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LEGAL MEMORANDUM

TO: Interested Persons
FROM: Office of Legislative Legal Services
DATE: November 1, 2016
SUBJECT: Use of House and Senate legislative staff, equipment, and resources.¹

This Office often receives questions from legislators and House and Senate staff relating to the permissibility of using legislative staff, equipment, and other resources during regular business hours on certain types of legislative and political activity. The purpose of this memorandum is to provide a resource to legislators and staff in connection with similar questions that may arise during the 2016 session and in the future. The memorandum is divided into two parts: The first part summarizes the law and legislative rules relating to the appropriate use of legislative staff and resources. The second part applies the law and rules in a "Frequently Asked Questions" format.

Legislators may wish to consider discussing unique factual circumstances similar to the examples below with those agencies charged with the administration and enforcement of the ethics and campaign finance laws, such as the Secretary of State's office and the Independent Ethics Commission, or with private legal counsel practicing in these areas.

1. Law and legislative rules:

- a) It is improper and unethical to use state equipment and state services such as offices, telephones, internet access accounts, copiers, fax machines, computers, postage, supplies, and staff time for campaign or personal purposes. Use of

¹ 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.

state equipment for these purposes holds potential civil and criminal liability. (*Colorado State Senate Employee Handbook - Lobbying and Political Activity; Personnel Policy and Procedure Manual for the House of Representatives - Improper Use of State Equipment/Resources; Sections 1-45-117, 18-8-404, and 18-8-405, C.R.S.*).

- b) Senate and House employees are not allowed to engage in political activity within the capitol building.
 - i) Political activity includes any form of campaigning or electioneering, such as attending or arranging for political meetings, transporting candidates or workers engaged in campaigning or electioneering, distributing campaign materials, including but not limited to literature, political guide cards, placards, and signs, soliciting or canvassing for campaign funds, developing or distributing opinion polls and surveys that are not related to legislative business, transporting electors to the polls on election day, and any other form of political work.
 - ii) Political activity does not include activities undertaken to assist the legislator in the performance of his or her duties as an elected official of the state. (*Colorado State Senate Employee Handbook - Lobbying and Political Activity; Personnel Policy and Procedure Manual for the House of Representatives - Political Activity by Employees*).
- c) No agency, department, board, division, bureau, commission, or council of the state, including the General Assembly, shall make any contribution in campaigns involving the nomination, retention, or election of any person to any public office, nor shall any such entity expend any public moneys or make any contributions to urge voters to vote for or against any ballot measure. As applied to the General Assembly, this prohibition applies to the staff of the General Assembly using the resources of the General Assembly to make a campaign contribution. The prohibition does not apply to lawful campaign contributions made by a member out of his or her own personal funds. (Section 1-45-117, C.R.S.).
 - i) A "contribution" includes anything of value given, directly or indirectly, to a candidate for the purpose of promoting the candidate's nomination, retention, recall, or election. (Colo. const. art. XXVIII, sec. 2 (5)(a)(IV)).
 - ii) An "expenditure" means any purchase, payment, distribution, loan, advance, deposit, or gift of money by any person for the purpose of

expressly advocating the election or defeat of a candidate or supporting or opposing a ballot measure. (Colo. const. art. XXVIII, sec. 2 (8)(a)).

- iii) The purpose of this section [1-45-117, C.R.S.] is to prevent state agencies or political subdivisions from devoting public resources to persuade voters during an election. (*Coffman v. Colorado Common Cause*, 102 P.3d 999 (Colo. 2004)).
- d) State capitol telephones are to be used primarily for business purposes. (*Colorado State Senate Employee Handbook - Telephones; Personnel Policy and Procedure Manual for the House of Representatives - Telephone Usage*).
- e) Any questions concerning the content of the material to be photocopied on a House or Senate copy machine must be directed to the Secretary of the Senate or the Chief Clerk of the House. (*Colorado State Senate Employee Handbook - Supplies and Copies; Personnel Policy and Procedure Manual for the House of Representatives - Supplies, Copy Machines and Faxes, Purchases and Building Maintenance Requests*).
- f) Nonpartisan House staff who are supervised by the Chief Clerk may not be active in any partisan political campaigns and political party activities, and also may not be active in political issues before the electorate. Partisan Senate staff taking time away from work for political and campaign-related activities shall not use annual, sick, or other personal leave and will not otherwise be paid by the Senate for time spent away from work. (*Colorado State Senate Employee Handbook - Lobbying and Political Activity; Personnel Policy and Procedure Manual for the House of Representatives - Political Activity by Employees*).
- g) Letters and mailings by members are subject to limitation:
 - i) Mail sent from Senators should be in response to a constituent request or comment and shall not exceed 25 pieces (either letters or postcards) per day. Mailings that are non-responsive to constituent requests or comments shall not be mailed by the Senator using his/her code. Such mailings must be paid for by the Senator from campaign or personal funds. (*Colorado State Senate Employee Handbook - Mail/Materials Distribution*). A minimal mailing initiated by a legislator using his/her code that relates to legislative business is permissible if resources are available for such purpose.
 - ii) Only mailings that are generated in response to a request for information are mailed at state expense. (*Personnel Policy and Procedure Manual for the House of Representatives - Letters and Incoming/Outgoing Mailings*).

- h) A legislator may use unexpended campaign contributions held by his or her candidate committee to:
 - i) Defray expenses for constituent mailings and similar communications; and
 - ii) Pay expenses that are directly related to the legislator's official duties as an elected official including but not limited to expenses for the purchase or lease of office equipment and supplies, room rental for public meetings, necessary travel and lodging expenses for legislative education such as seminars, conferences, and meetings on legislative issues, and telephone and pager expenses. (Section 1-45-106, C.R.S.).
- i) A legislator shall not accept or receive any money or any gift or other thing of value having an aggregate value greater than \$59 per year from a person, without the person receiving lawful consideration of equal or greater value in return from the legislator. (Colo. const. art. XXIX, sec. 3 (1) & (2) - "Amendment 41").
- j) A legislator is prohibited from knowingly receiving or accepting from any person, in connection with the public service of the legislator:
 - i) A gift of money or any monetary payment, given directly or indirectly, for the purpose of defraying any expenses related to the official duties undertaken by the legislator;
 - ii) An in-kind gift, which includes a gift of equipment, goods, supplies, property, services, or anything else, the value of which exceeds \$50 in any calendar year, given directly or indirectly, to the legislator for the purpose of defraying any expenses related to his or her official duties. (Section 24-6-203 (3.5), C.R.S.).
- k) No legislator may accept a gift of any money from any person who is a professional or volunteer lobbyist or from a corporation or labor organization. (Section 24-6-203 (3.7), C.R.S.).

2. Frequently Asked Questions:

2.1.1. Town hall meetings and legislative outreach.

Question #1: May House or Senate legislative staff, equipment, or other resources be utilized during regular business hours to arrange "town hall meetings" on behalf of a member of the General Assembly?

Answer #1: Yes. Legislative staff and resources may be utilized during regular business hours to arrange the town hall meeting so long as the meeting relates exclusively to the legislator's official duties, i.e., legislation, state issues, policymaking, etc., and the legislator or staff engages in no election campaign activity relating to the election of a candidate or the support or defeat of a ballot measure. Therefore, it is permissible for legislative staff to utilize state time and resources to create materials for a legislator to utilize in furtherance of his or her responsibilities as a member of the General Assembly at town hall meetings or for other legislatively-related activities conducted outside of the Capitol building (subject to Senate or House photocopying limitations). Likewise, so long as the communications are not for campaign or political purposes, staff may utilize state equipment during business hours to communicate with constituents on legislative matters on behalf of members.

However, to the extent such a meeting includes campaign activity or has the appearance of a campaign, rather than a legislative event, the relevant rules prohibiting the use of legislative staff and resources for campaign purposes may be implicated.

Question #2: May House or Senate legislative staff and equipment, including a legislator's Capitol building phone number, be utilized for the purpose of arranging and making automated telephone calls to the legislator's constituents that relate to a town hall meeting on legislative issues or other legislative issues generally?

Answer #2: Yes. The use of legislative staff and equipment, including a legislator's Capitol building phone number to generate automated telephone calls to that legislator's constituents inviting them to a town hall meeting on legislative issues or other legislative issues generally would not appear to implicate the rules prohibiting the use of state equipment or services for campaign or political purposes, so long as the purpose of the phone calls is exclusively related to legislative business.

Additionally, it may be advisable to consult with the Secretary of the Senate or the Chief Clerk of the House in connection with any technical or logistical concerns about using Capitol phones for automated phone calls.

Question #3: May legislative appropriations be expended for legislative outreach activities on behalf of legislators, such as town hall meetings, including expenses incurred by House or Senate legislative staff in connection with arranging and conducting meetings, travel and lodging expenses, communication supplies, cell phone expenses, and office supplies?

Answer #3: Yes, assuming such expenditures are authorized and funds are budgeted for such activities. So long as the legislative outreach activities are exclusively related to legislative business, the expenses are incurred in connection with work performed by staff on that legislative business for the legislator, similar to that performed for legislative committees, the reimbursement for travel and lodging expenses is permissible under relevant state and legislative reimbursement rules, and appropriations for such purposes have been authorized and are available in the legislative budget for such purposes. Under such circumstances, the expenditure of legislative funds for such purposes is not directly prohibited by the relevant rules. However, the following should be given consideration in connection with an expenditure of legislative funds for such purposes:

- The Secretary of the Senate and the Chief Clerk of the House have indicated that there have been no funds in previous legislative budgets designated nor have expenditures historically been authorized for such purposes.
- To the extent that legislative staff utilizes state time and resources to generate materials or communications that include, or that appear to include, both legislative and campaign or political content, an expenditure of legislative funds for such purposes may implicate the relevant prohibitions in state law or legislative personnel rules.
- The line between what is legislative and what is political in the context of a written or electronic communication, particularly in an election year, oftentimes may become blurred. Where legislative staff utilizes legislative time or resources to generate materials that appear or might be construed to be for a campaign or political purpose, the greater the likelihood that a complaint might arise. Such legislative outreach efforts on behalf of legislators may be susceptible to criticism or a complaint based on the appearance that state resources are being expended to support an incumbent legislator's campaign efforts with his or her constituency.
- Even where the activity or materials are predominately legislative, if there is an issue as to whether a portion of the activity or materials could be perceived as

having a political or campaign purpose, it may be advisable for the legislator and staff not to utilize state resources in connection with the task.

Question #4: May House or Senate legislative staff be reimbursed from a legislator's unexpended campaign contributions for expenses incurred in connection with legislative outreach activities on behalf of that legislator, such as travel and lodging expenses related to assisting with a town hall meeting?

Answer #4: Yes. Section 1-45-106 (1) (b) (V), C.R.S., authorizes the use of unexpended campaign contributions to pay expenses that are directly related to the legislator's official duties, including necessary travel and lodging expenses for meetings on legislative issues. A reimbursement of legislative staff for travel and lodging expenses in connection with a legislative meeting appears to be an appropriate use of a legislator's unexpended campaign contributions. Any such expenditure by a legislator is subject to the campaign finance law reporting requirements for candidate committees under section 1-45-108, C.R.S.

Question #5: May a legislator utilize unexpended campaign contributions for the purpose of paying for automated telephone calls to his or her constituents that relate to a town hall meeting on legislative issues or to other legislative issues generally?

Answer #5: Yes. Unexpended campaign contributions may be expended to defray expenses for constituent mailings and similar communications and to pay expenses that are directly related to the legislator's official duties as an elected official, including telephone expenses. (Section 1-45-106, C.R.S.). It is reasonable to conclude that this includes expenses related to automated telephone calls to a legislator's constituents. Any such expenditure by a legislator is subject to the campaign finance law reporting requirements for candidate committees under section 1-45-108, C.R.S.

Question #6: May political literature be handed out at a town hall meeting held in connection with the member's official duties?

Answer #6: Not advisable. If the town hall meeting is held for the purpose of communicating with the public generally in connection with legislative business and, accordingly, constitutes official business, it should not be coupled with any activity that suggests a political purpose, such as handing out campaign literature. Although section

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1-45-117 (1) (a) (II), C.R.S., essentially permits a member or employee of the General Assembly to expend \$50 or less of public moneys expressing his or her opinion, even such a de minimus use of public moneys in order to promote a political purpose at an official legislative event may trigger a complaint. It is recommended that members and employees stay comfortably clear of the line separating official duties from political activity in connection with town meetings and other legislative functions.

2.2. Unexpended campaign funds - donations and expenditure - legislative caucus accounts or funds.

Question #7: May legislators make donations from unexpended campaign contributions to a legislative caucus account or fund for the purpose of covering the expenses of a legislative caucus, such as the creation and maintenance of a caucus website, caucus lunches and dinners, or caucus retreats?

Answer #7: Yes. The question presumes a donation of an amount of one legislator's unexpended campaign contributions to a legislative caucus fund or account containing a pool of such donations from several legislators in the caucus. A reasonable argument can be made that such a donation is permissible under section 1-45-106, C.R.S., so long as the caucus account or fund is utilized exclusively to defray the donating legislator's legislative expenses, and not for any campaign activity related to supporting or opposing a candidacy or ballot measure. Under such circumstances, the donation can reasonably be characterized as one that is made for the purpose of defraying expenses that are directly related to the member's official duties as an elected official, and thereby permissible under the relevant statute and legislative rules. Any such donation by a legislator is subject to the campaign finance law reporting requirements for candidate committees under section 1-45-108, C.R.S.

Question #8: May legislators make donations from unexpended campaign contributions to a legislative caucus account or fund for the purpose of defraying expenses in connection with legislative outreach activities for other legislators belonging to the caucus?

Answer #8: Probably not. This situation seems distinguishable from the one posited for caucus expenses in **Question #7**. To the extent that an amount donated by one legislator is or appears to be utilized for legislative outreach efforts on behalf of a *different* caucus member, the provisions of section 1-45-106, C.R.S., which sets forth

the permissible uses of such funds, might be implicated. Under such circumstances an argument might be made that such a donation is not for the purpose of defraying expenses that are directly related to the donor-legislator's official duties as an elected official. Such a donation might be characterized as a gift of money to defray the expenses related to the official duties of a different legislator and therefore subject to criticism or a complaint as violative of the gift ban under Amendment 41 or the prohibition on "office account" donations under section 24-6-203 (3.5), C.R.S. Further, a donation of a legislator's unexpended campaign contributions to a fund or account that is expended for outreach on behalf of or to defray the expenses of other legislators may implicate relevant provisions of the campaign finance law.

Accordingly, it would seem advisable for legislators to limit the use of unexpended campaign contributions to their own legislative outreach efforts, as permitted by law, and to report those expenditures as such under the relevant campaign finance disclosure provisions.

Question #9: May private donations be accepted by a legislative caucus account or fund for the purpose of defraying expenses in connection with legislative outreach efforts for one or more legislators?

Answer #9: Probably not. Such donations may violate Amendment 41's prohibition on gifts of money and things of value to legislators or the prohibition contained in section 24-6-203 (3.5) (a), C.R.S., on acceptance of "office account" donations to legislators for the purpose of defraying expenses related to the legislator's official duties. Although the donations under such circumstances are not directly made to legislators, the gift of money, arguably, nonetheless benefits those legislators directly or indirectly.

Question #10: May unexpended campaign contributions be used for the purpose of hiring legislative aides?

Answer #10: Yes. Under section 1-45-106 (1) (b) (V), C.R.S., a person elected to office may use unexpended campaign contributions for the purpose of hiring legislative aides. This provision permits members of the General Assembly to use unexpended campaign contributions (in addition to a number of uses explicitly described in the statute) for "[a]ny expenses that are directly related to such person's official duties as an elected official." The retention and employment of legislative aides comes within the terms of this catch-all exception as long as the aide is used exclusively for official

legislative business while he or she is working at the Capitol and using public resources.

2.3. Legislator websites.

Question #11: May House or Senate legislative staff be utilized to maintain a legislator's website that is predominantly devoted to legislative activities, but that also contains some content that could be characterized as political or campaign-related?

Answer #11: Yes. To the extent that legislative staff utilizes state time and resources to generate materials or communications that include, or that appear to include, both legislative and campaign or political content, the relevant prohibitions in state law and the personnel rules may be implicated. However, the member should remain conscious of the fact that, as previously noted, the "line" between what is legislative and what is political in the context of a written or electronic communication oftentimes may become blurred. Accordingly, where legislative staff utilizes state time or resources to generate materials that appear or might be construed to be for a campaign or political purpose, the greater the likelihood that a complaint might arise. Even where the activity or materials are predominately legislative, if there is an issue as to whether a portion of the activity or materials could be perceived as having a political or campaign purpose, it may be advisable for the legislator and staff not to utilize state resources in connection with the task.

Question #12: May legislative staff assist with the production of videos of members of the General Assembly for inclusion on the legislator's website?

Answer #12: Subject to certain qualifications, yes. This question is similar to **Question #11** involving the use of legislative staff to maintain a member's website. In general, a member may use state resources to prepare a video for inclusion on his or her official or legislative website that addresses legislative matters and steers clear of content that appears predominately political in nature. Accordingly, by extension, legislative staff may also be used to assist the member with the preparation or production of such a video and even to appear in such a video. However, insofar as the content of the video blurs the distinction between legislative and political content (e.g., the video looks to a reasonable observer like a full-fledged campaign ad), the relevant prohibitions in state law could become implicated and the potential for the filing of a complaint increases. If the video appears predominately political in nature, then obviously staff should not be using state resources or their "official time" to

produce the material and staff runs the risk that they will be the subject of a complaint alleging a violation of section 1-45-117, C.R.S.

Question # 13: May a House or Senate caucus staff person engage in political activity on the weekend or at night when he or she may also be engaged in work on official legislative business?

Answer #13: Yes. The boundary between time that may be spent on official legislative duties and time spent on political activity is essentially governed by the staff person's official "legislative" work schedule. If, for example, the staff person's work schedule at the Capitol is 8-5 Monday -- Friday with an hour for lunch, the staff person is permitted to engage in political activity after 5 and on the weekends (and during lunch time if not in the Capitol building). A House or Senate caucus staff person is generally free to engage in political activity on weekends (unless his or her official work schedule covers weekends) and it doesn't matter that the staff person may be engaging in official legislative business at the same time (on the weekend) as well (again--as long as the staff person is not in a public building while performing both roles). What the employee needs to avoid is engaging in political activity while on the "legislative clock", and that is determined with reference to the precise hours for which he or she being paid to perform official duties.

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