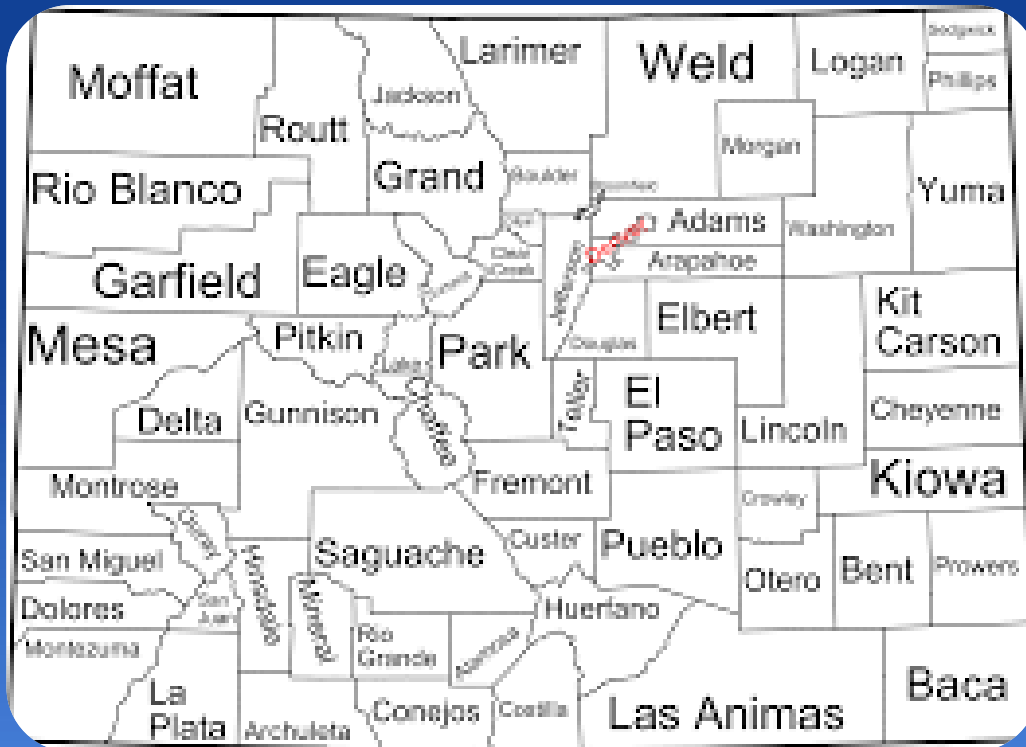


CCI COMMISSIONER ORIENTATION 2023



Agenda



- Elected Officials' Ethical Rules and dilemmas
- Open Meeting Rules
- Anything else you want to talk about

- What are the most corrupt states?
 - Wyoming (#1)
 - Vermont (#2)
 - Alaska (#3)
 - North Dakota (#4)
 - Delaware (#5)
 - Colorado (#24)
- What are the most corrupt states?
 - Vermont (#1)
 - Utah (#2)
 - Arizona (#3)
 - Oregon (#4)
 - Colorado (#5)

- The Big 3
 - New York
 - Louisiana
 - Illinois

ELECTIONS HAVE CONSEQUENCES:



**TALK TO YOUR KIDS ABOUT
RUNNING FOR OFFICE IN ILLINOIS**



1/17/2023



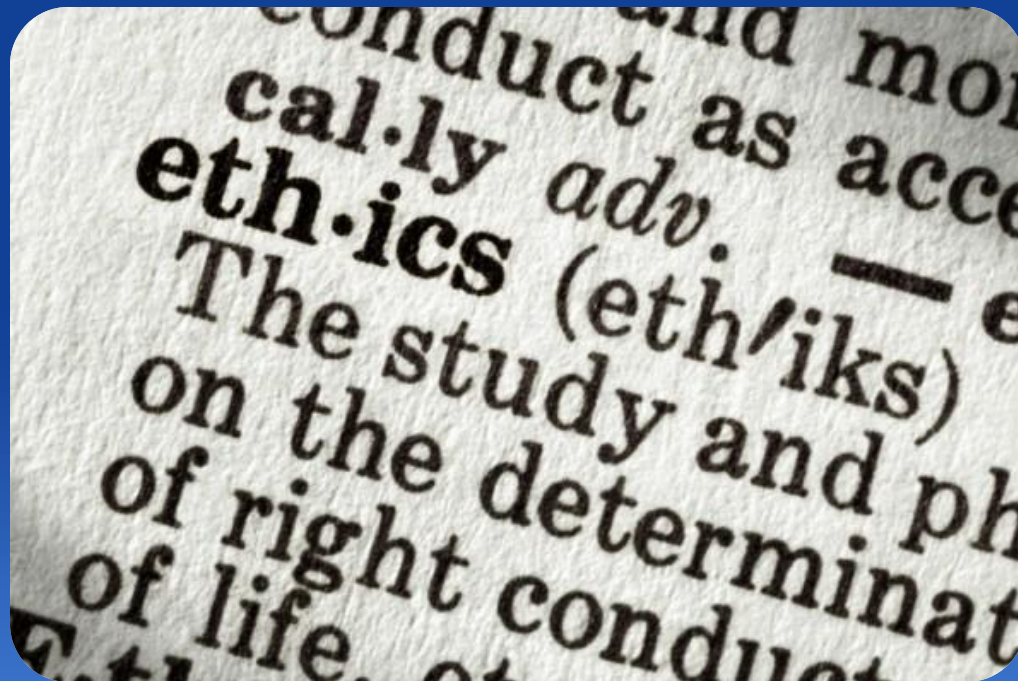
1/17/2023

So Why Does This Matter



- Legal Challenges. C.R.C.P. 106(a)(4) challenges the most likely culprit. This challenge provides for judicial review of a decision of any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions for the purpose of determining whether the body or officer exceeded its jurisdiction or abused its discretion.
 - An abuse of discretion occurs when a governmental body issues a decision that is not reasonably supported by any competent evidence in the record.
 - “No competent evidence” means that the governmental body’s decision is “so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority or failure to follow applicable law.”
 - A required hearing not conducted fairly is tantamount to no hearing at all.
 - If the governing body does not conduct a hearing fairly, then it has abused its discretion by not following the requirements of its own laws.
 - Failure of one board member to properly address bias, prejudgment or conflict is invalidation of the action of the entire body. You can’t just ignore and not count that vote.

Ethics for Elected Officials



Conflicts for Elected Officials

- Quasi-Judicial Hearings v. Legislative or Administrative Acts.
- If administrative or legislative, the same due process and ethical protections will not apply. A judge shouldn't talk to a plaintiff or defendant about a case in front of her, but certainly can talk to them about the general application of justice.
- Quasi-Judicial actions are those with state or local laws requiring:
 - that notice be given before the action is taken;
 - that a hearing be conducted before the action is taken;
 - that the action results from application of prescribed criteria to the individual facts of the case;
 - examples include zoning change to a single piece of property, rezoning, subdivisions, conditional and special use permits, and variances.

Statutes on Conflicts



- Some actions represent per se conflicts and are strictly prohibited, while other actions may or may not create a conflict depending upon the surrounding circumstances. Standards provide both mandatory rules as well as guidelines.
- Colorado Standards of Conduct. C.R.S. 24-18-101 et seq. Comprehensive code of ethics adopted in 1988.
- Need to keep in mind the underlying legislative reason for the Standards: “The holding of a public office or employment is a public trust, created by the confidence which the electorate reposes in the integrity of public officers, local government officials, and employees. They shall carry out their duties for the benefit of the people of this state.”

What is Prohibited

- Engaging in a substantial financial transaction for his or her private business purposes with a person whom he or she inspects or supervises in the course of his public duties. C.R.S. §24-18-108(2)(a);
 - Investing in a development project you will approve.
 - Being a landlord of an applicant.
- Performing an official act directly and substantially affecting a business to its economic benefit in which the official has a substantial financial interest **or** is engaged as counsel, consultant, representative or agent. C.R.S. §24-18-108(2)(d);
 - Board member owns or has an interest in a business before the public body;
 - Board member has financial dealings in a business before the public body;
 - Board member has a financial interest in a business which is a competitor to the business before the public body; and
 - Board member is a creditor of the business which is asking for action from the public body.

What is Prohibited

- Assisting any person for a fee or other compensation in obtaining any contract, claim, license, or other economic benefit. C.R.S. §24-18-108(2)(c);
- Disclosing or using confidential information acquired in the course of his official duties in order to further substantially his personal financial interests. C.R.S. 24-18-104(1)(a).
- NOT a personal or private interest:
 - Board member related by blood or marriage to the applicant but has no financial connection or potential of experiencing financial gain or loss. If a direct relationship (i.e. husband or son) then board member should step down based on bias;
 - Board member is neighbor of the applicant;
 - Board member is in same church, club, or other group with the applicant;
 - Board member is friends with applicant.

What is Prohibited

- Accepting a gift:
 - which would tend improperly to influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties;
 - which he knows or 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. C.R.S. §24-18-104;
 - **Practical Application Alert**
 - This one is easier to violate than the bribe scenario. No “payment” or “bribe” required. Includes the golf invites, the show tickets, the private jet rides, the dinners, etc?

What is Prohibited

- Disclosure of Conflict. There is an affirmative duty to disclose. A member of the governing body of a local government who has a personal or private interest in any matter proposed or pending before the governing body shall disclose such interest to the governing body and shall not vote thereon **AND** shall refrain from attempting to influence the decisions of the other members. C.R.S. §24-18-109(3)(a).
 - **Practical Application Alert**
 - Recusing yourself does not give you the right to be an advocate or opponent.

Perceived vs. Actual Conflicts

- Most likely to see. Do not have the clear benefit of statutory “shall not” language found in financial gain situations. However, statutes make it clear that there are conflicts that do not require financial gain.
- Due Process is applicable to any quasi-judicial function.
- Impartiality of a tribunal is an essential element of due process.
- Applicants are entitled to a fair and impartial hearing officer.
- Applicants are entitled to have a decision rendered based upon only the evidence presented at a hearing.
- Presumption of honesty, integrity and impartiality on the part of decision-makers.
- Substantial showing of bias required to disqualify.

Two Ways to Overcome Presumption

- Proceedings and surrounding circumstances demonstrate actual bias
- Appearance of impropriety is so great that bias is presumed



Perceived vs. Actual Conflicts

- Prejudgment and Bias. Elected officials are members of small communities. They are generally incapable of leaving their opinions and prejudices at the door when they come to work. Don't expect them to, but expect them to have an open mind. At least appear to be fair.
- Wisconsin Cheese heads
- Idaho Spuds

Perceived vs. Actual Conflicts

- Having or stating an opinion may be problematic.
 - The mere fact that a council member has learned facts or expressed an opinion is not sufficient in itself to demonstrate that a hearing is unfair. Johnson v. City Council of the City of Glendale, 595 P.2d 701 (Colo.App. 1979) (holding that it was not impermissible for board members during a personnel appeal to receive evidence at a prior “informal hearing” and then make a final decision after a subsequent formal hearing).
 - The Johnson case is tough to square with Booth v. Trustees of the Town of Silver Plume, 474 P.2d 227 (1970) (holding that the town trustees denied a liquor applicant a fair and impartial hearing when some of the trustees investigated the application prior to the hearing and recommended against issuance of a license).
 - **Practical Application Alert**
 - What is permissible and impermissible is a matter of degree without clear guidance. Exercise caution!

Perceived vs. Actual Conflicts

- When to Disclose Conflict:



- You can pickle a cucumber but you cannot cucumber a pickle.
- Disclose as soon as possible. It is a matter of degree and often times subjective. Self-report and don't get caught and tip the scales.
 - Jerry Sandusky Judge.
 - Alpine Slide

Examples of Bias

Staton v. Mayes, 552 F.2d 908 (10th Cir.) cert. denied, 434 U.S. 907 (1977)

- Board of Education voted to dismiss superintendent
- Tenth Circuit reversed due to bias of tribunal
- In campaign for election, one member stated:
 - no progress could be made with school problems until there was a new superintendent
 - that he was pledged to seek new top level administration
 - that it was apparent trouble lay with superintendent
 - that he would vote to make necessary change
- Second member stated prior to hearing “Dr. Staton has got to go.”



Appearance of Impropriety

- Even in the absence of actual bias, the Due Process Clause may be violated if the appearance of impropriety is too great.
- The Court must ask whether:
 - “‘under a realistic appraisal of psychological tendencies and human weakness,’ the interest ‘poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.’”

Capterton v. A.T. Massey Coal Co., Inc., 129 S.Ct. 2252, 2263 (2009)
(quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).



Perceived vs. Actual Conflicts

- Constitutional requirements (cont.):
 - **Practical Application Alert**
 - What about applicants meeting with commissioners or trustees individually prior to an application? NO safe harbor for pre-submission meetings!
 - What about pre- or post-submission work sessions with the planning commission, trustees or commissioners? Be very careful of what you say. Speak in general planning terms and philosophies. Or better yet, don't do it!
 - What about attending community meetings on a topic that will come before you? Nothing good can come from this.

Perceived vs. Actual Conflicts



- Ex Parte Contacts. Communications between board members and a party or member of the public that takes place outside a noticed public hearing on a topic to be heard in a formal hearing. Other side is not present to hear or refute what is being said. Gives an appearance of impropriety. Avoid them!
 - **Practical Application Alert**
 - Make sure they are disclosed. You cannot cucumber a pickle!
 - Such contacts can invalidate the action of the decision makers.
 - Contacts can be in person, by phones, via email, and through written letters. Form of contact is irrelevant.
 - Full disclosure must take place and an opportunity for cross examination given. Can be very unpleasant for a board member.

Perceived vs. Actual Conflicts

- Site Visits.
 - They serve a valid and necessary purpose. I still hate them.
 - Should only be used to acquaint the decision maker with the physical layout.
 - Should not be an opportunity to discuss or ask questions of the applicant or members of the public.
 - Should not be an opportunity for board members to discuss the application amongst themselves.
 - Should be carefully monitored.

Open Meeting Rules



Meetings Must be Open and Published



- The Colorado legislature declared it to be “a matter of statewide concern and the policy of this state that the formation of public policy is a public business and may not be conducted in secret.”
- All meetings of a quorum or three or more members of any local public body, whichever is fewer, 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. Sec. 24-6-402(2)(b), C.R.S. **Unique Challenge for County Boards!**
- "Meeting" means any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication. Sec. 24-6-402(1)(b), C.R.S. **Watch for Reply All Emails!**

1/22/2015

Eagle County Government Mail - Fwd: Tree Farm Editorial

From: Kathy Chandler-Henry <kathy.chandlerhenry@eaglecounty.us>
Date: January 15, 2015 at 8:36:52 AM MST
To: Jill Ryan <jill.ryan@eaglecounty.us>
Cc: Kris Friel <kris.friel@eaglecounty.us>, Jeanne McQueeney <jeannemcqueeney@yahoo.com>, Rachel Oys <Rachel.Oys@eaglecounty.us>
Subject: Re: Tree Farm Editorial

Jill-

I think you're right. We really need to be more personal in this. And we do need to address the perception that we won't meet with Carbondale. Clark Anderson asked me about that last night.

Could we do a joint article from all three of us like we did on the roundabout in Edwards?

Kathy

Sent from my iPhone

On Jan 15, 2015, at 8:32 AM, Jill Ryan <jill.ryan@eaglecounty.us> wrote:

Hi Kris,

I don't want to hurt Scot's feelings, but this reads more like a department's policy briefing paper, than a press release. I think the lead is buried and it feels bureaucratic and TMI.

I am not sure how to handle it except to ask you to take another stab at, it if my fellow commissioners agree. Also, what do you suggest in terms of a process for the letter to the editor coming from the BOCC? Would you like one of us to use Scot's document and take a stab at it?

Thank you.

Jill Ryan
Eagle County Commissioner
PO Box 850/500 Broadway
Eagle, CO 81631
(970) 471-9682

1/17/2023

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Meetings Must be Open and Published



- “Public Business” not defined but legislative declaration states “formation of public policy is public business.” Colorado Supremes define the policy-making process as “when the meeting is held for the purpose of discussing **or** undertaking a rule, regulation, ordinance or formal action.”
 - **No safe harbor for failing to take action. Rubber stamping issues.**
 - Meetings unconnected to the policy-making functions of a local public body, (attending a speech or educational seminar) are not public meetings even if quorum is attending.
 - Don’t expect courts to help. “All evils of government can be cured with a dose of sunshine.”
- “Local public body” means any board, committee, commission, authority, or other **advisory**, policy making, rule making, or formally constituted body of any political subdivision of the state and any public or private entity to which a political subdivision, or an official thereof, has delegated a governmental decision making function but does not include persons on the administrative staff of the local public body. Sec. 24-6-402(1)(a), C.R.S.

Meetings Must be Open and Published

- If a meeting, certain requirements must be met to assure an opportunity for public participation:
 - 24-hour posted notice
 - In designated location
 - Including Agenda
 - Minutes must be taken
 - Minutes must be open to public inspection
- However, these rules do not apply to a chance meeting or social gathering at which discussion of public business is not the central purpose. Sec. 24-6-402(e). **Watch for Public Perception!**
- Likewise, these rules do not apply to the day-to-day oversight of property or management of employees by county commissioners. Sec. 24-6-402(f). **Perception!**
- Consequences include invalidation of decisions and mandatory attorney fees.

Meetings Must be Open and Published



- Executive Sessions allowed under limited circumstances:
 - Purchase, sale or lease of property
 - Legal advice
 - Matters made confidential by statute
 - Security arrangements or investigations
 - Strategy for negotiations
 - Personnel matters but not if the employee who is subject of the discussion requests it open
 - Documents protected under the Open Records Act

Bryan Treu
Eagle County Attorney
Bryan.Treu@eaglecounty.us
(970) 328-8685