may lose their opportunity to serve in association leadership positions because they could not itemize a sufficient amount of annual membership dues to cover both the cost of association leadership activities and member participation activities.