

## **Proposed Statement of Basis, Purpose and Specific Statutory Authority**

### **Independent Ethics Commission**

#### **Rules of Procedure**

**December 15, 2010**

#### **1. Basis and Purpose**

This proposed statement pertains to amendments to the Rules of Procedure of the Colorado Independent Ethics Commission for the administration of Colorado State Constitution Article XXIX. The Commission first promulgated procedural rules in 2008 which are contained at 8 CCR 1510.

These changes are proposed in order to simplify and clarify the Commission's procedures regarding complaints and regarding the process for obtaining advice from the Commission. More specifically, the proposed rules:

- a. clarify what information must be contained in a complaint;
- b. limit the grounds upon which a complaint may be dismissed;
- c. provide that a person who receives an Advisory Opinion on a particular matter may rely on that opinion as a defense in any complaint proceeding;
- d. add a section regarding the Commission's investigation process and
- e. eliminate the requirement for a prehearing statement.

In addition, the proposed rules define the term "frivolous" to provide greater clarity as to that term's meaning under Article XXIX. The proposed rules also provide for a mandatory public comment period at all Commission meetings and provide for the development of a training program to more effectively administer and enforce the requirements of Article XXIX.

#### **2. Statutory Authority**

Amendments to the Independent Ethics Commission's procedural rules are adopted pursuant to this provision:

Colorado Constitution Article XXIX section 5(1) provides that the “independent ethics commission shall have the authority to adopt such reasonable rules as may be necessary for the purpose of administering and enforcing the provisions of this article and any other standards of conduct and reporting requirements as provided by law.”

# Independent Ethics Commission

## RULES OF PROCEDURE

### 1. STATEMENT OF INTENT/AUTHORITY

- A. These rules shall be referred to as the Independent Ethics Commission Rules of Procedure (IEC Rules).
- B. The intent of the IEC Rules is to implement the requirements of Article XXIX of the Colorado Constitution. The IEC Rules are promulgated pursuant to the authority granted in Article XXIX and §24-18.5-101, *et seq.* C.R.S. and shall apply to the conduct of all matters before the IEC.

### 2. INDEPENDENT ETHICS COMMISSION (IEC)

- A. The IEC is composed of five members appointed in accordance with the provisions of Article XXIX.
- B. The purpose of the IEC shall be to give advice and guidance on ethics issues arising under Article XXIX and any other standards of conduct or reporting requirements as provided by law, and to hear complaints, issue findings and assess penalties and sanctions where appropriate.

### 3. DEFINITIONS AND RULES OF CONSTRUCTION

- A. Definitions
  - 1. “Advisory Opinion” means an opinion by the IEC addressing ethics issues in response to a written request by a public officer, member of the General Assembly, local government official, or government employee.
  - 2. “Article XXIX” means Article XXIX of the Colorado Constitution.
  - 3. “Commission” or “IEC” means the Colorado Independent Ethics Commission as established by Article XXIX of the Colorado Constitution and §24-18.5-101, C.R.S. “Commissioner” means any one of the five individuals appointed to the Commission pursuant to Article XXIX.

4. "Complaint" means a written document filed with the IEC setting forth facts asking whether a public officer, member of the General Assembly, local government official, or government employee has violated the provisions of Article XXIX or any other standards of conduct or reporting requirements as provided by law.
5. "Frivolous" means a complaint filed without a rational argument for the IEC's involvement based on the facts or law.
6. "Government employee" means any employee, including independent contractors, of the state executive branch, the state legislative branch, a state agency, a public institution of higher education, or any local government, except a member of the General Assembly or a public officer.
7. "Letter ruling" means an opinion by the IEC addressing ethics issues in response to a written request by a person who is not a public officer, member of the General Assembly, local government official, or government employee.
8. "Local government" means any county or municipality under the jurisdiction of the IEC.
9. "Local government official" means an elected or appointed official of a local government but does not include an employee of a local government.
10. "Majority" means more than fifty percent of the members present at a meeting or hearing.
11. "Member" means any of the five Commissioners of the IEC.
12. "Official act" or "official action" means any vote, decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority.
13. "Party" means the person or persons filing a request for an advisory opinion, a request for a letter ruling, or a complaint, and the person or persons against whom a complaint is filed.
14. "Person" means any individual, corporation, business trust, estate, trust, limited liability company, partnership, labor organization, association, political party, committee, or other legal entity.
15. "Position Statement" means a generally applicable written statement addressing ethics issues, which provides guidance for public officers, members of the General Assembly, local government officials, government employees,

and members of the public and which is not an advisory opinion or a letter ruling.

16. “Professional lobbyist” means any individual who engages himself or herself or is engaged by any other person for pay or for any consideration for lobbying. “Professional lobbyist” does not include any volunteer lobbyist, any state official or employee acting in his or her official capacity, except those designated as lobbyists as provided by law, any elected public official acting in his or her official capacity, or any individual who appears as counsel or advisor in an adjudicatory proceeding. Any person who is registered, or should be registered, as a professional lobbyist pursuant to statute and the Rules of the Colorado Secretary of State is a professional lobbyist.
17. “Public officer” means any elected officer, including all statewide elected officeholders, the head of any department of the executive branch, and elected and appointed members of state boards and commissions. “Public officer” does not include a member of the General Assembly, a member of the judiciary, any local government official, or any member of a board, commission, council or committee who receives no compensation other than a per diem allowance or necessary and reasonable expenses.
18. “Quorum” means a majority of the number of members of the IEC as fixed by statute.

B. Rules of construction

1. Words in the singular shall include the plural and words in the plural shall include the singular.
2. The IEC Rules shall be liberally construed to secure the just, fair, speedy, and inexpensive determination of all matters before the IEC.

4. MEETINGS

- A. All meetings and hearings of the IEC shall include a public comment period. The length of time for public comment shall be at the discretion of the IEC.
- C. Minutes of all meetings shall be prepared and posted on the IEC website as soon as practicable following approval by the Commission.

5. REQUESTS FOR ADVISORY OPINIONS AND LETTER RULINGS

- A. Any public officer, member of the General Assembly, local government official, or government employee may submit a request for advisory opinion to the IEC as to

whether any particular action by that person would constitute a violation of Article XXIX or any other standards of conduct or reporting requirements as provided by law.

- B. Any person who is not a public officer, member of the General Assembly, local government official, or government employee may submit a request for letter ruling to the IEC as to whether any potential conduct of the person making the request would constitute a violation of Article XXIX or any other standards of conduct or reporting requirements as provided by law.
- C. Submission and filing
  - 1. A request for advisory opinion or letter ruling from the IEC must be submitted in writing, signed by the person making the request, be fact-specific and narrowly framed, and filed with the IEC at the offices of the IEC. A request for advisory opinion or letter ruling may be hand delivered to the IEC or sent to the IEC offices via first class mail or by facsimile. Requests may be sent via electronic mail if they are signed by the person making the request.
  - 2. All requests for advisory opinion or letter ruling should be filed with the IEC at least 10 days prior to the next scheduled meeting of the IEC.
- D. The IEC may request additional information and documents from a person submitting a request for advisory opinion or letter ruling.
- E. A request for advisory opinion or letter ruling is complete when the IEC has determined that no additional information is necessary to issue the advisory opinion or letter ruling.
- F. The IEC shall publish advisory opinions, letter rulings, and position statements on the IEC website as soon as practicable after an opinion is issued.
- G. In the event of disagreement by any Member in any advisory opinion or letter ruling, that Member may, at that Member's discretion, include a dissenting or concurring opinion in the issued document.
- H.. A person who receives an Advisory Opinion or Letter Ruling from the Commission may rely on that opinion as an affirmative defense should a complaint be filed against that individual for the subject of the advisory opinion or letter ruling. .
- I. Advisory Opinions and Letter Rulings are not Final Agency Actions and are not appealable.
- J. Advisory Opinions and Letter Rulings shall be responded to as soon as practicable after receipt of a completed request for advisory opinion or letter ruling.

6. POSITION STATEMENTS

- A. The IEC may, at its discretion issue position statements. Position statements shall be published on the IEC website.

7. COMPLAINTS

- A. Any person may file a written complaint with the IEC asking whether a public officer, member of the General Assembly, local government official, or government employee has failed to comply with the provisions of Article XXIX or any other standards of conduct or reporting requirements as provided by law.
- B. Complaints must be submitted in writing and filed with the IEC at the offices of the IEC. A complaint may be hand delivered to the IEC or sent to the IEC offices via first class mail or by facsimile. Complaints may be sent via electronic mail only if they contain the signature of the person making the complaint.
- C. All complaints filed with the IEC must contain the name, address and telephone number of the person filing the complaint. An email address should be provided if available.
- D. The complaint shall contain the following information:
  - 1. A statement of the facts underlying the complaint with specificity regarding the ethical violation, including the section or sections of Article XXIX or other standard of conduct which the complainant believes was violated;
  - 2. The name, address, position and email address if available, of any person whose conduct is being complained about;
  - 3. The date of the alleged violation;
  - 4. A statement that, to the best of the complainant's knowledge, information and belief, the facts and any allegations set out in the complaint are true, and be signed by the complainant.
- E. Any complaint provided to the Commission shall be kept confidential until a determination is made as to whether or not the complaint is frivolous. Any complaint dismissed as frivolous shall be maintained confidential by the Commission.
- F. The Commission may determine whether a complaint is frivolous based on the face of the complaint itself. Alternatively, the Commission in its discretion may defer a frivolous determination until after a preliminary investigation of the complaint by the staff of the Commission. The Commission shall exercise care to the extent practicable not to disclose the contents of the complaint as part of the preliminary investigation. If

after a preliminary investigation the Commission is unable to determine whether or not a complaint is frivolous, the Commission may disclose the complaint to the individual who is the subject of the complaint for their response in order to aid the Commission in rendering a frivolous determination.

- G. A complaint shall be dismissed by the IEC on one or more of the following grounds:
  - 1. The complaint is frivolous; or
  - 2. The IEC has no jurisdiction; or
  - 3. The complaint fails to allege that the conduct complained of occurred within twelve months of the filing of the complaint.
  
- H. A complaint may be stayed by the IEC on one or more of the following grounds:
  - 1. An action on the same subject of the complaint is pending before another body with concurrent jurisdiction; or,
  - 2. An adjudication regarding the same subject of the complaint is more properly before another body or agency which has concurrent jurisdiction with the IEC; or,
  - 3. The alleged violation is a criminal matter or a criminal investigation is pending.
  
- I. All non-frivolous complaints shall be referred to the staff of the Commission for an investigation.
  
- J. Investigations:
  - 1. Commission staff shall investigate all non-frivolous complaints.
  - 2. A copy of the Commission's staff investigative report shall be provided to the parties at least 10 business days before the hearing date. Prior to its disclosure, the report shall remain confidential.
  
- K. Response to non-frivolous complaints
  - 1. The IEC shall advise, in writing, the party who is the subject of a complaint that a complaint has been filed, his or her right to file a response to the complaint and his or her right to be represented by counsel of his or her choice. The IEC shall provide a copy of the complaint to the party who is the subject of the complaint.
  - 2. A public officer, member of the General Assembly, local government official, or government employee who is named in a complaint filed with the IEC and against whom allegations are made may file a response to the complaint. Any response shall be in writing, signed by the person submitting the response, and



may explain, rebut, or provide information, including documentation, concerning the facts and any allegations in the complaint.

3. The response shall include a statement that, to the best of the person's knowledge, information and belief, any statements set out in the response are true. The response shall be filed with the IEC within thirty (30) days of the date on the letter from the IEC advising the public officer, member of the General Assembly, local government official, or government employee of the right to file a response. A public officer, member of the General Assembly, local government official, or government employee may, for good cause, submit a written request for an extension of time to respond to a complaint.

## 8. HEARINGS

- A. The IEC shall hold a public hearing on all complaints within the jurisdiction of the IEC, arising under Article XXIX and under any other standards of conduct and reporting requirements as provided by law that have not been dismissed as frivolous or dismissed on other grounds consistent with the Constitution.
  1. Hearings may be held before the IEC or the IEC, at its discretion, may delegate a particular hearing to an administrative law judge or hearing officer. In such circumstances, the administrative law judge or hearing officer will render an Initial Decision and thereafter, the Commission will enter a Final Agency Order. The parties may file exceptions to the Initial Decision pursuant to the procedures set forth in section 24-4-105, C.R.S.
  2. The scope of the hearing shall be determined by the IEC and may be limited to specific factual, ethical or legal issues.
- B. Setting hearings
  1. Hearings on complaints will be set as soon as practicable. A hearing date can be continued only at the discretion of the IEC or upon a showing of good cause as determined by the IEC.
  2. The IEC shall send the complainant and the respondent a notice of the hearing date.
  3. Any person receiving notice of the hearing may request inspection of IEC documents pertaining to the complaint, with reasonable notice to the IEC. The IEC shall provide such requested non-confidential, non-privileged documents during regular business hours.

4. If a party retains an attorney to represent him or herself at the hearing, such attorney shall file a notice of appearance at the earliest practicable time. The IEC, at its discretion, may prohibit the participation of an attorney for failure to file such notice.
5. The Commission may schedule a hearing when it appears that there are no issues of material fact in dispute. Such hearing may include all or a portion of the case before the Commission.

C. Prehearing matters

1. Disclosure of Witnesses and Documents – Within thirty (30) days after the IEC sends out a notice of hearing, each party shall provide to all other parties and to the IEC, copies of all relevant documents and other tangible things, and a list, including contact information, of all persons who have relevant information or knowledge, and a short statement regarding the relevant facts or opinions about which they have information or knowledge.
2. Each party has an ongoing duty to supplement disclosures as new, different or additional information on witnesses and tangible items becomes available.
3. Should either party fail to comply with these rules, the IEC, may, at its discretion limit the presentation of evidence, or dismiss the complaint.
4. Discovery may be permitted at the discretion of the Commission in such form as the Commission deems appropriate.
5. Prehearing conference – A prehearing conference may be scheduled at the discretion of the IEC. Either party may request a prehearing conference.
6. Subpoenas- Members of the Commission have the power to subpoena documents and witnesses.
  - a. Upon written request of any party or counsel for any party, the IEC may sign a subpoena or subpoena *duces tecum* requiring the attendance of a witness or the production of documentary evidence. Any party requesting a subpoena shall provide the IEC with a letter detailing the information requested, and the reason for the subpoena. Nothing herein shall limit the ability of the IEC to issue subpoenas on its own motion.
  - b. The IEC may authorize IEC staff to use a stamp signature or to sign a subpoena on behalf of the IEC. However, no other person may duplicate the signature of a Commissioner in issuing a subpoena.

- D. Rules of evidence – The Colorado Rules of Evidence shall provide guidance for all hearings, but may not be strictly enforced. The IEC, at its discretion, may receive any evidence at a hearing that it deems relevant or helpful to the inquiry at hand as allowed under Colorado law.
- E. Presentation of evidence – Evidence at a hearing shall be presented through the testimony of witnesses and by the submission of documents or other tangible items. Testimony by affidavit or by telephone may be permitted at the discretion of the IEC if a witness is unavailable to testify in person. All arrangements for the taking of testimony by telephone or videophone shall be made by the party requesting such testimony, who shall be responsible for all costs associated with the testimony. The IEC may exclude evidence that is not relevant, cumulative or for such other reasons as determined by the IEC.
- F. The IEC, in its discretion, may accept written closing statements.
- G. The IEC does not supply court reporters. All hearings shall be electronically recorded. If any party wishes to have all or a portion of a proceeding transcribed by a court reporter, that party may make private arrangements to do so at that party’s own expense. The recording of any proceeding made electronically by the IEC shall be the official record.
- H. IEC decision
  - 1. A copy of the IEC decision concerning any complaint that proceeds to hearing shall be sent to all parties of record at the earliest practicable time.
  - 2. A copy of the IEC decision concerning any complaint that proceeds to hearing will be published on the IEC website at the earliest practicable time.
  - 3. A decision is final for appeal purposes when the IEC written decision is entered.
- I. The IEC may impose penalties and sanctions as provided by law.

9. GENERAL

- A. Ex-parte communications with any Commissioner concerning any matter before the IEC are strictly prohibited.
- B. Requests for advisory opinions or letter rulings, and/or complaints may not be filed with individual Commissioners.
- C. Authority of IEC Executive Director and staff - The IEC may, at its discretion, delegate functions and responsibilities to its Executive Director and staff. IEC staff is not permitted to render legal advice. Staff is not permitted to comment on the validity of a

complaint during the pendency of the complaint or afterwards or to discuss the substance of any complaint with the parties.

- D. Computation of time - In computing any period of time described in these rules, the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period of time shall be included unless it is a Saturday, Sunday, or a legal holiday, in which event the period of time runs until the next day which is not a Saturday, Sunday, or legal holiday. The IEC may, at its own discretion or upon the request of a party, enlarge any period of time set forth in these rules so long as any request to enlarge any period of time is made before the expiration of the period of time originally prescribed herein.
- E. Service of process - Service of documents and other tangible things shall be done by either hand delivery or by mailing the pleadings, other documents and tangible things to a person at his or her last known address on file with the IEC, first class mail, postage prepaid or to the party's counsel of record on file with the IEC.
- F. The Commission may develop and implement training programs and other related tools for the purpose of administering and enforcing the provisions of Article XXIX and any other standards of conduct and reporting requirements as provided by law.