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Colorado Court of Appeals, Case No. 2023COA118 Judges Furman, Román and Fox District Court, Arapahoe County Case No. 22CV30927 Judge Elizabeth Beebe Volz	
Petitioner: KADEE RODRIGUEZ, City Clerk, in her official capacity as Records Custodian for City of Aurora, v. **Respondent:** THE SENTINEL COLORADO.	**▲COURT USE ONLY▲**
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BRIEF OF *AMICI CURIAE* COLORADO MUNICIPAL LEAGUE AND THE SPECIAL DISTRICT ASSOCIATION OF COLORADO IN SUPPORT OF KADEE RODRIGUEZ'S PETITION FOR WRIT OF CERTIORARI

CERTIFICATION

I hereby certify that this brief complies with C.A.R. 28(a)(2-3), C.A.R. 29, C.A.R. 32, and C.A.R 53, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d).

☑ It contains 3,062 words (does not exceed 3,150 words).

The brief complies with the content and form requirements set forth in C.A.R. 29.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

/s/ Robert D. Sheesley
Robert D. Sheesley, #47150

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

The Colorado Municipal League ("CML") and the Special District Association of Colorado ("SDA") respectfully submit this *Amicus Curiae* Brief in Support of Petitioner Kadee Rodriguez in her official capacity as the City Clerk of the City of Aurora.

IDENTITY OF *AMICI CURIAE* AND THEIR INTEREST IN THE CASE

CML, formed in 1923, is a non-profit, voluntary association of 270 of the 273 cities and towns located throughout Colorado, comprising nearly 99 percent of the total incorporated state population. CML's members include all 107 home rule municipalities, 162 of the 165 statutory municipalities, and the lone territorial charter city. This membership includes all municipalities with a population greater than 2,000.

The SDA is a Colorado non-profit, voluntary association established in 1975 to provide communication, research, training, support, and advocacy for its member special districts. Special districts in Colorado date back to the early mining camps, where they were organized by residents to muster resources within the community to secure essential services. Since that time, special districts have played a vital role in providing public infrastructure and services throughout the state. The SDA's membership consists of 2,611 of 3,661 special districts located throughout Colorado.

CML and the SDA will provide the Court with a statewide local government perspective on the issues raised in Ms. Rodriguez's Petition. The Court of Appeals' decision creates substantial uncertainty for thousands of local governing bodies regarding how they can effectively communicate with attorneys and for local government attorneys who must provide legal services to local governments in conformance with the Colorado Rules of Professional Conduct. Local governments appoint legal counsel for general legal advice or as needed to handle specific legal matters. Local governments rely heavily on the advice and assistance of attorneys to ensure compliance with federal, state, and local laws, to engage in litigation to assert or defend the interests of the local government and the public, and to evaluate the scope and extent of authority and potential liability in the making of local laws.

This brief will assist the Court by exploring how governing bodies make decisions and communicate with their legal counsel as constituent parts of an organizational client, the role of the local government attorney, and the nature of public meeting agendas. This brief will also seek to identify the harms to the public interest that would result from the Court of Appeals' decision in this matter.

SUMMARY OF ARGUMENT

CML and the SDA urge the Court to grant Ms. Rodriguez's Petition to address novel questions of critical importance that will impact thousands of Colorado's local governments and their ability to enjoy the full benefit of the attorney-client relationship and the attorney-client privilege. These questions also implicate the ability of local government attorneys to fully perform their professional responsibilities if constrained in communicating with their clients' governing bodies. The Court of Appeals' construction of Colorado's Open Meetings Law ("OML") improperly limits attorney-client communications in a manner that harms the public's interest in a local government receiving effective legal advice and the attorney-client privilege.

CML and the SDA further urge the Court to grant the Petition to address a novel question regarding the ability of local governments to cure violations of the OML, including minor and technical errors that do not undermine the intent of the statute. By ensuring that the goals of the OML are met, a cure opportunity prevents public business from being delayed or invalidated and reduces cost burdens of responding to such claims.

ARGUMENT

I. The Court of Appeals' decision undermines the ability of Colorado's local governments to communicate with and give certain direction to their attorneys in an appropriate confidential setting.

The important questions presented in the Petition will impact the ability of thousands of local governments to consult with their attorneys in the pursuit of public business. The Court of Appeals' strict and mechanistic view of the OML, C.R.S. § 24-6-402, and specifically the executive session authorization for local public bodies to confer with attorneys, C.R.S. § 24-6-402(4)(b), singles out local governments and restricts their access to free and open communication with legal counsel. Without correction of the Court of Appeals' published decision, local governing bodies will be uncertain, at best, in their ability to confer with counsel and enjoy the full benefits of the attorney-client relationship, to the disadvantage of the public.

The OML acknowledges that a governing body's consultation with an attorney as an adjunct to policymaking is in the interest of both a local government and the public. The OML treats all "local public bodies" with the same opportunity to confer privately with their attorneys in confidential executive sessions "for the purposes of receiving legal advice on specific legal questions." C.R.S. § 24-6-402(4)(b). Although the OML generally prohibits the adoption of positions or formal

action in executive sessions, the OML does not attempt to define the relationship or manner of communication between a local public body and its attorney. Notably, other statutorily enumerated grounds for executive session allow for deliberation and even some form of pre-decisional direction. *See* C.R.S. § 24-6-402(4)(e) (allowing a body to take positions in executive sessions relative to negotiated matters, to develop strategy for negotiations, and to instruct negotiators).

While it may complicate consultation with an attorney, the OML should not be understood to equate a body's instruction or direction to its attorney regarding privileged matters with the adoption of a position or formal action that is not permitted in executive session. Local governments appoint attorneys for the organization and may appoint special counsel as needed, as is the case in the City of Aurora. *See* Aurora, Colo., Home Rule Charter art. 10, §§ 10-1, 10-3*; see also* C.R.S. § 31-4-304 (requiring statutory town boards to appoint town attorney); C.R.S. § 31-1-1001(1)(i) (providing for the appointment of attorneys by a special district governing body). As an organizational client, a local government acts and operates through its officers (e.g., elected bodies or mayors in some governments), employees, and other constituents. *See* Colo. R.P.C. 1.13, Comment 1. To that end, as in Aurora, the municipal attorney is "the legal representative of the city" who is responsible for advising the council and city officials. *See* Aurora, Colo., Home Rule

Charter art. 10, § 10-1. The professional responsibilities of a local government's attorney are owed to the client organization, but the attorney receives direction through the organization's constituents. *See* Colo. R.P.C. 1.13(a).

A governing body, as in Aurora and most local governments in Colorado, acts only by achieving consensus in some form of a majority – not through the individual desires of an individual member. A local government attorney, bound to abide by the client's decisions concerning the objectives of representation, must "consult with the client as to the means by which they are to be pursued." Colo. R.P.C. 1.2(a). A local government attorney cannot learn their organizational client's objectives in a protected manner unless the constituent governing body can provide some indication of their collective desire, objective, or intent. Giving and receiving that direction, while preserving the attorney-client privilege, is a significant component of the provision of legal advice.

Government entities are entitled to confidentiality in their communications with attorneys. *See Affiniti Colo., LLC v. Kissinger & Fellman, P.C.*, 461 P.3d 606, 614 (Colo. 2019) (citing *All. Constr. Sols., Inc. v. Dep't of Corr.*, 54 P.3d 861, 865-70 (Colo. 2002) and *Ross v. City of Memphis*, 423 F.3d 596, 601 (6th Cir. 2005)). The privilege allows a government to receive legal advice, comply with law, and communicate through multiple constituents who operate the client. *See Denver Post*

Corp. v. Univ. of Colo., 739 P.2d 874, 880 (Colo. App. 1987) (applying rationale from *Upjohn Co. v. United States*, 449 U.S. 383 (1981) to protect certain communications between state university counsel and state university employees). A government client and attorney must be able to rely with certainty on the protection, otherwise, the privilege "is little better than no privilege at all." *See Upjohn*, 449 U.S. at 393.

The attorney-client privilege serves to encourage a person or organization to obtain legal assistance or advice in a timely manner. *See Nat'l Farmers Union Prop. & Cas. Co. v. Dist. Court for Denver*, 718 P.2d 1044, 1047 (Colo. 1986). "[W]ithout the protection the privilege provides to such confidential communications, 'clients may be reluctant or unwilling to seek legal advice or to confide fully in their attorney.'" *Id*. (quoting *Wesp v. Everson*, 33 P.3d 191, 196 (Colo. 2001)). The open exchange of information between attorney and client facilitates a full understanding of the facts and, in turn, an attorney's effective representation of their client. This confidential exchange of information is so imperative that this Court has recognized that "the right of parties within our justice system to consult professional legal experts is rendered meaningless unless communications between attorney and client are ordinarily protected from later disclosure without client consent." *Wesp,* 33 P.3d at 196.

Despite the importance of the privilege and its worthy purposes, the Court of Appeals' decision could have the effect of requiring that a local government attorney learn the confidential desires or direction of a governing body in a public setting. That construction of the OML is not consistent with the nature of local governing bodies as organizational clients. Especially when dealing with governing bodies comprised of diverse individuals, a lawyer's communication may need to be tailored to ensure that the client's questions (as framed by varying constituent officials) are fully answered and its direction correctly heard. For example, if an attorney answers legal questions relative to a particular matter, they should be permitted to recite their understanding of confidential client direction and ask in some form, even by a lack of objection, that the understanding is correct. As another example, if a local governing body is receiving legal advice concerning potential affirmative litigation or the legal ramifications of a future policy decision, a lawyer may identify a need for additional research or investigation and ask the body for permission to conduct the research at the local government's expense. The OML cannot reasonably be understood to mean that such direction be made in public or that a future decision that is responsive to legal advice is a "rubber-stamp."

Meaningfully consulting an attorney in a manner that conforms to the Court of Appeals' understanding of the OML is likely to be time-consuming, burdensome,

and ineffective. One-on-one communications with individual officials or relying on written memoranda are not substitutes for direct, interactive communication with the entire body. Limiting local government attorneys in this manner may prevent them from fulfilling their professional responsibilities to their government clients. The result would be an increased risk of costly litigation, injury to the public and public employees, damages awards funded by taxpayers, non-compliance with the law, and a loss of public trust, none of which is in the public interest.

II. The Court of Appeals' decision regarding a waiver of the attorney-client privilege has statewide importance to local governments that provide agendas and materials to promote transparency.

CML and the SDA urge the Court to grant the Petition to ensure that broad waivers of a local government body's attorney-client privilege do not result from unilateral or inadvertent action by its officials or staff. The organizational nature of a local government and the way it must operate under the OML requires special considerations when examining what constitutes a waiver of the attorney-client privilege. Constituents of the client organization, whether elected officials or staff, are given broad access to privileged information in the course of their official duties but are not endowed with authority to act individually to waive the privilege on behalf of the local government.

As it relates to the Petition, the subsequent inclusion of a document in a public meeting packet, without more, should not be construed to operate as a waiver of the attorney-client privilege. Local government meeting agendas and supporting materials are compiled from many sources and are generally not reviewed by a governing body before publication. Similarly, agenda items and supporting materials do not represent a municipality's position or view on a particular item until approval of the item by the body. Constituents of the client organization, whether elected officials or staff, are given broad access to privileged information in the course of their official duties but are not endowed with authority to act individually to waive the privilege on behalf of the local government.

Moreover, meeting materials often include generic descriptions of the subject matter of prior discussions, including those discussions in a confidential setting. The OML itself requires some description of the detail of the matter discussed in executive session, without compromising the purpose, and the OML has been construed to require at least a description of the subject matter of attorney conferences in executive session without waiving the attorney-client privilege. C.R.S. § 24-6-402(4); *Guy v. Whitsitt*, 469 P.3d 546, 553 (Colo. App. 2020). Clients do not waive privilege by merely disclosing the subject discussed; rather, the client

must disclose the communication with the attorney itself. *See id.* at 551-52 (cited references omitted).

The result of the Court of Appeals' decision is manifestly unjust and against the public's interest. Local governments provide agendas and supporting documentation to promote transparency and inform the public. Finding an implied waiver of the attorney-client privilege based on information included in meeting materials undermines transparency and would discourage openness.

III. The Court of Appeals' decision disincentivizes local governments from correcting mistakes in the implementation of the Open Meetings Law and penalizes them for errors that do not undermine transparency.

Due to its complexity and vagueness, the OML may be incorrectly implemented without compromising the law's goals of transparency. The Court of Appeals' decision would preclude the opportunity to correct such errors in many circumstances and could cause local governments to incur substantial penalties ranging from attorney's fees to the potential disclosure of privileged or confidential information. Moreover, the decision would enable a plaintiff to determine whether a cure opportunity exists based on the remedy they seek. By allowing the appropriate application of the cure standards established in *Colorado Off-Highway Vehicle Coalition v. Colorado Board of Parks and Outdoor Recreation*, 292 P.3d 1132 (Colo. App. 2012), the Court could ensure that the goals of the OML are furthered

and promote increased compliance with the law without opening local governments to penalty.

The OML authorizes an award of costs and attorney fees to a prevailing citizen "[i]n any action in which the court finds a violation of this section," which section includes standards addressing public meeting requirements, the timing and content or meeting notices, executive sessions, and more. C.R.S. § 24-6-402(9)(b). Under the Court of Appeals' reasoning, if a lawsuit does not seek to invalidate a body's action under the OML's other remedial provisions and seeks only the release of information or a finding of a violation, a party could seek to challenge an error and obtain a fee award. The public's interest in transparency is not served by such a mechanistic application of the OML.

The OML should be construed in a manner that promotes both compliance with the OML and the correction of mistakes in its application, without the potential for reprisal for acknowledging the error. Consider the following scenarios in which, under the Court of Appeals' reasoning, a local government would not be entitled to argue that it cured an alleged violation if a plaintiff did not seek to invalidate a decision:

- A local government board enters an executive session properly but states the wrong subsection of the statute. *See* C.R.S. § 24-6-402(4) (requiring a

local public body to announce the executive session topic with "a specific citation to this subsection (4) authorizing the body" to hold the session). Even though the public is fully aware of the subject and nature of the executive session, the local government later clarifies the session in a public meeting.

- An executive session announcement fails to include sufficient information, despite the local government's good faith effort to comply. *See id.* (requiring the announcement to include "identification of the particular matter to be discussed in as much detail as possible without compromising the purpose" of the session). The body later adds more information to provide more information to the public.
- A local government posts notice of a meeting 23.75 hours before the meeting and begins the meeting before discovering the error. *See* C.R.S. § 24-6-402(2)(c)(III) (providing that posting notice at least 24 hours prior to the meeting is "full and timely notice" under the OML). The meeting is adjourned, and any business conducted prior to adjournment is repeated in full at a later meeting.

In these cases, without a reasonable opportunity to cure a mistake, the local government could be subject to the potential release of attorney-client privileged information, or confidential information, and an attorney fee award.

The OML can be construed in a manner that also respects the risk to taxpayer funds and the efficient conduct of public business. The Court of Appeals' decision creates an artificial distinction that allows a plaintiff to determine whether a cure is possible based on the remedy sought. Further, because self-correction could have the effect of drawing attention to the error and inviting legal claims, the decision disincentivizes local governments from working to ensure transparency and recognize mistakes. CML and the SDA urge the Court to grant the Petition to consider a cure remedy as a reasonable mechanism to implement the OML.

CONCLUSION

CML and the SDA urge the Court to grant Ms. Rodriguez's Petition to preserve the ability of local governing bodies to fulfill their duties to the public with the full support and guidance of legal counsel. Communications with counsel by a local governing body in executive session that constitute part of an attorney-client communication should not be construed as formal action or taking a position in violation of the OML, even if such communications precede or influence a later formal action. Local governments must be empowered to pursue the full benefit of

the attorney-client relationship, in the furtherance of the public interest, and then explain their later decision-making without endangering the attorney-client privilege or incurring statutory penalties. Similarly, local government attorneys must be permitted to communicate with their clients in a manner that allows them to comply with their professional obligations. Finally, the OML should be used to promote transparency, not to penalize local governments for errors when a reasonable cure is available that upholds the law's goals.

Dated this January 31, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on this January 31, 2024, I filed the foregoing **BRIEF OF *AMICI CURIAE* COLORADO MUNICIPAL LEAGUE AND THE SPECIAL DISTRICT ASSOCIATION OF COLORADO IN SUPPORT OF PETITIONER KADEE RODRIGUEZ** via Colorado Courts E-Filing, which will send a true and correct copy to the following:

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