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ETHICS RESOURCE MEMO

TO: Interested Persons

FROM: Office of Legislative Legal Services

DATE: August 24, 2011

SUBJECT: Ethics Laws and Rules for Members of the General Assembly

The following is a brief summary of the major constitutional provisions, statutes, and legislative rules that relate to the ethical duties of members of the Colorado General Assembly.

Constitutional Provisions

Conflict of Interest. Article V, section 43 of the Colorado Constitution requires that a member of the General Assembly who has a "personal or private interest" in pending legislation must disclose the fact of such interest and may not vote on the legislation.

Ethics in Government - Article XXIX ("Amendment 41"). Article XXIX of the state constitution (commonly referred to as "Amendment 41"), establishes a gift ban which prohibits members of the General Assembly (among other individuals covered by the article), from soliciting, accepting, or receiving any gift or other thing of value worth more than \$53¹ in any calendar year, without providing lawful consideration. This prohibition not only applies to gifts or things of value given directly to the member, but also to the member's spouse or dependent child. The gift ban further prohibits members from accepting or receiving any money, forbearance, or forgiveness of indebtedness in any amount from any person without lawful consideration. The measure carves out eight specific exceptions to these gift bans. Members are encouraged to seek advice from the Office of Legislative Legal Services if questions arise concerning the application of Article XXIX, and its exceptions, to specific factual circumstances.

¹ Although originally set at \$50, the Independent Ethics Commission increased the limit to \$53 in Position Statement 11-01, pursuant to Article XXIX section 3 (6) of the Colorado constitution.

Article XXIX also expressly prohibits a professional lobbyist, personally or on behalf of any other person or entity, from knowingly offering, giving, or arranging to give to members of the General Assembly (among other individuals covered by the article), or to a member's immediate family members, any gift or thing of value or any meal, beverage, or other consumable item. Because of this prohibition, members are cautioned not to accept anything of value, including a meal or beverage, from a professional lobbyist.

Another noteworthy provision of Article XXIX imposes a "revolving door" ban that prohibits former members of the General Assembly from personally representing another person or entity for compensation before any other statewide elected official or member of the General Assembly for a two-year period following the former member's departure from office.

Article XXIX establishes an independent ethics commission to enforce these ethics provisions as well as other ethics laws. Members may also submit requests for advisory opinions to the commission. The commission has issued several position statements, advisory opinions, and letter rulings addressing some of the common questions that have arisen since the passage of Article XXIX, including gifts, travel, and special discounts. These documents are accessible through the website of the independent ethics commission at <http://www.colorado.gov/ethicscommission>.

Statutory Disclosure Law **Gifts and Honoraria Reporting - Gift Ban**

Part 2 of article 6 of title 24, C.R.S., outlines requirements for the disclosure by public officials of interests, such as sources of income, business interests, and interests in real property, as well as for the reporting of gifts, honoraria, and other benefits. Under these provisions, in addition to the disclosure requirements, a member of the General Assembly is prohibited from accepting or receiving:

- A gift of money for the purpose of defraying any expenses related to his or her official duties or an in-kind gift; or
- A gift of money from a lobbyist or from a corporation or labor organization.²

² Section 24-6-203 (3.5) (a) and (3.7), C.R.S.

Statutory Code of Ethics

Article 18 of title 24, C.R.S., prescribes standards of conduct for government officials and employees. Part 1 establishes a "Code of Ethics", and part 2 describes prohibited acts relating to contracts and claims.

Rules of conduct versus ethical principles. The code of ethics provides that the holding of public office is a public trust, and a member of the General Assembly or other public official "whose conduct departs from his fiduciary duty is liable to the people of the state as a trustee of property and shall suffer such other liabilities as a private fiduciary would suffer for abuse of his trust".³ The code further enumerates specified "*rules of conduct*" applicable to members of the General Assembly and provides that "proof beyond a reasonable doubt of commission of any act enumerated" is proof that the actor "has breached his fiduciary duty and the public trust".⁴ Under these rules, a member of the General Assembly may not:

- Disclose or use confidential information acquired in the course of his or her official duties in order to further substantially his or her financial interests.

- Accept a gift of substantial value or a substantial economic benefit tantamount to a gift of substantial value which: 1) Would tend to improperly influence a reasonable person in his or her position to depart from the faithful and impartial discharge of his or her duties; or 2) he or she knows or which a reasonable person in his or her position should know under the circumstances is primarily for the purpose of rewarding him or her for official action he or she has taken.

- Accept a fee, a contingent fee, or any other compensation, except his or her official compensation, for promoting or opposing the passage of legislation.⁵

The code also establishes "*ethical principles*" applicable to members of the General Assembly and provides that ethical principles serve only as

³ Section 24-18-103, C.R.S.

⁴ Sections 24-18-104 and 24-18-106, C.R.S.

⁵ Sections 24-18-104 (1) and 24-18-106 (1), C.R.S.

"guides" to conduct and do not constitute violations as such of the public trust.⁶ Under the ethical principles, a member of the General Assembly who has a personal or private interest in any measure or bill proposed or pending before the General Assembly shall disclose that fact and shall not vote thereon.⁷

Voluntary disclosure. The code provides that a member of the General Assembly "may, prior to acting in a manner which may impinge on his fiduciary duty and the public trust, disclose the nature of his private interest" in the manner provided by the rules of the House of Representatives and the Senate. Disclosure then serves as "an affirmative defense to any civil or criminal action or any other sanction".⁸ We are not aware of a case in which this affirmative defense has been tested. While disclosure may provide a measure of protection when the issue is close, it is not certain that mere disclosure would insulate a member from liability when the conduct is clearly a breach of the member's fiduciary duty and the public trust. Furthermore, where civil or criminal liability is predicated on a *constitutionally* imposed duty, it is questionable whether a statute could grant an affirmative defense.

Board of ethics for the general assembly. The code establishes a "board of ethics for the general assembly" and provides that the board "shall, upon written request of a member of the general assembly, issue advisory opinions concerning issues relating to the requesting member's conduct and the provisions of this article".⁹ According to the code, the board consists of four members, and the majority and minority leaders of the Senate and the House of Representatives each appoint one member. The board has issued three advisory opinions that may be accessed through the following website: http://www.state.co.us/gov_dir/leg_dir/ethics.

Proscribed acts related to contracts and claims. Part 2 of the statutory provisions concerning standards of conduct for public officials prohibits members of the General Assembly and other public officials from being "interested in any contract made by them in their official capacity or by any body, agency, or board of which they are members or employees".¹⁰

⁶ Sections 24-18-105 and 24-18-107, C.R.S.

⁷ Section 24-18-107 (2), C.R.S.

⁸ Section 24-18-110, C.R.S.

⁹ Section 24-18-113, C.R.S.

¹⁰ Section 24-18-201 (1), C.R.S.

Criminal Code Provisions

The criminal code contains various provisions that could be applicable to the conduct of members of the House of Representatives, including provisions prohibiting bribery,¹¹ compensation for past official behavior¹², and misuse of official information.¹³

Rules of the House of Representatives

Conflict of interest. Rule 21 (c) of the Rules of the House of Representatives requires that, "A member who has an immediate personal or financial interest in any bill or measure proposed or pending before the General Assembly shall disclose the fact to the House, and shall not vote upon such bill or measure".

Ethics complaints. Rule 49 of the Rules of the House of Representatives establishes a procedure for a "committee on ethics" to consider complaints concerning "misconduct involving legislative duties by a member of the House, including but not limited to the alleged violation of the Rules of the House of Representatives or of section 40 of article V of the state constitution".

Rules of the Senate

Conflict of interest. Rule 17 (c) of the Rules of the Senate requires that, "Any Senator having a personal or private interest in any question or bill pending, shall disclose such fact to the Senate and shall not vote thereon, and if the vote be by ayes and noes, such fact shall be entered in the journal".¹⁴

Rule 41 of the Rules of the Senate establishes guidelines for determining when a Senator has a conflict of interest and prohibits Senators from certain acts that constitute undue influence.

Ethics complaints. Rule 43 of the Rules of the Senate establishes a process under which persons with knowledge of misconduct involving

¹¹ Section 18-8-302, C.R.S.

¹² Section 18-8-303, C.R.S.

¹³ Section 18-8-402, C.R.S.

¹⁴ Article V, section 43 of the Colorado constitution serves as the basis for both Senate Rule 17 (c) and House Rule 21 (c).

legislative duties by a Senator may file a written complaint with the President of the Senate seeking the appointment of a committee on ethics to investigate the complaint. If appointed, the committee may dismiss the complaint either after preliminary investigation or a hearing, or may make recommendations to the Senate, including reprimand, censure, or expulsion.

Joint Rules of the Senate and House of Representatives

Joint Rule 42 specifies that, for purposes of section 43 of article V, House Rule 21 (c) and Senate Rule 17 (c), a member shall be considered to have a personal, private, or financial interest in a pending bill, measure, or question if the passage or failure of the legislation will result in the member deriving a direct financial or pecuniary benefit that is greater than any such benefit derived by or shared by other persons in the member's profession, occupation, industry, or region. The Rule further provides that a member shall not be deemed to have such an interest in legislation where that interest arises from legislation affecting the entire membership of a class to which the member belongs.

General Discussion

Before entering into a contract for professional or other services or entering into an employment relationship with an entity that may be affected by legislation being considered by the General Assembly, a member should consider the provisions of law and legislative rules described in this memorandum. In addition, it is suggested that the member consider (1) consulting with the member's leadership or other members about their perception of the meaning of conflict of interest; (2) informing the potential employer about the applicable laws and rules which govern the conduct of a legislator; and (3) defining in writing the terms and conditions of employment or the contractual relationship in a manner that is consistent with the laws and legislative rules described in this memorandum.

Other Resources

For more information about legislative ethics, access the Center for Ethics in Government at the National Conference of State Legislatures (NCSL) in Denver at the following website: www.ncsl.org/ethics.