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COLORADO GENERAL ASSEMBLY**

Attachment E

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MEMORANDUM

TO: House Ethics Committee

FROM: Office of Legislative Legal Services

DATE: January 7, 2009

SUBJECT: Probable Cause¹

The purpose of this memorandum is to provide the members of the House Ethics Committee ("Committee") with an understanding of the probable cause determination that lies before them pursuant to House Rule 49. This memorandum is submitted merely as a tool for the Committee's use in considering the issues before it.

Standards for Finding "Probable Cause"

A. Preliminary Investigation Stage

The Committee is at the "preliminary investigation" stage under House Rule 49 (c) and (d), at which stage the Committee is charged with the responsibility of examining the complaint, the answer (if any), and any other evidence compiled pursuant to the request of the Committee, in order to determine whether probable cause exists to find that a violation may have occurred. It is noteworthy that the Committee is not and cannot be a court of law that determines whether a violation of criminal law has occurred. Pursuant to House Rule 49, if the Committee finds that no ethics violation has occurred, the complaint is to be dismissed. Even were the Committee to determine that there is probable cause to believe that a violation may have occurred, its responsibility under House Rule 49 is merely to notify Representative Balmer of such finding. At that point Representative Balmer may request an

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

evidentiary hearing, after which the Committee's power, as set forth in House Rule 49, is either to dismiss the complaint or, if it finds that action should be taken against Representative Balmer, to make appropriate recommendations to the House of Representatives regarding discipline, including reprimand, censure, or expulsion. If criminal charges are warranted, that would require the action of the district attorney.

B. The "Probable Cause" Standard

House Rule 49 does not define "probable cause". "Probable cause" is a standard that is most often used in a criminal proceeding. A criminal charge must be dismissed after a preliminary hearing unless the prosecution has shown that there is probable cause to believe that the defendant committed the crime charged. However, the complaint filed under House Rule 49 does not trigger a criminal proceeding, and thus the applicability of a criminal standard is somewhat problematic.

In the criminal context, the probable cause standard "requires evidence sufficient to induce a person of ordinary prudence and caution to a reasonable belief that the defendant committed the crimes charged." *People v. Johnson*, 618 P.2d 262, 265 (Colo. 1989). In a criminal case, a preliminary hearing is not a "mini-trial" but rather a screening device. In light of its limited purpose, evidentiary and procedural rules are relaxed. The Colorado Supreme Court has confirmed that, in determining probable cause, therefore, the usual rules of evidence are relaxed, and the courts may consider hearsay testimony. *People v. Quinn*, 183 Colo. 245, 516 P.2d 420 (1973); *Hunter v. District Court*, 190 Colo. 48, 543 P.2d 1265 (1975). In the *Hunter* case, the Supreme Court considered whether at a preliminary hearing the trial court could consider the credibility of the witnesses. The court held that a court may disregard testimony only if it is implausible or incredible. "When there is a mere conflict in testimony, a question of fact exists for the jury, and the judge must draw the inference favorable to the prosecution." *Id.* at 53.

C. Application to the Legislative Context

Translating these principles into the House Ethics Committee context, a common-sense approach may be for the Committee to examine the materials before it, even though they may technically constitute hearsay or evidence that might otherwise be inadmissible in a court of law, and to evaluate whether they lead to a reasonable belief that Representative Balmer violated any constitutional or statutory provisions or any legislative rules or other legislative

standards of conduct.²

Since the House Rule 49 procedure is not criminal, proof of an ethical violation (as opposed to a breach of fiduciary duty under article 18 of title 24, C.R.S.) probably need not be "beyond a reasonable doubt".³ The Committee has discretion to decide whether the burden of proof should be by a preponderance of the evidence, by clear and convincing evidence, beyond a reasonable doubt, or by some other standard.

² This approach is consistent with ethics procedures in other states. Ethics committees in other states consider hearsay evidence. They make preliminary judgments as to whether a complaint has stated an ethical violation, and if it does not, the complaint is dismissed. Other grounds for dismissal may be that the complaint is frivolous or that the violation was inadvertent, unintentional, technical, minor, or has been cured.

³ Even at the preliminary hearing on a criminal charge, the prosecution is not required to produce evidence sufficient to prove the defendant's guilt beyond a reasonable doubt. *People v. Walker*, 675 P.2d 304 (Colo. 1984).

