

The Knowledge Now series features practical research on timely topics from the Colorado Municipal League.

AMENDMENT 41 AND MUNICIPAL OFFICIALS AND EMPLOYEES

By Rachel Allen, Colorado Municipal League staff attorney

Be sure to check for local charter or ordinance provisions that may also bear on these issues.

Introduction

Colorado voters approved an initiated measure, Amendment 41, in the 2006 general election, which adds a new Article XXIX, entitled "Ethics in Government," to our state constitution. Amendment 41 places new restrictions on gifts received by Colorado public officials, government employees, and their immediate family members. Such persons are prohibited from receiving gifts with value exceeding \$53.¹ Exception is made for certain circumstances, such as gifts given between personal friends and relatives on special occasions.

Amendment 41 also prohibits statewide elected officeholders from lobbying certain state elected officials for pay for two years after leaving office and creates the Independent Ethics Commission appointed by elected officials with individual members having investigative and subpoena power.

This paper begins with discussion of the prohibitory provisions of Amendment 41, followed by an introduction to the provisions creating the Independent Ethics Commission ("Commission" or "IEC") and defining its role. Finally, we address the home rule provision in Section 7 of the amendment, which presents home rule municipalities with a significant alternative to the requirements of Amendment 41.

Amendment 41 is just part of the potential picture when it comes to restrictions on gifts to local government officials and employees. Local ordinances may exist, and Amendment 41 itself contemplates local home rule ordinances. Other laws besides Amendment 41 can affect receipt of gifts so be sure to always consult with your municipal attorney as to your local situation. This paper is not intended to be a substitute for legal advice.

Who's covered?

The Amendment 41 restrictions apply to receipt of gifts by various classes of persons. Among those covered are the following, which include municipal officials and employees:

- "Government employee" defined, in pertinent part, as "any employee, including independent contractors, of . . . any local government."²
- "Local government official" defined, in pertinent part, as "an elected or appointed official of a local government."³
- "Local government," as used in the foregoing definitions, is defined to include only counties and municipalities. Thus, when Amendment 41 limits receipt of gifts, etc., by "government employees" or "local government officials," those limits do not apply to officials and employees of Title 32 special districts or school districts, among others.⁴

What prohibitions does Amendment 41 impose on receipt of gifts?

Section 3 subsections (1) and (2) are the principal portions of the amendment affecting municipal officials and employees. Both provisions limit what may be received. The donee, not the donor, is the object of these sections.

Subsection 3(1) provides that a government employee/local government official shall not "accept" or "receive" any money, "forbearance" or forgiveness of indebtedness without receiving "lawful consideration of equal or greater value" in return.

Subsection 3(2) provides that a government employee/local government official shall not, directly or indirectly (via gift to spouse or dependant child) solicit, accept, or receive any "gift or thing of value," having a fair market value or "aggregate actual cost" greater than \$50.00 "in any calendar year," without receiving "lawful consideration of equal or greater value" in return.

The gift limit in Section 3(2) is on the "fair market value" or "aggregate actual cost" of gifts received by the covered official or employee, from "a person," in "any calendar year." So it is a limit of \$53 per year, per donor, per covered official or employee.

¹ Originally, Amendment 41 prohibited gifts over \$50. Position Statement 11-01 (adjustment of the \$50 limit) adjusted the gift limit to \$53 until the first quarter of 2015 pursuant to Colorado Constitution Article XXIX § 3(6).

² Colo. Const. Art. XXIX § 2(1).

³ Colo. Const. Art. XXIX § 2(3).

⁴ Colo. Const. Art. XXIX § 2(2).

The limitation is on gifts, etc., received per year, from “any person.” “Person” is defined as “any individual, corporation, business trust, estate, trust, limited liability company, partnership, labor organization, association, political party, committee, or other legal entity.”⁵

This section of the amendment declares that a “gift or thing of value” includes, but is not limited to, “gifts, loans, rewards, promises or negotiations of future employment, favors or services, honoraria, travel, entertainment, or special discounts.”

The Colorado General Assembly passed a statute that permits the IEC to dismiss frivolous complaints that do not allege that the covered employee or official has received the gift for “private gain or personal financial gain.” These items include “any money, forbearance, forgiveness of indebtedness, gift, or other thing of value given or offered by a person seeking to influence an official act that is performed in the course and scope of the public duties of a public officer, member of the general assembly, local government official or government employee”⁶ (emphasis added). The impact of this definition is significant in that it alters the gift prohibition in Section 3 from a crime irrespective of intention to one in which intent to influence is a required element.

Receptions, etc.

The actual costs of food, drink, etc., for a reception or similar event, to which covered officials and/or employees are invited, are covered things of value under Amendment 41; however, the costs may fairly be divided equally among everyone that attends. As a consequence, the distributed “gift” or “value” received by each individual official or employee attending could be quite minimal (e.g., if 200 people attend a \$2,000 reception, covered officials/employees receive a \$10 “gift” or “thing of value” from the event sponsor). See also exceptions below.

Scholarships, etc.

A common question has been whether Subsections 3(1) or 3(2) preclude award of scholarships to covered

officials and employees, or their children. Whether treated as a “forbearance” or a “gift or thing of value,” scholarships or similar benefits are not considered a violation of public trust “provided the scholarship is awarded using objective criteria” and is not a direct or indirect benefit to covered officials and employees. Additionally, scholarships are often conditioned on future performance (e.g., maintaining a certain grade point average) of the scholarship recipient.⁷

What are the exceptions to these prohibitions?

The exceptions set forth in Section 6 of the Amendment provide that the limitations contained in subsection 3(1) and 3(2), described above, do not apply, if the gift or thing of value received by a municipal official or employee is:

- Campaign contributions “as defined by law.”⁸
- An “unsolicited item of trivial value,” less than \$50, such as a “pen, calendar, plant, book, note pad or other similar item.”
- An “unsolicited token or award” in form of plaque, trophy, etc.
- Unsolicited publications, subscriptions, or “informational material” related to “recipient’s performance of official duties.”
- Admission and the “cost of food or beverages” at a reception, meal, or “meeting” before whom the recipient appears to speak or answer questions, as part of a “scheduled program.”
- “Reasonable expenses” paid by a nonprofit organization or local government for “attendance” by covered officials or employees at a convention, fact-finding mission, 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 government, provided the nonprofit organization receives “less than 5% of its funding from for-profit organizations or entities”
- Gift, etc., that is given by “an

individual” who is a relative or “personal friend” of recipient, “on a special occasion.”⁹

- Compensation/incentive given to an employee.

Complaints to the commission

“Any person” may file a complaint in writing to ask the Commission to determine whether a covered official or employee failed to comply with the requirements of Amendment 41, or “any other standards of conduct or reporting requirements as provided by law” within “the preceding twelve months.”¹⁰ The Commission may dismiss “frivolous” complaints without a public hearing. As to non-frivolous complaints, Amendment 41 requires the Commission to: “conduct an investigation,” hold a public hearing, and “render findings,” pursuant to written Commission rules. The Commission is authorized to assess penalties for “violations,” as prescribed in Amendment 41, and as otherwise provided by law.¹¹ (Penalties for violation of Amendment 41 are set forth in Section 6 of the amendment, discussed on page 3.) Members of the Commission are authorized to subpoena documents or witnesses.¹²

(Cont’d on Page 4)

5 Colo. Const. Art. XXIX § 2(4).

6 C.R.S. § 24-18.5-101(5)(a).

7 Position Statement 08-01 (gifts).

8 Colo. Const. Art. XXVIII § 2(5).

9 Position Statement 08-01 (gifts) explained that special occasions need not be limited to “birthdays, anniversaries and holidays; nor should it necessarily mean events that are rare or unusual. A special occasion may occur on a regular basis, such as a weekly meal with friends or family.”

10 Colo. Const. Art. XXIX § 5(3)(a).

11 Colo. Const. Art. XXIX § 5(3)(b)-(c).

12 Colo. Const. Art. XXIX § 5(4).

Independent Ethics Commission

By Jane T. Feldman, Colorado Independent Ethics Commission executive director

The Colorado Independent Ethics Commission was created in 2006 pursuant to a voter-initiated amendment to the Colorado Constitution.¹ The General Assembly thereafter passed enabling legislation.² The Commission held its first meeting in December, 2007, and issued its first opinion in October 2008.

Pursuant to the constitution and the enabling statute, the IEC is tasked to “hear complaints, issue findings and assess penalties, and also to issue advisory opinions on ethics issues arising under Article XXIX and other standards of conduct and reporting requirements as provided by law.” The Commission also issues letter rulings pursuant to the statute.³ The Commission also “shall conduct an investigation, hold a public hearing, and render findings on each non frivolous complaint pursuant to written rules adopted by the Commission.”⁴

The Commission consists of five members appointed as follows, one each by the Governor, the Speaker of the House, the President of the Senate, the Chief Justice of the Supreme Court, and one by the other four Commissioners. The fifth member must be a local government employee or official. No more than

two members of the Commission may be from the same political party. The current members of the Commission are Dan Grossman, chair; Sally H. Hopper, vice-chair, Dorothy B. Butcher, Bill Pinkham, and Matt Smith.

The Commission has jurisdiction over all state legislative branch employees and elected officials, and all state executive branch elected officials and employees, as well as employees and elected officials of all counties and municipalities in the state, unless they work for a home-rule county or municipality which has promulgated an ethics code or ordinance.

The work of the Commission on its constitutionally-mandated mission to hear complaints and issue advisory opinions is summarized below (see *Table 1*). In addition, Commission staff responds to open records requests pursuant to the Colorado Open Records Act (“CORA”),⁵ conducts trainings of state and local employees and officials, and answers informal questions from covered individuals, the press and public.

IEC Activities

The Commission issued its initial procedural rules in 2008, and substantially revised its rules in 2011. Both times, the promulgation and revision of the Rules took up portions of numerous meetings and countless

hours of staff and legal services time. The revised Rules were effective April 14, 2011.

The Commission remains committed to a training program for all employees and officials under its jurisdiction. The Commission broadened its training program during 2011, and conducted more than 30 trainings of state executive branch agencies, Public Trustees, the Offices of the Governor and Lieutenant Governor, members of the General Assembly, and several organizations including the Colorado Municipal League, the Colorado State Managers Association, the Colorado Fiscal Managers Association, and the Colorado Municipal Clerks Association. The Commission believes that training of covered individuals remains the most effective and efficient way to ensure that public officials and employees operate within the constitution.

In less than four years, the Commission has issued 55 opinions, (including 12 position statements, seven letter rulings, and 36 advisory opinions), processed 38 complaints and promulgated and revised its Procedural Rules. The Commission has also searched for, and appointed two Commissioners. It has responded to 33 requests under the CORA and conducted two public hearings, with another three either scheduled or anticipated.

- 1 Colo. Const. Article XXIX § 5.
- 2 C.R.S. § 24-18.5-101 et. seq.
- 3 C.R.S. § 24-18.5-101(4)(a) and (b).
- 4 Colo. Const. Art. XXIX § 5(c).

- 5 C.R.S. § 24-72-10.

Table 1 Summary of IEC Complaints, Hearings, and Advisory Opinions

Year	# of meetings	Opinions issued	Action taken	Complaints received	Hearings	CORA requests	Trainings	Informal advice calls
2008	24	3	all position statements	4	0	4	2	57
2009	25	21	7 position statements, 5 letter rulings, 9 advisory opinions	14	1	8	6	175
2010	20	19	1 position statement, 2 letter rulings, 16 advisory opinions	9	1*	12	7	150
01/2011 to 10/2011	13	12	1 position statement, 11 advisory opinions, 1 advisory opinion pending	11	3**	9	34	40
Total	82	55		38	5	33	49	422

*Two settled before hearing
 **All three are pending

Penalties for violation of Amendment 41

Section 6 of the amendment provides that any covered official or employee “who breaches the public trust for private gain” and “any person or entity inducing such breach,” shall be liable to the state or local jurisdiction for “double the financial equivalent of any benefits obtained by such actions.”¹³

The language of the penalty section making the person or entity that induces a breach of the public trust liable to the state or local government stands out in an amendment that, except for its provisions concerning professional lobbyists, focuses on covered officials or employees as recipients of gifts, etc. The jurisdiction of the Commission would apparently extend to assessing penalties on those who have led covered officials or employees astray.

Local authority and the home rule provision

Section 7 of Amendment 41 provides that “any” county or municipality may adopt ordinances or charter provisions with respect to ethics matters that are “more stringent” than the requirements of Amendment 41.

Home rule municipalities and counties are then given substantial additional authority. Section 7 provides that the requirements “shall not apply” to home rule counties or municipalities “that have adopted charters, ordinances, or resolutions that address the matters covered by [Article XXIX].”

Whether the “have adopted” language means that a home rule municipality must have had its local enactment on the books prior to Amendment 41 taking effect is subject to interpretation. CML endorses the interpretation that this language allows ordinances, charter provisions or resolutions, adopted after the effective date of Amendment 41 to remove officials and employees of that municipality from the Amendment 41 restrictions.

Opinions differ about what the “matters covered by” language requires to be included in the local ordinance, charter provisions, or resolutions. It is safe to assume the local provision should

address gift limits of some sort at a minimum. We posted to the CML website several recent municipal ethics enactments to accompany this *Knowledge Now*.

For additional information

Members can go to www.cml.org, > Member Login, > Information, > Publications, > Periodicals, > Knowledge Now, to view the following supplemental materials:

- Text of Amendment 41
- Sample home rule ethics provisions
- Link to the IEC’s website (www.colorado.gov/ethicscommission) to find an ethics handbook (2011) and ethics opinions issued.

Upcoming events on the topic

Jane Feldman, Independent Ethics Commission executive director, will be discussing IEC training issues and Amendment 41 on **Feb. 3** as part of CML’s Effective governance: Resources and skills for elected officials workshop and will be presenting a one-hour CML webinar on **Apr. 26**.

¹³ Colo. Const. Art. XXIX § 6.