

Amendment 41: Ethics in Government

by Gerald E. Dahl and B. Brittany Scantland

This article summarizes the principal features of Amendment 41 to the Colorado Constitution, as adopted by the voters in November 2006. It also reviews implementing legislation by the Colorado General Assembly and opinions of the Independent Ethics Commission created by the Amendment. Finally, the article reviews the limited case law decided under the Amendment and suggests a "decision tree" approach to its application.

The Colorado electorate adopted Amendment 41 to the Colorado Constitution on November 7, 2006.¹ It became effective on January 1, 2007.

This initiated measure added to the Colorado Constitution a new Article XXIX, entitled "Ethics in Government" (Amendment). In general, the Amendment bans public officials, members of the general assembly, local government officials, and government employees from receiving gifts and other items of value, regardless of whether the gifts and other items of value are connected with their public duties. It establishes stringent controls on gifts, entertainment, and other forms of activity by professional lobbyists. It also provides that receipt of a "thing of value" by the spouse or dependent of a public official, member of the general assembly, local government official, or government employee is prohibited in many circumstances, unless equal or greater value is given in return. Further, the Amendment creates as a penalty an amount double the amount of the gift or thing of value, which must be paid to the jurisdiction whose public trust was breached. It also sets up a state commission to hear and decide on complaints of violations of the Amendment by any state or local official.

The Amendment is broad and has far-reaching effects beyond the covered officials specifically named; thus, it must be closely read to determine who is covered and affected. For example, the Amendment affects all persons who may interact with or otherwise deal with the covered government officials and employees.

The Amendment also prohibits the receipt of certain gifts and the giving of such gifts to others.

This article describes the scope of the Amendment, including critical sections including Section 2 (definitions); subsections (1) through (4) of Section 3 (gift ban); Section 5, which establishes the Independent Ethics Commission (Commission); and Section 7 (application to local governments). It also reviews the implementing legislation adopted by the general assembly, Commission opinions, and the limited case law decided under the Amendment. Finally, it discusses a schematic "decision tree" approach to applying the Amendment.

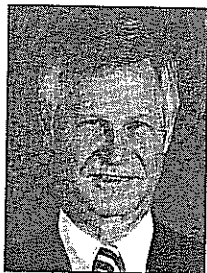
Key Definitions

The Amendment contains only six formal definitions.² However, as discussed below, this does not mean that all other terms are self-explanatory. The defined terms are as follows:

- "Government employee" means any employee, including independent contractors, of the state Executive Branch, a state agency, a public institution of higher education, or any local government, except a member of the general assembly or a public officer.³
- "Local government" is restricted to a county or municipality.⁴ Quasi-governmental entities, such as special districts, are excluded from this definition.

About the Authors

Gerald E. Dahl is a founding partner of Murray, Dahl, Kuechenmeister & Renaud LLP. He practices local government law, dealing with all aspects of land use, annexation, personnel, governmental operations, and water rights. He represents municipalities and counties in general government matters and in the planning and development of



land, and specializes in annexation and land use code diagnosis and revision to implement planning goals—(303) 493-6670, gdahl@mdklaw.com. B. Brittany Scantland is an associate with Murray, Dahl, Kuechenmeister & Renaud LLP. She represents clients in court and administrative hearings and provides legal counsel to public officials and staff on topics such as public records, open meetings, elections, and municipal tax—(303) 493-6670, bsantland@mdklaw.com.

Coordinating Editor

David D. Smith, Glenwood Springs, of Garfield & Hecht, P.C.—(970) 947-1936, dsmith@garfieldhecht.com

Government Law articles provide information to attorneys dealing with state and federal administrative agencies, as well as attorneys representing public or private clients in the areas of municipal, county, and school or special district law.

- “Local government official” means an elected or appointed official of a local government, but does not include a local government employee.⁵
- “Person” means any individual, corporation, business trust, estate trust, limited liability company, partnership, labor organization, association, political party, committee, or other legal entity.⁶ “Person” has been further defined by the Commission to include governmental agencies and institutions of higher learning.⁷
- “Professional lobbyist” means an individual who engages himself or herself or is engaged by any other person for pay or for any consideration for lobbying. The term excludes volunteer lobbyists; state officials or employees acting in their official capacity, except those designated as lobbyists as provided by law; any elected public official acting in his or her official capacity; or any individual appearing as counsel or advisor in an adjudicatory proceeding.⁸
- “Public officer” means any elected officer, including all statewide elected officeholders, the head of any department of the executive branch, and elected and appointed members of state boards and commissions. The term does not include members of the general assembly; members of the judiciary; local government officials; or any member of a board, commission, council, or committee who receives no compensation other than a *per diem* allowance or necessary and reasonable expenses.⁹

This article uses the term “covered official” to reference public officers, members of the general assembly, local government officials, and government employees.

Certain other key terms can be understood by reading the Amendment in full and by reference to the letter rulings, advisory opinions, and position statements (collectively, opinions) issued by the Commission. Those terms include:

- “Gift or thing of value” is a critical term but not formally defined in the Amendment. It is described in Section 3(2) and includes, but is not limited to, gifts, loans, rewards, promises or negotiations of future employment, favors or services, honoraria, travel, entertainment, or special discounts.
- “Special discount” is defined by the Commission to mean a discount targeted at a particular government employee or official (or small group of the same) where there is a potential to influence government action.¹⁰

- “Representation,” in the context of the Section 4 restriction on former elected officials, is defined by the Commission as employment requiring registration as a professional lobbyist pursuant to CRS § 24-6-301.2 or acting as a legislative liaison for a state agency.¹¹
- “Independent contractor” is defined by the Commission to include a contractor performing personal service contracts for which the government otherwise might traditionally employ in-house staff and who, therefore, is covered by the Amendment as if he or she were a government employee.¹²

Persons Affected

Section 3 imposes a gift ban prohibiting covered officials from receiving certain gifts from specific persons. A person first should determine whether he or she is identified by the Amendment either as a donor or a donee. The accompanying chart, “Amendment Section 3: Gift Ban—Persons Affected” depicts the categories of those affected by the gift ban.

If a person is included in the chart, the Amendment applies. It is important to consult the relevant definitions before reviewing the chart. In certain circumstances, a private company that ordinarily is not considered a government employee might qualify as an independent contractor subject to the gift ban.¹³

The Amendment is written in terms of prohibitions on receiving, as well as prohibitions on giving. The covered officials and professional lobbyists are the primary focus of the Amendment, but those who actually give the gifts also are punishable pursuant to its terms.¹⁴ Due to the broad definition of “person” in Section 2, as further defined by the Commission,¹⁵ the Amendment potentially applies to everyone interacting with a covered official where a gift or donation is concerned.

Prohibited Gifts

Armed with a clear understanding of who is covered by the gift ban as donors and donees, the next question is: What gifts are banned? Not all donors, donees, or gifts are treated the same. Section 3 of the Amendment contains three gift bans with varying degrees of prohibition. These bans are summarized in the accompanying chart, “Amendment Section 3: Gift Ban—Gifts Delineated.”

Amendment Section 3: Gift Ban—Persons Affected

	Subsection (1)	Subsection (2)	Subsection (3)
Prohibited donees	Public official Member of the general assembly Local government official Government employee	Public official Member of the general assembly Local government official Government employee Spouse or child of any of the foregoing	Public official Member of the general assembly Local government official Government employee Member of the immediate family of any of the foregoing
Prohibited donors	Person	Person	Professional lobbyist

As permitted by Section 9 of the Amendment, the Colorado General Assembly enacted CRS § 24-18.5-101, a new article 18.5 in Title 24 entitled "Independent Ethics Commission." Beyond reiterating the provisions of the Amendment, this legislation:

- 1) establishes the membership and method of appointment of the Commission;³⁶
- 2) provides that advisory opinions shall be issued as soon as practicable;³⁷
- 3) provides that letter rulings shall be issued as soon as practicable;³⁸
- 4) does not authorize position statements, though the Commission has issued them under its own rules as non-binding statements clarifying or stating the Commission's position on a matter;
- 5) states that the Commission shall dismiss as frivolous any complaint that fails to allege a covered official has accepted or received any gift or thing of value;³⁹ and
- 6) defines "official act," "private gain," and "personal financial gain"—the latter two terms are restricted to gifts given by a person "seeking to influence an official act" by the covered official.⁴⁰

Private or Personal Financial Gain

CRS § 24-18.5-101(5)(a) narrows the scope of the Amendment's reach in two significant ways. It provides that the Commission is required to dismiss as frivolous any complaint that fails to allege that the covered official or employee has received any gift or other thing of value for "private gain or personal financial gain."⁴¹ "Private gain" or "personal financial gain" is defined by the statute as follows:

[a]ny 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.⁴²

The effect of this definition is significant. It changes the nature of the gift ban in Section 3 of the Amendment from a status crime, where covered officials are in violation simply by receiving a gift or thing of value, regardless of whether it is related to their public position or activities, to an intent-based prohibition on such items only when given to influence an official act within the scope of du-

lunch at a location where the lobbyist was required to pay for lunch because the lobbyist was a member of the club and the public official (not a member of the club) was prohibited by club rules from paying for the meal. The Commission held that the purpose of the meal was irrelevant; however, eating at a restaurant where both parties can (and do) pay is permitted. The only exceptions to the gift ban placed on lobbyists that the Commission has held as permissible are (1) political campaign contributions and (2) gifts to a lobbyist's immediate family.²⁰

Section 3(3) Exceptions

Even if a person is otherwise prohibited from giving or receiving a gift based on the analysis above, Section 3(3) contains exceptions to the prohibitions in Sections 3(1) and 3(2). If an exception applies, the ban does not. This list does not provide exceptions to Section 3(4). Exceptions to Sections 3(1) and (2) are:

- 1) campaign contributions, as defined by law;²¹
- 2) an unsolicited item of trivial value (less than \$50), such as a pen, calendar, plant, book, notepad, or other similar item;²²
- 3) an unsolicited token or award in the form of a plaque, trophy, desk item, wall memento, or similar item;²³
- 4) unsolicited informational material, publications, or subscriptions related to the recipient's performance of official duties;²⁴
- 5) admission to and the cost of food and beverages at a "reception, meal or meeting . . . where the recipient appears to speak or answer questions as a part of a scheduled program";²⁵
- 6) "reasonable expenses" paid by a nonprofit organization or a state or local government for attendance at a convention, fact-finding mission, trip, or other meeting are exempt, but only if the covered official is scheduled to deliver a speech or presentation, participate on a panel, or represent that government, and in the event a nonprofit organization is the sponsor, that organization must receive less than 5 percent of its funding from for-profit entities;²⁶
- 7) a gift or thing of value from a relative or "personal friend" on a "special occasion," neither of which are defined terms;²⁷ and
- 8) a component of the compensation paid or other incentive given to the recipient in the normal course of employment.²⁸

Many of the Commission's opinions have focused on interpreting these exceptions and will be discussed in further detail below.

Amendment Section 3: Gift Ban—Gifts Delineated

	Subsection (1)	Subsection (2)	Subsection (3)
Ban	Money Forbearance Forgiveness of debt	Gift Thing of value	Gift Thing of value Payment for meal Payment for beverage Payment for any other item consumed
Monetary Limits	None of the above may be given, regardless of value.	A covered official may receive a gift of up to \$50 in a calendar year from a person.	None of the above may be given, regardless of value.

Lobbying by Elected Officials

Though its application is less far-reaching, Section 4 concerns lobbying by elected officials after leaving office. The section requires a two-year hiatus between leaving office and the commencement of work as a lobbyist "for compensation before any other statewide elected officeholder or member of the general assembly."²⁹ Those affected by Section 4 are statewide elected officeholders and members of the general assembly. The section authorizes "similar restrictions" on other public officers, local government officials, or government employees," through legislation.

Independent Ethics Commission

Section 5 creates a five-member unpaid ethics commission, one member of whom must be a local government official or employee. The Commission is given authority to hear complaints, issue findings, assess penalties, and issue advisory opinions. The Commission's jurisdiction extends to doing these things "on ethics issues arising under [the Amendment] and under any other standards of conduct and reporting requirements as provided by law."³⁰

Sections 5(3) and 5(4) establish the adjudicative functions and powers of the Commission in responding to specific written complaints, which may be filed by "any person."³¹ The Commission is required to conduct an investigation, hold a hearing, and issue findings on all non-frivolous complaints.³² The Commission is given power to subpoena documents and witnesses³³ and impose penalties.³⁴ The Commission's findings are presumed to be based on a preponderance of the evidence, unless the Commission itself determines a higher standard is warranted.³⁵



JOHN A. CRISWELL

ARBITRATOR AND MEDIATOR

FOR

LABOR, EMPLOYMENT AND COMMERCIAL
DISPUTES

- Senior Judge, Colorado Court of Appeals
- Labor Arbitrator Panel, Federal Mediation and Conciliation Service
- Labor, Employment and Commercial Arbitrator Panels, American Arbitration Association
- Hearing Officer, Colorado Judicial System Personnel Board of Review

1901 Littleton Blvd., Suite 260
Littleton, Colorado 80120
Tel: 303-864-1664
Fax: 303-798-2526
E-mail: CRISWELL1956@AOL.COM

As permitted by Section 9 of the Amendment, the Colorado General Assembly enacted CRS § 24-18.5-101, a new article 18.5 in Title 24 entitled "Independent Ethics Commission." Beyond reiterating the provisions of the Amendment, this legislation:

- 1) establishes the membership and method of appointment of the Commission;³⁶
- 2) provides that advisory opinions shall be issued as soon as practicable;³⁷
- 3) provides that letter rulings shall be issued as soon as practicable;³⁸
- 4) does not authorize position statements, though the Commission has issued them under its own rules as non-binding statements clarifying or stating the Commission's position on a matter;
- 5) states that the Commission shall dismiss as frivolous any complaint that fails to allege a covered official has accepted or received any gift or thing of value;³⁹ and
- 6) defines "official act," "private gain," and "personal financial gain"—the latter two terms are restricted to gifts given by a person "seeking to influence an official act" by the covered official.⁴⁰

Private or Personal Financial Gain

CRS § 24-18.5-101(5)(a) narrows the scope of the Amendment's reach in two significant ways. It provides that the Commission is required to dismiss as frivolous any complaint that fails to allege that the covered official or employee has received any gift or other thing of value for "private gain or personal financial gain."⁴¹ "Private gain" or "personal financial gain" is defined by the statute as follows:

[a]ny 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.⁴²

The effect of this definition is significant. It changes the nature of the gift ban in Section 3 of the Amendment from a status crime, where covered officials are in violation simply by receiving a gift or thing of value, regardless of whether it is related to their public position or activities, to an intent-based prohibition on such items only when given to influence an official act within the scope of duties of the covered official.

The Amendment anticipated and preemptively attempted to address potential legislative restrictions on its scope. Section 8 declares that any statutory provisions that are in conflict or inconsistent with the Amendment are preempted and declared inapplicable. Further, Section 9 states that legislation may be enacted to facilitate the Amendment "but in no way shall such legislation limit or restrict the provisions of this article." The enabling statute itself recognizes these potential conflicts.⁴³ What is yet to be decided is how any facilitating legislation, such as CRS § 24-18.5-101, which contains additional potentially restrictive definitional terms, would be interpreted in light of Sections 8 and 9 of the Amendment.

Advisory Opinions, Letter Rulings, and Position Statements

As discussed above, the Commission is statutorily authorized to issue letter rulings and advisory opinions. Letter rulings are issued

under the authority of Section 5(3)(a), which allows any person⁴⁴ to file a written complaint requesting that the Commission determine whether a covered official or employee failed to comply with the Amendment or the "other standards of conduct or reporting requirements as provided by law" within the preceding twelve months.⁴⁵ Advisory opinions allow covered officials to submit a written request for an opinion as to whether contemplated action will violate the Amendment or "other standards of conduct or reporting requirements as provided by law."⁴⁶

In addition to the letter rulings and advisory opinions, the Commission also has published eight non-binding position statements. Position statements are authorized by Commission rule and are initiated at the Commission's discretion.⁴⁷

The Commission's website contains a list and the full text of all opinions.⁴⁸ The Commission also has promulgated detailed rules of procedure governing its activities, requests for advisory opinions and letter rulings, the filing of complaints, and the conduct of hearings.⁴⁹

Commission Opinions

Each opinion begins with a summary introduction that provides the purpose of the opinion. The introduction to the Commission's first position statement offers the following explanation:

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. The IEC issues this Position Statement for the purpose of clarifying the provisions of Section 3(1) and (2) of Article XXIX of the Colorado Constitution ("Section 3"). In this Position Statement, the Commission responds to the uncertainty surrounding Section 3(1) and (2), relating to gifts. It is the Commission's hope that this Position Statement will increase the awareness of public officials and employees and the public at large. The Commission encourages public employees and officials to request further clarification if needed, through a request for advisory opinion.⁵⁰

The purpose of clarification is found throughout the introductions to the opinions issued to date.

Many opinions contain a general statement of background detailing why the issue is being discussed. All contain some form of jurisdictional statement or statement of applicable law to guide the reader to the pertinent section being discussed.

The vast majority of the opinions rendered to date discuss and interpret the Section 3 gift ban and the Section 2 definitions. Examples of the subject matter of opinions include gifts,⁵¹ travel,⁵² discounts,⁵³ representation after leaving office,⁵⁴ and the definitions of "person"⁵⁵ and "independent contractor."⁵⁶

The following is not a complete description of all of the opinions. Provided is a general overview of the opinions issued to date and the rationale behind each. For a complete list and full text, see the Commission's website.⁵⁷

Position Statement 08-01—Gifts

In its first position statement, the Commission responded to the considerable public concern surrounding the scope of the Amendment with respect to the gift ban, permissible gifts, and who may receive them. The position statement addressed scholarships; hon-



Save on reliable coverage for your business — and your family.

Exclusively for Colorado Bar Association members:

- **Rate discounts** — save on Anthem's standard EmployeeElect rates.
- **Control and flexibility** — select from 15 affordable plan designs or package multiple plans to give employees more choices.
- **Additional perks** — Anthem's 360° Health program and Member Assistance Program included at no additional charge. Plus get packaged discounts for ancillary benefits.

Call today for more information.

Metro Denver & Northern Colorado:
Benefits & Incentives Group, Inc.
800-305-0062, ext. 705 or 709

Colorado Springs & Southern Colorado:
Golenda Insurance & Benefit Consulting
877-892-4833



GOLENDA INSURANCE & BENEFIT CONSULTING

Anthem. 

biq

Benefits & Incentives Group, Inc.

Anthem Blue Cross and Blue Shield is the service mark of Rocky Mountain Health and Welfare Services, Inc. An independent director of the local Board and State Council Association. Anthem is a registered provider of All American Insurance Company, Inc. The Blue Cross and Blue Shield names and symbols are registered marks of the Blue Cross and Blue Shield Association.

form (7/09)

oraria; insurance proceeds; prizes; raffles and lotteries; inheritances; and importantly, the Commission's interpretation of the scope of a "special occasion," in connection with which some gifts, otherwise prohibited, are permissible.

- Scholarships are not considered a direct or indirect benefit to the public employee or official.
- Honoraria generally may be accepted by employees and officials for speaking before business or civic groups or writing for publications. Honoraria of more than \$50 are permissible, provided that the speech or publication is not part of the covered official's duties, public resources or government time are not used in its preparation, the amount of the honoraria is not used in its preparation, the amount of the honoraria is reasonably related to the services being performed, and neither the sponsor of the speech nor the source of the honoraria is a person or entity with whom the covered official has had or expects to have dealings in his or her official capacity.
- Insurance proceeds are exempt, because usually there is lawful consideration and no breach of the public trust where, for example, a public official or employee is a beneficiary of a parent's or spouse's life insurance policy.
- Prizes are permissible, as long as the competition was fair and open to everyone similarly situated and not given based on the covered official's governmental status or to influence a particular official decision.
- Raffles, lotteries, and silent auctions are considered not to be a violation of the public trust and permissible, if lawful consideration is paid and in the cases where not, as long as the pub-

lic employee or official has an equal opportunity to win as other entrants, participation is permissible.

- Inheritances are considered based on the close personal relationship of the people involved, rather than the public status of the recipient, and are not considered a violation of the public trust.
- Special occasions "[s]hould not be restricted to birthdays and anniversaries and holidays nor should it necessarily mean events that are rare or unusual." Things of value and gifts given by relatives or personal friends on special occasions are permissible, provided that: (1) it is a family or personal relationship, rather than the governmental position that is the controlling factor; and (2) the gift would not result in or create the appearance of using the office for personal benefit or favors for performing official duties.

Position Statement 08-02—Travel

Although expressly included on the list of prohibited things of value in the Amendment, Position Statement 08-02 states that acceptance of travel-related expenses may be considered as a gift to the state or local government, rather than to the covered official and therefore are permissible when the travel is: (1) for a legitimate government purpose; (2) appropriate to that purpose [fly coach]; (3) no longer than reasonably necessary to accomplish its business purpose; (4) the covered official was not, is not, and will not be in a position to take direct official action;⁵⁸ and (5) the covered official verifies compliance with these conditions.



There's a better way.



Expert
Consulting
Services, Inc.

www.ecsofcolorado.com

(303) 226-0450

Providing Attorneys with Expert Witnesses

Position Statement 09-01—Gifts From Lobbyists

Position Statement 09-01 concerns gifts from lobbyists and organizations represented by lobbyists. As noted above, the Amendment imposes an absolute prohibition of gift giving by professional lobbyists. Position Statement 09-01 draws a distinction between professional lobbyists, subject to the absolute prohibition, and organizations or groups that might be represented by professional lobbyists or whose industry may be represented by a professional lobbyist. In these latter situations, the Commission holds that the \$50 gift threshold and its relevant exceptions as described above apply.

Advisory Opinion 09-07—Acceptance of a Prize by Government Employees

Advisory Opinion 09-07 holds that it is not a violation for government employees to accept cash prizes from professional organizations in their fields of employment, assuming that the prize is available to all individuals similarly situated. The Commission relied on its Position Statement 08-01 for the proposition that government officials and employees should not be prohibited from accepting offers and benefits given to the general public or a class of people under circumstances where others receive the same opportunity.

Position Statement 09-04—"Person" Defined

The Commission finds that a government agency and an institution of higher learning is each a "person." A public official or employee therefore may not accept gifts valued in excess of \$50 from governmental agencies or institutions, unless the gift falls under another specified exception.

Letter Ruling 09-02—Luncheons

Unless appearing as a speaker or a panelist or representing a state or local government, the \$50 prohibition applies to luncheons. The Commission:

believes that there is a burden of inquiry placed upon each government official and employee to ascertain the value of items being offered to them as gifts. . . . This is especially applicable in the scenario presented here, where the value of a meal may not be readily apparent.

Advisory Opinion 10-07—Caucus Funding

Advisory Opinion 10-07 holds that a caucus may partner with a non-profit organization or may form its own nonprofit to solicit funds. In issuing this opinion, the Commission expressly warned that members of the caucus should be vigilant to avoid the appearance of impropriety when soliciting funds in this manner. The Commission reasoned that the prohibitions of the Amendment do not extend to the organizations that members of the caucus support.

Section 6: Penalties

Section 6 of the Amendment establishes penalties for any person who "breaches the public trust for private gain" and for anyone who induces such a breach. A violator must pay to the state or local jurisdiction, as appropriate, "double the financial equivalent of any benefits obtained by such [illegal] actions." This section does not

simply state that anyone who violates the Amendment shall be subject to penalties; rather, it describes the particular action that gives rise to penalties. The terms "breaches the public trust" and "for private gain" are not defined by the Amendment. CRS § 24-18.5-101 defines the term "private gain"; however, the statute defines that term specifically for the purposes of subsection (5) of that section. Thus, the reader is left to determine what a "breach of the public trust for private gain" encompasses. It is unclear whether the term refers to violation of the Amendment in general, or violation of "any other standards of conduct and reporting requirement as provided by law." Further, § 6 does not state, though it implies, that such person must be found guilty by letter ruling of the Commission.

Section 7: County and Municipal Authority

Section 7 allows counties and municipalities to adopt local provisions more stringent than those contained in the Amendment. Home rule counties and municipalities may opt out of the Amendment if they "have adopted charters, ordinances, or resolutions that address the matters covered by this Article."⁵⁹ The key term in this sentence is "covered." The proper and conservative advice to a home rule county or municipality is to adopt a local ordinance or charter provision that touches on all subjects contained in the Amendment, and that expressly declares the intention of the county to fully occupy the field. Home rule counties and municipalities should be mindful that simply having adopted a charter provision or ordinance concerning "conflicts of interest"—a topic



GUARDIAN®

www.cbadi.com

Your ability to work as an attorney is the most valuable asset you own. Doesn't that asset deserve proper protection? Insist on true "own occupation" disability coverage from a name you can trust at discounted rates for CBA members.

Contact **David Richards, Disability Income Specialist** at 303-714-5875 or toll free 1-877-402-0485 ext. 3211

*Policy form 1400. Disability Insurance Products underwritten and issued by Berkshire Life Insurance Company of America, Pittsfield, MA, a wholly owned stock subsidiary of The Guardian Life Insurance Company of America, New York, NY. Product provisions may vary from state to state.

that deals with ethics generally, but not gifts specifically—in many cases likely is not enough to exempt them and their officials and employees from the Amendment.

The Developmental Pathways v. Ritter Opinion

After the passage of the Amendment, but before the appointment of all five members of the Commission, several plaintiffs brought suit against Governor Bill Ritter, challenging the gift bans contained in the Amendment as being overbroad and vague and in violation of their First Amendment rights.⁶⁰ The plaintiffs included a lobbyist, a legislator, a county commissioner, a university professor, an appointed board member for a statutory city, non-profit organizations, and government employees and their families.

The Denver District Court issued a preliminary injunction finding that the gift bans in the Amendment impermissibly chilled the plaintiffs' First Amendment rights. The governor appealed, and the Colorado Supreme Court held that, because the injunction was issued before the Commission came into existence and before it had the authority to act in furtherance of the Amendment, the plaintiffs failed to present a ripe as-applied constitutional challenge. The Supreme Court reversed the district court's order on that ground alone, specifically refraining from considering the merits of the plaintiffs' constitutional claims.⁶¹ Nevertheless, the Supreme Court opinion is significant for a number of points.

The governor argued that the penalty provision of Section 6, which states that a covered official "who breaches the public trust for private gain" is subject to penalty, essentially modified the gift

ban provisions of Section 3 by relating them to gifts intended to influence the public official or employee's official actions, thereby narrowing their scope. This position is not expressly stated in the Amendment, although it since has been supported by Commission opinions. The governor also argued that the passage of CRS § 24-18.5-101(5), which expressly links the gift ban to attempts to influence the covered official's official actions, similarly cured any constitutional overbreadth problems.

Finally, the governor argued that the Amendment was not self-executing and would not be in effect until the Commission was formed and adopted rules governing the process of hearing complaints and assessing penalties. The Supreme Court held that the Amendment is self-executing and does not require any further action by the general assembly to be effective.⁶² Nevertheless, the Court also held that, because the Commission had not been formed, there had not yet been an actual application or at least a reasonable possibility or threat of enforcement, and therefore the plaintiffs had failed to present a ripe as-applied constitutional challenge.⁶³

This may present a difficult situation for covered officials, because the Court determined that the Amendment is self-executing and, over a year after the Amendment became effective, also held that the existence of the Commission was necessary to present an as-applied challenge. This is particularly acute in light of the fact that individuals and organizations altered their behavior based on their understanding that the Amendment was self-executing, and that they would be subject to penalty—by someone—for failing to comply with its limitations.

Decision Trees for Amendment Compliance

To assist with understanding the practical application of the Amendment, provided in the Appendix to this article are basic decision trees setting forth the questions practitioners should consider when facing Amendment Sections 3(1), 3(2), 3(4), and 4. It is important to remember that the Commission has published opinions addressing questions concerning the Amendment's interpre-



**Barbara
Salomon**

Family Law and Family Business
Dispute Resolution

Mediation and Arbitration

www.SalomonSolutionsLLC.com
Barbara@SalomonSolutionsLLC.com
Phone 303-947-1117 Fax 303-756-7748

PROMISSORY NOTE VALUATION EXPERT WITNESS

Ridge Gate Financial, LLC

Lawrence Tepper
P.O. Box 631370 | Littleton, CO 80163-1370
(303) 779-6996 | Fax: (303) 779-6996
E-mail: Lawrence.Tepper@comcast.net
Website: www.promissorynoteappraisers.com

Specialization: Promissory note valuations and appraisals. All types of notes, including Estate Notes (IRS Form 706), Divorce Notes, and Partnership Dissolution Notes. DU Law School; Colorado Real Estate Broker; more than 25 years of promissory note experience.

tation. Where questions arise as to the interpretation of requirements or definitions in the decision trees, it will be imperative to consult the Commission publications, as well as the Amendment and its implementing legislation.

Conclusion

This article provides an overview for navigating Amendment 41 and its implementing legislation. Both are ripe for future interpretation. Further, the weight and scope of the various Commission opinions have yet to be tested. It is unlikely that any person would make the claim that ethics in government is not a noble aspiration, if not a basic expectation. To what extent the Amendment will foster that goal has yet to be seen.

Notes

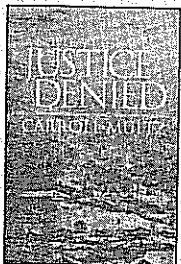
1. Colo. Const. art. XXIX.
2. Colo. Const. art. XXIX, § 2.
3. Colo. Const. art. XXIX, § 2(1).
4. Colo. Const. art. XXIX, § 2(2).
5. Colo. Const. art. XXIX, § 2(3).
6. Colo. Const. art. XXIX, § 2(4).
7. Commission Position Statement 09-04. Links to Commission opinions can be found at www.colorado.gov/ethicscommission.
8. Colo. Const. art. XXIX, § 2(5).
9. Colo. Const. art. XXIX, § 2(6).
10. Commission Position Statement 08-03.
11. Commission Position Statement 09-02.
12. Commission Position Statement 09-07.
13. *Id.*
14. Colo. Const. art. XXIX, § 6.
15. Commission Position Statement 09-04.
16. CRS § 2-4-101.
17. Commission Advisory Opinion 10-04, citing Section 3(3)(h) of the Amendment.
18. Commission Position Statements 08-01, 08-02, 08-03, 09-03, 09-04, 09-07, 10-01; Advisory Opinions 09-01, 09-02, 09-03, 09-05, 09-07, 09-08, 09-09, 10-01, 10-02, 10-03, 10-04, 10-05, 10-06; Letter Rulings 09-02, 09-03, 09-05, 09-06, 10-01.
19. Letter Ruling 09-01.
20. *Id.*
21. Colo. Const. art. XXIX, § 3(3)(a). See also Colo. Const. art. XXIX, § 2(5).
22. Colo. Const. art. XXIX, § 3(3)(b).
23. Colo. Const. art. XXIX, § 3(3)(c).
24. Colo. Const. art. XXIX, § 3(3)(d).
25. Colo. Const. art. XXIX, § 3(3)(e).
26. Colo. Const. art. XXIX, § 3(3)(f).
27. Colo. Const. art. XXIX, § 3(3)(g).
28. Colo. Const. art. XXIX, § 3(3)(h).
29. Colo. Const. art. XXIX, § 4.
30. CRS §§ 24-18-101 *et seq.* (statutory standards of conduct), 24-6-203 (gift and honorarium reporting), 31-4-404 (voting disclosure and abstention). These standards and regulations considerably broaden the Commission's potential jurisdiction to a number of areas for which enforcement mechanisms already are in place. *E.g.*, CRS §§ 24-18-111, -112, and -113 authorize, respectively, the Secretary of State, the board of ethics for the Executive Branch, and the board of ethics for the general assembly to issue advisory opinions and review ethics complaints arising under CRS §§ 24-18-101 *et seq.*
31. Colo. Const. art. XXIX, § 5(3)(a).
32. The Commission may dismiss frivolous complaints without a hearing. Colo. Const. art. XXIX, § 5(3)(c).
33. Colo. Const. art. XXIX, § 5(4).
34. Colo. Const. art. XXIX, § 5(3)(d).
35. Colo. Const. art. XXIX, § 5(3)(e).
36. CRS § 24-18.5-101(2).
37. CRS § 24-18.5-101(4)(b)(II).
38. CRS § 24-18.5-101(4)(b)(III).
39. CRS § 24-18.5-101(5)(a). It is unclear whether: (1) this ultimately defines "frivolous"; and (2) this is in conflict with § 5 (3)(b) of the Amendment stating that the Commission may dismiss frivolous complaints.
40. CRS § 24-18.5-101(5)(b).
41. CRS § 24-18.5-101(5)(a).
42. CRS § 24-18.5-101(5)(b)(II) (emphasis added).
43. CRS § 24-18.5-101(5)(c).
44. Although it is not defined by the statute, the broad definition of "person" contained in Colo. Const. art. XXIX, § 2 could be used to establish the scope of who may file a written complaint with the Commission under Colo. Const. art. XXIX, § 5(3)(a).
45. Colo. Const. art. XXIX, § 5(3)(a).
46. Colo. Const. art. XXIX, § 5(5).
47. Commission Rule of Procedure 6.A. Links to the Commission's Rules of Procedure can be found at www.colorado.gov/ethicscommission.
48. See www.colorado.gov/ethicscommission.
49. Colo. Const. art. XXIX, § 5(1); CRS § 24-18.5-101(6). See Taylor and Toro, "The Colorado Independent Ethics Commission: Colorado's New 'Super-Agency,'" 38 *The Colorado Lawyer* 43 (March 2009).
50. Commission Position Statement 08-01.
51. *Id.*
52. Commission Position Statement 08-02.
53. Commission Position Statement 08-03.
54. Commission Position Statement 09-02.
55. Commission Position Statement 09-04.
56. Commission Position Statement 09-07.
57. See www.colorado.gov/ethicscommission.
58. CRS § 24-18-102(7) (statutory definition).
59. Colo. Const. art. XXIX, § 7.
60. *Developmental Pathways v. Ritter*, 178 P.3d 524 (Colo. 2008).
61. *Id.* at 526.
62. *Id.* at 533.
63. *Id.* at 534.

See Appendix: Decision Trees on next page.

CBA Member Carroll Multz Pens Courtroom Drama

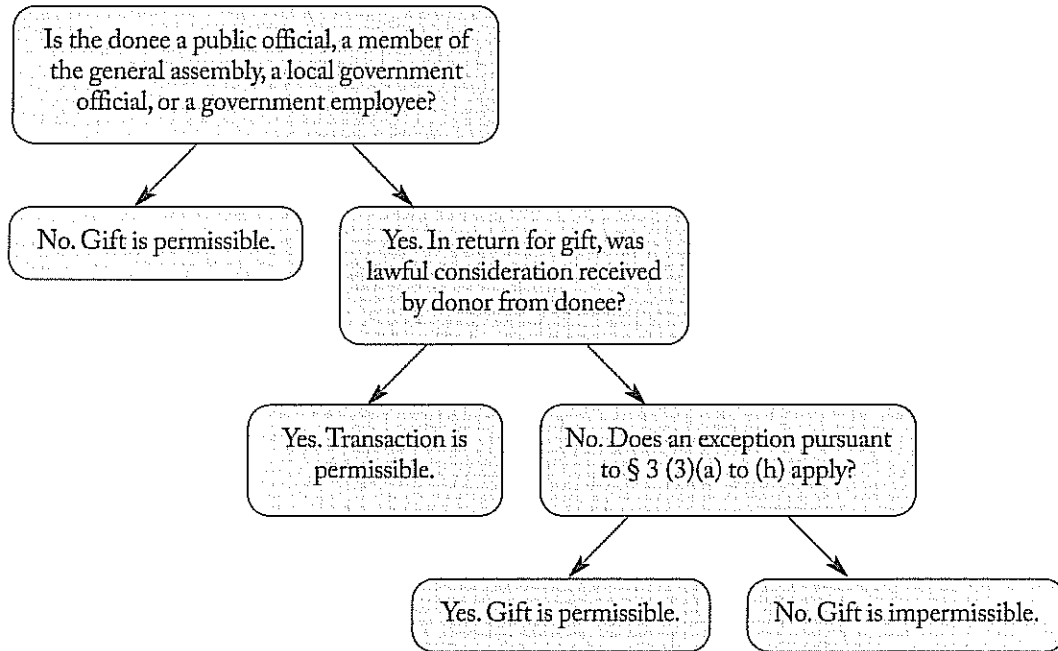
Justice Denied is the title of CBA member Carroll Multz's first novel, a courtroom drama set in Steamboat Springs. The book was released by Tate Publishing on November 30, 2010.

Multz, a retired trial attorney and former district attorney, is an adjunct professor at Mesa State College. He is a senior member of the CBA and served on the CBA-CLE Board for many years. In addition, he is a past member of *The Colorado Lawyer* Board, including serving as its Chair for several years, and has written numerous articles for the publication.

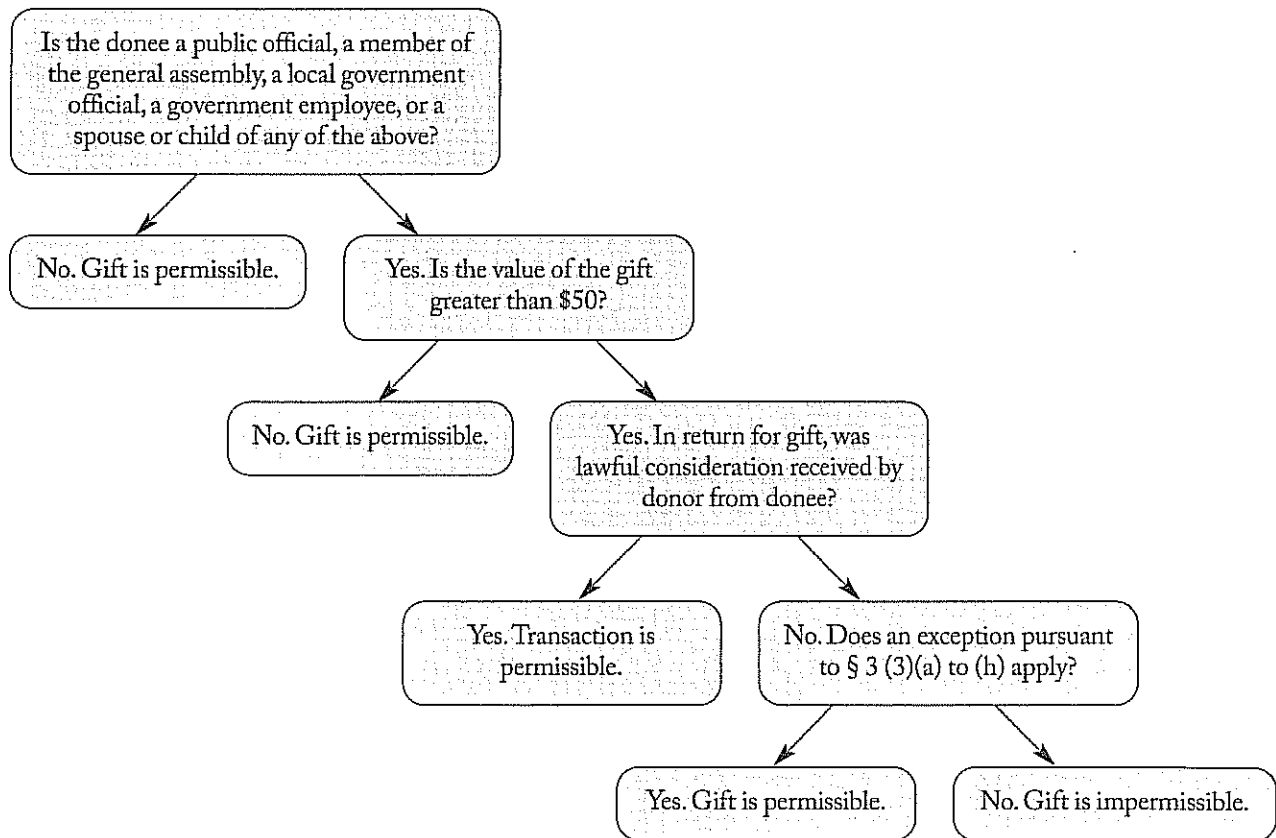


Appendix: Decision Trees

Section 3(1): Is a gift of money, forbearance, or forgiveness of debt permissible?

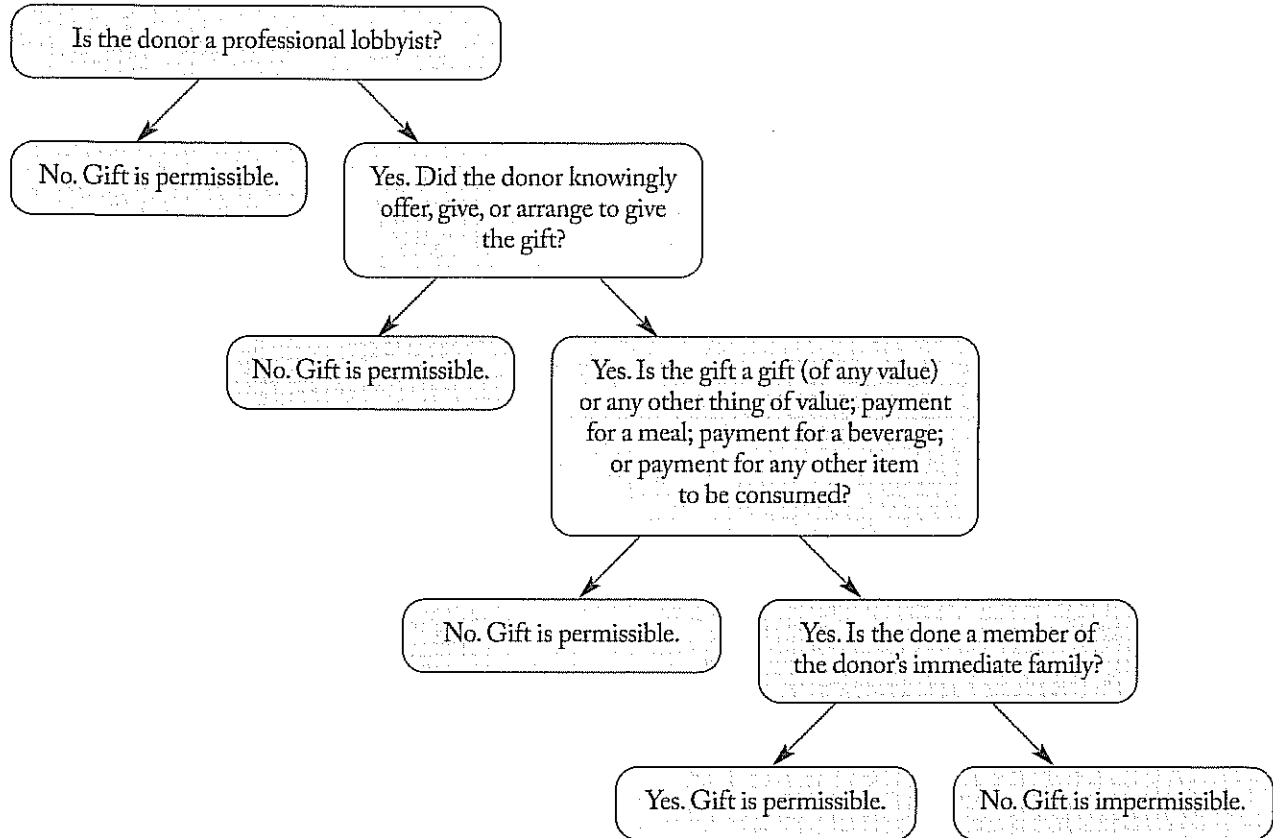


Section 3(2): Is a gift or thing of value permissible?



When reviewing questions arising under Sections 3(1) and 3(2), it is important to remember that the exceptions set forth in Section 3(3) are numerous. Further, the interpretation of the exceptions is the subject of several Commission opinions.

Section 3(4): Is a gift from a professional lobbyist permissible?



Section 4: Is representation after holding office permissible?

