

49. Committee on Ethics

- (a) Any person who has knowledge concerning misconduct involving legislative duties by a member of the House, including but not limited to the alleged violation of the Rules of the House of Representatives or of section 40 of article V of the state constitution, may file a written, signed complaint with the Speaker setting forth the facts that constitute the alleged misconduct and specifying the statutes, rules, constitutional provisions, or other ethical principles alleged to have been violated. The Speaker shall provide the member complained against with a copy of the complaint. The Speaker shall consult with the majority leader and the minority leader about the complaint. The Speaker may ask the member complained against to provide an explanation of his or her understanding of the issues raised in the complaint for the purpose of assisting the Speaker, the majority leader, and the minority leader in making a preliminary determination of whether or not the complaint appears to be meritorious. The fact that a complaint has been filed and any documents relating thereto shall be kept confidential by the Speaker, the majority leader, and the minority leader. If at least two of the three leaders conclude that the complaint does not appear to be meritorious, the complaint shall be dismissed, and the complainant and the member complained against shall be so notified. If the complaint is dismissed, it shall continue to be kept confidential by the Speaker, the majority leader, and the minority leader.
- (b) If the complaint is not dismissed pursuant to subsection (a) of this rule, the Speaker shall appoint a committee on ethics, which shall consist of not less than five nor more than seven members. The party representation on the committee shall be in proportion generally to the relative number of members of the two major political parties in the House. The majority party members of the committee shall be selected from among the chairmen of committees of reference of the House. The minority party members of the committee shall be selected, after considering recommendations by the minority leader, from among the members of the House who are senior in service and experience. The Speaker shall designate the chairman and vice-chairman of the committee from among its members.
- (c) The person complained against may submit a written answer to the committee within ten days after appointment of the committee. The committee shall make a preliminary investigation of the complaint. The preliminary investigation shall consist of an examination of the complaint, the answer, if any, and any other evidence compiled pursuant to the request of the committee, but the committee shall not receive testimony or other evidence from other sources. The preliminary investigation shall be completed within thirty days after appointment of the committee. If, after the preliminary investigation, the committee determines no violation has occurred, the complaint shall be dismissed.
- (d) If, after the preliminary investigation, the committee determines probable cause

exists to find that a violation may have occurred, it shall so notify the person complained against. Within seven days after such notification, such person may request a hearing before the committee, at which he or she shall be entitled to appear, present evidence, cross-examine witnesses, and be represented by counsel. The committee shall have the power to take testimony under oath and to issue subpoenas and subpoenas duces tecum in the manner provided by Joint Rule No. 33 (b), (c), and (d) of the Joint Rules of the Senate and House of Representatives. The hearing shall commence within fourteen days after receipt of the request for a hearing.

- (e) All proceedings of the committee shall be governed by the provisions of part 4 of article 6 and part 2 of article 72 of title 24, Colorado Revised Statutes.
 - (f) After a hearing held pursuant to subsection (d) of this rule, the committee may dismiss the complaint, or, if it finds that action should be taken against the member complained against, it shall make appropriate recommendations to the House of Representatives, including reprimand, censure, or expulsion. Expulsion of a House member shall require the affirmative vote of two-thirds of the members elected to the House. Reprimand or censure of a member shall require the affirmative vote of a majority of the members elected to the House.
 - (g) Action of the leadership, the ethics committee, or the House pursuant to this rule is final and not subject to court review. Nothing in this rule shall prohibit the House of Representatives from taking any action based upon its authority to judge the qualifications of its members pursuant to Section 10 of Article V of the state Constitution.
 - (h) The committee may retain such counsel and may hire such investigators as it deems necessary for the performance of its duties under this rule. All expenditures incurred pursuant to this subsection (h) shall be approved by the Speaker and paid by vouchers and warrants drawn as provided by law from appropriations made to the General Assembly.
 - (i) The committee may adopt rules of procedure for the orderly conduct of its meetings, investigations, and hearings, which rules shall be consistent with this rule and other applicable rules and statutes.
 - (j) If the complaint concerns misconduct of the Speaker, then the duties of the Speaker in this rule shall be the duties of the majority floor leader and the duties of the majority floor leader shall be the duties of the assistant majority leader. If the complaint concerns misconduct of the majority floor leader or the minority leader, then the duties of such leader in this rule shall be the duties of the assistant majority leader or the assistant minority leader, as the case may be.
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MEMORANDUM

TO: House Committee on Ethics

FROM: Office of Legislative Legal Services

DATE: February 6, 2012

SUBJECT: Open Meeting and Open Records in Ethics Investigations¹

I. Background

On February 1, 2012, the Speaker of the House of Representatives appointed a Committee on Ethics based on a Complaint from the Speaker dated January 31, 2012. Questions may arise on how the open meetings and open records laws apply to the actions of the Committee on Ethics.

II. Issue Presented

How do the Open Meetings Law, part 4 of article 6 of title 24, C.R.S., and the "Colorado Open Records Act", part 2 of article 72 of title 24, C.R.S., apply to proceedings of the Committee on Ethics?

III. Conclusion

Pursuant to Rule 49 (e) of the Rules of the House of Representatives, both the

¹ This legal memorandum results from a request made to the Office of Legislative Legal Services (OLLS), a staff agency of the General Assembly, in its capacity as in-house counsel for 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.

Open Meetings Law and the "Colorado Open Records Act" apply to actions of the Committee on Ethics. Under the Open Meetings Law, the Committee on Ethics may meet in executive session under certain circumstances. For example, section 24-6-402 (3) (a) (II), C.R.S., permits the public body to meet in executive session to discuss matters that are required to be kept confidential by federal law or rules or state statutes, among other reasons. Generally, documents relating to the Committee on Ethics are public documents unless they meet an exception under the "Colorado Open Records Act".

IV. Analysis

Rule 49 of the Rules of the House of Representatives

The Complaint filed pursuant to Rule 49 of the Rules of the House of Representatives ("Rule 49") identifies possible misconduct involving a member's legislative duties as a result of possible traffic violations, including driving under the influence of alcohol or while the member's abilities were impaired and the possible invocation of legislative privilege, either expressly or implicitly, by the member to avoid arrest. The Speaker appointed a Committee on Ethics pursuant to Rule 49 (b) to conduct a review of the matter. Rule 49 (e) provides:

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(e) All proceedings of the committee shall be governed by the provisions of part 4 of article 6 and part 2 of article 72 of title 24, Colorado Revised Statutes.

Pursuant to the Rules of the House of Representatives, proceedings of the Committee on Ethics are subject to the Open Meetings Law and the "Colorado Open Records Act".

Open Meetings

Section 24-6-402 (2) (a), C.R.S., provides:

24-6-402. Meetings - open to public. (2) (a) All meetings of two or more members of any state public body at which any public business is discussed or at which any formal action may be taken are declared to be public meetings open to the public at all times.

Section 24-6-402 (1) (d), C.R.S., defines a "state public body" as follows:

24-6-402. Meetings - open to public. (1) For the

purposes of this section:

(d) "State public body" means any board, **committee**, commission, or other advisory, policy-making, rule-making, decision-making, or formally constituted body **of any state agency**, state authority, governing board of a state institution of higher education including the regents of the university of Colorado, a nonprofit corporation incorporated pursuant to section 23-5-121 (2), C.R.S., **or the general assembly**, and any public or private entity to which the state, or an official thereof, has delegated a governmental decision-making function but does not include persons on the administrative staff of the state public body. (emphasis added)

Therefore, the Committee on Ethics is a state public body, and meetings of its members are open to the public. Section 24-6-402 (3), C.R.S., establishes when a state public body may go into executive session. As mentioned previously, section 24-6-402 (3) (a) (II), C.R.S., would permit the Committee on Ethics to meet in executive session to discuss matters that are required to be kept confidential by federal law or rules or state statutes, among other reasons. In addition, section 24-6-402 (3) (b) (I), C.R.S., concerning investigations of charges or complaints against an employee or public official, authorizes an executive session if requested by the employee or public official. However, section 24-6-402 (3) (b) (II), C.R.S., provides that subparagraph (I) does not apply to discussions concerning an elected official. It does not appear that the meetings of the Committee on Ethics could be closed at the request of a representative for such purposes. Accordingly, only in limited circumstances, as set forth in section 24-6-402 (3), C.R.S., may the Committee on Ethics to go into executive session.

Open Records

Pursuant to section 24-72-202 (6) (a) (I), C.R.S., the term "public records" generally includes correspondence of elected officials. "Correspondence" is defined in section 24-72-202 (1), C.R.S., as any communication sent to or received by a specified individual that can be produced in a written form. Correspondence of members of the Committee on Ethics is public unless it meets an exception under part 2 of article 72 of title 24, C.R.S.

Section 24-72-202 (6) (a) (II), C.R.S., excludes "work product" from the definition of "correspondence" of elected officials constituting public records. "Work product" is defined in part in section 24-72-202 (6.5) (a), C.R.S., as follows:

24-72-202. Definitions. As used in this part 2, unless the context otherwise requires:

(6.5) (a) "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. Such materials include, but are not limited to:

- (I) Notes and memoranda that relate to or serve as background information for such decisions;
- (II) Preliminary drafts and discussion copies of documents that express a decision by an elected official.

Documents prepared for the Committee on Ethics by staff to assist the Committee in reaching its decision would be considered work product and would not be public records.

Section 24-72-202 (6.5) (c) (IV), C.R.S., provides that materials that would otherwise constitute work product are not work product if they "are produced and distributed to members of a public body for their use or consideration at 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." If documents prepared by staff for the Committee on Ethics are discussed at an open meeting, the documents may become public records.