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## LEGAL MEMORANDUM

**TO:** Interested Persons

**FROM:** Office of Legislative Legal Services

**DATE:** November 8, 2006

**SUBJECT:** Amendment 41: Ethics in Government<sup>1</sup>

### Background

This Office has received a number of inquiries from members of the General Assembly and legislative staff relating to their ability to accept or receive gifts and other items of value as a result of the passage of Amendment 41 on November 7, 2006. In fact, Amendment 41, which adds a new article XXIX to the Colorado constitution,<sup>2</sup> raises a number of questions and issues. The first portion of this memorandum summarizes the major provisions of Amendment 41 (Standards of Conduct in Government), and the second part attempts to provide answers to many of the questions this office anticipates legislators and their staff may have about the restrictions and limitations set forth in the measure.

This memorandum will address the application of the measure to legislators and legislative staff specifically (the intended audience of this memorandum), although it is important for those readers to recognize that the measure's application is far broader. As an example, the gift ban established in the measure also applies to public officers, local government officials, and other government employees such as employees of the state executive branch, state agencies, public institutions of higher education, local government, and independent contractors.

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<sup>1</sup> This legal memorandum results from a request made to the Office of Legislative Legal Services (OLLS), a staff agency of the General Assembly. OLLS legal memoranda do not represent an official legal position of the General Assembly or the State of Colorado and do not bind the members of the General Assembly. They are intended for use in the legislative process and as information to assist the members in the performance of their legislative duties.

<sup>2</sup> The new constitutional article that is the subject of this memorandum will be described interchangeably herein as "Amendment 41," "article XXIX," "the new constitutional article," or "the measure."

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## **I. Summary of Amendment 41/Article XXIX of the Colorado Constitution**

**A. Bans on the acceptance or receipt of gifts or other things of value.** Amendment 41 contains the following restrictions on the acceptance or receipt of gifts or other things of value by any covered public official or officer, member of the General Assembly ("member"), or government employee:

**1. Section 3** (1)<sup>3</sup> of the amendment prohibits any public officer,<sup>4</sup> member, local government official,<sup>5</sup> or government employee<sup>6</sup> from accepting or receiving any money or forbearance or forgiveness of indebtedness from any person<sup>7</sup> unless such person has received from the officer, member, official, or employee lawful consideration<sup>8</sup> of equal or greater value in return.

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<sup>3</sup> The actual language of this provision reads:

**Section 3. Gift ban.** (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.

<sup>4</sup> Section 2 (6) of Article XXIX defines "public officer" to mean "any elected officer, including all statewide elected officeholders, the head of any department of the executive branch, and elected and appointed heads of state boards and commissions." The same definition explicitly excludes from its scope a member of the General Assembly, a member of the judiciary, any local government official, or any member of a board, commission, council, or committee who receives no compensation, other than a per diem allowance or reasonable and necessary expenses.

<sup>5</sup> Section 2 (3) of article XXIX defines "local government official" to mean "an elected or appointed official of a local government but does not include an employee of a local government."

<sup>6</sup> Section 2 (1) of article XXIX defines "government employee" to mean "any employee, including independent contractors, of the state executive branch, the state legislative branch, a state agency, a public institution of higher education, or any local government, except a member of the [G]eneral [A]ssembly or a public officer."

<sup>7</sup> Section 2 (4) of article XXIX defines "person" to mean "any individual, corporation, business trust, estate, trust, limited liability company, partnership, labor organization, association, political party, committee, or other legal entity."

<sup>8</sup> "Consideration" is generally defined to mean "[s]omething of value (such as an act, a forbearance, or a return promise) received by a promisor from a promisee." BLACK'S LAW DICTIONARY 300 (7th ed. 1999). Generally, doing or agreeing to do what one is not legally obligated to do, constitutes in law "consideration." *Cooper v. Cooper*, 112 Colo. 140, 144, 146 P.2d 986, 987 (1944). "Valid consideration may consist of a benefit to the promisor, or a detriment or disadvantage to the promisee." *Sportsmen's Wildlife Defense Fund v. Romer*, 29 F. Supp. 2d 1199, 1210 (D. Colo. 1998). An authoritative treatise on contract law states that "[v]irtually anything that

2. **Section 3 (2)**<sup>9</sup> of the amendment prohibits a public officer, member, local government official, or government employee from soliciting, accepting, or receiving any gift or other thing of value having either a fair market value or aggregate actual cost greater than \$50 in any calendar year from a person unless the person has received lawful consideration of equal or greater value in return from the officer, member, official, or employee who solicited, accepted or received the gift or thing of value. This particular restriction prohibits not only a direct solicitation, acceptance, or receipt of the gift or thing of value by the officer, member, official, or employee, but also prohibits such person from indirectly realizing a gift or thing of value "as the beneficiary of a gift or thing of value given to such person's spouse or dependent child." **Section 3 (2)** of the amendment explicitly enumerates as examples of covered gifts or other things of value: "gifts, loans, rewards, promises or negotiations of future employment, favors or services, honoraria, travel, entertainment, or special discounts."

3. **Section 3 (3)** of the amendment specifies that the prohibitions contained in **Sections 3 (1) or (2)** do not apply to a gift or thing of value that is:

- A campaign contribution as defined by law.
- 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 of appreciation in the form of a plaque, trophy, desk item, wall memento, or similar item.

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anyone would bargain for in exchange for a promise can be considered consideration for that promise." E.A. FARNSWORTH, *CONTRACTS* 42-3 (1982). "Lawful consideration" may be defined as "enough consideration -- as a matter of law -- to support a contract." *BLACK'S LAW DICTIONARY* 302 (7th ed. 1999).

<sup>9</sup> The actual language of this provision reads:

**Section 3. Gift ban.** (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 a 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.

- Unsolicited informational material, publications, or subscriptions related to the recipient's performance or official duties.
- Admission to, and the cost of food or beverages consumed at, a reception, meal or meeting by an organization before whom the recipient appears to speak or answer questions as part of a scheduled program.
- 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 government as long as the non-profit organization receives less than 5% of its funding from for-profit organizations or entities.
- Given by an individual who is a relative or personal friend of the recipient on a special occasion.
- A component of the compensation paid or other incentive given to the recipient in the normal course of employment.

Essentially, under these provisions no covered public official or officer, member, or government employee may accept any money or forbearance or forgiveness of indebtedness from any person or accept from any one person, in any calendar year, any one or more gifts or other items of value that, in the aggregate, have a value in excess of \$50 unless one of the specified exceptions applies.

**4. Section 3 (4)<sup>10</sup> of the amendment prohibits a professional lobbyist,<sup>11</sup>**

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<sup>10</sup> The actual language of this provision reads:

(4) Notwithstanding any provisions of this section to the contrary, and excepting campaign contributions as defined by law, no professional lobbyist, personally or on behalf of any other person or entity, shall knowingly offer, give, or arrange to give, to any public officer, member of the general assembly, local government official, or government employee, or to a member of such person's immediate family, any gift or thing of value, of any kind or nature, nor knowingly pay for any meal, beverage, or other item to be consumed by such public officer, member of the general assembly, local government official or government employee, whether or not such gift or meal, beverage or other item to be consumed is offered, given or paid for in the course of such lobbyist's business or in connection with a personal or social event; provided, however, that a professional

personally or on behalf of any other person or entity, from knowingly:

- Offering, giving, or arranging to give, to any public officer, member, local government official, or government employee, or to a member of such person's family any gift or thing of value of any kind or nature; or
- Paying for any meal, beverage, or other item to be consumed by the officer, member, official, or employee, regardless of whether the gift, meal, beverage, or other item is offered, given, or paid for in the course of the lobbyists's business or in connection with a personal or social event.

The prohibition contained in **Section 3** (4) does not prohibit a professional lobbyist from offering or giving the gift, thing of value, meal, beverage, or other item to an officer, member, official, or employee who is a member of the lobbyist's immediate family.

**5. Section 3** (5) of Amendment 41 obligates the General Assembly to make any conforming amendments to the existing statutory reporting and disclosure requirements for public officers, members, and professional lobbyists necessary for compliance with the requirements of the new constitutional article.

**6. Section 3** (6) of Amendment 41 requires the \$50 cap on allowable gifts specified in **Section 3** (2) of the amendment to be adjusted for inflation initially in the first quarter of 2011 and every 4 years thereafter.

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lobbyist shall not be prohibited from offering or giving to a public officer, member of the general assembly, local government official or government employee who is a member of his or her immediate family any such gift, thing of value, meal, beverage or other item.

<sup>11</sup> **Section 2** (5) of Amendment 41 defines "professional lobbyist" to mean "any individual who engages himself or herself or is engaged by any other person for pay or for any consideration for lobbying. 'Professional lobbyist' does not include any volunteer lobbyist, any state official or employee acting in his or her 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 who appears as counsel or advisor in an adjudicatory proceeding." The amendment does not contain a separate definition for "lobbying." It may be expected that a court or other body faced with construing the construction of the term "lobbying" in the context of the amendment would draw at least to some extent upon the rather comprehensive definition of the term contained in section 24-6-301 (3.5), C.R.S.

**B. Restrictions on representation after leaving office.** **Section 4** of Amendment 41 prohibits a statewide elected officeholder or member from personally representing another person or entity for compensation before any other statewide elected officeholder or member for a period of 2 years following vacation of office. This provision permits further restrictions to be placed by law on public officers or members and similar restrictions to be placed on other public officers, local government officials, or government employees.

**C. Independent ethics commission.** **Section 5 (1)** of Amendment 41 creates an independent ethics commission ("commission") to be composed of five members. This subsection (1) specifies that the purpose of the commission is "to hear complaints, issue findings, and assess penalties, and also to issue advisory opinions, on ethics issues arising under this article and under any other standards of conduct and reporting requirements as provided by law." The text goes on to authorize the commission to "adopt such reasonable rules as may be necessary for the purpose of administering and enforcing the provisions of this article and any other standards of conduct and reporting requirements as provided by law," thereby at least implicitly if not explicitly empowering the commission to administer and enforce all other legal standards governing the conduct of public officials or employees (and related reporting requirements) whether contained in the provisions of Amendment 41 or otherwise. This subsection obligates the General Assembly to appropriate reasonable and necessary funds to cover staff and administrative expenses of the commission. Members of the commission are prohibited from receiving compensation for their service on the commission. Additional provisions in the text of Amendment 41 addressing the commission include the following:

- The method or manner by which commission members are appointed is specified in **Section 5 (2)** of Amendment 41. Specifically, the Colorado Senate, House of Representatives, Governor, and Chief Justice of the Colorado Supreme Court shall each appoint one member of the commission and the fifth and final member is to be a local government official or a local government employee appointed by the affirmative vote of at least three of the other four members of the commission. No more than two commission members shall be affiliated with the same political party. Except for specified initial terms, members of the commission shall be appointed to terms of four years.
- **Section 5 (3) (a)** of Amendment 41 authorizes any person to file

a written complaint with the commission "asking whether a public officer, [member], local government official, or government employee has failed to comply with [Amendment 41] or any other standards of conduct or reporting requirements as provided by law within the preceding twelve months." Under **Section 5 (3) (c)**, the commission is required to conduct an investigation, hold a public hearing, and render findings on each non-frivolous complaint pursuant to written rules established by the commission. Under **Section 5 (3) (d)**, the commission is authorized to assess penalties for violations prescribed by Amendment 41 and provided by law.

- **Section 5 (3) (e)** of Amendment 41 establishes a presumption that the commission's findings shall be based upon a preponderance of the evidence standard unless the commission determines that the circumstances warrant a heightened evidentiary standard.
- **Section 5 (4)** empowers "[m]embers of the [commission]...to subpoena documents and to subpoena witnesses to make statements and produce documents." As is discussed in the next section of this memorandum, it is unclear from a plain reading of the text of this provision whether these powers are granted to the commission as a body or to each of the commission members individually.
- **Section 5 (5)** of Amendment 41 authorizes any public officer, member, local government official, or government employee to submit a written request to the commission seeking an advisory opinion as to whether conduct by the person making the request would constitute a violation of state ethical standards.

**D. Penalties.** **Section 6** of Amendment 41 specifies that any public officer, member, local government official, or government 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 amount of the financial equivalent of any benefits obtained by such action. **Section 6** goes on to state that "[t]he manner of recovery and additional penalties may be provided by law."

**E. Role for local regulations.** **Section 7** of Amendment 41 authorizes any county or municipality to adopt ordinances or charter provisions with



respect to ethics matters that are more stringent than any of the provisions contained in Amendment 41. This section goes on to state that the requirements of the new constitutional article shall not apply to home rule counties or home rule municipalities that have adopted charters, ordinances, or resolutions that address the matters covered by Amendment 41.

**F. Other provisions.** **Section 8** of Amendment 41 declares any statutory provisions in conflict with or inconsistent with the provisions of its terms to be preempted by the new constitutional article and inapplicable to the matters that it covers and for which it provides. **Section 9** of Amendment 41 authorizes the enactment of legislation to facilitate the operation of the new constitutional article but specifies that "...in no way shall such legislation limit or restrict the provisions of this article or the powers herein granted."

## **II. Frequently Asked Questions about Amendment 41/Article XXIX of the Colorado Constitution**

### **A. Gift ban.**

The questions most frequently posed to this Office relate to the gift ban set forth in **Section 3** of Amendment 41. As summarized in Part I of this memorandum, **Section 3** of the measure actually establishes three separate bans in subsections (1), (2), and (4). The actual language of each of these subsections is set forth in footnote 3 on page 3, footnote 9 on page 4, and footnote 10 on page 5, respectively.

#### **1. Does the "gift ban" apply to legislators and to their staff?**

Yes. The gift ban expressly applies to a "member of the general assembly." In addition, the gift ban applies to "government employees." As noted earlier, **Section 2** of the measure defines certain terms that are used in the body of the measure, including "government employee." The measure defines "government employee" to mean "any employee, including independent contractors, of the state executive branch, the state legislative 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." From this definition, it becomes clear that the gift ban applies to "any employee...of the state legislative branch". Accordingly, it is reasonable to conclude that all of legislative staff, whether partisan or non-partisan, are subject to the gift ban, including Senate and House staff, Legislative Council staff, Joint Budget Committee staff, Legislative Information Services staff, Office of the State

Auditor staff, and staff from this Office as well as legislative aides.

## **2. Who has to give the "gift" for the ban to apply?**

The gift ban created in the measure applies to those gifts or things of value given to the relevant official or government employee by a "person." The term "person" is broadly defined in **Section 2** (4) of the measure to include "any individual, corporation, business trust, estate, trust, limited liability company, partnership, labor organization, association, political party, committee, or other legal entity."

It is plausible to interpret this sweeping definition of "person" as encompassing virtually all possible donors of gifts and things of value, since it broadly includes everything from individuals to all legal entities. Some have queried whether "person" includes certain unintended donors such as the federal government or joint governmental agencies such as the National Conference on State Legislatures and the Council of State Governments.<sup>12</sup> Arguably, the term could cover the federal government. Under such an interpretation, attendance by government employees at educational programs or conventions paid for with federal grant moneys, for example, may no longer be permissible. Until legislation is enacted that further defines or clarifies the term "person" or until the independent ethics commission,<sup>13</sup> or some other interpretative body, issues an opinion to clarify the term, the best practice for legislators and legislative staff is to consider all sources of gifts, benefits, and items of value as within the definition of "person."

It is noteworthy that subsection (4) of **Section 3** of the measure establishes a ban on certain *donors*, as well. See the summary regarding prohibitions on gifts from professional lobbyists on pages 5 and 6 of Part I of this memorandum. That provision prohibits professional lobbyists personally, or on behalf of any other person or entity, from knowingly offering, giving, or arranging to give to a member of the general assembly or government employee, or to a member of such person's family, any gift or thing of value of any kind or nature, or knowingly pay for any meal, beverage, or other item to be consumed by the member or government employee. Accordingly, it is likely that many of the "gifts" and benefits historically provided to legislators

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<sup>12</sup> See discussion in question II. 2. e. of this memorandum.

<sup>13</sup> **Section 5** of the measure creates an independent ethics commission charged with the responsibility, among other things, to issue advisory opinions on conduct related to this article and other standards of conduct or reporting requirements as provided by law.

and their staff by professional lobbyists may no longer be offered by those professionals who are attempting to comply with the requirements of the new constitutional provision.

### **3. What "gifts" are covered?**

Neither the term "gift" nor the term "thing of value" is defined in the measure. **Section 9** of the measure authorizes the General Assembly to enact legislation to facilitate the operation of the new constitutional article, which legislation may conceivably define terms used in the measure. However, until such time as legislation is enacted more specifically defining these terms and providing guidance, public officers, legislators, and other government employees will be left to speculate about the measure's breadth and meaning. The initiative provides several examples of gifts and other things intended by its language, including: In subsection (1), "any money, forbearance, or forgiveness of indebtedness from any person"; and in subsection (2), "gifts, loans, rewards, promises or negotiations of future employment, favors or services, honoraria, travel, entertainment, or special discounts." However, the latter list is written as a noninclusive list. The plain language of the measure appears to be intentionally broad, as evidenced by the use of the phrase "or other thing of value having either a fair market value or aggregate actual cost greater than fifty dollars (\$50)."

Prior to the enactment of clarifying legislation, a prudent and conservative interpretation of the measure would be to consider any item or benefit, or any collection of items or benefits, from a single source totaling more than fifty dollars in value in a calendar year to fall within the scope of the gift ban unless an exception applies. Accordingly, the acceptance of breakfasts, lunches, and other meals, candy, theater tickets, and similar benefits historically enjoyed by both legislators and legislative staff should be avoided unless one of the following conditions applies: The aggregate value of the gift(s) or thing(s) of value received from any one "person" in a calendar year does not exceed fifty dollars; consideration of equal or greater value is provided by the legislator or staff person; or one of the eight exceptions enumerated in the measure and discussed below applies.

***a. Will Amendment 41 prevent me from accepting tickets to sporting events, cultural events, or other entertainment events or meals from lobbyists?...from friends or business associates that are unrelated to my position as a legislator or legislative employee?***

Yes. If the value of the ticket or admission to the entertainment event exceeds

fifty dollars, a legislator or legislative employee shall not accept the benefit from any person whether the donor is a lobbyist or a business associate. Amendment 41 clearly prohibits a member of the General Assembly or a legislative employee from soliciting, accepting, or receiving a gift or other thing of value having either a fair market value or aggregate actual cost of greater value than fifty dollars in any calendar year, unless he or she provides lawful consideration of equal or greater value in return, presumably by paying for the ticket. While there are exceptions to this gift ban, described in section 4 of this Part II. A. of this memorandum, there is no exception for the receipt of gifts that are unrelated to the recipient's position as a legislator or legislative employee. One exception does permit the receipt of gifts from relatives or personal friends, but only on special occasions. *See* discussion in section II. A. 4. below.

Furthermore, professional lobbyists are prohibited by the new constitutional measure from knowingly giving a gift or other thing of value of any kind or nature to a member of the General Assembly or to a legislative employee, among other persons, including meals, beverages, or other items to be consumed by such person.

***b. May I still partake of the legislative breakfasts provided each morning of the regular legislative session?***

Most likely yes. Not only is it unlikely that a member or legislative employee will consume more than fifty dollars worth of breakfast fare from any one sponsor of a legislative breakfast in any calendar year, such breakfast buffets may also be considered exempt under the second enumerated exception discussed in section 4 below as unsolicited items of trivial value less than fifty dollars.

***c. Am I now prohibited from accepting the types of gifts that organizations or lobbyists have historically placed on my legislative desk such as candy, flowers, coffee cups, sports caps, or similar items?***

Probably not, depending on the value of such items. Many of the gifts that legislators and legislative staff receive are less than fifty dollars in value. If that is the only gift or benefit that the member or staff person receives from that particular source in a year, then acceptance of the item will not violate the terms of Amendment 41. In addition, some "gifts" that legislators or their staff have historically received from lobbyists or special interest groups, such as candy, flowers, or trinkets placed on members' desks or made available for consumption by an entire legislative staff office, may arguably be considered

"unsolicited item[s] of trivial value less than fifty dollars," as contemplated by the second exception. Although the examples listed in that exception are items such as pens, calendars, plants, books, and note pads, the series ends with the phrase "or other similar item" which phrase could arguably include these types of incidental items or trinkets of little value.

***d. Will Amendment 41 prevent me from attending informational meetings or social events hosted by local governmental entities, nonprofit organizations, or special interest groups at which a meal is provided or conferences for which transportation, meals, and/or lodging are provided?***

Yes, if the benefit provided exceeds fifty dollars and none of the exceptions to the gift ban apply; no, if the benefit has a value of fifty dollars or less or if one or more of the exceptions to the ban apply. Functions such as meetings or conferences at which a meal or meals, lodging, transportation, registration, or any combination of such benefits exceeding fifty dollars in value are provided to a legislator or legislative employee from one source appear to be prohibited by this measure, unless the legislator or legislative employee provides compensation for the thing of value (meals, transportation, lodging, registration) received. However, some types of these functions may still be permitted, despite the ban on legislators and legislative staff accepting gifts and the ban on professional lobbyists from giving gifts or providing meals and beverages, if such an occasion fits within one of the several exceptions listed in the measure and summarized on pages 4 and 5 of this memorandum.

As discussed in section 4 below, there are at least two exceptions set forth in the body of the measure that may apply to these types of occasions. One such exception allows a legislator or legislative employee to receive admission to and the cost of food or beverages consumed at a reception, meal, or meeting by an organization before which the recipient appears to speak or to answer questions as part of a scheduled program. Another exception authorizes the receipt of reasonable expenses 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 a local government if the expenses are paid for by a nonprofit organization receiving less than five percent of its funding from a for-profit organization or by a state or local government. If the legislator or legislative employee is scheduled to speak, field questions, participate on a panel, or otherwise make a presentation or represent the state, then the "gift" of admission and the meal or beverage may be permitted.

***e. Will I still be able to attend and participate in conferences and other programs or events hosted by joint governmental agencies such as NCSL, CSG, or ALEC?***

Whether legislators and legislative staff may attend and participate in functions sponsored by the National Conference of State Legislatures ("NCSL"), the Council of State Governments ("CSG"), the American Legislative Exchange Council ("ALEC"), or other similar agencies dedicated to working with and representing state legislatures across the nation, or participate in programs or events hosted by such agencies, is uncertain. Generally under the new constitutional article, legislators and legislative staff may not accept gifts or anything of value from any "person" if the value of the benefit exceeds fifty dollars, unless the recipient provides "lawful consideration" for the gift or thing of value or unless one of the exceptions applies.

The first question is whether these types of agencies are considered a "person" within the definition of Amendment 41. As previously discussed, **Section 2 (4)** of the measure defines the term "person" to mean "any individual, corporation, business trust, estate, trust, limited liability company, partnership, labor organization, association, political party, committee, or other legal entity." It might be argued that NCSL, CSG, and ALEC do not fit within this definition of "person," since these organizations are declared in statute to be joint *governmental* agencies.<sup>14</sup> As such, it could be argued that these agencies are neither individuals nor businesses, but rather a form of government. NCSL, for example, does not file an income tax return as an individual or a business entity would. Instead, it is treated as a governmental entity for tax purposes. Under an interpretation that these agencies are *governmental* agencies, they may not be "persons" from which legislators and legislative staff are prohibited from accepting or receiving money, gifts, and other things of value under the measure. On the other hand, the definition of "person" includes the general term "association" and also concludes with the vague phrase "...or other legal entity." An alternative argument could therefore be made that these joint governmental agencies are, in fact, "associations" or even "legal entities" identified in statute and therefore fit the measure's definition of "person." Because the measure does not expressly include "joint

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<sup>14</sup> Section 2-3-311 (2) (a), C.R.S., provides that, "[t]he council of state governments and the national conference of state legislatures are declared to be joint governmental agencies of this state and of other states which cooperate through them. The general assembly is authorized to subscribe to membership in such organizations and to pay membership fees therein from appropriations made to the legislative department of state government." Section 2-3-311 (2) (b), C.R.S., provides the same for the American legislative exchange council.

governmental agencies" within the definition of "person," it is unclear whether these agencies were intended to be included as those "persons" from which legislators and legislative employees are prohibited from accepting gifts.

Even if joint governmental agencies were intended to be included in the term "person," the measure authorizes the acceptance of gifts or things of value from such donors if the recipient provides lawful consideration of equal or greater value in return. Colorado pays annual dues for membership to some of these agencies such as NCSL and CSG, for example. In addition, legislative attendees at many of the events sponsored by such agencies pay registration fees for the events, programs, or conferences they are attending. It is arguable that these payments, in the form of dues and registration fees, may constitute the lawful consideration contemplated by the measure. However, it is also possible, if not likely, that at least some of the events sponsored by agencies such as NCSL, CSG, and ALEC are funded, in part, from other sources, including non-profit and for-profit organizations. If this is the case, the "compensation" attributed to the legislator or legislative employee in the form of annual dues and registration fees may not be sufficient "lawful consideration of equal or greater value" as required by the measure. In those instances, however, a legislator or legislative staff person could request that the agency sponsoring the event or conference invoice the attendee for the difference so that he or she could still attend and remain in compliance with the constitutional provision by providing lawful consideration.

One of the exceptions to the gift ban, however, authorizes the acceptance of "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...." [Emphasis added.] If a joint governmental agency such as NCSL, CSG, or ALEC were to be viewed as a "state or local government," an argument could be made that, under the language of the measure and this exception, a legislator or legislative staff person could attend a meeting or conference sponsored by a joint governmental agency if the legislative attendee was to participate in the program or otherwise represent the state at the meeting or conference. It is simply unknown at this time whether the joint governmental agencies identified in this memorandum may in the future be determined to be state or local governments under this exception.

There are many questions related to the language of Amendment 41 and its application to joint governmental agencies. Because these types of entities are

not expressly addressed in the measure, it is possible that the General Assembly may enact legislation to address and clarify the application of the measure to them. In addition, the independent ethics commission established in the measure may also issue an opinion addressing the issue, as might a court. Until that time, however, it is incumbent upon a legislator or legislative staff person considering attendance at or participation in a program, conference, or other event sponsored by a joint governmental agency such as NCSL, CSG, or ALEC to determine whether the state's dues and the amount of the registration fee, if any, cover the entire cost of the program, conference or event or whether the cost of the event exceeds that consideration. In the latter case, the attendee may seek an invoice from the sponsoring agency and pay the balance, in order to remain in compliance with the terms of the measure.

***f. Will Amendment 41 prevent me from accepting honoraria for speaking engagements?***

Yes, if the amount of the honoraria is in excess of the fifty-dollar limit specified in the measure. Specifically, the gift ban established in Amendment 41 expressly prohibits a legislator or legislative employee from soliciting, accepting, or receiving "honoraria." The term "honoraria" is not defined in the measure. The dictionary definition for "honoraria" is "[a] payment given to a professional person for services for which fees are not legally or traditionally required." Given this definition, it is reasonable to conclude that "honoraria" is ordinarily a payment for a speech or speaking engagement, and has also been applied to payments for appearances and publications. Accordingly, in the context of this measure, Amendment 41 will prevent a legislator or legislative employee from accepting more than fifty dollars from any single source for any speech, appearance, or publication.

***g. As a legislator, am I still required to file a gift and honoraria report with the Secretary of State?***

Yes. Amendment 41 does not change or add to the quarterly reporting requirements for gifts and honoraria set forth in section 24-6-203, C.R.S. However, subsection (5) of **Section 3**, the measure requires the General Assembly to make any necessary conforming amendments to the reporting and disclosure requirements for members of the General Assembly to comply with the requirements of the new constitutional article. It is uncertain whether this provision will induce the General Assembly to expand the statutory reporting requirements to include legislative employees and other persons affected by the gift ban established by Amendment 41.



***h. Will Amendment 41 prevent legislators from being able to accept campaign contributions?***

No. Campaign contributions, as defined by law, are expressly excepted from the gift ban. The term "contribution" is defined in the state constitution, article XXVIII, section 2 (5).<sup>15</sup> Amendment 41 does not change this constitutional definition relating to campaign contributions.

***i. Will my dependent child be prohibited from applying for and accepting a college scholarship?***

Arguably the answer to this question is "yes." The gift ban prohibits members of the general assembly and government employees, "either directly or indirectly as the beneficiary of a gift or thing of value given to such person's spouse or dependent child," from soliciting, accepting, or receiving a gift or other thing of value with an actual cost greater than fifty dollars in any calendar year. Whether a scholarship is viewed as a *direct* benefit to a legislator or legislative employee who would otherwise be paying the additional tuition covered by the scholarship on behalf of his or her dependent child or as an *indirect* benefit to that legislator or employee as his or her child reaps the benefits of a college education that might otherwise have been financially unattainable, it seems possible that the measure can be read to apply to such a situation.

However, the gift ban does allow for the acceptance of a gift when there is lawful consideration of equal or greater value given in return. Therefore, it is arguable that, even if a scholarship is determined to be a direct or indirect gift or other thing of value for purposes of Amendment 41, the scholarship

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<sup>15</sup> Article XXVIII, section 2 of the Colorado constitution provides:

**Section 2. Definitions.** (5) (a) "Contribution" means:

(I) The payment, loan, pledge, gift, or advance of money, or guarantee of a loan, made to any candidate committee, issue committee, political committee, small donor committee, or political party;

(II) Any payment made to a third party for the benefit of any candidate committee, issue committee, political committee, small donor committee, or political party;

(III) The fair market value of any gift or loan of property made to any candidate committee, issue committee, political committee, small donor committee or political party;

(IV) Anything of value given, directly or indirectly, to a candidate for the purpose of promoting the candidate's nomination, retention, recall, or election.

(b) "Contribution" does not include services provided without compensation by individuals volunteering their time on behalf of a candidate, candidate committee, political committee, small donor committee, issue committee, or political party; a transfer by a membership organization of a portion of a member's dues to a small donor committee or political committee sponsored by such membership organization; or payments by a corporation or labor organization for the costs of establishing, administering, and soliciting funds from its own employees or members for a political committee or small donor committee.

may require the scholarship recipient to do or provide something back, such as enrollment at a particular institution, maintenance of a certain grade point average, or work toward a specified subject or degree. Therefore, one might submit that meeting the conditions of a scholarship constitutes "legal consideration" sufficient to satisfy the terms of the measure. Furthermore, a scholarship is typically offered in good faith and earned through an objective process based upon merit or need or both and the satisfaction of certain requirements. An applicant for a scholarship typically competes for the scholarship based on objective standards or criteria and presumably is not awarded the benefit of a scholarship based solely on the fact that the applicant's parent is a public servant whose objectivity in his or her job may potentially be influenced by his or her child's receipt of such a scholarship.

While it seems unreasonable that the measure will be interpreted so restrictively as to prevent the children of state and local government employees from applying for or receiving college scholarships, the plain language of the measure makes that interpretation a possibility. Again, it is also possible that the General Assembly will enact legislation in the future that will clarify the application and breadth of the constitutional provision in this situation or that the independent ethics commission or a court will address the matter in an opinion. However, until such legislation or opinion sheds light on this area of concern, legislators and legislative employees are advised that the measure could reasonably be interpreted to apply to college scholarships as something "of value having either a fair market value or aggregate actual cost greater than fifty dollars" and therefore to prohibit the application for or acceptance of such a benefit.

#### **4. Are there any exceptions to the "gift ban"?**

Yes. In addition to the possibility that a legislator or legislative employee may receive less than fifty dollars in gifts or other things of value from any one person in a calendar year or may provide compensation of equal or greater value for the gift or other thing of value, the measure sets forth eight specific exceptions to the money and gift bans. See prior discussion in Part I, section 3 of this memorandum on pages 4 and 5. Some of these exceptions have been mentioned earlier in this memorandum. The prohibition against accepting or receiving money, gifts, or other things of value exceeding fifty dollars does not apply if the gift or thing of value is one of the items excepted from the ban under **Section 3 (3)** of the measure, as summarized on pages 4 and 5 of this memorandum.

While it may be possible to present a plausible argument in support of

accepting a particular gift or item of value as being covered by one or more of the specified exemptions, the most prudent course of action for both legislators and their staff is to be vigilant of the "appearance of impropriety" and to refrain from accepting any benefits which may be considered "gifts" under the measure. In this way, legislators and legislative staff are more likely to avoid possible accusations that the candy, meal, theater ticket, or other benefit was inappropriately, and therefore unethically, received in violation of the constitutional provision. The purposes and findings set forth in **Section 1** of the new constitutional article support this approach by directing public officials and government employees to avoid conduct that creates a justifiable *impression* among members of the public that the public trust is being violated.

***a. Do I need written authority from leadership in order to confirm that I am representing the state under the sixth exception?***

Probably not. Some individuals have inquired whether, in order to avail themselves of the sixth exception, legislators need written authority from leadership that they are representing the state at the convention, trip, or meeting hosted by a nonprofit organization or by a state or local government. The language of the measure does not require this type of documentation, nor is it likely leadership wishes to be placed in the position of writing "permission slips" for members to attend such events. It would be advisable, however, for the legislator or legislative staff person to keep a record of all such events that the member or staff person attends and how he or she "represented" the state at the event (e.g. by answering questions, speaking about pending legislation, or otherwise addressing matters of statewide concern.)

***b. What is a "special occasion" as contemplated in the seventh exception?***

The phrase "special occasion" appears in the seventh exception which permits the receipt of gifts or items of value from relatives or personal friends on special occasions. The term "special occasion" is not defined in the measure nor elsewhere in statute or the constitution. It is a well-settled rule of statutory construction that words and phrases are to be construed by their plain meaning or common usage.<sup>16</sup> Accordingly, if the measure is strictly construed and

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<sup>16</sup> See section 2-4-101, C.R.S., which provides:

**2-4-101. Common and technical usage.** Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be

applied, an individual subject to Amendment 41 would not be able to avail himself or herself of this exception unless the gift or item of value was given by the relative or friend on a holiday, birthday, anniversary, or other similar "special occasion." Again, it seems unreasonable that the measure is intended to prevent a person from accepting a gift completely unrelated to the person's role as a legislator or legislative employee from a friend, neighbor, or spouse, for example, on something other than a special occasion. Whether or not some reasonableness standard will be applied in the eventual interpretation of this new constitutional article remains unknown at this time.

In time, the independent ethics commission, a judicial body, or the General Assembly, through the issuance of an opinion or the adoption of legislation, may address how strictly the language of this exception should be interpreted and thereby reduce the possibility of an overly restrictive interpretation. It is noteworthy, however, that **Section 9** of the measure<sup>17</sup> authorizing legislation to facilitate the operation of the new constitutional article also specifies that such legislation shall neither limit nor restrict the provisions of the article or the powers granted by it.

## **B. Effective date and applicability of Amendment 41.**

### **1. When do the provisions of Amendment 41 take effect?**

According to the Colorado constitution, article V, section 1 (4),<sup>18</sup> Amendment 41 will take effect upon the date of the Governor's proclamation of the vote, but not later than thirty days after the vote has been canvassed. Amendment

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construed accordingly.

<sup>17</sup> For a more in-depth analysis concerning the effective date and applicability of Amendment 41, see OLLS memorandum dated October 5, 2006, entitled "Effective date of Amendment 41, "Ethics in Government," and applicability of the two-year employment restriction on members of the General Assembly."

<sup>18</sup> Article V, section 1 (4) of the Colorado constitution provides:

**Section 1. General assembly - initiative and referendum.** (4) The veto power of the governor shall not extend to measures initiated by or referred to the people. All elections on measures initiated by or referred to the people of the state shall be held at the biennial regular general election, *and all such measures shall become the law or a part of the constitution, when approved by a majority of the votes cast thereon, and not otherwise, and shall take effect from and after the date of the official declaration of the vote thereon by proclamation of the governor, but not later than thirty days after the vote has been canvassed.* This section shall not be construed to deprive the general assembly of the power to enact any measure. (Emphasis added).

41 contains no effective date that would give it effect on a date earlier, such as the November 7, 2006, date of passage, or later than the date of the proclamation. The date the Governor must make the proclamation is not constitutionally or statutorily prescribed and has been as early as December 1 and as late as January 19 following several recent elections.

**2. Will the two-year employment restriction contained in Section 4 of Amendment 41 apply to members of the General Assembly who are term-limited and scheduled to vacate office upon the January 10, 2007, convening date of the General Assembly?**

The two-year employment restriction **will apply** to a term-limited member if Amendment 41 takes effect prior to the January 10, 2007, convening date of the General Assembly and that member serves until he or she vacates office on that convening date. The restriction **will not apply** to a term-limited member who: Serves until he or she vacates office on the January 10, 2007, convening date if the Governor's proclamation and effective date of Amendment 41 is subsequent to January 10; or resigns and vacates office prior to the date of the Governor's proclamation and Amendment 41 taking effect.

**C. Independent ethics commission.**

**1. Where will the independent ethics commission created by Amendment 41 be housed and how will it be funded?**

It is unclear from the measure where the independent ethics commission created in **Section 5** of the measure will be housed. Amendment 41 does not specify that the commission be created in any particular branch of government or within local government. Presumably, the General Assembly, pursuant to the authority set forth in **Section 9** of the measure, will enact legislation providing more detail with respect to the independent ethics commission, including resolution of the question where the commission will be located.

By contrast, the measure very specifically addresses the funding issue by expressly stating that the "general assembly shall appropriate reasonable and necessary funds to cover staff and administrative expenses to allow the independent ethics commission to carry out its duties" pursuant to the new article. However, the measure further specifies that "[m]embers of the commission shall receive no compensation for their services on the commission."

**2. Will the independent ethics commission impact the authority of the existing executive branch and legislative branch boards of ethics and the legislative ethics committees created pursuant to statute and legislative rules?**

Most likely it will. Statutory provisions in part 1 of article 18 of title 24, C.R.S., establish boards of ethics for both the executive branch<sup>19</sup> and the General Assembly.<sup>20</sup> The statutory board of ethics for the executive branch is a five-member board of individuals appointed by and serving at the pleasure of the governor. It is charged with the responsibility of commenting on certain gubernatorial appointments at the request of the governor and reviewing complaints of violations of the statutory standards of conduct set forth in article 18 of title 24, C.R.S. It also makes written recommendations to the governor on his or her requests and reviews appeals brought from the division of administrative hearings in the department of personnel.

The board of ethics for the General Assembly is composed of four legislative members whose sole responsibility is to issue advisory opinions, upon written request of a legislator, concerning the requesting member's conduct and the standards of conduct set forth in article 18 of title 24, C.R.S. Senate Rule 41 (g) encourages members of the Senate to seek advisory opinions from the board of ethics for the General Assembly in certain circumstances. In addition, House Rule 49 and Senate Rule 43 authorize the appointment of

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<sup>19</sup> **24-18-112. Board of ethics for the executive branch - created - duties.** (1) There is hereby created a board of ethics for the executive branch of state government in the office of the governor. The board shall consist of five members to be appointed by and serve at the pleasure of the governor.

(2) The board of ethics for the executive branch shall:

(a) Comment, when requested by the governor, on each proposed gubernatorial appointment, including the heads of the principal departments and the senior members of the governor's office based upon the provisions of this article;

(b) Upon written request of the governor, review complaints of any violation of the provisions of this article by a member of the executive branch of state government;

(c) Make written recommendations to the governor concerning his requests; and

(d) Review appeals brought before the board of ethics pursuant to section 24-30-1003 (4).

<sup>20</sup> **24-18-113. Board of ethics for the general assembly - created - duties.** (1) There is hereby created a board of ethics for the general assembly. The board shall consist of four legislative members. One member shall be appointed by and serve at the pleasure of the majority leader of the house of representatives; one member shall be appointed by and serve at the pleasure of the majority leader of the senate; one member shall be appointed by and serve at the pleasure of the minority leader of the house of representatives; and one member shall be appointed by and serve at the pleasure of the minority leader of the senate.

(2) The board of ethics for the general assembly 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.

committees on ethics in each house to address complaints lodged by persons against legislators concerning the legislator's possible misconduct.

The independent ethics commission created by Amendment 41 is established by the state constitution and, while charged with some of the same powers and responsibilities that the statutory boards of ethics and ethics committees have, is composed of five notably different members appointed as follows: One member is to be appointed by the Senate; one member is to be appointed by the House of Representatives;<sup>21</sup> one member is to be appointed by the Governor; one member is to be appointed by the Chief Justice of the Colorado Supreme Court; and one member, who is to be either a local government official or a local government employee, is to be appointed by the affirmative vote of at least three of the other four members of the commission.

This body is charged with the duty of considering written complaints regarding compliance by a legislator or legislative employee (among other state and local public officers and officials) with the new constitutional article or standards of conduct or reporting requirements otherwise set forth in law. In that capacity, the commission may dismiss frivolous complaints, but must investigate, hold a hearing concerning, and render findings on non-frivolous complaints. Ultimately, the independent ethics commission may assess penalties for violations. In addition, the independent ethics commission is also directed to render advisory opinions regarding standards of conduct upon the written request of public officers, legislators, local government officials, and government employees.

It is foreseeable that this newly created body may issue opinions or address complaints regarding ethics behavior by public officials or government employees differently or even in conflict with the opinions or recommendations rendered by the existing statutory boards of ethics or legislative ethics committees. To the extent that there is a conflict, the constitutional provision takes precedence over and supersedes the statutory provisions. Indeed, **Section 8** of the measure expressly identifies that "provisions in the statutes of this state in conflict or inconsistent with this article are hereby declared to be preempted by this article and inapplicable to the matters covered by and provided for in this article." It is therefore likely that, in order to avoid confusion, possible discrepancies, and inconsistent rulings and recommendations among the various boards of ethics, ethics

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<sup>21</sup> It is unclear how either the Senate or the House of Representatives, as bodies, are to appoint the members to the independent ethics commission. Perhaps this procedure will be clarified in implementing legislation.

committees, and the independent ethics commission, the General Assembly will consider legislation that will amend, or even repeal altogether, certain authority of the statutory boards of ethics and the legislative ethics committees.

**3. What standard of review will the independent ethics commission apply when reviewing complaints of ethics violations?**

**Section 5** of article XXIX creates a presumption that the findings employed by the independent ethics commission when considering complaints against legislators and legislative staff (as well as other state and local public officers and officials) shall be based upon a "preponderance of evidence unless the commission determines that the circumstances warrant a heightened standard." Preponderance of the evidence is defined as evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it, or more probable than not.<sup>22</sup> While a high standard of proof, this standard is generally viewed as something less than "clear and convincing" or "beyond a reasonable doubt," the standard of proof applied in criminal proceedings. The new measure does not offer guidance concerning when the circumstances might warrant the application of a "heightened standard" of proof by the independent ethics commission. Again, this may be an area that the General Assembly will address in legislation implementing Amendment 41.

**4. Will each individual member of the independent ethics commission have the power to issue subpoenas for the production of documents and the appearance of witnesses?**

The answer to this question is uncertain. Members have expressed concern about the subpoena authority granted in **Section 5** (4) of the measure which states that "[m]embers of the independent ethics commission shall have the power to subpoena documents and to subpoena witnesses to make statements and produce documents." It is not clear what is intended by the language of this provision. It is possible to interpret the provision as empowering each individual member of the independent ethics commission to issue subpoenas. However, it is also plausible that the provision could be read as requiring all

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<sup>22</sup> "Preponderance of the evidence" is defined to mean "[t]he greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to include a fair and impartial mind to one side of the issue rather than the other. This is the burden of proof in a civil trial, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be." BLACK'S LAW DICTIONARY, p. 1201 (7th ed. 1999).



members, a majority of the members, or at least two members of the independent ethics commission to issue a subpoena or a subpoena duces tecum. By contrast, House Rule 49 (d) and Senate Rule 43 (d) are clearly written in such a way as to authorize the legislative ethics *committees*, as opposed to any individual member of such committee, to issue subpoenas and subpoenas duces tecum.<sup>23</sup> The General Assembly may address this apparent ambiguity in legislation enacted pursuant to **Section 9** of the article.

### **III. Conclusion**

#### **A. Concluding thoughts.**

There are many questions surrounding the interpretation and application of Amendment 41. The measure contains vague terms, broad definitions, and ambiguous provisions. Parts of the measure, if literally interpreted, seem extreme and unreasonable. As previously discussed, it is likely that the General Assembly will address many aspects of the measure in future legislation intended to facilitate its operation. Such legislation may include the clarification of terms and the breadth of the measure's application. In addition, the independent ethics commission, once established, may issue one or more opinions addressing the application of the measure to specific situations. Finally, provisions of the measure may ultimately be the subject of a court action. Opinions from the independent ethics commission or resulting from litigation will also shape the interpretation and application of Amendment 41. However, until such time as implementing legislation or interpretive opinions from the independent ethics commission or a court of law are available to help guide our interpretation of this measure, legislators and their staff should exercise a cautious and conservative approach.

#### **B. Additional Information on Amendment 41.**

The Office of Legislative Legal Services is available to assist members of the General Assembly and their staff with any additional questions regarding any of the matters addressed in this memorandum and Amendment 41. Please be advised that the applicability of any legal requirement addressed in this memorandum will always depend heavily on the particular facts and circumstances presented. The foregoing analysis is a general analysis of the parameters and applicability of the new constitutional article and the legal

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<sup>23</sup> Both House Rule 49 (d) and Senate Rule 43 (d) state, "The committee shall have the power to take testimony under oath and to issue subpoenas and subpoenas duces tecum in the manner provided by Joint Rule No. 33 (b), (c), and (d) of the Joint Rules of the Senate and House of Representatives."

principles at issue rather than an opinion applicable to any particular set of facts.