

COLORADO INDEPENDENT ETHICS COMMISSION

Complaint No. 08-01

PREHEARING STATEMENT

Colorado Ethics Watch,

Petitioner,

v.

Michael Coffman,

Respondent.

Respondent Michael Coffman, by and through his attorneys, submits the following Prehearing Statement.

I. STATEMENT OF CLAIMS, ALLEGATIONS, AND ISSUES BEFORE THE INDEPENDENT ETHICS COMMISSION AND ALL RELEVANT FACTS AND CIRCUMSTANCES ADDRESSING THE CLAIMS, ALLEGATIONS, AND ISSUES

A. ISSUES

1. Whether Colorado Ethics Watch has stated claims for which relief may be granted.
2. Whether the Commission has jurisdiction to hear the claims for relief brought by Colorado Ethics Watch.
3. Whether the allegations, if true, violated Article XXIX of the Colorado Constitution.
4. Whether the allegations are barred in whole, or in part, by the decision in *Developmental Pathways v. Ritter* or by the applicable statute of limitations.
5. Whether the Commission must dismiss the complaint, because the allegations are frivolous as a matter of law.

6. Whether the complaint, if true, constitutes a violation of other standards of conduct.
7. What standard of conduct does Colorado Ethics Watch allege that Mr. Coffman violated?
8. What is the remedy for alleged violation of this standard of conduct?
9. What legal authority provides for such a remedy?
10. Whether the complaint was brought for the purposes of harassment.
11. Whether the Commission has jurisdiction over this case when they concede they have no jurisdiction over criminal allegations.
12. Whether the Commission should dismiss the first two claims for relief, because the Colorado State Auditor and Denver District Attorney's Office has already taken action on the underlying allegations.
13. Whether Colorado Ethics Watch has proven by clear and convincing evidence that Mr. Coffman committed the actions in claims 2 and 3.
14. Whether Colorado Ethics Watch has proven by a preponderance of the evidence that Mr. Coffman committed the actions in claim 1.
15. Whether the Commission erred in denying the Motion to Transfer when the Commission is devoid of the authority to issue subpoenas to produce and compel the attendance of witnesses at the hearing.
16. Whether Mr. Coffman has been denied his procedural due process rights through the preclusion of discovery, artificial time limitations, and inability to subpoena witnesses and documents.
17. Whether the Commission should stay its proceedings pending the Denver District Court's action on the Motion to Stay in *Coffman v. Independent Ethics Commission*.
18. Whether the Commission will allow telephonic testimony and testimony by affidavit in lieu of testimony at the hearing.

B. STATEMENT OF FACTS

1. LEGAL BACKGROUND OF AMENDMENT 41 AND THE INDEPENDENT ETHICS COMMISSION

In November 2006, the voters of Colorado enacted Amendment 41, which was entitled “Ethics in Government” and later codified as Article XXIX to the Colorado Constitution. COLO. CONST. art. XXIX.¹ Amendment 41 generally provides for a (1) “fifty-dollar ban,” which generally limits to \$50 any gifts to public officers, members of the general assembly, local government officials, and government employees, along with their spouses or dependent children; and (2) “zero-dollar ban,” which bans any gifts from lobbyists to elected officeholders. *Developmental Pathways v. Ritter*, 178 P.3d 524, 527 (Colo. 2008) (citing COLO. CONST. arts. XXIX(3) and (4)). Amendment 41 also prohibits statewide elected officeholders and members of the general assembly from engaging in representation of other persons or entities before certain public bodies for a period of two years. COLO. CONST. art. XXIX(4).

Amendment 41 created a five-member independent ethics commission. COLO. CONST. art. XXIX(5)(2).² The Commission’s mandate is to “hear complaints, issue findings, and assess penalties, and also to issue advisory opinions, on ethics issues arising under this article and *under any other standards of conduct and reporting requirements as provided by law.*” COLO. CONST. art. XXIX(5)(1) (emphasis added).³

¹ See also COLO. REV. STAT. § 24-18.5-101(1)(a); *Developmental Pathways v. Ritter*, 178 P.3d 524, 526 (Colo. 2008) (sole Colorado Supreme Court case addressing Amendment 41). Amendment 41 provides that “[l]egislation may be enacted to facilitate the operation of this article, but in no way shall such legislation limit or restrict the provisions of this article or the powers herein granted.” COLO. CONST. art. XXIX(9). The Colorado legislature enacted legislation, pursuant to Amendment 41. COLO. REV. STAT. § 24-18.5-101; *Developmental Pathways*, 178 P.3d at 528. Additionally, pursuant to Amendment 41 and confined by Article 4 of the statute, the Colorado legislature delegated to the Commission the requirement to “adopt reasonable rules as may be necessary 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.” COLO. REV. STAT. § 24-18.5-101(6); see also *Developmental Pathways*, 178 P.3d at 528. Pursuant to Amendment 41 and Colorado statute, the Commission promulgated its own rules of procedure. Indep. Ethics Comm’n R. P., available at <http://www.colorado.gov/cs/Satellite/DPA-IEC/IEC/1223375602913> (last visited Feb. 11, 2009) [hereinafter “IEC Rules” or “IEC Rule”].

² See also COLO. REV. STAT. § 24-18.5-101(2)(a); see generally *Developmental Pathways*, 178 P.3d at 527.

³ See also COLO. REV. STAT. § 24-18.5-101(4); *Developmental Pathways*, 178 P.3d at 527; IEC Rule 2(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.”).

Amendment 41 does not define the term “other standards of conduct or reporting requirements” is not defined.⁴ This term, however, clearly applies to violations of the public trust. *See Developmental Pathways v. Ritter*, No. 07CV1353, 2007 WL 5765724 (Denver Dist. Ct. May 31, 2007), *rev'd on other grounds*, *Developmental Pathway*, 178 P.3d 524.⁵ Alleged violations of technical personnel rules, as CEW’s Complaint alleges, fall outside the scope of Amendment 41’s “others standards of conduct or reporting requirements.” The rule of *ejusdem generis* counsels this reading of Amendment 41. Indeed, the Colorado Court of Appeals cited to “other conduct of a similar nature” and applied the rule of *ejusdem generis* in interpreting a vague statute. *People v. Geyer*, 942 P.2d 1297, 1299 (Colo. App. 1996) (citing, *inter alia*, *Dunnigan v. State*, 364 So.2d 1217 (Fla. 1978)).

Amendment 41 provides that “[a]ny person may file a written complaint with the independent ethics commission asking whether a public officer, member of the general assembly, local government official, or government employee has failed to comply with this article or any other standards of conduct or reporting requirements as provided by law within the preceding twelve months.” COLO. CONST. art. XXIX(3)(a).⁶ The Commission must dismiss without a hearing any frivolous complaint. COLO. CONST. art. XXIX(3)(b).⁷

A “frivolous” complaint is defined as:

any complaint filed under article XXIX that fails to allege that a
[public officer, member of the general assembly, local government

⁴ Indeed, neither Amendment 41, Section 24.18.5-101 of the Colorado Revised Statutes, IEC Rules, nor the Colorado courts define “other standards of conduct and reporting requirements as provided by law.”

⁵ The trial court cited to the following statutes in analyzing the status of relevant ethics laws prior to the passage of Amendment 41: COLO. REV. STAT. §§ 24-6-203(3.5), 24-6-203(3.7), 24-18-101 *et seq.*, 25-1-114, 25-1-514 (state and local official gift ban); COLO. REV. STAT. §§ 24-6-202, 24-6-203(2), and (3) (gift reporting); COLO. REV. STAT. §§ 24-6-301 *et seq.* (lobbying registration and disclosures); COLO. REV. STAT. §§ 24-18-112, 24-18-113, COLO. CONST. art. V, § 12; House Rule 49; Senate Rules 41 and 43 (ethics complaints and discipline); COLO. REV. STAT. §§ 18-8-302 (criminal bribery), 18-8-304 (soliciting unlawful compensation), 18-8-303 (compensation for past official behavior), 18-8-305 (trading in public office), 18-8-308 (failure to disclose a conflict of interest), 37-41-109 (criminal penalties for water conservation district officers for taking bribes); and COLO. CONST. art. IV, § 19; art. 5, § 40; art. XII, §§ 6 and 7 (pre-Amendment 41 constitutional anticorruption provisions). *Developmental Pathways v. Ritter*, No. 07CV1353, 2007 WL 5765724 (Denver Dist. Ct. May 31, 2007), *rev'd on other grounds*, *Developmental Pathway*, 178 P.3d 524.

⁶ *See also* IEC Rule 7(A); *Developmental Pathways*, 178 P.3d at 527.

⁷ *See also* IEC Rule 7(D)(2); *Developmental Pathways*, 178 P.3d at 528

official, or government employee] has accepted or received any gift or other thing of value for *private gain or personal financial gain*.

Developmental Pathways, 178 P.3d at 528 (quoting COLO. REV. STAT. § 24-18.5-101(5)(a)) (alterations added; emphasis in original). “Private gain” or “personal financial gain” means:

any money, forbearance, forgiveness of indebtedness, gift, or other thing of value given or offered by a person seeking to influence an *official act* that is performed in the course and scope of the public duties of a public officer, member of the general assembly, local government official, or government employees.

Id. (quoting COLO. REV. STAT. § 24-18.5-101(5)(b)(II)) (emphasis added). An “official act” is “any vote, decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority.” Indep. Ethics Comm’n R. P. 3(A)(11), available at <http://www.colorado.gov/cs/Satellite/DPA-IEC/IEC/1223375602913> (last visited Feb. 11, 2009) [hereinafter “IEC Rules” or “IEC Rule”].

In addition to “frivolous” complaints, on September 1, 2008, the Commission adopted its rules of procedure that require that the Commission *must dismiss a complaint* if: (a) the Commission has no jurisdiction; (b) “the alleged violation, if true, would not constitute a violation of Article XXIX, or any other standards of conduct or reporting requirements under the jurisdiction of the IEC”; or (c) “the complaint fails to allege that the conduct complained of occurred within the preceding twelve months.” IEC Rule 7(D); *see also Developmental Pathways*, 178 P.3d at 534-35, n.8 (“This [12-month] provision essentially sets forth the statute of limitations period for violations under the Amendment.”).⁸

The Commission’s rules of procedure further provide that it *may dismiss a complaint*, if: (a) “[t]he complaint is groundless or brought for the purposes of harassment as determined by the IEC”; (b) “[a]nother body has already taken action on the subject of the complaint and the IEC believes the action of the other body was appropriate”; or (c) “the complaint fails to comply with IEC rules of procedure regarding complaints.” IEC Rule 7(E). The Commission may stay a complaint if: (a) “[a]n action on the same subject of the complaint is pending before another

⁸ In addition to this pending complaint, as of February 11, 2009, the Commission has considered five other complaints. Indep. Ethics Comm’n, Complaints, available at <http://www.colorado.gov/cs/Satellite/DPA-IEC/IEC/1225190784719> (last visited Feb. 11, 2009). The Commission dismissed all five of these complaints, because: (1) they were “frivolous”; (2) “the alleged misconduct occurred more than 12 months prior to the filing of the complaint, pursuant to Colorado Constitution Article XXIX, Section 5(2)(3)(a) and (b), and IEC Rule 7.D.2 and 4”; (3) of the “lack of jurisdiction pursuant to IEC Rule 7.D.1, because it alleges misconduct by a member of the judicial branch”; and/or (4) “pursuant to IEC Rule 7.D.3, the alleged violation, if true, would not constitute a violation of Colorado Constitution Article XXIX, or any other standard of conduct or reporting requirement under the jurisdiction of the IEC.” *Id.*

body with concurrent jurisdiction”; or (b) “[t]he alleged violation is a criminal matter or a criminal investigation is pending.” IEC Rule 7(F).⁹

The Commission shall, however, “conduct an investigation, hold a public hearing, and render findings on each non-frivolous complaint pursuant to written rules” it adopts. COLO. CONST. art. XXIX(3)(c).¹⁰ The Commission may delegate to an administrative law judge or hearing officer a particular hearing. IEC Rule 8(B). Amendment 41 grants the Commission the power to issue subpoenas for both documents and witnesses. COLO. CONST. art. XXIX(4). To issue a subpoena, Colorado statute requires a motion by a commissioner and the approval of “no fewer than four” commissioners. COLO. REV. STAT. § 24-18.5-101(8).¹¹ The Commission is unable to issue subpoenas in this case; thereby depriving Mr. Coffman the ability to compel attendance of witnesses or the production of documents.

The Commission may also “assess penalties for violations as prescribed by this article *and provided by law*,” based upon findings by “a preponderance of evidence unless the commission determines that the circumstances warrant a heightened standard.” COLO. CONST. arts. XXIX(3)(d) and (e) (emphasis added).¹² Amendment 41 permits penalties for “breaches [of] the public trust for *private gain*.” COLO. CONST. art. XXIX(6) (emphasis added). Moreover, Amendment 41 provides that “any person or entity inducing such breach shall be liable to the state or local jurisdiction for double the amount of the financial equivalent of any benefits obtained by such actions.” *Id.*; see also *Developmental Pathways*, 178 P.3d at 527. “The

⁹ The Commission denied Mr. Coffman’s request to file a motion to stay, even though the Complaint is criminal in nature.

¹⁰ See also IEC Rule 8(A) (“The IEC shall hold a public hearing on all complaints within the jurisdiction of the IEC that have not been dismissed as frivolous or dismissed on other grounds.”); *Developmental Pathways*, 178 P.3d at 527.

¹¹ The Commission, therefore, cannot issue subpoenas in Mr. Coffman’s matter, because two of the five commissioners recused themselves. In other words, if this matter goes to a hearing before the Commission, Mr. Coffman has no means of subpoenaing witnesses or documents. An earlier Commission ruling deprived Mr. Coffman the ability to conduct discovery. This deprives Mr. Coffman his fundamental right to due process, including a fair hearing where he can confront witnesses. Moreover, even if COLO. CONST. art. XXIX, § 5(4) allows individual members to issue subpoenas and COLO. CONST. art. XXIX, § 9 prevents the legislature from limiting the Commission’s subpoena power, COLO. REV. STAT. § 24-18.5-101(8) limits the Commission’s subpoena power and agencies generally have no authority to decide constitutional issues that require the agency to question its own statutory authority or to disregard any statutory instructions. See, e.g., *Riggin v. Office of Senate Fair Employment Practices*, 61 F.3d 1563 (Fed. Cir. 1995) (“[T]he constitutional issue does not require the agency to question its own statutory authority or to disregard any instructions Congress has given it.”).

¹² See also IEC Rule 8(D)(5) (emphasis added) (“The IEC may impose penalties and sanctions *as provided by law*.”); see generally *Developmental Pathways*, 178 P.3d at 527-28.

manner of recovery *and additional penalties may be provided by law.*” *Developmental Pathways*, 178 P.3d at 527-28 (emphasis added) (quoting COLO. CONST. art. XXIX(6)).

Colorado statute provides that “[a]ny final action of the commission concerning a complaint shall be subject to judicial review by the district court for the city and county of Denver.” COLO. REV. STAT. § 24-18.5-101(9); *see general Developmental Pathways*, 178 P.3d at 535.

2. COLORADO ETHICS WATCH’S COMPLAINT AGAINST FORMER COLORADO SECRETARY OF STATE MICHAEL COFFMAN

On February 13, 2008, Petitioner Colorado Ethics Watch (“CEW”) filed with the Commission its Complaint against then-Colorado Secretary of State Michael Coffman. Complaint, Feb. 13, 2008, Ex. 1 to Denver Dist. Ct. Mot. for Stay (including 29 exhibits to Complaint). The Commission did not yet exist and was not operational until it promulgated its rules on September 1, 2008. Hence, the Complaint was not ripe for review. *Developmental Pathways*, 178 P.3d at 535.

a. CEW’S COMPLAINT MAKES TWO SETS OF FACTUAL ALLEGATIONS RELATED TO MR. COFFMAN

Allegation 1: Mr. Coffman Allegedly Knew Of And Deliberately Misled The Public About His Employee’s Unlawful Outside Political Business

CEW’s factual allegations consist of the following: (1) in January 2007, Mr. Coffman hired Dan Kopelman, a political ally since 1996 who is a political consultant and an owner and operator of a political website called “Political Live Wires,” to serve as the elections technology manager within the Office of the Secretary of State; (2) in his previous position as the Colorado state treasurer, Mr. Coffman also hired Mr. Kopelman to serve as his systems analyst; (3) Mr. Kopelman took two weeks of paid leave from his position in the Office of the State Treasurer to help Mr. Coffman’s campaign for secretary of state; (4) Mr. Coffman’s campaign paid Mr. Kopelman’s company \$1,500 for consulting services during this paid leave; (5) Mr. Coffman’s campaign also paid Mr. Kopelman and Mr. Kopelman’s company for other expenditures; (6) Mr. Coffman claimed that he did not know of Mr. Kopelman’s company until May 2007, after a newspaper reported the story; (7) the Office of the Colorado State Auditor released an audit, in which it stated that Mr. Kopelman violated Colorado law by owning and operating a partisan political business without prior authorization while serving in the Office of the Secretary of State; (8) the audit also stated that Mr. Coffman “shares responsibility for these violations,” pursuant to the state personnel rules; (9) the audit further stated that four other employees of the Office of the Secretary of State held outside employment without prior authorization, and Mr. Coffman knew of two of these circumstances; (10) “[d]ocuments obtained by Ethics Watch through its [Colorado Open Records Act] request strongly suggest that Mr. Kopelman was one of the two employees”; (11) Mr. Coffman and his assistant received directly from Mr. Kopelman the outside company’s emails between January and March 2007; (12) Mr. Kopelman utilized his outside company’s email address, with Mr. Kopelman’s official title included in the signature

block, to correspond with Mr. Coffman and his staff; (13) if Mr. Coffman knew of Mr. Kopelman's company, Mr. Coffman "deliberately misled the public and should be held accountable for allowing his employees to engage in partisan conflicts of interest, failing to perform the duties of his office and violating the public trust."; and (14) "Secretary Coffman and/or his allies . . . personally benefitted from Secretary Coffman's failure to perform the duties required of his office." Complaint, Feb. 13, 2008, Ex. 1 to Denver Dist. Ct. Mot. for Stay, at 1-4, 5.

Allegation 2: Mr. Coffman Allegedly Certified One Company's Voting Machine, Against His Expert Panel's Recommendation, After The Company Hired Mr. Coffman's Campaign Consultant As Its Lobbyist

CEW next alleges that: (1) in April 2007, the Office of the Secretary of State accepted applications to retest the security standards on four electronic voting systems, one system of which was Premier; (2) Mr. Coffman appointed an expert advisory panel to advise him on the retesting; (3) in August 2007, Mr. Coffman "consulted with Phase Line Strategies LLC ("Phase Line") about hiring the company to run his" congressional campaign; (4) Mr. Coffman had a "working relationship" with Phase Line's president for more than ten years; (5) on September 17, 2007, Premier hired Phase Line as its lobbyist; (6) on October 30, 2007, Mr. Coffman's spokesman stated that Mr. Coffman "had every intention to run" for Congress; (7) Mr. Coffman knew of Phase Line's representation of Premier when Mr. Coffman hired Phase Line to run his congressional campaign; (8) Mr. Coffman's panel recommended that he recertify none of the four systems; (9) because Mr. Coffman stated that Premier's system substantially complied with legal requirements, he recertified Premier's system; (10) Mr. Coffman decertified some or all of the other three manufacturer's voting machines; (11) following a news report, Premier terminated its relationship with Phase Line; (12) Mr. Coffman continued his relationship with Phase Line; and (13) "Secretary Coffman and/or his allies . . . personally benefitted from Secretary Coffman's failure to perform the duties required of his office." *Id.*, at 4-5.

**b. BASED UPON THESE TWO SETS OF ALLEGATIONS,
CEW STATES THREE CLAIMS AGAINST MR. COFFMAN**

Claim 1: Violation of C.R.S. § 24-50-101(3)(d) and 4 CCR § 801, Rule 1-11
(Department of Personnel – Legislative Declaration – Terminology;
Personnel Board Rules and Personnel Director's Administrative
Procedures)

CEW first claims, *inter alia*, that Mr. Coffman violated technical personnel rules and procedures. Indeed, it claims that

[o]n information and belief, Secretary Coffman knew *or should have known* that Mr. Kopelman was operating a partisan political business while employed as the state's elections technology manager in violation of state personnel rules and state law.

Id., at 6 (emphasis added). Moreover,

[o]n information and belief, Secretary Coffman personally benefited from his transgressions. Allowing Mr. Kopelman to continue operating Political Live Wires while employed in the secretary of state's office, and therefore, using state time and resources, *presumably* helped Secretary Coffman maintain and enhance his political network and position himself to pursue his bid for Congress.

Id. (emphasis added).

Claim 2: Violation of C.R.S. §§ 18-8-404 and/or 405
(Colorado Criminal Code – First Degree Official Misconduct and Second Degree Official Misconduct)

CEW next brings a private right of action -- reserved solely for prosecutors -- claiming that, *inter alia*, Mr. Coffman violated the criminal code, punishable as a misdemeanor, as follows:

[T]here is reason to believe that Secretary Coffman committed first degree official misconduct. The attached documents and the audit suggest that: (1) Secretary Coffman was aware that Mr. Kopelman was engaged in a partisan side business and did nothing to stop it; and (2) Secretary Coffman and/or Dan Kopelman benefitted from Mr. Kopelman's continued operation of Political Live Wires.

Id. (emphasis added). Moreover,

Additionally, Secretary Coffman violated state personnel rules and state law by failing to disclose his conflict with Premier by way of their mutual engagement of Phase Line. See C.R.S. § 24-50-117. On information and belief, Secretary Coffman's nondisclosure advantaged all parties involved -- Premier had its voting machine certified, Phase Line delivered on its contract with Premier and Secretary Coffman assisted his long-time political allies and current campaign consultants.

Id. at 7.

Claim 3: Violation of C.R.S. § 1-13-107
(Criminal Violation: Corrupt Conduct in the Discharge of a Duty Under the Election Code)

CEW finally claims that Mr. Coffman violated the criminal corrupt discharge statute, punishable as a misdemeanor, *inter alia*, that

[b]y authorizing the certification of Premier's voting system against the recommendations of the expert panel when a known conflict existed between Secretary Coffman and Premier's lobbying firm, Secretary Coffman *appears to have* engaged in "corrupt conduct in the discharge" of his duties under the Election Code.

Id., at 7 (emphasis added).¹³

C. PROCEDURAL HISTORY WITHIN THE INDEPENDENT ETHICS COMMISSION

On October 8, 2008, the Commission notified the parties of the hearing and hearing procedures. Notice of Hearing and Hearing Procedures, Oct. 13, 2008, Ex. 2 to Denver Dist. Ct. Mot. for Stay. The Commission's staff and the parties' counsel held a general status conference on October 20, 2008. Transcript of Status Conf., Oct. 20, 2008, Ex. 3 Denver Dist. Ct. Mot. for Stay. On November 3, 2008, the Commission issued its procedural determination for the case. Procedural Determination, Nov. 3, 2008, Ex. 4 to Denver Dist. Ct. Mot. for Stay. The Commission ruled, *inter alia*, that parties must obtain permission to file motions. *Id.* Additionally, the Commission stated that, *inter alia*,

[t]he IEC wishes to emphasize that it contemplates that complaints and hearings before it will not be treated as formal litigation and it encourages the parties to work together to present the material each side feels is relevant for the IEC to consider in its deliberations.

Id., at 2. CEW objected to the Commission's procedural determinations, arguing, *inter alia*, that the Commission failed its constitutional duty to investigate. Objections, Nov. 13, 2008, Ex. 5 to Denver Dist. Ct. Mot. for Stay.

Mr. Coffman responded to CEW's Complaint on November 13, 2008, denying the allegations and arguing that: (1) arguing that the Complaint is "frivolous and brought for the purposes of harassment"; (2) the Commission lacks jurisdiction; (3) the Complaint fails to state a claim for relief; (4) even if the allegations in the Complaint were true, it does not allege a violation under Article XXIX or other standards of conduct or reporting requirements under the Commission's jurisdiction; (5) the claims are barred in whole or in part by the statute of limitations; (6) the Denver District Attorney's Office already reviewed the allegations and found they lacked merit; and (7) CEW failed to comply with the rules of procedure. Response, Nov. 13, 2008, Ex. 6 to Denver Dist. Ct. Mot. for Stay.

On November 13, 2008, Mr. Coffman requested leave from the Commission to file several motions. Request for Submission of Motions, Nov. 13, 2008, Ex. 7 to Denver Dist. Ct.

¹³ Pursuant to the Election Code, only the district attorney or attorney general have the authority to prosecute criminal allegations. COLO. REV. STAT. § 1-13-101.

Mot. for Stay. Specifically, Mr. Coffman requested to file a: (1) motion to dismiss; (2) motion to stay; (3) motion for jury trial; (4) motion to transfer matter to an administrative law judge, or in the alternative, motion to recuse; (5) motion for determination of standard of review; (6) motion to continue and extend deadlines; and, (7) motion to conduct discovery. *Id.*

On November 17, 2008, the Commission met in executive session. Transcript of Gen. Bus. of the Indep. Ethics Comm'n, Nov. 17, 2008, Ex. 8 to Denver Dist. Ct. Mot. for Stay. Thereafter, the Commission publicly denied Mr. Coffman's requests to file a: (a) motion to stay; (b) motion for jury trial; and, (c) motion to conduct discovery. *Id.* The Commission, however, approved Mr. Coffman's request to file a (1) motion to dismiss; (2) motion to transfer matter to an administrative law judge, or in the alternative, motion to recuse;¹⁴ (3) motion for determination of standard of review;¹⁵ and, (4) motion to continue and extend deadlines.¹⁶ *Id.*

Subsequently, Commissioner Wood recused and the Commission denied Mr. Coffman's request to transfer this matter to an administrative law judge. However, this left the Commission without subpoena powers pursuant to Colo. Rev. Stat. §24-18.5-101(8). The Commission, however, did provide a heightened standard of proof for the criminal allegations utilizing a clear and convincing standard.

On December 17, 2008, Mr. Coffman filed with Commission a motion to dismiss. Mot. To Dismiss, Dec. 17, 2008, Ex. 17 to Denver Dist. Ct. Mot. for Stay. Mr. Coffman made numerous arguments, including that the Commission lacked jurisdiction to consider CEW's ethics complaint against Mr. Coffman. *Id.* This is so, according to Mr. Coffman, because, *inter alia*: (1) the Commission has no jurisdiction to consider alleged conduct before September 1, 2008; (2) even if it does, the Commission must dismiss claims based upon conduct prior to

¹⁴ On November 17, 2008, Mr. Coffman filed with the Commission this motion. Mot. To Transfer Matter To An Admin. Law J., Or In The Alternative, Mot. To Recuse, Nov. 17, 2008, Ex. 9 to Denver Dist. Ct. Mot. for Stay. CEW responded on January 9, 2009. Response, Jan. 9, 2009, Ex. 10 to Denver Dist. Ct. Mot. for Stay (including exhibits). On January 28, 2009, the Commission denied the motion. O. Re. Mot. To Recuse or Transfer, Jan. 28, 2009, Ex. 11 to Denver Dist. Ct. Mot. for Stay.

¹⁵ On November 17, 2008, Mr. Coffman filed with the Commission this motion. Mot. For Determination of Standard of Review, Nov. 17, 2008, Ex. 12 to Denver Dist. Ct. Mot. for Stay. CEW responded on January 9, 2009. Resp. to Mot. To Transfer Matter To An Admin. Law J., Or In The Alternative, Mot. To Recuse, Jan. 9, 2009, Ex. 13 to Denver Dist. Ct. Mot. for Stay. On February 5, 2009, the Commission granted this motion, in part, and held that it would utilize a clear-and-convincing evidence standard. O. Re. Mot. To Determine Evidentiary Standard, Feb. 5, 2009, Ex. 14 to Denver Dist. Ct. Mot. for Stay.

¹⁶ On Dec. 1, 2008, Mr. Coffman requested in writing for an extension of the deadlines related to the hearing. Ex. 15 to Denver Dist. Ct. Mot. for Stay. On Dec. 3, 2008, the Commission responded, in writing, extending the Hearing date and Prehearing Statement. Ex. 16 to Denver Dist. Ct. Mot. for Stay.

September 1, 2007; (3) the Commission must dismiss CEW's Complaint, as it is "frivolous" as a matter of law; and (4) CEW's Complaint fails to state a claim for relief for which relief may be granted. *Id.*

On January 12, 2009, CEW responded in opposition to Mr. Coffman's motion to dismiss. Response To Mot. To Dismiss, Jan. 12, 2009, Ex. 18 to Denver Dist. Ct. Mot. for Stay; Exhibits To Response To Mot. To Dismiss, Jan. 12, 2009, Ex. 19 to Denver Dist. Ct. Mot. for Stay. The Commission, on February 5, 2009, denied Mr. Coffman's motion to dismiss, finding that, *inter alia*, it had jurisdiction to consider CEW's ethics complaint, even though it had no authority over criminal allegations. O. Re. Mot. To Dismiss, Feb. 5, 2009, Ex. 20 to Denver Dist. Ct. Mot. for Stay.

On February 11, 2009, Mr. Coffman filed his complaint with the Denver District Court, seeking a legal review of the Commission's jurisdictional determination. On February 12, 2009, Mr. Coffman filed a motion to stay, seeking a stay of the Commission's actions pending the Court's determination of the Commission's threshold jurisdictional question.

On February 13, 2009, the Commission issued an Amended Notice of Hearing, which limited the time allotted for Mr. Coffman to present evidence, testimony and cross examine witnesses to 3.5 hours.

Putting aside jurisdictional question, Mr. Coffman denies any and all wrongdoing and intends to call witnesses on his behalf to in support of this.

Mr. Coffman reserves the right to supplement this list.

II. LIST OF ALL WITNESSES MR. COFFMAN INTENDS TO HAVE TESTIFY AT THE HEARING, INCLUDING THE FULL NAME, ADDRESS, AND TELEPHONE NUMBER, TO THE EXTENT KNOWN, FOR EACH WITNESS, ALONG WITH A SHORT STATEMENT REGARDING THE SUBJECT OF HIS OR HER TESTIMONY

1. The Honorable Michael Coffman
c/o Mr. Douglas Friednash, Counsel
Greenberg Traurig, LLP
The Tabor Center
1200 17th Street, Suite 2400
Denver, Colorado 80202

Mr. Coffman is the Defendant/Respondent in this matter and may have information or knowledge in connection with the allegations against him set forth in the Complaint.

2. Ms. Jacque Ponder, Chief of Staff
Office of Representative Michael Coffman
1508 Longworth House Office Building
Washington, DC 22515

Upon information and belief, Ms. Ponder may have information or knowledge in connection with the allegations against Mr. Coffman set forth in the Complaint.

3. Mr. William A. Hobbs
Deputy Secretary of State
State of Colorado
Denver, CO 80290
(303) 860-6900

Upon information and belief, Mr. Hobbs may have information or knowledge in connection with the allegations against Mr. Coffman set forth in the Complaint.

4. Ms. Sibyl Clausen, Human Resources Division
Office of the Colorado Secretary of State
State of Colorado
1700 Broadway, Suite 250
Denver, CO 80290
(303) 860-6900

Upon information and belief, Ms. Clausen may have information or knowledge in connection with the allegations against Mr. Coffman set forth in the Complaint.

5. Mr. Trevor Timmons, Chief Information Officer
Office of the Colorado Secretary of State
State of Colorado
1700 Broadway, Suite 250
Denver, CO 80290
(303) 860-6900

Upon information and belief, Mr. Timmons may have information or knowledge in connection with the allegations against Mr. Coffman set forth in the Complaint.

6. The Honorable Sally Symanski
State Auditor of Colorado
200 East 14th Avenue
Denver, CO 80203-2211
(303) 869-2800

Upon information and belief, Ms. Symanski may have information or knowledge regarding an audit conducted of the Office of Secretary of State in relation to the allegations in the Complaint

7. The Honorable Mitchell R. Morrissey (or a representative of his office)
District Attorney
City and County of Denver
201 West Colfax
Denver, CO 80202
(720) 913-9000

Upon information and belief, Mr. Morrissey may have information or knowledge regarding a request for a criminal investigation against Mr. Coffman in connection with the allegations set forth in the Complaint.

8. Joseph M. Morales, Chief Deputy
Office of the District Attorney
City and County of Denver
201 West Colfax
Denver, CO 80202

Upon information and belief, Mr. Morales may have information or knowledge regarding a request for a criminal investigation against Mr. Coffman in connection with the allegations set forth in the Complaint.

9. Mr. Dan Kopelman
7443 South Mobile Street
Aurora, CO 80016-1462

Upon information and belief, Mr. Kopelman may have information or knowledge in connection with the allegations against Mr. Coffman set forth in the Complaint.

10. Mr. Sean Tonner
President and CEO
Phase Line Strategies, LLC
9135 Ridgeline Blvd., Suite 150
Highlands Ranch, CO 80129
(303) 297-8170

Upon information and belief, Mr. Tonner may have information or knowledge in connection with the allegations against Mr. Coffman set forth in the Complaint.

11. Mr. Michael Ciletti, Principal
Phase Line Strategies, LLC
9135 Ridgeline Blvd., Suite 150
Highlands Ranch, CO 80129
(303) 297-8170

Upon information and belief, Mr. Ciletti may have information or knowledge in connection with the allegations against Mr. Coffman set forth in the Complaint.

12. Ms. Chantell Taylor, Director
Colorado Ethics Watch
1630 Welton Street, Suite 415
Denver, CO 80202

Upon information and belief, Ms. Taylor may have information or knowledge in connection with the allegations against Mr. Coffman set forth in the Complaint.

13. Mr. Luis Toro, Senior Counsel
Colorado Ethics Watch
1630 Welton Street, Suite 415
Denver, CO 80202

Upon information and belief, Mr. Toro may have information or knowledge in connection with the allegations against Mr. Coffman set forth in the Complaint.

14. Mr. John Gardner
Contact information unknown

Upon information and belief, Mr. Gardner may have information or knowledge in connection with the allegations against Mr. Coffman set forth in the Complaint.

15. Mr. Jonathan Tee
Contact information unknown

Upon information and belief, Mr. Tee may have information or knowledge in connection with the allegations against Mr. Coffman set forth in the Complaint.

16. Any individual or potential witness identified by Colorado Ethics Watch or the IEC during prehearing proceedings.
17. Any witness necessary for impeachment or rebuttal.

Mr. Coffman reserves the right to supplement this list.

III. LIST OF ALL DOCUMENTS OR OTHER TANGIBLE ITEMS THAT MR. COFFMAN INTENDS TO USE AS EXHIBITS OR TO SUPPORT HIS POSITION AT THE HEARING (COPIES OF WHICH ARE ALSO FILED WITH THE IEC AND SERVED ON COLORADO ETHICS WATCH)

1. Complaint with Exhibits 1 through 29
2. Any document produced in Colorado Ethics Watch's Initial/Supplemental Disclosures
3. Any document identified in Colorado Ethics Watch's Prehearing Statement
4. Any document responsive to any Open Records Request received by Colorado Ethics Watch
5. Any document identified by Colorado Ethics Watch
6. Independent Ethics Commission Rules of Procedure
7. Amendment 41 to the Colorado Constitution
8. *Developmental Pathways v. Ritter* Colorado Supreme Court Decision
9. Judge Habas Preliminary Injunction Order
10. Enabling Statute for Amendment 41
11. Documents from Colorado Ethics Watch's Website
12. Documents from Dan Kopelman's Website
13. Notice of Hearing and Hearing Procedures
14. Status Conference Transcript
15. 10/17/08 Letter Re Status Conference
16. Procedural Determination
17. Coffman Answer to Complaint
18. Coffman Initial Disclosures
19. Correspondence To Jane T. Feldman, IEC, Regarding Motions Requests
20. Colorado Ethics Watch's Objections To The Procedural Determination Issued By The IEC
21. Colorado Ethics Watch Initial Disclosure Statement (Disclosure Documents In Separate File Transcript of The General Business Session)
22. E-Mail Setting Forth Deadlines Issued During The General Business Session
23. Motion to Transfer to an Administrative Law Judge or, In The Alternative, Motion to Recuse Commissioner Wood and Provide Disclosures by Commissioners
24. Motion to Dismiss
25. Motion for Determination of Evidentiary Standard
26. Response to Motion for Determination of Evidentiary Standard
27. Response to Motion to Transfer to an Administrative Law Judge or, in the Alternative, Motion to Recuse, Etc.
28. Response to Motion to Dismiss
29. Order Regarding Motion to Recuse
30. Order Regarding Motion to Determine Evidentiary Standard
31. Order Regarding Motion to Dismiss
32. Letter Response to Open Records Act Request, Dated January 26, 2009, and Enclosing Procedural Determination, Dated November 3, 2008
33. E-mail Communications from Doug Friednash and the Independent Ethics Commission
34. Complaint, Civil Cover Sheet
35. Emergency Motion to Stay of Proceedings of the Independent Ethics Commission

36. Delay Reduction Order
37. Summons and Confirmation of Service Upon Jane Feldman, On behalf of the Independent Ethics Commission, of the Summons, Complaint, Civil Case Cover Sheet, Delay Reduction Order, and Waiver and Acceptance of Service
38. Waiver and Acceptance of Service, Executed by Jane Feldman on February 13, 2009
39. Revised Draft of Restrictions for Department of State Personnel
40. List of Outside Activities for Secretary of State Employees
41. State Certification at a Glance, the Five Phases of Certification
42. January 9, 2007 Memorandum, and Attachments, from Sibyl Clausen and Dan Kopelman
43. January 9, 2007 End-User Computing Policy Signed by Dan Kopelman
44. January 9, 2007 Policy Regarding Department of State Outside Activity – End User Computing Policy
45. February 12, 2007 E-mail from Dan Kopelman and Hillary Rudy and Jonathan Tee
46. February 12, 2007 E-mail from Jonathan Tee: Public Meeting Announcement
47. March 20, 2007 News Release
48. April 7, 2007 Applications for Certification of Voting System
49. April 25, 2007 E-mail from Jonathan Tee: Voting Systems
50. May 1, 2007 E-mail: Voting System
51. May 4, 2007 Letter – News Release from Pat Waak and form of Policy Regarding Department of State Outside Political Activity
52. May 4, 2007 E-mail from Dana Williams and Todd Johnson
53. May 8, 2007 Letter from Chantell Taylor and Mike Coffman
54. May 8, 2007 Letter from Mike Coffman and Sally Symanski
55. May 8, 2007 E-mail from Jonathan Tee and Trevor Timmons
56. May 9, 2007 E-mail from Jonathan Tee and John Turk
57. May 9, 2007 E-mail of News Release
58. May 9, 2007 News Release
59. May 9, 2007 Letter from Sally Symanski to Chantell Taylor
60. May 9, 2007 Letter from Sally Symanski to Mike Coffman
61. May 11, 2007 E-mail of News Release
62. May 11, 2007 Letter from Jonathan Tee to Chantell Taylor
63. May 11, 2007 E-mail with Redactions from Leslie Reynolds to NASS Secretaries
64. May 11, 2007 E-mail from Mike Coffman to Peggy Kerns
65. May 14, 2007 E-mail from Mike Coffman to Jacque Ponder, Bill Hobbs, Jonathan Tee, Stephanie Cegielski, Holly Lowder, and Wayne Munster
66. May 14, 2007 Letter from Chantell Taylor to Mike Coffman with Exhibits
67. May 14, 2007 Outlook Meeting Notification
68. May 15, 2007 E-mail between Jonathan Tee and Chantell Taylor
69. May 16, 2007 E-mail between Mike Coffman and Jonathan Tee
70. May 16, 2007 Letter between Pat Waak and Mike Coffman
71. May 16, 2007 E-mail between Dan Kopelman and Jacque Ponder and Bill Hobbs
72. May 17, 2007 E-mail Chain between Chantell Taylor and Jonathan Tee
73. May 17, 2007 E-mail between Jacque Ponder and Commissioner Hillman
74. May 17, 2007 E-mail between Commissioner Gracia M. Hillman and Jacque Ponder
75. May 17, 2007 Letter between Jonathan Tee and Chantell Taylor
76. May 17, 2007 E-mail between Jacque Ponder and All of Office

77. May 18, 2007 E-mail between Jonathan Tee: Voting Systems
78. May 21, 2007 Letter from Chantell Taylor to the Honorable Cary Kennedy
79. May 22, 2007 E-mail between Chantell Taylor and Jonathan Tee
80. May 22, 2007 E-mail between Sibyl Clausen and Jonathan Tee
81. May 22, 2007 E-mail Chain between Jonathan Tee and Chantell Taylor
82. May 22, 2007 E-mail between Jonathan Tee to Dana Williams, Dan Kopelman, Jacque Ponder, Bill Hobbs, Stephanie Cegielski, Wayne Mu8nster, Trevor Timmons, Sibyl Clausen, Holly Lowder, and Mike Coffman
83. May 23, 2007 E-mail between John Coniff and Bill Hobbs
84. May 25, 2007 Letter from Jonathan Tee and Chantell Taylor
85. May 25, 2007 CCEG Open Records Request, Employee Log
86. May 29, 2007 Letter from Chantell Taylor and Jonathan Tee
87. May 30, 2007 Letter from Jonathan Tee and Chantell Taylor
88. May 30, 2007 CCEG Open Records Request, Employee Log
89. May 30 2007 E-mail between Mike Coffman and Jonathan Tee
90. May 31, 2007 Letter from Chantell Taylor and Jonathan Tee
91. May 31, 2007 E-mail between Jonathan Tee and Chantell Taylor
92. June 1, 2007 E-mail between Al Kolwicz and Chantell Taylor
93. June 4, 2007 Letter from Jonathan Tee and Chantell Taylor
94. June 5, 2007 Personnel Action Notice Form
95. June 6, 2007 Letter from Chantell Taylor to Jonathan Tee
96. June 7, 2007 Letter from Dan Kopelman to William Hobbs
97. June 8, 2007 Letter from Jonathan Tee to Chantell Taylor
98. June 8, 2007 E-mail between Jonathan Tee and Mike Coffman
99. June 8, 2007 Letter to Chantell Taylor from Jonathan Tee
100. June 12, 2007 Letter from Jonathan Tee to Claudia Kuhns with Enclosure
101. June 15, 2007 Letter from Chantell Taylor to Mitchell R. Morrissey, with Attachments
102. August 2007 Excerpts from SOS Employee Handbook
103. September 18, 2007 Letter from the Colorado Voter Group to Mike Coffman
104. September 19, 2007 Letter from the Central Region Clerk and Records to William Hobbs
105. September 26, 2007 Statement of Change
106. October 1, 2007 Letter from William A. Hobbs to Central Region Clerk and Records'
107. November 9, 2007 E-mail Chain between Jacque Ponder, John Gardner and Mike Coffman
108. December 3, 2007 News Release
109. December 10, 2007 E-mail between Jacque Ponder and John Gardner
110. December 12, 2007 Letter from Joseph Morales to Chantell Taylor
111. December 12, 2007 E-mail between Mike Coffman and John Gardner
112. December 17, 2007 Letter from Mike Coffman to David Hart
113. December 17, 2007 Letter from Mike Coffman to Ed Smith
114. January 2, 2008 E-mail between Richard Coolidge and Chantell Taylor
115. January 2, 2008 Faxed Letter from Richard Coolidge to Chantell Taylor
116. January 14, 2008 Phase Line Strategies Webpage
117. May 2008 Performance Audit
118. June 18, 2008 E-mail between Richard Coolidge and Chantell Taylor

119. June 25, 2008 Letter from Richard Coolidge to Luis Toro
120. June 26, 2008 E-mail between Richard Coolidge and Chantell Taylor
121. June 26, 2008 E-mail between Richard Coolidge and Luis Toro
122. August 1, 2008 E-mail between Richard Coolidge and Chantell Taylor
123. August 7, 2008 E-mail between Richard Coolidge and Chantell Taylor
124. August 12, 2008 E-mail between Richard Coolidge and Doug Staggs
125. August 14, 2008 E-mail between Jane Feldman and Luis Toto
126. August 20, 2008 E-mail between Richard Coolidge and Chantell Taylor
127. August 28, 2008 E-mail between Richard Coolidge and Doug Staggs
128. October 14, 2008 E-mail between Luis Toro and Jane Feldman
129. October 14, 2008 Letter from Luis Toro to Jane Feldman
130. Colorado Laws
 - a. COLO. REV. STAT. § 1-13-101 et. seq.
 - b. COLO. REV. STAT. § 18-8-404
 - c. COLO. REV. STAT. § 18-8-405
 - d. COLO. REV. STAT. § 24-50101(3)(d)
 - e. 4 CCR 801, Rule 1-11
 - f. COLO. REV. STAT. § 16-5-101(3).
 - g. COLO. REV. STAT. § 24-6-203(3.5)
 - h. COLO. REV. STAT. § 24-6-203(3.7)
 - i. COLO. REV. STAT. §§ 24-18-101 *et seq.*
 - j. COLO. REV. STAT. § 25-1-114
COLO. REV. STAT. § 25-1-514 (state and local official gift ban)
 - k. COLO. REV. STAT. § 24-6-202
 - l. COLO. REV. STAT. §§ 24-6-203(2) and (3) (gift reporting)
 - m. COLO. REV. STAT. §§ 24-6-301 *et seq.* (lobbying registration and disclosures)
 - n. COLO. REV. STAT. §§ 24-18-112, 24-18-113
 - o. COLO. CONST. art. V, § 12
 - p. House Rule 49
 - q. Senate Rules 41 and 43 (ethics complaints and discipline)
 - r. COLO. REV. STAT. § 18-8-302 (criminal bribery)
 - s. COLO. REV. STAT. § 18-8-304 (soliciting unlawful compensation)
 - t. COLO. REV. STAT. § 18-8-303 (compensation for past official behavior)
 - u. COLO. REV. STAT. § 18-8-305 (trading in public office)
 - v. COLO. REV. STAT. § 18-8-308 (failure to disclose a conflict of interest)
 - w. 37-41-109 (criminal penalties for water conservation district officers for taking bribes)
 - x. COLO. CONST. art. IV, § 19;
 - y. COLO. CONST. art. 5, § 40
 - z. COLO. CONST. art. XII, §§ 6 and 7 (pre-Amendment 41 constitutional anticorruption provisions).
132. All pleadings before IEC and District Court.
133. Documents pertaining to Mike Coffman from Ethics Watch website.
134. All documents and other tangible items in the possession of the Colorado Independent Ethics Commission in connection with this Complaint.

135. All documents and other tangible items responsive to all Colorado Open Records Act requests submitted in connection with this Complaint.
136. All documents identified by Colorado Ethics Watch.
137. All documents and other tangible items produced in discovery in connection with this Complaint.
138. All documents and other tangible items identified by Michael Coffman.
139. All documents necessary for impeachment or rebuttal.
140. Mr. Coffman reserves the right to amend and supplement this exhibit list discovery continues.

Respectfully submitted this 13th day of February, 2009.

GREENBERG TRAUIG, LLP



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**ATTORNEYS FOR RESPONDENT
MICHAEL COFFMAN**


CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February, 2009 a true and correct copy of the foregoing Prehearing Statement and Exhibits was delivered via E-mail Transmission and U.S. Mail to:

Ms. Chantell Taylor
Mr. Luis Toro
Colorado Ethics Watch
1630 Welton Street, Suite 415
Denver, CO 80202

Ms. Jane Feldman
Colorado Independent Ethics Commission
633 17th Street, 13th Floor
Denver, Colorado 80202

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Karen Brock
Legal Assistant to Douglas J. Friednash and
Michael R. Davis