

**CODE OF CONDUCT FOR ELECTED OFFICIALS
TOWN BOW MAR, COLORADO**

Adopted by Board of Trustees Resolution No. _____, _____, 2016,
Town of Bow Mar (“Town”), State of Colorado.

This Code of Conduct is designed to describe the manner in which the Board of Trustees and Mayor for the Town (collectively, the “Board” or “Town Board”) should treat one another, town staff, constituents and others they come into contact with in representing the Town of Bow Mar. It reflects the work of the Town Board with defining more clearly the behavior, manners and courtesies that are suitable for various occasions. The constant and consistent theme through all of the conduct guidelines is “respect.” Board members experience stress in making decisions that impact the lives of the citizens. At times, the impacts of the entire community must be weighed against the impact of only a few. Despite these pressures, elected officials are called upon to exhibit appropriate behavior at all times. Demonstrating respect for each individual through words and actions is the touchstone that can help guide Board members to do the right thing in even the most difficult situations.

1. Overview of Roles & Responsibilities.

MAYOR

- The Mayor shall serve two-year terms, elected at the same time as the Trustees are elected
- Recognized as head of the Town government for all ceremonial purposes
- Presides over meetings of the Town Board
- Has same speaking rights as any other member
- The Mayor shall have no vote on any matter before the Board, except in the case of a tie vote. In the case of a tie vote, the Mayor shall be entitled to cast the deciding vote, subject to certain limitations
- All ordinances and all resolutions authorizing the expenditure of money or the entering into of a contract shall be subject to disapproval by the Mayor as provided by state law and shall not be valid without the signature of the Mayor; provided, however, that the Board may override any such veto by the Mayor upon affirmative vote of two-thirds (2/3) of all the members elected to the Board as provided by state law, in which case said ordinance, resolution or contract shall be valid as if it had been approved and signed by the Mayor
- The Mayor is the chief executive office of the Town and is empowered to act to preserve the health, welfare and safety of the Town and its residents
- The Mayor is further empowered to act to perform the duties of any Trustee in the event of an emergency during the death, disability, unavailability or failure of such Trustee to act.
- The Mayor shall have such other duties and responsibilities as the Board may give to him or her from time to time

- Executes and authenticates legal instruments requiring signature
- Shall be the conservator of peace, and in emergencies may exercise within the Town the powers conferred by the Governor of the State of Colorado for purposes of military law, and shall have the authority to command the assistance of all able-bodied citizens to aid in the enforcement of the ordinances of the Town and to suppress riot and disorder
- Leads the Board into an effective, cohesive working team

MAYOR PRO-TEM

- Elected by the Town Board at the first meeting following their election
- Performs the duties of the Mayor if the Mayor is absent or disabled

ALL BOARD MEMBERS

- All members of the Town Board have equal votes.
- No Trustee has more power than any other member of the Board, and all should be treated with equal respect.
- All Board members should fully participate in Town Board meetings and other public forums while demonstrating respect, kindness, consideration, and courtesy to others
- Prepare in advance of meetings and be familiar with issues on the agenda
- Represent the Town at ceremonial functions at the request of the Mayor
- Be respectful of other people's time
- Stay focused and act efficiently during public meetings
- Serve as a model of leadership and civility to the community
- Inspire public confidence in Bow Mar government
- Provide contact information with the Town Clerk in case of an emergency or an urgent situation while the Board member is out of town
- Demonstrate honesty and integrity in every action and statement
- Participate in scheduled activities
- Practice civility, professionalism and decorum in discussions and debate -- difficult questions, tough challenges to a particular point of view, and criticism of ideas and information are legitimate elements of a free democracy in action. This does not, however, allow Trustees to make belligerent, personal, impertinent, slanderous, threatening, abusive, or disparaging comments. Trustees should conduct themselves in a professional manner at all times.
- Honor the role of the Mayor in maintaining order -- it is the responsibility of the Mayor to keep the comments of Trustees on track during public meetings. Trustees should honor efforts by the Mayor to focus discussion on current agenda items. If there is disagreement about the agenda or the Mayor's actions, those objections should be voiced politely and with reason, following procedures outlined in parliamentary procedure.

- Demonstrate effective problem-solving approaches -- Trustees have a public stage to show how individuals with disparate points of view can find common ground and seek a compromise that benefits the community as a whole.
- Avoid expressing opinions during Public Hearings -- Trustees will not express opinions during the public hearing portion of the meeting except to ask pertinent questions of the speaker or staff. "I think" and "I feel" comments by Trustees are not appropriate until after the close of the public hearing. Trustees should refrain from arguing or debating with the public during a public hearing and shall always show respect for different points of view.
- Trustees should act within the scope of such Trustee's assigned Administrative Department as provided in the Town Code -- Trustees, by virtue of the Code of Conduct, agree that, except for ministerial and day-to-day actions and/or actions in furtherance of approved duties and responsibility, no Trustee shall have the right to take action within such Trustee's Administrative Department or the Administrative Department of another Trustee unless directed by the Board. The Board, by resolution, may further limit the actions of Trustees.

2. Policies & Protocol Related to Conduct.

Ceremonial Events. Requests for a Town representative at ceremonial events will be handled by Town staff. The Mayor will serve as the designated Town representative. If the Mayor is unavailable, then Town staff will determine if event organizers would like another representative from the Board. If yes, then the Mayor Pro-Tem will be recommended to serve as the substitute. Invitations received by the Town are presumed to be for official Town representation. Invitations addressed to Board members at their homes are presumed to be for unofficial, personal consideration.

Correspondence Signatures. Board members do not need to acknowledge the receipt of correspondence, or copies of correspondence, during Board meetings. Town staff will prepare official letters in response to public inquiries and concerns. These letters will carry the signature of the Mayor or the appropriate Town staff. If correspondence is addressed only to one Board member, that correspondence will be shared with the rest of the Board.

Endorsement of Candidates. Board members have the right to endorse candidates for all Board seats or other elected offices. It is inappropriate to mention endorsements during Board meetings or other official Town meetings or functions.

Intergovernmental Relations. The Board values intergovernmental relations with neighboring communities and other entities. As a result, Board members should make a concerted effort to attend scheduled meetings with other entities to further promote intergovernmental relations. In no event shall the Board or any individual Trustee take any

action without the consent of the Board that may adversely impact intergovernmental relations.

Legislative Process. The Town generally follows Roberts Rule of Order for meeting management.

Public Meeting Hearing Protocol. The Mayor has the responsibility to run an efficient public meeting and has the discretion to modify the public hearing process in order to make the meeting run smoothly. Board members will not express opinions during the public hearing portion of the meeting. Main motions may be followed by amendments, followed by substitute motions. Any Board member can call for a point of order. Only Board members who voted on the prevailing side may make motions to reconsider.

Board Conduct with One Another. Boards are composed of individuals with a wide variety of backgrounds, personalities, values, opinions, and goals. Despite this diversity, all have chosen to serve in public office in order to preserve and protect the present and the future of the community. In all cases, this common goal should be acknowledged even as Board may “agree to disagree” on contentious issues.

In Public Meetings.

- Practice civility, professionalism and decorum in discussions and debate
- No shouting or physical actions that could be construed as threatening will be tolerated
- Honor the role of the Mayor in maintaining order
- Avoid personal comments that could offend other Board members -- if a Board member is personally offended by the remarks of another Board member, the offended Board member should make notes of the actual words used and call for a “point of personal privilege” that challenges the other Board member to justify or apologize for the language used. Making the public feel welcome is an important part of the democratic process. No signs of partiality, prejudice or disrespect should be evident on the part of individual Board members toward an individual participating in a public forum. Every effort should be made to be fair and impartial in listening to public testimony.
- Be welcoming to speakers and treat them with care and gentleness
- Speaking in front of Board can be a difficult experience for some people. Some issues the Board undertakes may affect people’s daily lives and homes. Some decisions are emotional. The way that Board treats people during public hearings can do a lot to make them relax or to push their emotions to a higher level of intensity.
- Be fair and equitable in allocating public hearing time to individual speakers. The Mayor will determine and announce limits on speakers at the start of the public hearing process. Generally, each speaker will be allocated three-minutes with applicants and appellants or their designated

representatives allowed more time. If many speakers are anticipated, the Mayor may shorten the time limit and/or ask speakers to limit themselves to new information and points of view not already covered by previous speakers. No speaker will be turned away unless he or she exhibits inappropriate behavior. Each speaker may only speak once during the public hearing unless the Board requests additional clarification later in the process. After the close of the public hearing, no more public testimony will be accepted unless the Mayor reopens the public hearing for a limited and specific purpose.

- Give the appearance of active listening. It is disconcerting to speakers to have Board members not look at them when they are speaking. It is fine to look down at documents or to make notes, but reading for a long period of time gazing around the room gives the appearance of disinterest. Be aware of facial expressions, especially those that could be interpreted as “smirking,” disbelief, anger or boredom.
- Ask for clarification, but avoid debate and argument with the public. Only the Mayor – not individual Board members -- can interrupt a speaker during a presentation. However, a Board member can ask the Mayor for a point of order if the speaker is off the topic or exhibiting behavior or language the Board member finds disturbing. If speakers become flustered or defensive by Board questions, it is the responsibility of the Mayor to calm and focus the speaker and to maintain the order and decorum of the meeting. Questions by Board members to members of the public testifying should seek to clarify or expand information. It is never appropriate to belligerently challenge or belittle the speaker. Board members’ personal opinions or inclinations about upcoming votes should not be revealed until after the public hearing is closed.
- No personal attacks of any kind, under any circumstance. Board members should be aware that their body language and tone of voice, as well as the words they use, can appear to be intimidating or aggressive.
- Follow parliamentary procedure in conducting public meetings. The Town Attorney serves as advisory parliamentarian for the Town and is available to answer questions or interpret situations according to parliamentary procedures. Final rulings on parliamentary procedure are made by the Mayor, subject to the appeal of the full Board.

In Private Encounters.

- Continue respectful behavior in private-the same level of respect and consideration of differing points of view that is deemed appropriate for public discussions should be maintained in private conversations.
- Be aware of the insecurity of written notes, voicemail messages and e-mail -- technology allows words written or said without much forethought to be distributed wide and far. Would you feel comfortable to have this note

faxed to others? How would you feel if this voicemail message was played on a speaker phone in a full office? What would happen if this email message was forwarded to others? Written notes, voicemail messages and e-mail should be treated as potentially “public” communication.

- Even private conversations can have a public presence -- elected officials are always on display -- their actions, mannerisms, and language are monitored by people around them that they may not know. Lunch table conversations will be eavesdropped upon, parking lot debates will be watched, and casual comments between individuals before and after public meetings noted.

Board Conduct with Town Staff. Governance of a Town relies on the cooperative efforts of elected officials, who set policy, and Town staff, who implement and administer the Board’s policies. Therefore, every effort should be made to be cooperative and show mutual respect for the contributions made by each individual for the good of the community.

- Treat all staff as professionals clear, honest communication that respects the abilities, experience, and dignity of each individual is expected.
- Poor behavior towards staff is not acceptable.
- Questions of Town staff and/or requests for additional background information should be directed to the Mayor, in which event the Mayor will contact the Town Clerk, Town Attorney or other Department Heads.
- When in doubt about what staff contact is appropriate, Board members should ask the Mayor for direction.
- Materials supplied to a Board member in response to a request will be made available to all members of the Board so that all have equal access to information.
- Board members should not disrupt Town staff while they are in meetings, on the phone, or engrossed in performing their job functions in order to have their individual needs met.
- Board should never express concerns about the performance of a Town employee in public, to the employee directly, or to the employee’s manager. Comments about staff performance should only be made to the Mayor through private correspondence or conversation.
- Board members must not attempt to influence Town staff on the making of appointments, awarding of contracts, selecting of consultants, processing of development applications, or granting of Town licenses and permits.
- Before sending correspondence, Board members should check with Town staff to see if an official Town response has already been sent or is in progress -- also verify approved by the Board.
- Do not attend meetings with Town staff unless requested by staff.
- Limit requests for staff support -- requests for additional staff support -- even in high priority or emergency situations -- should be made to the

Mayor who is responsible for allocating Town resources in order to maintain a professional, well-run Town government.

- Board members should not solicit any type of political support (financial contributions, display of posters or lawn signs, name on support list, etc.) from Town staff. Town staff may, as private citizens with constitutional rights, support political candidates but all such activities must be done away from the workplace.

In Unofficial Settings.

- Make no promises on behalf of the Board. Board members will frequently be asked to explain a Board action or to give their opinion about an issue as they meet and talk with constituents in the community. It is appropriate to give a brief overview of Town policy and to refer to Town staff for further information. It is inappropriate to overtly or implicitly promise Board action, or to promise Town staff will do something specific (fix a pothole, remove a library book, plant new flowers in the median, etc.).
- Make no personal comments about other Board members. It is acceptable to publicly disagree about an issue, but it is unacceptable to make derogatory comments about other Board members, their opinions and actions.
- Bow Mar is a small community at heart Board members are constantly being observed by the community every day that they serve in office. Their behaviors and comments serve as models for proper deportment in the Town. Honesty and respect for the dignity of each individual should be reflected in every word and action taken by Board members, 24 hours a day, seven days a week. It is a serious and continuous responsibility.

Board Conduct with Other Public Agencies.

- Be clear about representing the Town or personal interests. If a Board member appears before another governmental agency or organization to give a statement on an issue, the Board member must clearly state: (a) if his or her statement reflects personal opinion or is the official stance of the Town; and (b) whether this is the majority or minority opinion of the Board. Even if the Board member is representing his or her own personal opinions, remember that this still may reflect upon the Town as an organization. If the Board member is representing the Town, the Board member must support and advocate the official Town position on an issue, not a personal viewpoint. If the Board member is representing another organization whose position is different from the Town, the Board member should withdraw from voting on the issue if it significantly impacts or is detrimental to the Town's interest. Board members should be clear about which organizations they represent and inform the Mayor and Board of their involvement.

- Correspondence also should be equally clear about representation Town letterhead may be used when the Board member is representing the Town and the Town's official position. A copy of official correspondence should be given to the Town Clerk to be filed as part of the permanent public record. It is best that Town letterhead not be used for correspondence of Board members representing a personal point of view, or a dissenting point of view from an official Board position.

Board Conduct with The Media. Board members may be contacted by the media for background and quotes.

- The best advice for dealing with the media is to never go "off the record" Most members of the media represent the highest levels of journalistic integrity and ethics, and can be trusted to keep their word. But one bad experience can be catastrophic. Words that are not said cannot be quoted.
- The Mayor is the official spokesperson for the representative on Town position. The Mayor is the designated representative of the Board to present and speak on the official Town position. If an individual Board member is contacted by the media, the Board member should be clear about whether their comments represent the official Town position or a personal viewpoint.
- Choose words carefully and cautiously. Comments taken out of context can cause problems. Be especially cautious about humor, sardonic asides, sarcasm, or word play. It is never appropriate to use personal slurs or swear words when talking with the media.

3. Sanctions.

Public Disruption. Members of the public who do not follow proper conduct after a warning in a public hearing may be barred from further testimony at that meeting or removed from the Board meeting.

Inappropriate Staff Behavior. Board members should refer to the Mayor any Town staff who do not follow proper conduct in their dealings with Board members, other Town staff, or the public. These employees may be disciplined in accordance with standard Town procedures for such actions.

Board Members Behavior and Conduct. Town Board members who intentionally and repeatedly do not follow proper conduct may be reprimanded or formally censured by the Board. Serious infractions of the Code of Conduct could lead to other sanctions as deemed appropriate by Board. Board members should point out to the offending Board member infractions of the Code of Conduct. If the offenses continue, then the matter should be referred to the Mayor in private. If the Mayor is the individual whose actions are being challenged, then the matter should be referred to the Mayor Pro-Tem and Town Attorney. It is the responsibility of the Mayor to initiate action if a Board member's behavior may warrant sanction. If no action is taken by the Mayor, the alleged violation(s)

can be brought up with the full Board in a public meeting. If violation of the Code of Conduct is outside of the observed behaviors by the Mayor or Board members, the alleged violation should be referred to the Mayor. The Mayor should ask the Town Clerk and/or the Town Attorney to investigate the allegation and report the findings to the Mayor. It is the Mayor's responsibility to take the next appropriate action. These actions can include, but are not limited to: discussing and counseling the individual on the violations; recommending sanction to the full Board to consider in a public meeting; or forming a Board ad hoc subcommittee to review the allegation; the investigation and its findings, as well as to recommend sanction options for Board consideration.

How Governing Body Members Can Govern Better

The following items are taken from the Colorado Municipal League, Handbook for Municipal Elected Officials, and is reprinted from the League of Kansas Municipalities' brochure, "Suggestions for Successful Public Service"

Governing is clearly more of an art than a science. There are no ultimate answers on how to govern; different approaches are to be expected, and probably desired. However, there do seem to be some fundamentals. The suggestions that follow range from practical, common sense fundamentals to those more philosophic and theoretical. These tips for successful and effective public service are intended to assist mayors, Board members, and board trustees. While most suggestions relate to individual officers others apply to the governing body as a whole. These two applications, however, are interdependent - the capacity of a governing body to govern effectively is dependent on the collective capacities of at least a majority of its membership. These suggestions are not in any priority order, and not all are universally accepted. All of them, however, are worth consideration by anyone who would serve the public through an elective local office.

1. Learn all you can about your town, its history, its operation, its financing. Do your homework. Know your town ordinances. Dust off your comprehensive plan.
2. Devote sufficient time to your office and to studying the present and future problems of your community.
3. Don't bum yourself out on the little things but recognize that they are often important to the public. Save some energy - and time - for the important matters.
4. Don't act as a committee of one; governing a town requires team effort - practically and legally.
5. Don't let honest differences of opinion within the governing body degenerate into personality conflicts.
6. Remember that you represent all the people of your community, not just neighbors and friends. Be wary of personal experiences coloring your public decisions.

7. Take your budget preparation job seriously, for it determines what your town does or does not do for the coming year and will also influence what happens in future years.
8. Establish policy statements. Written policy statements let the public, and the town staff, know where they stand. They help the governing body govern, and writing them provides a process to develop consensus.
9. Make decisions on the basis of public policy, and be consistent. Treat similar situations similarly, and avoid favoritism.
10. Focus your attention on ways to prevent problems, rather than just trying to solve them as they occur. Filling potholes is one approach to governing; developing plans to prevent them is more important.
11. Don't be misled by the strong demands of special interest groups who want it done now, their way. Your job is to find the long-term public interest of the community as a whole, and you may be hearing from the wrong people.
12. Don't rush to judgment. Few final actions have to be taken at the first meeting at which they are considered. Avoid "crisis management."
13. Don't be afraid of change. Don't be content to just follow the routine of your predecessors. Charge your appointed officers and employees with being responsible for new ideas and better ways. Listen to what they have to say.
14. Don't give quick answers when you are not sure of the real answer. It may be embarrassing to appear ignorant, but it can be more embarrassing, and damaging, to tell a person something which is wrong.
15. As an individual, even if you are the mayor, don't make promises you can't deliver! Most decisions and actions require approval of the governing body, and this takes a majority vote.
16. Remember that you have legal authority as a governing body member only when the governing body is in legal session.
17. Don't spring surprises on your fellow governing body members or your town staff, especially at formal meetings. If a matter is worth bringing up for discussion, it's worth being on the agenda. Surprises may get you some publicity, at the embarrassment of others, but they tend to erode the "team" approach to governance.

18. Participate in official meetings with the dignity and decorum fitting those who hold a position of public trust. Personal dress and courteous behavior at meetings help create an environment for making sound public decisions.
19. Conduct your official public meetings with some formality, and follow rules of procedure. Have an agenda, and follow it. Most governing body members agree that formal meetings expedite the process and promote better decision making.
20. Don't be afraid to ask questions. It is one of the ways we learn. But do your homework by studying agenda material before meetings.
21. Vote yes or no on motions. Don't cop out by abstaining except when you have a conflict of interest. A pass does not relieve you of responsibility when some decision must be made.
22. Once a majority decision of the governing body has been made, respect that official position and defend it if needed, even if you personally disagreed.
23. Respect the letter and intent of the open meetings law, but also keep private and confidential matters to yourself. Don't gossip.
24. Retain competent, key employees, pay them well, trust their professional judgment, and recognize their authority and responsibilities.
25. Don't bypass the system! If you have a manager or other chief administrative officer, stick to policy making and avoid personal involvement in the day-to-day operations of the municipality. If you do not have an administrative officer, make sure you have some management system that officers, employees, and the public understand.
26. Don't let others bypass the system. Insist that people such as equipment or service suppliers work with your town staff. If direct contact with governing body members is necessary, it should be with the governing body as a whole, or a committee, and not on a one-on-one basis.
27. Don't pass the buck to the staff or employees when they are only following your policies or decisions.
28. Don't always take no for an answer. The right question may be "How can we do this?" instead of "May we do this?" Be positive!
29. Learn to evaluate recommendations and alternative courses of action. Request that your staff provide options. Encourage imaginative solutions.

30. Avoid taking short-term gains at the expense of long-term losses. Be concerned with the long-term future of the town.
31. In determining the public interest, balance personal rights and property interests, the possible harm to a few versus the good of the many. Recognize that in some situations, everyone can't be a winner.
32. Remember that cities are for people! Be concerned with the total development - physical, economic, and social of your community.
33. Don't act as if the town operates in a vacuum. Cities must work within the intergovernmental system to be effective. Keep in contact and cooperate with your federal, state, county, and school officials.
34. Know your neighbors. Get to know the officials of neighboring and similar size cities. Visit other cities, particularly those with a reputation of being well run.
35. Learn to listen - really listen - to your fellow governing body members and the public. Hear what they are trying to say, not just the words spoken.
36. Keep your constituents informed, and encourage citizen participation.
37. Be friendly and deal effectively with the news media. Make sure what you say is what you mean. Lack of good communication, with the media and the public, can be a major problem for municipal officials.
38. Remember that what you say, privately and publicly, will often be news. You live in a glass house. Avoid over-publicizing minor problems.
39. Expect, and respect, citizen complaints. Make sure that your governing body members and your town, have a way to deal effectively with them. Have a follow up system.
40. Be careful about rumors. Check them out. Help squelch them when you know they are false.
41. Appoint citizen advisory committees and task forces when you need them, but be prepared to follow their advice if you use them.
42. Take care in your appointments to boards and commissions. Make sure they are willing and capable as well as representative of the whole community.
43. Never allow a conflict of interest to arise between your public duties and your private interests. Be sensitive to actions you take that might even give the appearance of impropriety.

44. Seek help. Use manuals, guides, and other technical assistance and information available from the Colorado Municipal League and other agencies. Attend workshops and conferences put on for the benefit of you and your town.
45. Pace yourself. Limit the number of meetings you attend. Set some priorities, including the need to spend time with your family. Recognize that life - and the town - is dependent on a lot of things you have little control over.
46. Establish some personal goals and objectives. What do you want to help accomplish this year? Next year?
47. Help develop some short-term and long-term goals and objectives for your town, and check your progress at least every six months.
48. Similarly, help your town develop a vision of the future. Plan from the future to the present - no vision, no plan. One of the important purposes of a governing body is to establish a vision for the future.
49. Focus on the future, and try to leave your town better than that which you inherited as a town officer.
50. Be a leader, as well as part of the team of elected and appointed officials who were selected to make your town an even better place to live.
51. At least once a year, schedule a governing body discussion about how you are governing. Review the processes and procedures. Sit back and ask, "How are we doing? How can we do things better?"
52. Be enthusiastic about your public service and the privilege you have, and let the public know it. But maintain your sense of humor. Don't take yourself or the business of government so seriously that you don't enjoy it. It should be fun as well as a rewarding experience.
53. Celebrate! Always focusing on problems and issues may lead you, the governing body, and the public, to believe that nothing positive ever happens. Good things do happen. Let the public share your successes.

In addition to the foregoing, the Board hereby determines that it is in the best interest of the Town to adopt the attached schedules (Schedule 1, Schedule 2 and Schedule 3) and incorporate the same herein as part of the Code of Conduct as if the same were more fully set forth herein.

Schedule 1

COLORADO STATUTORY PROVISIONS CONCERNING ETHICS AND CONFLICTS OF INTEREST FOR MUNICIPAL OFFICIALS AND EMPLOYEES

by

Geoffrey Wilson, CML General Counsel

Applicable Statutes

Ethics and conflicts of interest for local government officers and employees are addressed in three areas of the Colorado Revised Statutes:

- I. Article 18 of Title 24. Part 1 is Colorado's "Code of Ethics" for public officers and employees. Part 2 addresses proscribed interests in contracts;
- II. Sections 31-4-404(2) and (3), concerning restrictions on members of municipal governing bodies voting on matters in which they have a personal or private interest; and
- III. Section 18-8-308 of the Colorado Criminal Code, imposing certain disclosure requirements on public officials.

Caveat: Be sure to check for local charter or ordinance provisions that may also bear on these issues.

Colorado "Code of Ethics" for Public Officials and Employees-

[C.R.S. 24-18-101, et seq.; C.R.S. 24-18-201, et seq.]

Violation of Public Trust and Fiduciary Duty- Standard of Proof

The Code of Ethics identifies several rules of conduct for local government officials and employees. Violation of these rules is declared to be a breach of fiduciary duty and the public trust. [C.R.S. 24-18-103(2)] A local government official or employee whose conduct departs from his fiduciary duty is "liable to the people of the state as a trustee of property and shall suffer such other liabilities as a private fiduciary would suffer for abuse of his trust." The district attorney in the district where the trust is violated is authorized to bring "appropriate judicial proceedings" on behalf of the people, and money collected in such proceedings is paid to the general fund of the local government. Successful prosecution under the Code of Ethics for breach of fiduciary duty requires proof beyond a reasonable doubt of the commission of any act proscribed in the Code.

Code of Ethics: Rules of Conduct

[C.R.S. 24-18-101, et seq]

The Code of Ethics specifies "Rules of Conduct", violation of which constitutes breach of fiduciary duty and the public trust. (The Code also specifies non-binding "Ethical Principles", which are intended as guides to conduct.)

1. Use of Confidential Information for Personal Benefit. [C.R.S. 24-18-104-(1)(a)]

A local government official or employee shall not:

"Disclose or use confidential information acquired in the course of his official duties in order to further substantially his personal financial interest."

- Note that this section restricts only use of "confidential" information.
- "Financial interest" is defined as a substantial interest held by an individual which is:
 - (a) An ownership interest in a business
 - (b) A creditor interest in an insolvent business
 - (c) An employment or prospective employment for which negotiations have begun
 - (d) An ownership interest in real or personal property
 - (e) A loan or any other debtor interest
 - (f) A directorship or officership in a business.(24-18-102-(4), C.R.S)

2. Accepting Gifts or Economic Benefits as Rewards or Inducements. [C.R.S. 24-18-104-(1)(b)]

A local government official or employee shall not:

"Accept a gift of substantial value or a substantial economic benefit tantamount to a gift of substantial value:

- 1) *Which would tend to improperly influence a reasonable person in his position to depart from the faithful discharge of his public duties; or*
 - 2) *Which he knows or which a reasonable person in his position should know under the circumstances is primarily for the purpose of rewarding him for official action he has taken."*
- This prohibition utilizes an objective "reasonable person" standard. Thus it is no defense to argue that the gift or benefit did not actually induce improper conduct or was not actually understood to be a reward for official action.
 - *Inclusions:* "Economic benefit tantamount to a gift of substantial value"
 - I. A loan at a rate of interest substantially lower than the commercial rate then currently prevalent for similar loans, and
 - II. Compensation received for private services rendered at a rate substantially exceeding the fair market value of such services. [C.R.S. 24-18-104(2)]

- *Exclusions: Economic benefits*. The Code does not define "gift of substantial value"; however, it does identify several items that are not considered "gifts of substantial value" or "economic benefits tantamount to gifts of substantial value." [See C.R.S. 24-18-104(3)] Among these exclusions are:
 - Campaign contributions reported under the Fair Campaign Act,
 - Honoraria
 - "Items of perishable or nonpermanent value, including, but not limited to, meals, lodging, travel expenses or tickets to sporting, recreational, educational, or cultural events."

3. Transactions With Those One Supervises or Inspects. [C.R.S. 24-18-109(2)(b)]

A local government official or employee shall not:

"Engage in a substantial financial transaction for his private business purposes with a person whom he inspects or supervises in the course of his official duties."

4. Acts Benefitting Ones Business or Client. [C.R.S. 24-18-109-(2)(b)]

A local government official or employee shall not:

"Perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which he either has a substantial financial interest or is engaged as counsel, consultant, representative or agent."

- "Official act" is defined as including any "vote, decision, recommendation, approval, disapproval, or other action, including in action, which involves the use of discretionary authority." [C.R.S. 24-18-102(7)]

Exclusions: Section 24-18-109(4) provides that it is not a breach of fiduciary duty or the public trust for a local government official or employee to:

- (i) Use local government facilities or equipment to communicate with constituents, family members or business associates, or
- (ii) Accept or receive benefits as an indirect consequence of transaction local government business

Defense: Disclosure

- A. Section 24-18-110 provides for voluntary disclosure by a local government official or employee of the "nature of his private interest" prior to acting in a manner that may impinge upon fiduciary duty and the public trust. Proper disclosure is an affirmative defense to "any civil or criminal action or any other sanction." (Emphasis added)
- B. Proper disclosure:
 - 1. For local government officials and employees, disclosure must be in writing to the Secretary of State. Disclosure may be accomplished online: go to the Secretary of State website, www.sos.state.co.us; click on "Elections" and then "Conflict of Interest".

2. Elements of the disclosure
 - (i) Amount of financial interest if any,
 - (ii) Purpose and duration of services rendered, if any,
 - (iii) Compensation received for services, or
 - (iv) "Such other information as necessary to describe" the interest.
3. If the act is then performed, the official or employee shall state for the record the fact and nature of the interest involved.

Code of Ethics: Prohibited Interests in Contracts

[C.R.S. 24-18-201, et seq.]

Rule: Local government officials and employees "*shall not be interested in any contract made by them in their official capacity or by any body, agency or board of which they are members or employees.*"

- **Note:** See particularly part (e) below, concerning compliance with the "Disclosure and Abstention" statutes.
- **"Safe Harbors":** The statute states that certain types of transactions are not "contracts" for purposes of these restrictions. [C.R.S. 24-18-201(1)(b)] Excluded transactions include:
 - a. Contracts awarded to the lowest responsible bidder based on competitive bidding procedures;
 - b. Merchandise sold to the highest bidder at public auction;
 - c. Investments or deposits in financial institutions which are in the business of loaning or receiving monies;
 - d. A Contract with an interested party if, because of geographical restrictions, a local government could not otherwise reasonably afford itself of the subject of the contract. It shall be presumed that a local government could not otherwise reasonably afford itself of the subject of a contract if the additional cost to the local government is greater than 10% of a contract with an interested party or if the contract is for services that must be performed within a limited time period and no other contractor can provide those services within that time period.
 - e. A contract with respect to which any... local government official or employee has disclosed a personal interest and has not voted thereon or with any respect to which any member of the governing body of a local government has voted thereon in accordance with Section 24-18-109(3)(b) or 31-4-404(3), C.R.S. Any such disclosure shall be made: To the governing body, for local government officials and employees.
- **Noncompliance- contract voidable:** Violation of the prohibitions described above shall render the contract voidable at the instance of any party to the contract except the officer interested therein. [C.R.S. 24-18-203]

Rule: "Revolving Door" Provision: Former employees may not within six months of the end of their employment contract or be employed by any employer that contracts with a local government during his employment.

Title 31-Municipal Governing Body Members –Disclosure/Abstention

[C.R.S. 31-4-404(2) and (3)]

Rule: "Disclosure and Abstention", a member of the governing body of a city or town who has a personal or private interest in any matter proposed or pending before the governing body shall:

- A. Disclose such interest to governing body,
- B. Not vote and
- C. Not attempt to influence the votes of other members of the governing body. [C.R.S. 31-4-404-(2)]

Exception

A member of the governing body may vote notwithstanding his or her personal or private interest if:

- A. Such member's participation is necessary to achieve a quorum or otherwise enable the body to act, and
- B. Disclosure is made pursuant to Section 24-18-110 C.R.S. of the Colorado Code of Ethics for Public Officials and Employees (which, as noted above, requires disclosure in writing to the Secretary of State prior to official action). [31-4-404-(3)] C.R.S.

Criminal Code Disclosure Requirements

[C.R.S. 18-8-308]

Section 18-8-308 of the Colorado Criminal Code contains additional disclosure requirements affecting local government officials and employees.

Rule: When the disclosure requirement of section 18-8-308 C.R.S. is triggered, "actual advance written notice" to the Secretary of State and to the governing body is required 72 hours before any action is taken.

What triggers the Law (When you pay attention to this rule): An impending exercise of "substantially discretionary function with respect to a government contract purchase, payment or other pecuniary transaction" where a "potential conflicting interest" is known by the official or employee to exist.

- A "potential conflicting interest" exists when the public servant is a director, president, general manager or similar executive officer or owns or controls directly or indirectly a substantial interest in any non-governmental entity participating in the transaction in question.

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Schedule 2

“Bob’s Rules of Order”

Robert (Bob) Widner

The following materials are excerpted from “*The Colorado Handbook for Effective Local Government Meetings*” (tentative title) which is in preparation for anticipated future publication. These materials are intended to support and aid understanding of information provided at various workshops and presentations in sessions conducted by the author often titled “Running Effective Meetings and Bob’s Rules of Order.”

The excerpted materials primarily include “Bob’s Rules of Order” which are offered as a simplified set of motions and rules premised very broadly on the seminal handbook *Roberts Rules of Order*.

It is hoped that, through a uniform understanding of simplified local procedural rules, government officials engaged in public meetings can more effectively conduct the public’s business.

An important disclaimer about legal advice:

These materials are for informational purposes only and not for the purpose of providing legal advice. You should contact your local attorney to obtain advice with respect to any particular issue or problem. If anything you read in these materials or hear during this presentation is inconsistent with your local attorney’s advice or counsel, your local attorney’s advice and counsel is correct.

A note about what rules govern your community:

Colorado local governments enjoy fairly broad authority to craft rules to govern their day-to-day affairs and the conduct of their local meetings. In determining what rules might govern a particular matter, it is important to consult your local ordinances, resolutions, and bylaws, and to have an understanding of the local historical practices that have guided your community meetings in the past. Overshadowing all of these local rules and practices is our state law -- to the extent it might be applicable – which should be considered when determining proper meeting procedure.

The rules and processes contained in these materials are not applicable to your community unless your community takes appropriate steps to formally incorporate the rules and processes into your local laws and policies.

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Excerpts from
Colorado Handbook for Effective Local Government Meetings
(Publication Pending)

Introduction

Efficient and well run public meetings are a necessity for local government. An efficient and well-run meeting allows all scheduled business to be accomplished, voices to be equally heard, and differences of opinion to be aired amicably. Whether the meeting issues are deeply challenging and emotional or simply ministerial and non-confrontational, a well-run meeting leaves all participants feeling that the decisions made during the meeting are the product of fairness, equality, and respect. Poorly run meetings can undermine confidence in local government by allowing a perceived inequality among participants when engaged in debate and discussion, injecting conflict and argument between the participants, and adding confusion to the decision-making process and uncertainty in the eventual decision. Unfortunately, efficient and well-run meetings for many Colorado local governments may be the exception and not the rule.

The seminal handbook, *Roberts Rules of Order*, is perhaps the most widely known set of rules designed to facilitate and manage meetings. Beginning with the pocket handbook first drafted in 1878, and with significant rewriting and amendment since that time, *Roberts Rules of Order* has evolved into a complex set of rules intended to organize large meetings of every type. Due to the sheer volume and complexity of *Roberts Rules of Order*, it is unreasonable for all meeting participants to fully comprehend and gain a working knowledge of *Roberts Rules of Order*. As a result, *Roberts Rules of Order* is often ineffective for use in conducting the meetings of local government.

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"*Bob's Rules of Order*" is intended as a simplified set of rules better suited to manage local government meetings and decision-making within Colorado. Although *Bob's Rules of Order* calls upon the basic concepts offered by *Robert's Rules*, *Bob's Rules* pares down the available motions to those essential to advance the goal of running an efficient public meeting for Colorado local government.

Key Terminology

Amendment (or to Amend) - An amendment is a motion to change, to add words to, or to omit words from, a pending main motion. The change is usually to clarify or improve the wording of the original motion and must, of course, be germane to that motion.

Body - The formally constituted organization commissioned with the obligation and duty to act on behalf of the local government.

Chairperson - The person appointed or elected to preside over the meeting.

Floor - The privilege or right to speak to the body.

Member - A person appointed or elected to hold office as a recognized participant of the body.

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Motion – A formal proposal seeking specific action by the body typically preceded by the words "I move that ..." Motions are generally introduced by voice but may be presented in writing.

Moving Party – The Member presenting a motion or point for action by the body.

Out of Order – An act or action that fails to comport with these Rules of Order

Point – A declaration of a member addressed to the chairperson requesting to bring before the body a matter for immediate decision or resolution. There are three recognized points: (1) Point or Order; (2) Point of Information; and (3) Point of Appeal.

Second – An oral declaration by a Member to express that a motion offered to the body should receive debate or discussion.

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General Rules Governing the Meeting

- **Floor Required to Address Body.** Except when raising a Point (Point of Order, Point of Information, or Point of Appeal), a Member must first be recognized by the Chairperson and be given the floor in order to address the Body.
- **Time Limit for Floor.** A Member's right to the floor should be limited to five (5) minutes. A Member may request that the Chairperson grant additional time. Such request should customarily be granted by the Chairperson unless the Chairperson determines that other Members are waiting to be recognized to obtain the floor or that meeting efficiency necessitates that the requested extension be denied. When one Member is denied a request for an extension of time to speak, no other Member shall be granted an extension of time for the same agenda item.
- **Limitation on Obtaining Floor.** A Member should only speak once to any motion under debate until such time that all others seeking the floor have been provided an opportunity to speak to the motion.
- **No Interruptions or Side Discussions.** In order to maintain a clear recorded meeting record, only one person shall speak at any one time. Interrupting a person who has the floor or engaging in side discussions while another person has the floor is out of order.
- **Second Required for Debate.** All motions must receive a second before debate or discussion may begin. A second does not connote approval of the motion but only that the Member offering the second supports fuller discussion of the motion.
- **Chairperson Discretion.** The Chairperson may independently decide to deviate from the Rules of Order in order to increase meeting efficiency and to best enable full and informed discussion of a matter before the Body. However, such independent action by the Chairperson remains subject to a Point of Order and Point of Appeal through which a Member can bring the meeting into full compliance with the Rules of Order.

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- Voting:

Vote Requirement. A majority vote of the quorum present is required for any motion unless a different requirement is set by these Rules of Order or by applicable law. For example, a supermajority (2/3rds of quorum present) is required for a Motion to Call the Question pursuant to these Rules of Order and a supermajority (2/3rds of a quorum present) is required for a motion for executive session pursuant to the Colorado Open Meetings Law (C.R.S. § 24-6-402(4)).

Aye or Nay Vote Required. A vote of aye or nay (or another form of affirmative or negative declaration such as "yes" or "no") shall be taken upon motions. Every Member, when present, must vote aye or nay unless:

- (1) The Member is excused by the Chairperson due to the Member's declaration of a conflict of interest at the introduction of the agenda item or immediately upon discovery of a legally recognized conflict of interest; or
- (2) The Member is excused by the Chairperson because the member is without sufficient information upon which to enable an informed vote due to an absence at a prior meeting, e.g., the member did not attend the meeting for which meeting minutes are moved for approval.

No Abstention. An unexcused member's vote to "abstain" or other similar declaration other than "aye" or "nay" shall be recorded as a "nay" vote on the pending motion or matter.

No Explanation of Vote. Members shall not explain their vote except during discussion and deliberation prior to the calling of the vote on the question. Any attempt to explain a vote or to condition the vote immediately prior to casting the vote is out of order.

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Meeting Notice, Minutes, and Recording of Meetings

A. Notice

The most effective meetings involve active participation by varying viewpoints and opinions. Participation is best achieved through adequate and reasonable notice given to interested parties.

Notice of a meeting should include information that would clearly inform the layperson of the date, time, place, and general purpose of the meeting.

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It is often surprising for some to learn that state law requires relative little notice to the public of local government meetings where business may be conducted. In fact, absent any local rules or practices requiring greater notice, most meetings can be conducted, and important public

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business accomplished with as little as 24 hours' notice posted at some general location in the community that is annual designated and could include a local bulletin board.¹ Locally adopted rules can greatly aid in the effort of providing greater notice to inform the community of meetings. Municipalities should consider establishing minimum notice requirements and, if desired non-mandatory or "courtesy" notice guidelines with the understanding that failure to comply with the mandatory requirements may undermine the ability to conduct a meeting or, at worst, invalidate action taken during a meeting held without compliance with the required notice.

***[Materials Deleted from Original]

Chairperson's Privileges & Duties

- Chairperson to Direct Meeting. The Chairperson is privileged to act as the director of the meeting. The Chairperson shall seek to clarify the actions pending before the Body during the meeting and prior to a vote. For example, the Chairperson is encouraged to restate motions, announce expectations for the meeting agenda, and recommend to the Body the proper procedure or rules for a particular course of action. The Chairperson has a continuing right to the floor although, like any other member, shall be held to compliance with the Rules of Order.
- Chairperson as Parliamentarian. The Chairperson is the meeting parliamentarian and shall decide all questions of process and procedure. Such decisions are subject to appeal by a Point of Appeal. The Chairperson may consult with the Body's legal counsel or administrative staff to assist in rendering decisions regarding the application of the Rules of Order.
- Chairperson as Facilitator of Discussion. As the meeting director, the Chairperson should generally encourage and enlist other Members to propose or to second motions and to lead initial debate. Nevertheless, the Chairperson is entitled to the same rights as Members regarding the presentation of motions, seconding motions, and debate and may exercise such privilege as deemed appropriate by the Chairperson.
- Temporary Informal Recesses. The Chairperson may declare a temporary recess without motion or consent of the Body. However, no recess shall be declared which would interrupt a member who has properly secured the floor to speak.

¹ C.R.S. § 24-6-402(2)(c) provides:

"Any meetings at which the adoption of any proposed policy, position, resolution, rule, regulation, or formal action occurs or at which a majority or quorum of the body is in attendance, or is expected to be in attendance, shall be held only after full and timely notice to the public. In addition to any other means of full and timely notice, a local public body shall be deemed to have given full and timely notice if the notice of the meeting is posted in a designated public place within the boundaries of the local public body no less than twenty-four hours prior to the holding of the meeting. The public place or places for posting such notice shall be designated annually at the local public body's first regular meeting of each calendar year. The posting shall include specific agenda information where possible."

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Moving Party's Privileges

- At any time *prior to* receiving a second on a motion, the Moving Party may unilaterally withdraw or unilaterally amend a motion provided that the Moving Party has the floor. A motion, *once seconded*, belongs to the decision-making Body and the Moving Party's privileges are limited.
- The Moving Party retains the following limited privileges after the motion receives a second if the Moving Party has properly secured the floor to speak:
 - A. The Moving Party may speak to the rationale, purpose, meaning, or need of the motion prior to the opening of full debate to other members of the Body.
 - B. The Moving Party may withdraw his/her seconded motion unless an objection is raised by Point of Order. An objection to the Moving Party's withdraw of the seconded motion will summarily defeat the Moving Party's request to withdraw.
 - C. The Moving Party may accept a proposed amendment (a "Friendly Amendment") unless an objection is raised by Point of Order. An objection to a Friendly Amendment will summarily defeat the Moving Party's privilege to accept a Friendly Amendment and, in such case, a formal Motion to Amend would be in order.
 - D. During debate, to further explain or clarify the meaning, intent, or purpose of the motion or to otherwise respond to a Point of Information.

***[Materials Deleted from Original]

Classes & Priority for Points and Motions

There are three classes for motions and points: (1) Privileged; (2) Main; and (3) Subordinate. The class determines the priority or importance of the motion or point and, therefore, determines whether the motion or point is "in order" when made, i.e., if the motion or point proposed is appropriate for the Body to consider at the time it is presented.

- **PRIVILEGED** motions, which include all three Points, do not require a pending main motion on the floor and do not relate directly to a pending question. Privileged motions or points may be raised at any time. Privileged *points* do not require the floor; privileged *motions* require the floor. Privileged motions oftentimes involve an administrative or ministerial aspect of the meeting that needs to be resolved independently of the business then-pending before the Body. The following motions or points are recognized as privileged and are listed *in order of precedence*:
 - Point of Order
 - Point of Information

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- Point of Appeal
- Motion to Recess
- Motion for Executive Session
- A **MAIN** motion formally presents to the Body an item for action. A Main motion can be made only when no other motion is pending. If a Main motion is presented when another pending motion or point is before the Body, it is out of order.

Although there are as many Main motions as there are subject matters that a Body may consider, there are four (4) commonly recognized *specific* Main motions used in local government decision-making:

- Motion to Adjourn
- Motion to Reconsider
- Motion to Postpone an Agenda Item to a Date Certain
- Motion to Postpone Indefinitely
- A **SUBORDINATE** motion is related to and supplements or builds upon the Main motion. A Subordinate motion must be dealt with before the Main motion can be voted on. A Subordinate motion is in order only when there is a pending main motion on the floor. Once a seconded Subordinate motion is pending on the floor, neither a MAIN motion nor another Subordinate motion is in order.

There are three (3) recognized Subordinate motions:

- Motion to Amend (a Main Motion)
- Motion to Continue Matter Before the Body to Date Certain
- Motion to Call the Question (Close Debate)

Points and Motions in Detail

A. Points

There are three "Points:" (1) Point of Order; (2) Point of Information; and (3) Point of Appeal. Points do not require a second. They are each "privileged" and may be raised at any time.

- **Point of Order** (or to "raise a question of order" as it is sometimes expressed), is an opportunity for a Member to express an opinion that the rules or procedures of the Body are being violated. The appropriate means of asserting such opportunity is for the member to wait for a break in the discussion and state "Point of Order" and wait to be recognized by the Chairperson. Any existing debate or discussion should cease. Upon the Chairperson's recognition, the member must succinctly state the general rule or procedure believed to be in violation. A point of order

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should not interrupt another speaker, does not require a second, is not debatable, is not amendable, and cannot be reconsidered. For example:

Member Jones was granted the floor and proposed a motion to approve a site plan. Member Jones then proceeded to discuss the rationale for his motion.

Member Jones: [has the floor and is engaged in debate on a motion, he pauses in his debate]

Member Smith: "Point of Order."

Chairperson: "Excuse me a moment, Mr. Jones. The Chairperson recognizes Ms. Smith."

Member Smith: "I believe we are debating a motion that did not receive a second. I believe that this is out of order because a motion requires a second before debate."

Chairperson: "You are correct Ms. Smith, I do not recall a second was offered. Therefore, let us cease debate. Do I have a second on the motion? [A second is offered]. Thank you for your Point of Order, Ms. Smith. Mr. Jones, you have the floor and may commence debate."

- **Point of Information** is a *request to receive information* on a specific question, either about process, meeting conduct, clarification of a motion, or about a fact at any time during a meeting. A Point of Information is not an opportunity for a member to *provide* information to the Body and should never be used as a means of continuously interrupting the flow of debate. Using a Point of Information to provide information or to interrupt debate would be out of order.

As an example of the proper use of a Point of Information while the Body is engaged in debate on a seconded motion:

Member Quinn: [Has the floor and is offering her thoughts on a pending matter.]

Member Frank: "Madam Chairperson, Point of Information"

Chairperson: "Excuse me a moment, Ms. Quinn. The Chairperson recognizes Member Frank."

Member Frank: "Ms. Quinn said there are more than 5,000 vehicles passing through the Main Street intersection during the peak evening hours. But I recall that our Traffic Engineer stated earlier that the traffic count at the intersection during evening peak hours was only 1,500 vehicles. What is the correct number?"

Chairperson: "Let's have the Traffic Engineer provide us the accurate figure for traffic count."

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Following the Traffic Engineer's advisement, Ms. Quinn again has the floor.

- **Point of Appeal** is a request of a member to challenge a decision of the Chairperson concerning the application of the Rules of Order. A Point of Appeal shall customarily be in order immediately following the Chairperson's decision and may be declared out of order and unavailable where the Body has relied upon the Chairperson's decision and continued the proceeding in reliance upon, or in accordance with, the Chairperson's decision. The member making the Point of Appeal may briefly state his or her reason for the Point, and the Chairperson may briefly explain his or her ruling, but there shall be no further debate on the appeal.

As an example of the use of a Point of Appeal when a motion is pending discussion:

Chairperson: "We have on the floor a Motion to Call the Question that was seconded." The vote on a Motion to Call the Question is not debatable and will require a majority vote of the quorum present."

Member Thomas: "Point of Appeal"

Chairperson: Mr. Thomas has raised a Point of Appeal. Mr. Thomas, you have the floor. What is your appeal?"

Member Thomas: I appeal the Chairperson's decision regarding the required vote on a Motion to Call the Question. A Motion to Call the Question requires a 2/3rds vote pursuant to our Rules of Order.

Chairperson: "My decision regarding the required vote is being appealed. I believe that closing debate is a rather simple matter only requiring a majority vote like a majority of all of our motions."

"We shall now vote on the appeal. Mr. Thomas appeals my decision regarding a vote on a Motion to Call the Question requires a simple majority of this quorum. Mr. Thomas asserts it should be a 2/3rds vote. The question we are now voting on is 'Shall the decision of the Chairperson be sustained?'"

[The Members vote to not sustain (they overturn) the Chairperson's decision.]

Chairperson: "My decision is overturned on appeal. I stand corrected and will now declare that the Motion to Call the Question requires a vote of 2/3rds of the members of the Body. Let us proceed to the consideration of the Motion to Call the Question."

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B. Motions

- **Motion to Recess** (Privileged)

A Motion to Recess is intended to provide a temporary cessation in the meeting to accommodate matters such as restroom breaks or to consult with legal counsel or administrative staff. The motion should state approximate amount of time for the requested recess as a convenience to other members and the public in attendance. A second is required and the motion is not debatable and requires an immediate vote. A majority vote of quorum present required for approval.

As an example of a Motion to Recess, such motion might be stated as:

Member Thomas: "I move to recess our meeting for 15 minutes until 7:30."

Member Jones: "Second."

Chairperson: "We have a Motion to Recess on the floor to recess until 7:30. Because this motion is not debatable, would the clerk please call for the vote."

- **Motion to Adjourn** (Main)

Motion to Adjourn is available to cease further action of the Body and immediately terminate the meeting. A Motion to Adjourn is debatable and requires a majority vote of quorum present required. Caution should be exercised when presenting a Motion to Adjourn when items are pending on the agenda that required prior notice (such as public hearing publication or posting of property) because these matters must be properly continued to a future date or new notice published and/or posted.

As an example of a Motion to Adjourn, such motion might be stated as:

Member Thomas: "I move to adjourn this meeting."

Member Jones: "Second."

Chairperson: "We have a Motion to Adjourn on the floor. Member Thomas, did you want to speak to your motion or open any debate?"

Member Thomas: "Thank you. I believe the remaining items on our agenda are not important and it is already 11:00 p.m. I believe we are all tired and can no longer concentrate."

Chairperson: Any other debate? Seeing none, would the clerk please call for the vote? Please note that only a

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simple majority of our quorum present tonight is needed to adjourn."

• **Motion to Reconsider** (Main)

A Motion to Reconsider is an extraordinary motion that requires a degree of care in presenting and, if approved, care in processing the matter to be reconsidered. A successful Motion to Reconsider will effectively void the prior vote taken on the previously decided motion and cause the matter to be reopened for another motion and a new consideration.

A Motion to Reconsider is only in order at the same meeting at which the decision to be reconsidered was made or at the *next* regular meeting of the Body. The motion must be made by a member on the prevailing side of the original motion to be reconsidered. The required second on the motion need not be a member from prevailing side. The motion is debatable but only for the reasons to explain or justify reconsideration and not for the purpose of debating the merits of the original motion.

A supermajority vote of 2/3rds of the quorum present is required for approval. All proceedings, testimony, evidence, and debate on the matter presented during the initial consideration of the original matter will remain part of the official record; only the decision or vote taken is voided.

In the event of a successful Motion for Reconsideration, it is recommended that the reconsideration of the original matter be continued to a future date as opposed to being heard at the same meeting in which the Motion for Reconsideration was approved. This recommendation stems from the fact that the matter under reconsideration will likely require new public notice so that interested parties (and possibly an applicant whose rights are being decided) are apprised of the new consideration and can attend and participate in the new consideration. Even when a successful Motion for Reconsideration was presented in the same night as the matter subject to reconsideration, the parties present for the original matter may have departed the meeting after what appeared to those attending to be a final decision on the original motion. Fairness will often dictate that the reconsideration be scheduled for a future date.

As an example of the typical process surrounding a Motion to Reconsider, such motion might be stated as:

Member Thomas: "I move to reconsider our decision to approve Ordinance 14 which required all owners to keep their dogs on leashes at all times. I believe I can make this motion because I voted "yes" on the ordinance and it was approved at our last meeting."

Member Jones: "Second."

Chairperson: "We have on the floor a Motion to Reconsider Ordinance 14 concerning our new dog leash law."

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Please note that a Motion to Reconsider, if we approve it tonight, will reopen the consideration of Ordinance 14 and require new debate, a new motion, and a new vote. Member Thomas, did you want to speak to your Motion to Reconsider? Please note that you are free to discuss the reason why you wish to seek reconsideration but this is not intended to be a debate of the merits of Ordinance 14 at this time."

Member Thomas: "Thank you. I would like us to reconsider Ordinance 14 because upon reflection over the last week I believe the Ordinance may be too restrictive and we might want to consider allowing an exemption to the leash requirement for owners that can maintain control over their dogs by using voice command."

Chairperson: "Any other debate concerning whether we should reconsider Ordinance 14? Seeing none, would the clerk please call for the vote. Please note that this Motion to Reconsider requires a supermajority of 2/3rds of the quorum present tonight to be approved. If approved, our administrative staff will need to schedule Ordinance 14 for discussion at a future date and provide or publish any required notices to the public concerning our reconsideration of Ordinance 14."

• **Motion to Postpone an Agenda Item to Date Certain (Main)**

A Motion to Postpone an Agenda Item to a Date Certain pertains to a matter that is not presently on the floor but is scheduled for later consideration on the Body's agenda. The motion must identify a date and time certain for the agenda item to be reset for Body consideration. If the Moving Party desires to *indefinitely* postpone an item, a Motion to Postpone indefinitely is the appropriate motion (see below). The Motion to Postpone an Agenda Item to a Date Certain is debatable. A majority vote of quorum present required for approval.

As an example of a Motion to Postpone an Agenda Item to Date Certain, such motion might be stated as:

Member Smith: "I move to Postpone Agenda Item 8 which pertains to funding of the repainting of the offices in the City Hall to our meeting on August 15 at 7:00 p.m. here in our Council Chambers."

Member Edwards: "Second."

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Chairperson: "We have a Motion to Postpone Agenda Item 8 which pertains to the funding of the repainting of the offices. This motion is debatable, so I would offer Mr. Smith and other Members an opportunity to comment on the motion".

Member Smith: "I believe that this is not an urgent matter and, quite frankly, there are more pressing matters to fully consider tonight. The August 15 agenda looks like a light meeting."

Chairperson: "Any other discussion? Seeing none, would the clerk please call for the vote?"

• **Motion to Postpone Indefinitely (Main)**

A Motion to Postpone Indefinitely will effectively kill a matter that is subject to the Body's consideration (and is usually on the meeting agenda or scheduled on a future agenda). This motion will remove the matter from the Body's consideration without full debate of the matter and without directly voting the matter down on the matter's merits. It is most commonly used to eliminate a matter from the current and/or future agendas because there is insufficient interest on the Body to hear the matter. As a caution, a Motion to Postpone Indefinitely would not be appropriate where the item involves a quasi-judicial matter for which an applicant has a right to a hearing and opportunity to be heard; legal counsel should be consulted regarding the use of this Motion for any quasi-judicial matter. The motion is debatable. A majority vote of quorum present required for approval. If approved, the matter will not be brought back to the Body unless the Body instructs that the item return for a future agenda.

As an example of a Motion to Postpone Indefinitely, such motion might be stated as:

Member Johnson: "I move to Postpone Indefinitely Agenda Item 2 which pertains to enacting a leash law for all cats in the city."

Member Samuels: "Second."

Chairperson: "We have a Motion to Postpone Agenda Item 2 indefinitely which pertains to our imposing a leash law on cats. This motion is debatable and requires a majority vote of the quorum present tonight. I would offer Ms. Johnson and other Members an opportunity to comment on the motion."

Member Johnson: "I have talked with many citizens about this proposal and believe that we are likely to be harshly criticized should be enact such an ordinance. So I think it is a waste of our time to continue to entertain this idea

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and I prefer just to eliminate the matter from tonight's agenda and our future consideration."

Chairperson: "Any other discussion? [Member Thomas requests floor] The floor recognizes, Mr. Thomas. Mr. Thomas you have the floor."

Mr. Thomas: "Thank you. Although I agree with Ms. Johnson about the public sentiment we are likely to hear about leashing cats, I think we should at least open the public debate and have the citizens comment to us directly. So I oppose the motion to postpone indefinitely."

Chairperson: "Seeing no other discussion, would the clerk please call for the vote."

[Vote fails to gain the required simple majority vote needed for a Motion to Postpone Indefinitely.]

Chairperson: "We do not have the required majority of the quorum so the offered motion is rejected or fails. We will consider the matter of leashing cats as our scheduled Agenda Item 2 tonight."

• **Motion to Amend (a Main Motion) (Subordinate)**

A Motion to Amend (a Main Motion) is applicable only to a Main motion on the floor. The motion must provide specificity as to the intended amendment. The motion is debatable. A majority vote of a quorum present required for approval. A motion to amend is not in order when another motion to amend is already pending (made and seconded) before the Body; e.g., the Body will deal with only one Motion to Amend at a time to avoid confusion.

As an example of a Motion to Amend a Main Motion, such motion might be stated as:

Member Smith: "I move to Approve Ordinance No. 6 as presented to us tonight."

Member Jackson: "Second."

Chairperson: "We have a proper Motion on the floor that has received a second to approve Ordinance No. 6. Any discussion?"

Chairperson: "Yes, the Chair recognizes Mr. James. Mr. James, you have the floor."

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Member James: "Thank you. I move to amend the motion offered by Ms. Smith to change the amount of the penalty for the first violation stated in Section 1-1-3 on page 3 of Ordinance No. 6 from the stated \$100 for the first offense to \$200 for the first offense."

Member Samuel: "Second."

Chairperson: "We have a Motion to Amend before us to change the penalty in Section 1-1-3 of Ordinance No. 6 from \$100 to \$200 for the first offense. We will take up the Motion to Amend first and decide that Motion before we consider the Main Motion. It is debatable and requires a simple majority vote. I see no one wishing to comment or debate the offered amendment to Ordinance No. 6. Would the clerk call for the vote on the Motion to Amend only?"

[Motion receives majority vote of approval.]

Chairperson: "The Motion to Amend is approved so Ordinance No. 6 is now amended to change the penalty for a first offense to \$200. We next turn to the Main Motion to approve Ordinance 6, now as amended. Any debate on Ordinance No. 6 as amended? Seeing none, would the clerk please call for the vote of Ordinance No. 6 as it was amended?"

• **Motion to Continue Matter to Date Certain (Subordinate)**

A Motion to Continue a Matter (that is before the Body) to a Date Certain postpones to holdover the current motion to a specific date, time, and place stated in the motion. Note that a motion to continue a matter without stating a date certain would operate more like a Motion to Postpone Indefinitely (see above) and would require the matter to be affirmative requested by the Body for future consideration and reintroduced and, when required, new publication of notice of the hearing or discussion. The motion is debatable. A majority vote of a quorum present required for approval.

As an example of a Motion to Continue a Matter to a Date Certain, such motion might be stated as:

Member Smith: "I move to continue this matter under consideration to our meeting on February 23 at 7:00 p.m. here in our Council Chambers."

Member Edwards: "Second."

Chairperson: "We have a Motion to Continue this matter we are considering to a date and time certain, that being our meeting of February 23, at 7:00 p.m. here in our

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Council Chambers. This motion is debatable and only requires a majority of the quorum here this evening. I would offer Mr. Smith and other Members an opportunity to comment on the motion."

Member Smith: "I believe we need a continuation so that we can have a full opportunity to review the traffic study we received tonight. Without my detailed review of that study, I do not believe I am able to make an informed decision on the matter pending before us."

Chairperson: "Any other discussion? The Chair recognizes Ms. Hampton."

Member Hampton: "We have all had the traffic study for more than a month and we received a presentation on the study contents last week. With all respect to Mr. Smith, I believe a majority of us are fully informed and we can decide the issue tonight."

Chairperson: "Seeing no other request to debate, would the clerk please call for the vote?"

• **Motion to Call the Question (Subordinate)**

A Motion to Call the Question (also more correctly phrased as to "Close Debate") will close further debate and require vote on the motion pending before the Body. The motion applies only to the motion on the floor. The motion is not debatable. Due to the fact that such a motion will forestall the Body's ability to discuss the merits of the pending matter, a supermajority vote of 2/3rds of the quorum present is required for approval in order that the Body evidences a strong intent that continuing debate is not necessary to decide the matter.

As an example of a Motion to Call the Question (or Close Debate), such motion might be stated as:

[A debatable motion is pending before the Body and the Body is engaged in debate.]

Member Bernie: "I move to Call the Question."

Member Jones: "Second."

Chairperson: "We have Motion to call the Question which will, if approved, close all debate on the matter presently before us and require a vote. This motion is not debatable. This motion will require a supermajority of our quorum by 2/3rds. Would the clerk please call for the vote?"

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Chairperson: "The Motion to Call the Question is approved by a 2/3rds vote. Would the Clerk please call for the vote on the main motion?"

• **Motion for Executive Session (Privileged)**

Executive sessions are expressly permitted by state law to allow the Body to discuss certain topics in a closed non-public setting. The most common authorized executive session topics for local government include:

- A. Purchase, acquisition, lease, transfer, or sale of any real, personal, or other property interest; except that no executive session shall be held for the purpose of concealing the fact that a member of the local public body has a personal interest in such purchase, acquisition, lease, transfer, or sale.²
- B. Conferences with an attorney for the local public body for the purposes of receiving legal advice on specific legal questions. Mere presence or participation of an attorney at an executive session of the local public body is not sufficient to qualify the executive session as a session involving legal advice.³
- C. Matters required to be kept confidential by federal or state law or rules and regulations. The Body shall announce the specific citation of the statutes or rules that are the basis for such confidentiality before holding the executive session.⁴
- D. Specialized details of security arrangements or investigations, including defenses against terrorism, both domestic and foreign, and including where disclosure of the matters discussed might reveal information that could be used for the purpose of committing, or avoiding prosecution for, a violation of the law.⁵
- E. Determining positions relative to matters that may be subject to negotiations; developing strategy for negotiations; and instructing negotiators.⁶
- F. Personnel matters *except if* the employee who is the subject of the session has requested an open meeting, or if the personnel matter involves more than one employee, all of the employees have requested an open meeting.⁷ However, you cannot hold an executive session for "personal matters" to discuss:
 - (i) an elected official or an appointed member of the Body;⁸ or

² C.R.S. § 24-6-402(4)(a).
³ C.R.S. § 24-6-402(4)(b).
⁴ C.R.S. § 24-6-402(4)(c).
⁵ C.R.S. § 24-6-402(4)(d).
⁶ C.R.S. § 24-6-402(4)(e).
⁷ C.R.S. § 24-6-402(4)(f)(I).
⁸ C.R.S. § 24-6-402(4)(f)(II).

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- (ii) the appointment of a person to fill an appointed⁹ or elective office; or
 - (iii) personnel policies that do not require the discussion of matters personal to particular employees.¹⁰
- G. Consideration of any documents protected by the mandatory nondisclosure provisions of the "Colorado Open Records Act",¹¹ except that all consideration of documents or records that are work product as defined in C.R.S. § 24-72-2020 or that are subject to the governmental or deliberative process privilege shall occur in a public meeting unless an executive session is otherwise allowed pursuant to state law.

Because the authorized purposes for executive session are limited and because errors in calling for an executive session may result in the session discussion becoming subject to public disclosure or actions, if any, invalidated, it is always advised to obtain legal advice regarding each motion.

Unlike other matters that will be open for public discussion, debated, and possibly decided by the Body, it is not necessary that the Executive Session be listed on the meeting agenda in advance. Oftentimes, the Body has no need for an executive session and the need arises during the meeting. For example, the need for legal advice may not be known until evidence or information is presented that give rise to a question requiring consultation with the Body's counsel.

The Motion for Executive Session must include the citation to Colorado Revised Statute subsection authorizing session and a brief description of subject matter.

The motion is debatable. However, care should be taken during debate to not disclose any confidential or sensitive information that might undermine the purpose of the executive session. For example, a town board member may state in debate during the public meeting that an executive session should be held to allow the council to decide "whether to spend up to \$2,000,000 on the acquisition of the vacant Thompson Property for a public park." Such public disclosure would essentially undermine the purpose of the executive session, that is, to give the town board the opportunity to determine negotiation strategy and the total amount willing to be paid to the seller for the Thompson Property. More appropriate would be to declare in debate that the executive session is needed to "allow the town board to decide the maximum amount the negotiation team can offer in negotiation."

⁹ Id. A special statutory provision of the Colorado Open Meetings Law (C.R.S. § 24-6-402(3.5)) may authorize non-public executive sessions to conduct some of the business associated with selecting the chief executive officer (commonly considered as the "city manager" or "town administrator.") Consult your local counsel to understand the steps necessary to hold these special forms of non-public public meetings.

¹⁰ C.R.S. § 24-6-402(4)(II).

¹¹ Id.

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Very importantly, a supermajority of 2/3rds of quorum present required for approval pursuant to the Colorado Open Meetings Law.

As an example of a Motion for Executive Session to obtain legal advice, such motion might be stated as follows:

Member Thomas: "I move to hold an executive session pursuant to C.R.S. § 24-6-402(4)(b) to receive legal advice on the right to impose a condition on the proposed rezoning application under discussion."

Member Jones: "Second."

Chairperson: "Is there any debate on this motion? Seeing none, would the clerk please call for the vote?" Please note that the vote required for executive session is a 2/3rds of the quorum present tonight."

[Vote by the Body is taken and the vote is unanimous.]

Chairperson: "We are now authorized to enter into executive session."

The Location of Executive Session

State law does not require that executive sessions be conducted in any particular location. Most communities remove the Body to a side room or conference chambers that allows for private conversation outside the hearing of the general public. Other communities ask members of the public attending the body's meeting to exit the room to allow the necessary confidential conversation.

Confidentiality of Executive Sessions

Contrary to popular belief, there are no *specific* laws that require confidentiality of discussion in executive session or prohibit disclosure of confidential information discussed in an executive session. Attendees may, therefore, believe they are free to disclose information provided to them during the session. However, state law imposes upon all municipal officials, officers, and employees a general statutory obligation to protect the public trust.¹² Where disclosure of confidential information harms the interests of the public, such disclosure may subject the official, officer, or employee to prosecution for the monetary harm inflicted on the public due to such disclosure.¹³ As a better protection, local rules of ethics and conduct may be enacted to expressly provide that executive session information is deemed confidential and the disclosure of such information may violate local ethics standards and, for employees, may lead to disciplinary action.

***[Materials Deleted from Original]

¹² See Part 1, Article 18, Title 24, C.R.S., titled "Code of Ethics" and in particular C.R.S. § 24-18-103.

¹³ C.R.S. § 24-18-103(2)(prosecution by district attorney for breach of public trust).

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Who May Attend an Executive Session?

State law does not specify who may attend an executive session. It is commonly understood that the Body determines the individuals that are necessary to conduct the executive session and provide the background information and advice to the Body. Besides the Body members, the most common attendees include the city or town manager or administrator, the Body's legal counsel, and administrative staff members involved in the particular issue under discussion. Obviously, the city or town legal counsel is required for any executive session convened for the purpose of obtaining legal advice pursuant to C.R.S. § 24-6-402(4)(b).

A special note should be made when inviting individuals into the executive session who are not members of the municipal government. These individuals will not be bound to any local rules such as local ethics rules or personnel rules that require confidentiality. It is not uncommon for a municipality to require some form of confidentiality agreement or understanding by the non-municipal attendee as a condition of attendance.

On occasion, a Body member or several members of the Body may request that another member of the Body be excluded from the executive session. Such exclusion may be due to a myriad of reasons, for example, an actual or perceived conflict of interest, unwillingness of the excluded member to agree to keep executive session information confidential, or lack of confidence in the excluded member to maintain confidences. Although state law does not provide a means or method for exclusion of a Body member from an executive session, the law does not, conversely, give an absolute right to a Body member to attend every executive session. It is recommended that local policy be created and approved by the Body that specifically authorizes the Body, as a whole, to decide executive session attendees.

***[Materials Deleted from Original]

Suspension of Rules

A. Chairperson May Suspend

Subject to challenge by Point of Appeal, the Chairperson may elect to suspend operation of any rule provided by these Rules of Order; provided, however, that the Chairperson shall not be authorized to suspend or alter the vote required on any motion or matter.

B. Motion to Suspend

Any member may move to suspend the applicability of a rule of order by proposing a main motion; provided, however, that no motion may suspend or alter the vote required on any motion or matter. Such motion shall be presented only as a Main motion which motion shall require a second, be subject to debate, and shall require a majority vote of the quorum present for adoption.

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Summary of Requirements for Motions and Points

MOTION	Type	Second Required?	Debatable?	Vote Required
Point of Order	Privileged	No	No	No Vote Required
Point of Information	Privileged	No	No	No Vote Required
Point of Appeal (to challenge the Chairperson's decision)	Privileged	No	Only as needed to explain the Decision and the applicable Rule subject to challenge	Majority of quorum present
Motion to Recess	Privileged	Yes	No	Majority of quorum present
Motion for Executive Session	Privileged	Yes	No	2/3rds of quorum present
Any Main Motion	Main	Yes	Yes	Majority of quorum present unless otherwise required by law, rule, or regulation
Motion to Adjourn	Main	Yes	Yes	Majority of quorum present
Motion to Reconsider	Main	Yes	Yes	2/3rds of quorum present
Motion to Postpone an Agenda Item	Main	Yes	Yes	Majority of quorum present
Motion to Postpone Indefinitely	Main	Yes	Yes	Majority of quorum present

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MOTION	Type	Second Required?	Debatable?	Vote Required
Motion to Amend (a Main Motion)	Subordinate (to a Main Motion)	Yes	Yes	Majority of quorum present
Motion to Continue Matter Before the Body to Date Certain	Subordinate (to a Main Motion)	Yes	Yes	Majority of quorum present
Motion to Call the Question (Close Debate)	Subordinate (to a Main Motion)	Yes	No	2/3rds of quorum present

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Privileges Under the Colorado Open Records Act

*Kendra Carberry, Hoffmann, Parker, Wilson & Carberry, P.C.
Kathleen Kelly, Light Kelly, P.C.
Geoff Wilson, General Counsel, CML*



Privileges under the CORA

- Work Product
- Attorney-Client
- Deliberative Process
- Trade Secrets, Confidential Commercial and Financial Data



What is work Work Product under the CORA?

Let's start with the definition:
"Work product" means and includes all intra- or inter-agency advisory or deliberative materials assembled for the benefit of elected officials, which materials express an opinion or are deliberative in nature and are communicated for the purpose of assisting such elected officials in reaching a decision within the scope of their authority. . . .
C.R.S. § 24-72-202(6.5)(a).



Work Product - inclusions

The CORA then provides two express inclusions:
Such materials include, but are not limited to:
(I) Notes and memoranda that relate to or serve as background information;
(II) Preliminary drafts and discussion copies of documents that express a decision by an elected official.
C.R.S. § 24-72-202(6.5)(a).



Work Product - exclusions

The CORA also provides an exhaustive list of exclusions:
"Work product" does not include:
(I) Any final version of a document that expresses a final decision by an elected official;
(II) Any final version of a fiscal or performance audit report or similar document . . . ;
(III) Any final accounting or final financial report.



Work Product - exclusions

(IV) Any materials that would otherwise constitute work product if such materials are produced and distributed to the members of a public body for their use or consideration in a public meeting or cited and identified in the text of the final version of a document that expresses a decision by an elected official.

C.R.S. § 24-72-202(6.5)(c).

But wait, there is much more . . .



Work Product - exclusions

More express exclusions:

(d)(1) In addition, "work product" does not include any final version of a document prepared or assembled for an elected official that consists solely of factual information compiled from public sources. The final version of such a document shall be a public record. These documents include, but are not limited to:



Work Product - exclusions

(A) Comparisons of . . . laws, ordinances, rules, or regulations with [other existing or proposed laws, ordinances, rules or regulations]

(B) Compilations of existing public information, statistics or data;

(C) Compilations or explanations of general areas or bodies of law, ordinances, rules or regulations, legislative history, or legislative policy.

C.R.S. § 24-72-202(6.5)(d).



Work Product - what is it?

So what does all this really mean?

- Five (?) part test:
 - 1) Is it intra- or inter-agency?
 - 2) Is it advisory or deliberative?
 - 3) Is it prepared for the benefit of elected officials to make a decision within their authority?
 - 4) If so, is it expressly included?
 - 5) Even if 1-4 are satisfied, is it excluded?



Work Product - case law

Despite the ridiculously lengthy definition, there is only one published case expressly addressing the CORA definition of "work product" as it relates to municipalities: *City of Fort Morgan v. Eastern Colo. Publishing Co.*, 240 P.3d 481 (Colo. App. 2010).



Work Product - case law

In the *Fort Morgan* case, the Colorado Court of Appeals held that certain documents related to a performance evaluation for the city administrator were work product. The records at issue were individual review forms prepared by Councilmembers and an associated spreadsheet.



Work Product - case law

First, the court noted that exemptions from the CORA must be construed narrowly and in favor of public access. Then the court discussed the meaning of "advisory" and "deliberative." After a lengthy analysis, the court ultimately concluded that the documents were advisory, and therefore, it was immaterial whether they were deliberative.



Work Product - case law

Then the court discussed whether one Councilmember's individual evaluation, which was then compiled into the overall evaluation, was a "final decision" of that Councilmember. The court found that the individual evaluations were not final decisions, or even "votes," because the only final decision was the entire Council's decision.



Work Product - case law

In the *Fort Morgan* case, the plaintiff argued that the court's decision "gutted" the CORA as it relates to work product, because no elected official can ever make a final decision. The court disagreed, noting that the Council must act by voting, in a public meeting.



Work Product - examples

- A draft Town Council ordinance.
 - It is inter-agency (prepared by staff), deliberative (a draft), and assembled for elected officials.
 - It fits within the second inclusion (preliminary drafts and discussion copies of documents that express a decision by an elected official).
 - *Sidebar* - one elected official, by definition, cannot make a final decision. However, the ordinance is the governing body's final decision. *Stay tuned on this.*
 - It does not fit within any of the listed exclusions.
 - So . . . it is work product.



Work Product - examples

- A staff memo to City Council regarding a land use application.
 - It is inter-agency, advisory, and prepared for the benefit of elected officials, enabling a decision.
 - It fits under the first inclusion, as a memo that serves as background information.
 - However, because it is distributed to the City Council for use during a public meeting, it is expressly excluded from the definition of work product.
 - So . . . it is not work product.



Work Product - examples

- An outside consultant's memo to the Board of Trustees regarding a construction project.
 - Is it inter- or intra-agency? Likely not. Consultants are typically independent contractors, and thus not part of any "agency."
 - So . . . it is not work product.
 - Perhaps a cure is to have the Town Manager send the memo, attaching the findings of the consultant? Or is this too cute?



Work Product - wrap up

Work product is an exclusion to the CORA, and is therefore construed narrowly by courts. However, many documents prepared by staff and submitted to elected officials will constitute work product. A careful analysis is recommend, because the ultimate answer will be quite-fact specific.



Attorney-Client Privilege

- Custodian shall deny the right of inspection of privileged information, unless otherwise provided by law. C.R.S. 24-72-204(3)(a)(IV).
- No discretion on the part of the custodian.



What is the attorney-client privilege?

- Common law privilege codified at C.R.S. 13-90-107(1)(b).
 - Attorney shall not be examined without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment.
- Protects communications between attorney and client relating to legal advice.



What is the attorney-client privilege?

- Exists for the personal benefit of the client who holds the privilege.
 - must be asserted by the client
 - only the client can waive
- Privilege is available to corporations. *A. v. Dist. Court*, 550 P.2d 315 (Colo. 1976).
- And to governmental entities. *Alliance Construction Solutions v. Dept. of Corrections*, 54 P.3d 861 (Colo. 2002).



What is the attorney-client privilege?

- Policy underlying the privilege is to ensure candid and open discussion by the client without fear of disclosure.



What types of records does it protect?

- Only confidential matters communicated by or to the client in the course of gaining counsel, advice, or direction with respect to the client's rights or obligations.
- Applies to legal advice, not general business decisions.



What types of records does it protect?

- Statements made in circumstances giving rise to a reasonable expectation that the statements will be treated as confidential.
- Protects not only information and advice communicated from the attorney to the client, but also communications to the attorney that facilitate sound and informed legal advice.



What types of records does it protect?

- Not every document produced by an attorney is privileged.
 - Attorney as scrivener
 - Transmittal letters
 - Invoices from outside counsel?
 - Records to or from lawyer/lobbyist? *Black v. Southwestern Water Conserv. Dist.*, 74 P.3d 462 (Colo. App. 2003)
 - Attorney as investigator?



What types of records does it protect?

- Only protects against disclosure of communications, not the underlying facts on which the communication is based.
 - Client cannot refuse to disclose relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney. *Nat'l Farmers Union Prop. & Cas. Co. v. Dist. Court*, 718 P.2d 1044 (Colo. 1986).



What type of records does it protect?

- Burden of establishing a document is attorney-client privileged is on the claimant of the privilege.
- Burden of establishing waiver is on the party seeking to overcome the claim of privilege.



What type of records does it protect?

- Communications between governmental entity's legal counsel and independent contractor may be attorney-client privileged. *Alliance Construction Solutions*, 54 P.3d at 862.
- Four-part test
 - (1) Information-giver must be employee, agent or independent contractor of entity.



What types of records does it protect?

- (2) Communication made for the purpose of seeking or providing legal assistance.
- (3) The subject matter of the communication was within the scope of the duties provided to the entity by its employee, agent, or independent contractor.
- (4) The communication was treated as confidential and only disseminated to those persons with a specific need to know its contents.



How can the attorney best protect privileged records?

- Should every written communication have a notification of the privilege?
 - Standard email footer in signature?
 - Header for memoranda?
- Documents prepared for executive session.
 - Distribute in executive session
 - Collect them before executive session ends.



How can the City or Town best protect privileged records?

- Council or Board resolution in certain circumstances, like pending litigation.
 - Can help demonstrate a disclosure was not authorized.
- Address in code of ethics.
- Recordkeeping approaches.
 - Segregate privileged documents.



Who can waive the privilege?

- Only the governing body.
 - Governing body must act by motion, resolution or ordinance at a public meeting.
 - Individual elected official cannot act on behalf of municipality.
- Asserting a claim or defense that focuses on attorney advice can operate as a waiver.
 - Reliance on legal advice as a defense.
 - Attorney may defend his ethics and conduct.



Who can waive the privilege?

- Sharing document with a third party may sometimes constitute a waiver.
 - Including privileged document in public meeting packet.
 - But mere disclosure at a public meeting of a document's existence, without public discussion of its contents or dissemination, not likely to constitute a waiver. *Black, 74 P.3d at 470.*



Who can waive the privilege?

- Common interest doctrine. *Black, 74 P.3d at 469.*
 - Not an independent basis for privilege, but an exception to the general rule of waiver when disclosed to third parties.
 - Does not require existing or impending litigation.
 - Includes pre-existing confidential communications during common enterprise.



Can City or Town staff waive the privilege?

- Unauthorized or inadvertent disclosure.
 - Disclosure must be knowingly made.
 - Colorado law does not recognize inadvertent disclosure.
 - Privilege intact, even though document may no longer be confidential.
 - So may be protected from a legal standpoint, but from political standpoint damage is done.



What is the effect of waiver?

- The document is a public record, so subject to disclosure unless some other CORA exception applies.
- (Review whether work product applies.)



Crime/Fraud Exception

- Attorney-client privilege does not apply when the communication relates to an ongoing or future criminal or fraudulent act. *Caldwell v. District Court*, 644 P.2d 26 (Colo. 1982).
 - Party seeking privileged material must prove factual basis adequate to support good-faith belief by a reasonable person that wrongful conduct has occurred.
 - Factual basis must be derived independently.



Crime/Fraud Exception

- Must be proven as to each document before the document is stripped of the privilege.
- Court may order production of documents for *in camera* review.



How to respond to CORA request?

- *Mountain-Plains Invest. Corp. v. Parker Jordan Metro. Dist.*, 312 P.3d 260 (Colo. App. 2013).
 - Can charge fee for review of records to identify those protected by the privilege and for creating privilege log, if one requested.
 - \$25 per hour determined reasonable, so long as does not exceed actual cost.
 - Can require advance deposit of fees.
 - Policy need not be in place before request.



Deliberative Process Privilege

- "Common law" privilege codified at C.R.S. § 24-72-204(3)(a)(XIII)
- Privilege first described in *City of Colo. Springs v. White*, 967 P.2d 1042 (Colo. 1998) (citing *Martinelli v. Dist. Court*, 612 P.2d 1083 (Colo. 1980))
- *White* remains instructive as to scope of privilege, as well as process for assertion
- Similar privilege in FOIA: 5 USC 552(b)(5) (1994); considerable case law



Purpose of the Privilege

- To "protect the frank exchange of ideas and opinions critical to the government's decision making process where disclosure would discourage such discussion in the future." *White*, 967 P.2d at 1051



Purpose of the Privilege

- "The privilege rests on the ground that public disclosure of certain communications would deter the open exchange of opinions and recommendations between government officials, and it is intended to protect the government's decision-making process, its consultative functions, and the quality of its decisions." White, 967 P.2d at 1047



Scope of the Privilege

The privilege protects records that are:

(1) Pre-decisional

- Public has little interest on discussion of plans not adopted, options not chosen
- Post-decisional documents not protected – quality of decision not affected by release – public has interest in rationale for course chosen



Scope of the Privilege

(2) Deliberative

- Not all pre-decisional documents are privileged; the record should reflect the "give and take" of the consultative process
- Factual material less likely to qualify; advisory material more likely
- Role of document in process is considered



Scope of the Privilege

(3) Likely to stifle future communication if revealed

- "[I]n order to determine if disclosure of the material is likely to adversely affect the purposes of the privilege, courts inquire whether "the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency." White, 967 P.2d at 1052



Scope of the Privilege

(3) Likely to stifle future communication if revealed

- "As a consequence, the deliberative process privilege typically covers recommendations, advisory opinions, draft documents, proposals, suggestions, and other subjective documents that reflect the personal opinions of the writer rather than the policy of the agency." White, 967 P.2d at 1053



Asserting the Privilege

- White court: The "requirements for assertion of the privilege are rather technical." No kidding!
- If document withheld, custodian shall provide a sworn statement to applicant:
 1. Specifically describing each document withheld,
 2. Explaining why each document is privileged, and
 3. Explaining how disclosure would do substantial injury to public interest



Asserting the Privilege

- As noted, White helpful as to (2)
- As to (3) statute says, "[T]he court shall weigh, based on the circumstances presented in the particular case, the public interest in honest and frank discussion within government and the beneficial effects of public scrutiny upon the quality of governmental decision-making and public confidence therein." C.R.S. § 24-72-204(3)(a)(XIII).

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Asserting the Privilege

If applicant requests, custodian shall apply to district court for an order restricting disclosure

- Custodian has burden of proof
- Goes beyond White
- A CORA action initiated by custodian if unsure whether release prohibited by privilege does not appear foreclosed

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Protection for Trade Secrets, Confidential Commercial and Financial Data under CORA

- CORA: custodian shall deny access to "trade secrets...and confidential commercial [or] financial data." C.R.S. § 24-72-204(3)(a)(IV)
- FOIA contains similar provision: 5 USC 552(b)(4)

CML

Trade Secrets, Confidential Commercial and Financial Data

- Colorado cases cite "Morton Test" (derived from Nat'l. Parks & Conservation Assoc. v. Morton, 498 F.2d 765 (DC Cir.1974), under which records are shielded from release if their release is "likely to":

1. "Impair the government's future ability to gain necessary information", or
2. "Cause substantial harm to the competitive position of the person providing the information." Freedom Newspapers, Inc. v. Denver & Rio Grande Western R. Co., 731 P.2d 740, 743 (Colo. App. 1986).

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Trade Secrets, Confidential Commercial and Financial Data

- The "purpose of the exception is to protect information received from private individuals or businesses, not the government itself." Zubeck v. El Paso Co. Retirement Plan, 961 P.2d 567,601 (Colo. App. 1998).

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Trade Secrets, Confidential Commercial and Financial Data

- Neither conclusory declarations on the face of a document, nor "custom in industry" sufficient to shield data: IBEW Local 68 v. Denver Metro. Major League Baseball Stadium Dist., 880 P.2d 160 (Colo. App. 1994).

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Questions?

Contact us

- Kendra Carberry, Hoffmann, Parker, Wilson & Carberry, P.C. (303) 951-2095
klc@hpwclaw.com
- Kathleen Kelly, Light Kelly, P.C. (303) 298-1601 x215 kkelly@lightkelly.com
- Geoff Wilson, CML (303) 831-6411 x108
gwilson@cml.org

