

ETHICS BOARD
COLORADO GENERAL ASSEMBLY



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ETHICS BOARD OF THE GENERAL ASSEMBLY

Advisory Opinion 2006 - No. 1

Conflict of Interest

REDACTED

12 September 2006

QUESTION

What advice would the Ethics Board of the General Assembly give to a legislator faced with questions about his or her vote on a bill appropriating moneys for a grant program that subsequently benefitted a nonprofit organization of which the legislator was a paid director?

ADVISORY OPINION

It does not appear that the inquiring legislator faced with the circumstances described in the request for the advisory opinion violated any rules or statutes warranting discipline. However, if certain facts were to be assumed, it becomes a closer question, and a legislator faced with any of the circumstances discussed in this opinion should carefully consider all of the facts, as well as the possibility of a perceived appearance of a conflict of interest, before acting.

No actual conflict-of-interest situation would exist for a legislator at the time that he or she voted on a measure in a situation similar to the one described in the letter requesting an advisory opinion if the legislator did not have any economic or financial interest in the nonprofit organization that ultimately benefitted from the legislation. Nor would the legislator be presented with a conflict-of-interest situation if the organization with which he or she was

affiliated was merely one among a class of similarly situated organizations that might potentially qualify for the grant moneys.

However, under similar circumstances, if a legislator were to have an economic or financial interest in the organization benefitting from the legislation, then it becomes a closer question. For example, if the legislator received a salary from the organization or a bonus or other pecuniary benefit due to the receipt of the grant or if the legislator held an interest or some other investment in the organization that would be enhanced as a result of receiving the grant, then the legislator should consider whether the perception of an *appearance* of a conflict of interest, if not an actual conflict, makes full disclosure of the circumstances, and possibly recusal from the vote, advisable. If, in addition to an economic or financial interest, the legislator knows at the time of his or her vote that the organization is the only one uniquely qualified or eligible to benefit from the grant program and that his or her personal situation is distinct from that held generally by members of the same occupation, profession, or business, then an actual conflict of interest exists. In that situation the legislator is advised to disclose the circumstances and recuse himself or herself from voting on the matter.

A prudent course of action for a similarly situated legislator would be to disclose his or her particular situation or interest relative to a particular bill prior to voting on that bill and explain the basis for voting or abstaining from a vote on the bill.

Furthermore, a legislator should refrain from using his or her position as a legislator, intentionally or otherwise, to exercise undue influence over other legislators, public officials, or private persons for his or her personal gain.

BACKGROUND

The Ethics Board, created pursuant to section 24-18-113, C.R.S. (hereinafter the "Board"), received a request for an advisory opinion inquiring whether a legislator is presented with a conflict-of-interest situation when voting on a bill that appropriates moneys for a grant program that promotes certain policy objectives for the state. At the time the legislator voted on the measure the legislator did not have an expectation of benefitting directly from the legislation. The legislator seeking the advisory opinion, while not the sponsor of the bill, sponsored a House Appropriations Committee amendment to the bill that added the grant program at issue. The inquiring legislator is the director of a nonprofit organization that later applied for, and ultimately

received, a partial grant funded with state moneys appropriated pursuant to the legislation. At the time that the legislator voted on the bill, the legislator was paid a salary by the organization; however, the legislator did not know the eligibility and other criteria that would later be developed by the executive branch for distributing the grant moneys and therefore did not know whether the legislator's nonprofit organization would qualify and ultimately realize any benefit from the legislation. There is no evidence indicating whether any of the grant moneys received by the organization paid the legislator's salary or otherwise directly benefitted the legislator.

ANALYSIS

A. Personal, Private, or Financial Conflicts of Interest

1. Colorado Constitution

The situation presented in the advisory opinion request raises questions about the potential for a conflict of interest arising between a legislator's private responsibilities and his or her legislative duties. It requires the consideration of principles related to conflict of interest and undue influence. The state constitution, legislative rules, and statutes all address when a member of the General Assembly may not vote on legislation in which the member has an interest. The Colorado constitution, article V, section 43, provides:

Section 43. Member interested shall not vote. A member who has a personal or private interest in any measure or bill proposed or pending before the general assembly, shall disclose the fact to the house of which he is a member, and shall not vote thereon.

An issue of whether a member has a personal or private interest in a particular bill has historically arisen when a member's business, profession, or occupation is impacted by that bill. Accordingly, the phrase "personal or private interest" has been interpreted in the past to mean a *financial* interest through one's business, profession, or occupation affected by the legislation that is not shared by other members of that business, profession, or occupation.

2. Legislative Rules

While Senate Rule 17 (c) tracks the constitutional language concerning "a personal or private interest", by contrast, House Rule 21 (c) varies slightly from the Colorado constitution by requiring any representative "who has an immediate personal or *financial* interest in any bill or measure" to disclose such fact to the House and not vote thereon. (Emphasis added.) Although House Rule 21 (c) does not define "financial interest", it has historically been

construed to exist if there is a possibility that the member has a financial or economic interest in particular legislation or the member has a personal relationship with an individual who has an economic or financial interest in the legislation. Senate Rule 41 (b) states that a Senator is disqualified from voting upon a question if his or her personal interest conflicts with the public interest, impacting the Senator's independence of judgment. That rule describes personal or private interests as economic or financial interests, whether held directly or indirectly by the member. Senate Rule 41 (b) (2) (A) also provides that a question arises as to whether a personal or private interest tends to affect a Senator's independence of judgment if the Senator "[h]as or acquires a substantial economic interest by reason of the Senator's personal situation, distinct from that held generally by members of the same occupation, profession, or business, in a measure proposed or pending before the General Assembly; or has a close relative or close economic associate with such an interest."

It should be noted that newly adopted Joint Rule 42, although not applicable to this inquiry, will have future application. Joint Rule 42 explicitly states that "[a] member of the General Assembly shall be considered to have a personal, private, or financial interest in a pending bill, measure, or question if the passage or failure of such bill, measure, or question 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." Joint Rule 42 creates an exception if the legislator is a member of a class impacted by the bill, measure, or question, but permits the legislator, nevertheless, to disclose that fact and not vote on the matter.

In addition, Senate Rule 41 (c) states that a "Senator shall not use his or her public position, intentionally or otherwise, to obtain or attempt to obtain any confidential information or special advantage or a decision from a public body on a matter unrelated to his or her senatorial duties in which he or she has a financial interest for himself or herself, a close relative, or a close economic associate." When a legislator is faced with a difficult decision with respect to action on a certain matter, the legislator should consider, among the other factors, whether his or her actions amount to the inappropriate exertion of undue influence over another person or persons to improve the legislator's financial interest.

3. Financial Interest

Applying the constitutional provision and the legislative rules to the circumstances presented in the request for an advisory opinion, it may be

reasonable to assume that the legislator may have had a personal, private, or financial interest in the matter by virtue of the fact that he was the paid director of the nonprofit organization that received a grant as a result of the legislation. It is arguable that the receipt of the grant moneys by the organization indirectly, if not directly, benefitted the legislator, although it is unclear whether the grant moneys actually paid any portion of the legislator's salary or otherwise financially benefitted the legislator directly. Nor does the inquiry specify whether the viability of the organization was aided, or possibly insured, by the receipt of the grant moneys. Had the viability of the organization been secured by the receipt of the grant moneys or had the legislator been paid directly from or otherwise been the beneficiary of some portion of the grant moneys, the possibility of a financial interest, and therefore a conflict of interest, would certainly have been more obvious. Furthermore, if the facts had been different and the organization had been a for-profit concern, rather than a nonprofit organization, the argument might be stronger still that a conflict of interest existed. The actual viability of the business interest may have been directly enhanced and the legislator's economic or financial interest more obviously and directly improved as a result.

However, the unique facts described in the advisory opinion request make it clear that the legislator did not know at the time that he voted on the bill whether the organization with which the legislator was affiliated would ultimately be eligible to receive the grant moneys authorized by the legislation. It is difficult, therefore, to say that, at the time the legislator voted, there was an actual conflict of interest presented to the legislator, even if the legislator did later receive some sort of pecuniary benefit from the nonprofit organization. The legislator did not know what eligibility criteria the executive branch might establish for the application and receipt of the grant moneys.

4. Member of a Class

Furthermore, the advisory opinion request does not specify whether the legislator's nonprofit organization was uniquely qualified to receive the moneys authorized by the legislation or whether there was a class of similarly situated persons or entities would have potentially qualified them for the grants, as well. The facts presented do not indicate that the legislator's personal interest was any different from other similarly situated members of a class in the legislator's profession, occupation, or business. Senate Rule 41 (b) (2) (A) and new Joint Rule 42 indicate that a legislator's personal or private interest in a bill does not require the legislator's recusal from voting on that bill if that interest is shared by a class of similarly situated persons of

which the legislator is a member.¹ A legislator, therefore, must consider whether any personal benefit he or she may receive from a particular bill, however ultimate or indirect, derives from being a member of the class affected or benefitted by the bill and not from being a member participating in the consideration of the bill. Therefore, if the legislator is a member of a class of persons who might benefit from legislation, a conflict of interest may not arise. Alternatively, a legislator who votes for a measure for which he or she is uniquely qualified to benefit, or whose business interest is uniquely qualified to benefit, may face a conflict of interest.

The request merely offers the fact that there were a number of other grant recipients. Therefore the Board assumes that the legislator was a member of a class of persons associated with possible grant applicants. It is therefore reasonable to conclude that the legislator did not have an interest requiring abstention by virtue of the legislator's membership in that class. Accordingly, if legislation supported by a member is not uniquely tailored to suit only a very narrowly defined group of prospective grant applicants, but rather suitable to a class of possible applicants, then it is less likely that a conflict-of-interest situation is present. The facts presented do not support a finding to the contrary; however, the Board suggests that the better practice may be for a legislator presented with a similar situation to disclose the circumstances before he or she votes or to abstain from voting on the issue.

5. Citizen Legislature

Finally, references in the rules and statute to membership in a class appear to recognize the fact that the Colorado General Assembly is viewed as a part-time citizen legislature. Members must balance their roles as legislators and as members of businesses, professions, and occupations. Members of a citizen legislature can reasonably be expected by the public generally and their constituents specifically to advocate and vote on bills that directly or indirectly impact the legislators' professional, business, property, and financial interests. It should not be a surprise that a member of the General Assembly votes on matters in which he or she has an interest. Presumably, the legislator's constituency elected him or her with full knowledge of and because of the legislator's particular background and expertise. That constituency has a reasonable expectation that the legislator will utilize, rather than completely divorce himself or herself from, that experience in making decisions impacting those interests without using the position to directly advance his or her personal, private, or financial interests to the exclusion of others.

¹ See also, section 24-18-107 (3), C.R.S., which specifies that, "[a]n interest situation does not arise from legislation affecting the entire membership of a class."

6. *Statutory "Code of Ethics"*

The statutory "Code of Ethics", part 1 of article 18, of title 24, C.R.S., echos the principles established in the state constitution and in the rules of the House of Representatives and the Senate. It provides further guidance by defining a "financial interest" to include a "substantial interest" held by an individual which interest is an ownership interest in business or real or personal property or a directorship or officership in a business.² In addition, section 24-18-107 (2), C.R.S., of the statutory "Code of Ethics" mirrors the constitutional language by recommending that a member of the general assembly who has a "personal or private interest" in a proposed or pending measure or bill disclose that interest and not vote on the bill.³ This section enumerates the following factors for a member to consider when determining whether the member has a "personal or private interest": (1) Whether the interest impedes the member's independence of judgment; (2) the effect of the member's participation on public confidence in the integrity of the general assembly; and (3) whether the member's participation is likely to have any significant effect on the disposition of the matter.

a. Impact on legislator's independence of judgment

The first consideration is whether the legislator's interest impedes his or her independence of judgment. The information provided in the request states that the legislator was the director of the nonprofit organization that ultimately received grant moneys, and information from other sources indicates that the legislator was paid a salary by the organization at the time of the 2005 legislative session. As previously stated, the "Code of Ethics" expressly recognizes that the director of a business has a "substantial interest" in the business and therefore, by definition, a "financial interest". If the legislator received any direct economic benefit as a result of being the director of the organization receiving grant moneys or if, by virtue of its paying the legislator a salary, the receipt of the grant moneys by the organization indirectly, if not directly, benefitted the legislator, the potential that the legislator's judgment may have been influenced is likely. Stated another way, if the legislation did not directly impact the viability of the organization with which the legislator was associated, it is unlikely to have impacted the legislator's judgment. If, however, the legislation did impact the viability of the organization, and

² Section 24-18-102 (4) (a) and (f), C.R.S.

³ Section 24-18-107 (1), C.R.S., specifies that the ethical principles serve only as guides to determining whether a member's conduct is ethical. Section 24-181-07 (4), C.R.S., further states that "[i]f a member of the general assembly elects to disclose the interest, he shall do so as provided in the rules of the house of representatives or the senate, but in no case shall failure to disclose constitute a breach of the public trust of legislative office."

thereby the legislator's salary, there is a stronger argument that the legislator's interest impacted his or her judgment.

The unique facts described in the advisory opinion request, however, make it clear that the legislator did not know at the time that the legislator voted on the bill whether the organization with which the legislator was affiliated would ultimately be eligible to receive the grant moneys authorized by the legislation. It is difficult, therefore, to say that there was an actual conflict of interest presented to the legislator, even if the legislator did receive some sort of pecuniary benefit from the nonprofit organization at the time that the legislator voted for the bill since the legislator did not know what eligibility criteria the executive agency might establish for the application and receipt of the grant moneys. However, the Board notes that the situation presented a possible *appearance* of a conflict based upon the *possibility* that the nonprofit organization of which the legislator was the director might be eligible to apply for and receive the grant moneys. For these reasons, the legislator, at a minimum, should have disclosed the legislator's interests prior to voting.

b. Impact on public confidence in the integrity of the General Assembly

The second consideration for possible recusal set forth in the "Code of Ethics" is the effect that the member's participation in a legislative decision might have on the public's confidence in the integrity of the General Assembly. As stated previously, members of a citizen legislature can reasonably be expected by the public to advocate and vote on bills that directly or indirectly impact the legislator's professional, business, property, and financial interests. It should not be a surprise, and therefore unlikely to compromise the confidence of the public in the legislative institution, that a member of the General Assembly vote on matters in which he or she has an interest.

In fact, a legislator, when balancing the recusal factors, must also consider the impact that recusal from a decision related to a measure or issue would have on the voice of his or her constituency vis-a-vis that measure or issue. A relevant paper from NCSL's Center for Ethics states that, "[w]hen state policymakers abstain from voting on a bill, they, in essence, disenfranchise their district on that particular issue."⁴ This outcome must often be balanced by a legislator against the appearance of, rather than the concrete existence of, a personal or private or financial interest in a bill and the public's response

⁴ "To Vote or Not to Vote: Balancing Personal and Public Interests in the Legislature". National Conference of State Legislatures, Center for Ethics in Government, September 2004.

from voting on that bill. The Board further observes that the rules and statutes should not be interpreted in a way that would have a chilling effect on the laudable goal of legislators serving the community through volunteering their time and energy to help nonprofit organizations for fear that such participation may expose them to conflict-of-interest claims. Nor does the Board necessarily view such participation as a threat to the public's trust and confidence in the integrity of the legislative process. Serving on the board of a nonprofit organization without pay should not, in itself, create a conflict of interest for a legislator voting on a bill or measure that may affect that organization.

However, it is advisable for a legislator voluntarily serving on the board of a nonprofit organization to, at the least, disclose his or her interests when voting on a bill or measure that may ultimately affect the organization.

c. Effect on disposition of the matter

The final factor enumerated in the "Code of Ethics" for a legislator to consider when contemplating whether he or she has an interest in an issue dictating abstention is whether the member's participation is likely to have any significant effect on the disposition of the matter. This factor is only helpful to the extent the legislator faced with the possible conflict of interest knows in advance the climate of the body and whether there is substantial support for the measure or whether it is a controversial issue. In the specific case brought before this Board, the House Appropriations Committee approved both the amendment and the motion to pass the bill to the committee of the whole unanimously. Furthermore, the bill passed on third reading in the House of Representatives 65-0. It appears there was broad support for the measure, regardless of the legislator's interest in and position on its passage. It is unlikely that the member's recusal would have impacted the result of the bill's adoption.

7. Undue Influence

As previously stated, Senate Rule 41 prohibiting a Senator from using his or her position to obtain or attempt to obtain any special advantage or decision from a public body on a matter in which the legislator has a financial interest may also provide guidance. While the Senate Rules are inapplicable to the factual circumstances specifically addressed in this opinion, a legislator in a similar position, whether a member of the House or Senate, should consider what effect his or her position has on other legislators. Furthermore, the Senate Rule should deter a member in a situation similar to the one at issue

from using, or attempting to use, his or her position as a legislator from inappropriately influencing, or attempting to influence, those persons responsible for determining the grant recipients once the legislation is implemented.

B. Appearance of Impropriety

Even if there is not a clear and direct personal, private, or financial interest in the legislation that would require the legislator to disclose and abstain from voting, there may still be an issue of an *appearance* to the public of such an interest. When contemplating a possible conflict-of-interest situation and the appropriate course of action to take, a legislator should always consider the perspective of the public. As stated previously, were there no evidence whatsoever that the inquiring legislator's amendment to the bill and ultimate vote on the bill authorizing the grant moneys was driven by the legislator's personal, if not financial, interest in benefitting a potentially qualifying organization of which the legislator was the director, abstention may nonetheless have been the advisable course of action under the ethics rules because of the mere *possibility* and strong perception that such a situation existed. At a minimum, the best practice may be for a similarly situated legislator to consider full disclosure of the surrounding circumstances and his or her interests, even if remote, prior to voting on or abstaining from a vote.

CONCLUSION

There are a variety of factors that a legislator should consider when determining whether he or she faces a conflict of interest, or even the appearance of a conflict of interest, when voting on a measure. Some of these considerations are as follows:

- Whether the legislator has a financial or pecuniary interest in the matter or will receive income or otherwise benefit economically, directly or indirectly, from the measure on which he or she is voting, keeping in mind that Joint Rule 42 provides that a member has a personal, private, or financial interest in a measure if the passage or failure of the measure will result in the member deriving a direct financial or pecuniary benefit greater than any such benefit derived by other persons in the member's profession, occupation, industry, or region;
- Whether a business interest with which the legislator is

associated is a nonprofit or not-for-profit organization whose purpose is to promote the public good and from which the legislator receives no economic or pecuniary benefit or whether it is a for-profit entity from which the legislator may directly or indirectly realize benefit;

- Whether the legislator, or his or her business interest, is uniquely qualified to benefit from the legislation or whether the legislator, or the legislator's business interest, is only one among a class of similarly situated persons or entities that might potentially benefit from the measure;
- The affect on the voice of the legislator's constituency if the legislator abstains from voting on the measure as weighed against the risk that the public's general confidence in the legislative process might be impaired if the legislator votes on the measure;
- Whether the contemplated action would amount to the use of the legislator's public position, whether intentionally or otherwise, to obtain or attempt to obtain any special advantage or a decision from a public body that may enhance his or her financial interest;
- Notwithstanding the fact that there may be no conflict of interest legally under the relevant constitutional, statutory, and legislative rule provisions, the legislator should nonetheless consider whether abstention is a prudent course of action when there is an appearance of a conflict based upon the legislator's own perception or one communicated to him or her by the public, the press, or other legislators.

If there is even a remote possibility of a perceived conflict of interest on an issue, the legislator should disclose his or her particular situation or interest relative to the measure at issue prior to voting or abstaining from such a vote.