

Ethics Watch

April 18, 2008

Colorado Independent Ethics Commission
c/o Todd Larson, Esq.
1525 Sherman Street, 4th Floor
Denver, CO 80203

Re: IEC Rulemaking Process

To the Commissioners:

Colorado Ethics Watch (“Ethics Watch”) is a nonpartisan, nonprofit watchdog group that holds public officials and organizations legally accountable for unethical activities that undermine the integrity of state and local government. As you know, Ethics Watch has actively observed the efforts of the Independent Ethics Commission (“IEC”) to adopt rules and become operational. Ethics Watch intends to submit formal comments on the IEC rules once they are submitted to the public. In this letter, we wish to address two significant issues that should be addressed before the IEC issues its proposed rules: the need for the IEC to retain independent counsel, and the purported statutory requirement of a supermajority vote to issue subpoenas.

Independent Counsel

Currently, the IEC is being ably represented by attorneys from the Colorado Department of Law. Ethics Watch views the work of these attorneys as appropriate and valuable during this interim period while the IEC is becoming fully operational. Ethics Watch recommends that the IEC retain independent counsel to advise it in connection with the handling of complaints, requests for advisory opinions and requests for letter rulings.

In its recent ruling regarding the ripeness of a First Amendment challenge to the gift ban provision of Amendment 41, the Colorado Supreme Court emphasized the voters’ intent that the IEC be independent from both the legislative or executive branches.¹ It would be incongruous for the IEC to be represented by the attorney general in the complaint and advisory opinion process, because he is part of the Executive Branch.² The IEC would enhance its independence from the executive branch by retaining independent counsel.

The IEC should also consider the possibility that representation by the Department of Law would create the appearance of a conflict of interest. The attorney

¹ *Developmental Pathways v. Ritter*, 178 P.2d 524 (Colo. 2008), slip op. at 21-22.

² Colo. Const., art. IV, § 1.

general and employees of his department are themselves subject to IEC jurisdiction, and therefore, have a personal interest in IEC rulings that potentially conflicts with their representation of the IEC in connection with the handling of complaints and requests for advisory opinions and letter rulings.³

An independent counsel, employed by the IEC and not part of the Department of Law, would be less likely to be influenced by concerns relating to restrictions on his or her own personal conduct. The attorney would have been hired specifically to investigate and prosecute ethics complaints and would be expected to set aside personal concerns in order to perform the job. His or her performance would not be evaluated by Department of Law staff who themselves are subject to IEC jurisdiction. Under those circumstances, the IEC may be able to give its informed consent to representation by the independent counsel, notwithstanding the conflict arising from the fact that the independent counsel, as a state employee, would be directly affected by the IEC's actions.⁴

Ethics Watch commends to the IEC the example of Delaware, where the State Public Integrity Commission is represented by its own independent counsel. That independent counsel is responsible for investigating complaints, unless a conflict exists involving the independent counsel, in which case the matter may be referred to the attorney general or a special counsel.⁵

Subpoenas

The power to subpoena witnesses to produce documents and testify under oath is critical to the IEC's mission of investigating ethics complaints. This is why the Colorado Constitution provides 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."⁶

In the enabling legislation, however, the state legislature has attempted to restrict the members' subpoena power by requiring a motion and supermajority vote of four

³ Colo. R.P.C. 1.7(a)(2) ("a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer.")

⁴ Colo. R.P.C. 1.7(b) ("Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.")

⁵ Rules of the Delaware State Public Integrity Commission, § III.A (Exhibit 1).

⁶ Colo. Const., art. XXIX, § 5(4).

commissioners in order to authorize the issuance of a subpoena.⁷ Article XXIX vests in each individual member of the IEC – not the IEC as a whole, not a majority or supermajority of the IEC, and certainly not the legislature – the power to issue subpoenas.⁸ The supermajority requirement, therefore, violates the state constitution, which prohibits the legislature from limiting or restricting the powers granted to the IEC and its members. The statute’s purported supermajority requirement violates the state constitution, which prohibits the legislature from limiting or restricting the powers granted to the IEC and its members,⁹ and threatens the IEC’s ability to investigate ethics complaints.

Ethics Watch recommends that the IEC rectify the statutory conflict by adopting a rule that confirms each member’s constitutionally mandated authority to issue subpoenas.

Ethics Watch appreciates this opportunity to address the IEC.

Very truly yours,

A handwritten signature in black ink, appearing to read "Luis Toro". The signature is fluid and cursive, with a long horizontal stroke at the end.

Luis Toro
Senior Counsel

⁷ C.R.S. § 24-18.5-101(4).

⁸ Colo. Const., art. XXIX, § 5(4).

⁹ Colo. Const., art XXIX, § 9.