COLORADO DEPARTMENT OF LAW

Colorado Attorney General Investigative Hearings - Colorado Consumer Protection Act and Colorado Antitrust Act Statement of Basis, Specific Statutory Authority, and Purpose

4 CCR 904-2

The Attorney General's Authority to Promulgate Rules for Investigative Hearings

In the 1969 legislative session, the Colorado General Assembly passed the Colorado Consumer Protection Act, sections 6-1-101, *et seq.*, C.R.S. ("CCPA"). In the 1992 legislative session, the Colorado General Assembly passed the Colorado Antitrust Act, sections 6-4-101, *et seq.*, C.R.S. ("CAA").

The CCPA authorizes the Attorney General to "prescribe such forms and promulgate such rules as may be necessary to administer the provisions of" the CCPA. C.R.S. § 6-1-108(1). Similarly, the CAA provides that the Attorney General may "prescribe such forms and promulgate such rules as may reasonably be deemed to be necessary to administer the provisions" of the CAA. C.R.S. § 6-4-110(1)(b).

Purposes of the Rules

The Attorney General finds it necessary to finalize rules to aid in the efficient and fair administration of the investigative hearing process for matters involving the CCPA and the CAA. Regarding these investigative hearings, the CCPA authorizes the Attorney General or district attorneys to "issue subpoenas to require the attendance of witnesses or the production of documents, administer oaths, conduct hearings in aid of any investigation or inquiry" when they have "reasonable cause to believe that" there has been a violation of the CCPA. C.R.S. § 6-1-108(1). Similarly, the CAA authorizes the Attorney General to request reports and "[i]ssue subpoenas to require the attendance of witnesses or the production of relevant documents, administer oaths, conduct hearings in aid of an investigation or inquiry" if the Attorney General has "reasonable cause to believe" there has been a violation of the CAA or federal antitrust laws. C.R.S. § 6-4-110(1)(b).

An initial purpose of these rules is to articulate who may conduct investigative hearings on behalf of the Attorney General. The CCPA and CAA give sole authority and discretion to the Attorney General and the district attorneys to determine who may conduct investigative hearings.

A second purpose of the rules is to provide guidance on the confidential nature of these investigative hearings, pursuant to existing provisions found in the Colorado Open Records Act (CORA), C.R.S. §§ 24-72-101 *et al.,* the CCPA and the CAA. Pursuant to the exceptions found in CORA, the Attorney General has authority to

exempt its investigative records from open records requests. C.R.S. § 24-72-204(2)(a)(IX)(A).

In tandem with CORA, the CCPA confers discretion to the Attorney General to determine whether investigative records obtained under the CCPA may be deemed public records available for inspection by the general public. C.R.S. § 6-1-111(2). The CAA authorizes the Attorney General to disclose information obtained pursuant to an investigation under section 6-4-110 to any law enforcement agency or department of any governmental or public entity of Colorado or any other state or to the federal government so long as the receiving entity executes an agreement that information will remain confidential. C.R.S. § 6-4-110(4).

Pursuant to these confidentiality provisions, the Attorney General has authority to determine who may attend investigative hearings and to retain all documents, transcripts, and recordings related to these hearings to preserve the confidential nature of its investigations. The rules start from the premise that the Attorney General will exercise its authority to preserve the confidentiality of its investigations in all matters related to these investigative hearings. However, the Attorney General may permit representatives of other law enforcement agencies to attend investigative hearings and the Attorney General maintains the discretion to provide copies of recordings or transcripts of hearing to other state or federal law enforcement agencies.

A third purpose of the rules is to clarify that investigative hearings are not governed by the Colorado Rules of Civil Procedure. In drafting the CCPA, the legislature explicitly stated where the rules of civil procedure apply and where they do not apply. For example, C.R.S. § 6-1-108, "Subpoenas, Hearings, Rules," explicitly provides that service of investigative subpoenas "shall be made in the manner prescribed by law, or as provided by Rule 4 of the Colorado Rules of Civil Procedure." C.R.S. § 6-1-108(2*)*. C.R.S. § 6-1-110, "Restraining Orders, Injunctions, Assurances of Discontinuance," explicitly provides that the Attorney General may seek a temporary restraining order or injunction, "pursuant to the Colorado rules of civil procedure." C.R.S. § 6-1-110(1).

By comparison, C.R.S. § 6-1-108 describes the Attorney General's authority to "conduct hearings in aid of any investigation or inquiry," without reference to the rules of civil procedure. C.R.S. § 6-1-108(1). Similarly, the CAA, C.R.S. § 6-4-110 "Civil Discovery Request," explicitly references the Attorney General's authority to "enter a protective order as provided for in the Colorado rules of civil procedure," yet makes no reference to the rules of civil procedure in describing its authority to "conduct hearings in aid of an investigation or inquiry." *See* C.R.S. § 6-4-110. Section 6-4-110 does not mention the Colorado Rules at all until subpart (d), making clear Civil Discovery Requests and hearings are not under the Colorado Rules of Civil Procedure.

Finally, the rules specify that the Attorney General has the authority to compel an entity or organization to designate persons with knowledge of the subpoena topics, and whose testimony can bind the entity or organization, to testify at investigative hearings. This authority should be construed as analogous to the authority granted parties under C.R.C.P. 30(b)(6).

The Attorney General received public comments from two members of the public. One commenter, a local defense attorney who submitted his comments during the stakeholder meeting, raised several questions about the Attorney General's discretion in conducting investigative hearings. The Attorney General's discretion is built into the statutes that authorize the Attorney General to investigate. Indeed the CCPA and CAA are expansive in their descriptions of the Attorney General's authority to conduct investigative hearings. The Investigative Hearing Rules do not enlarge the Attorney General's authority and simply affirm the Attorney General's discretion to conduct investigative hearings, as set forth in the CCPA and CAA. The Rules are intended to provide certainty and transparency to the public and the individuals or entities participating in the investigative hearing process about that process.

One commentor asked whether conducting investigative hearings is the practice of law and, therefore, personnel designated by the Attorney General to conduct the hearings should be limited to licensed attorneys (Rule B). The CCPA and CAA do not state that only licensed attorneys may question witnesses and take testimony. Indeed, personnel such as investigators routinely interview witnesses in consumer protection cases and ask questions during investigative hearings. The commentor also suggested changing Rule B to allow the witness's counsel to ask questions during an investigative hearing. While the Attorney General agrees that it may be important for counsel to provide information during an investigation there are other ways in which counsel may do so, including through correspondence, written statement, or discussion at another time. Further, investigative hearings are not adversary proceedings and as noted above are not subject to the Rules of Civil Procedure. Instead, investigative hearings are intended to permit the Attorney General to learn information, develop facts, and preserve evidence in the context of a law enforcement function.

The commentor asked the Attorney General to consider whether counsel for a witness can bring their own staff, such as a paralegal, to an investigative hearing. The Attorney General believes Rule C, as written, is clear that it would allow counsel to bring in staff so long as they have the express consent of the Attorney General.

With respect to Rule E, the commenter questioned why the Attorney General would elect not to have an investigative hearing record transcribed and that doing so might suggest the Attorney General is hiding something. The Attorney General believes that there is no reason to make transcription or any method mandatory by rule. Further, there are a range of concerns that could inform the timing or decision

whether to record and transcribe an investigative hearing, so the Attorney General does not believe it is appropriate for the rule to require the hearing record be transcribed in all circumstances. The purpose of Rule E is to provide transparency to the public and witnesses about the investigative hearing process and the methods by which the testimony may be taken.

The commenter suggested that allowing counsel to object to form during an investigative hearing would help make a better record. Although the Attorney General has concerns about counsel using evidentiary objections to coach witnesses during an investigative hearing, the Attorney General ultimately elected to delete this provision that was included in the draft of Rule F discussed at the stakeholder meeting and did not include this provision in the proposed or final Rule F, to address the commenter's concern.

Finally, the commentor raised a concern that there is no time limit for the length of investigative hearings in the draft of Rule G. The Attorney General added language to Rule G such that it allows a hearing to continue for a "reasonable amount of time" and until the Attorney General specifies that it has ended.

Another member of the public submitted a written comment that inquired why the rules are necessary and what rights would be given up under the new system. She also requested a cost benefit analysis. The Investigative Hearing Rules do not create a new system or way in which the Attorney General conducts investigative hearings, nor do they take away any rights. Rather, the Investigative Hearing Rules are intended to aid in the efficient and fair administration of the investigative hearing process for matters involving the CCPA and the CAA. The rules are intended to provide certainty and transparency to the public and the individuals or entities participating in the investigative hearing process about that process. The cost benefit analysis prepared by the Attorney General was made part of the Public Hearing record as Exhibit 2.

<u>Similar Investigative Hearing Rules, Federal Agencies</u>

While the Attorney General has historically conducted investigative hearings without these rules, federal agencies with similar investigative powers have promulgated rules that address investigative hearings. **Federal Trade Commission (FTC):** *See 16 CFR § 2.7(f), Compulsory Process in Investigations (*addressing process for FTC investigative hearings, non-public nature of hearings, and limitations on attendance); *See 16 CFR § 2.9 Rights of Witnesses in Investigation* (addressing form of objections and proper decorum for FTC investigative hearings); **Consumer Financial Protection Bureau (CFPB):** *See 12 C.F.R § 1080.7, Investigational Hearings* (addressing who may conduct and who may attend CFPB hearings); *See 12 C.F.R § 1080.9, Rights of Witnesses in Investigations* (addressing form of objections and proper decorum for CFPB investigative hearings); *See 12 C.F.R § 1080.14, Confidential Treatment of Demand Material and Non-Public Nature*

of Investigations (describing the confidential nature of CFPB investigative materials and hearings). **Securities and Exchange Commission (SEC)**: *17 C.F.R. § 203.5 Non-public Formal Investigative Proceedings* (stating that all formal SEC investigative proceeding shall be non-public); *17 C.F.R. § 203.7 Rights of Witnesses* (addressing who may attend SEC investigative proceedings).