

# **Conversing on Public Business Via Text Messaging: Ethical and Legal Tips for Municipal Attorneys**

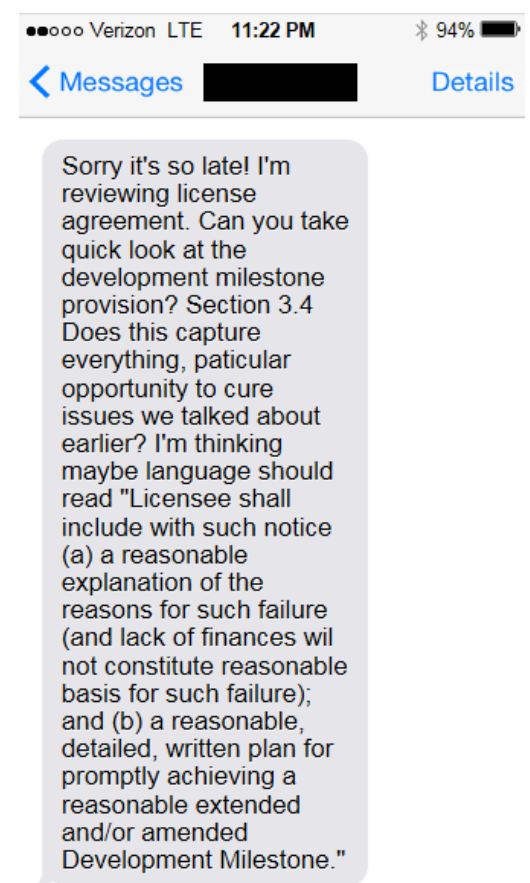
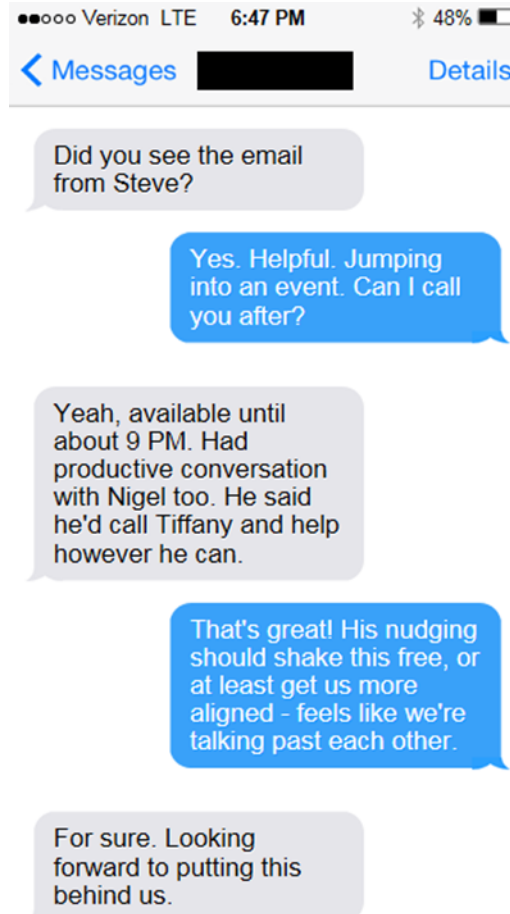
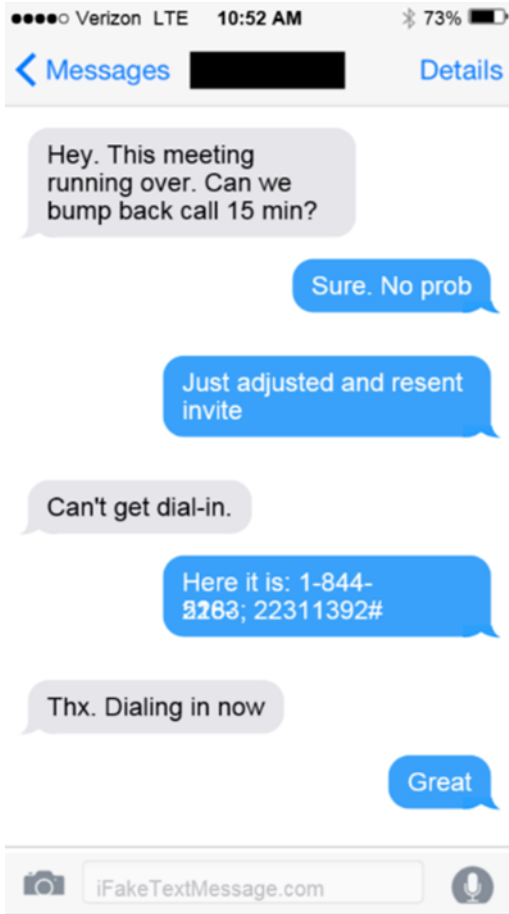
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# Any of These Look Familiar?



# **Texting with Municipal Clients: Program Outline**

## **Colorado Rules of Professional Conduct**

- Rule 1.1 – Competence
- Rule 1.4 – Communication
- Rule 1.6 – Confidentiality of Information
- Rule 1.16 – Declining or Terminating Representation
- Rule 5.1 – Responsibilities of a Partner or Supervisory Lawyer
- Rule 5.3 – Responsibilities Regarding Nonlawyer Assistants

## **Regulation of text messaging under:**

- Colorado Open Records Act (“CORA”)
- Public records retention and archiving laws
- Open Meetings Law

## **Practical Considerations**

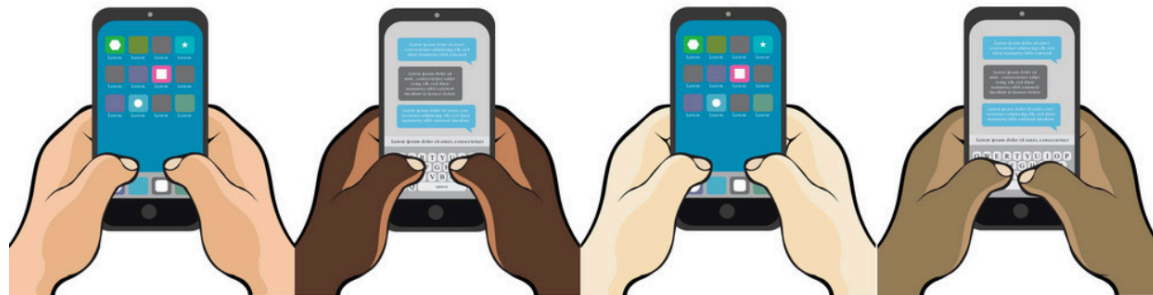
- Timekeeping
- Boundaries
- Plan of Action



# Rules of Professional Conduct

Which sets of rules apply to text messaging:

- (1) Client–Lawyer Relationship
- (2) Law Firms and Associations (both outside counsel and in-house legal departments!)



# In the real world, clients text!

## Practical Questions:

- Am I allowed to text with my clients? Do I have to if I don't want to?
- Can I give legal advice over text? Even if I can, I shouldn't – right?
- What if my texts get forwarded?
- How do the Colorado Rules of Professional Conduct interact with texting?
- But I definitely should not use emojis – right? I'm a lawyer after all!



# Colorado Professional Rules of Conduct

## Rule 1.1 - Competence

- “A lawyer shall provide **competent representation** to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

## Rule 1.1, cmt. [8] – Maintaining Competence

- “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **and changes in communications and other relevant technologies**, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.”

## Application

- The upshot: You have a duty to maintain technological competence
- Ask yourself: How will I advise my clients about the benefits and risk of texting with me?



# Colorado Professional Rules of Conduct

## Rule 1.4 - Communication

- “A lawyer shall . . . **reasonably consult** with the client about the means by which the clients objectives are to be accomplished; keep the client **reasonably informed** about the status of the matter; [and] **promptly comply with reasonable requests** for information,” among other duties.

## Rule 1.4, cmt. [4] – Communicating with Client

- “When a client makes a reasonable request for information, [the rule] requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, **acknowledge receipt of the request and advise the client when a response may be expected**. A lawyer should promptly respond to or acknowledge client communications.”

## Application

- The upshot: You have a duty to communicate with your clients, no matter the method, but that duty extends only to reasonable communications
- Ask yourself: How will I (not whether I will) respond if my clients text me?



# Colorado Professional Rules of Conduct

## Rule 1.6 – Confidentiality of Information

- “A lawyer **shall not reveal information** relating to the representation of a client unless the client gives informed consent.”
- “A lawyer **shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to,** information relating to the representation of a client.”

## Application

- The upshot: You have a duty to safeguard communications with your clients because they are privileged and confidential
- Ask yourself: Am I using best practices to keep my cell phone locked and to keep my messaging apps secure?
- Ask yourself: Do my clients fully appreciate that our texts are privileged and confidential communications?





# Colorado Professional Rules of Conduct

## Rule 1.16 – Declining or Terminating Representation

- “Upon termination of representation, a **lawyer shall take steps to the extent reasonably practicable to protect a client’s interests**, such as giving reasonable notice to the client, allowing time for employment of other counsel, [and] **surrendering papers** and property to which the client is entitled. . . . The lawyer may retain papers relating to the client to the extent permitted by other law.”

## Rule 1.16A – Client File Retention

- “A lawyer in private practice **shall retain a client’s files** respecting a matter unless:  
. . . .”

## Application

- The upshot: You have a duty to create, maintain, and retain a file for each of your clients, whether physically or electronically
- Ask yourself: How am I going to create a record of texts that should be preserved in the client file?



# Colorado Professional Rules of Conduct

## Rule 5.1 – Responsibilities of a Partner or Supervisory Lawyer

- “A lawyer having direct supervisory authority over another lawyer **shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.**”

## Rule 5.3 – Responsibilities Regarding Nonlawyer Assistants

- “A lawyer having direct supervisory authority over [a] non-lawyer **shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.**”

## Application

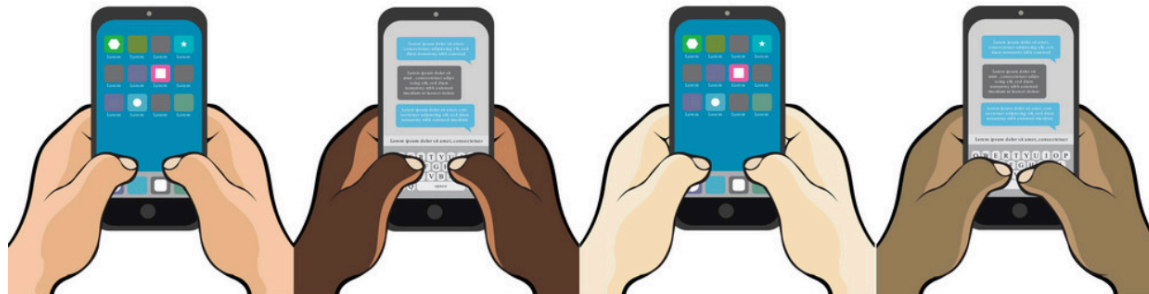
- The upshot: You are responsible for the ethical conduct of the lawyers and non-lawyers you supervise
- Ask yourself: Is my whole team on the same page when it comes to texting with clients?



# Legal Tips for Municipal Attorneys

How text messaging may be regulated under:

- (1) Colorado Open Records Act (“CORA”),
- (2) Public records retention and archiving laws,
- (3) Open Meetings Law



# In the real world, clients text!

## Practical Questions:

- What type of text messages are subject to CORA?
- How do we manage or keep track of texts?
- Is there a duty to retain texts? If so, how long?
- What about apps that automatically delete messages?
- How should one produce text messages in response to a CORA request?
- When can texting run afoul of the Open Meetings Law?



# Colorado Open Records Act (CORA)

➤ Text messages seem to fit within definitions under CORA

**"Writings"** defined as: all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials, regardless of physical form or characteristics.

**"Writings"** includes digitally stored data, including without limitation electronic mail messages.

**"Correspondence"** means a communication sent to or received by one or more specifically identified individuals and that is or can be produced in written form, including, without limitation, communications sent via:

U.S. mail;  
private courier;  
electronic mail.

**"Public records"** defined as all writings:

- (1) made, maintained, or kept,
  - (2) for use in the exercise of functions required or authorized by law, or involving the receipt/expenditure of public funds.
- (C.R.S. 24-72-202)



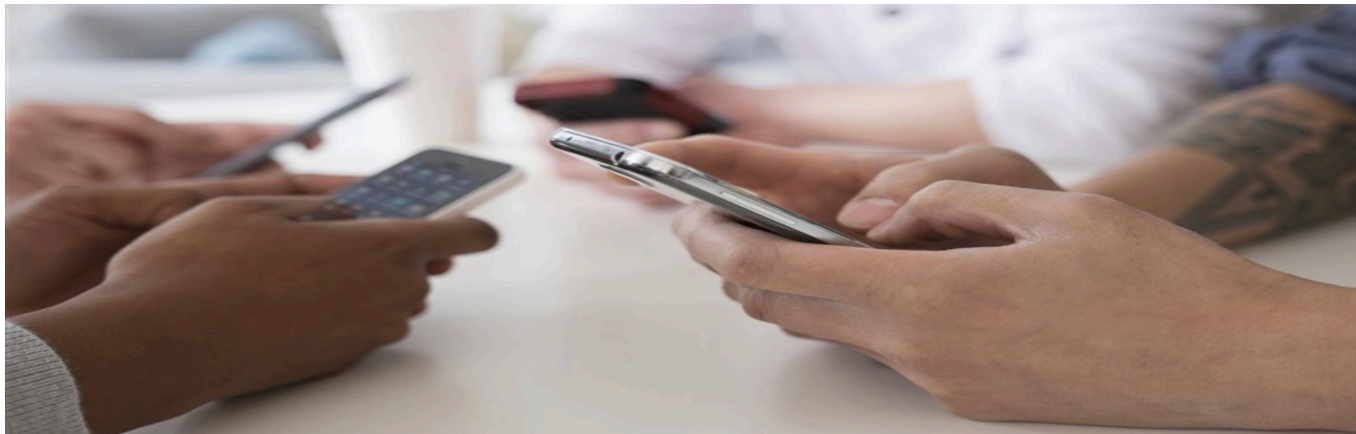
# What text messages may be “public records” under CORA?

- (1) Messages sent or received by a public official, **AND**
- (2) Where public business is discussed

- The device or account used to text is irrelevant!
- Texting personal matters on a government-issued cell phone doesn't make it an open record
- Texting public business on a private cell phone doesn't shield you from disclosure

**When considering whether a text is a “public record” subject to disclosure under CORA, ask:**

- (1) who made, maintained or kept the requested record; and**
- (2) why they did so**



## What text messages may be “public records” under CORA?

- ❖ “It is obvious that if any high-ranking government executive may ‘privatize’ his conduct of public business by establishing a private account for dealing with private providers of communications technologies, it would allow government officials to unilaterally create a vast and unacceptable ‘loophole’ in the requirements of CORA. (*Denver Post Corp. v Ritter*, 255 P.3d 1083 (2011)).
- ❖ “The simple possession, creation or receipt of an email record by a public official or employee is not dispositive as to whether” it is a public record... The inquiry is content-driven and the communication at issue must be coupled with the performance of public functions.” (*Denver Pub. Co. v Board of County Com’rs of County of Arapahoe*, 121 P.3d 190 (2005)).



# Privileged Text Messages

- SHALL deny “privileged information” from open records request (CRS 24-72-204)
- **Attorney client communications:**
  - Communication between the client and attorney made for the purpose of securing legal advice made with the intent that it remain confidential, and not made in the presence of a third party to whom the privilege does not extend.
- Who is our client?
  - Mayor, City Council, Town Board members
  - An individual of *sufficient authority*:
    - officers or agents who play a substantial role in directing action in response to legal advice, or
    - lower level employees where following order to obtain legal advice from those with authority.
- **Deliberative process privilege:**
  - Purpose is to protect frank exchange of ideas and opinions critical to the government's decision-making process and where disclosure would discourage such discussion in the future.
  - Includes pre-decisional and deliberative material where disclosure would likely adversely affect purposes of the privilege and stifle frank communication within an agency.





# Work product not a public record

- **“Work product”** includes all intra- or inter-agency advisory or deliberative materials assembled for the benefit of elected officials, which express an opinion or are deliberative in nature, and are communicated for purpose of assisting elected officials in reaching a decision within the scope of their authority.
  - Examples: Notes and memoranda that serve as background information for such decisions; Preliminary drafts and discussion copies of documents that express a decision by an elected official. (C.R.S. 24-72-202)
- **Work product** does not include: Any final version of a document that expresses a final decision by an elected official.
- Other Correspondence by elected officials that are not public records:  
A communication which a constituent expects is confidential or relating to a personal and private matter.



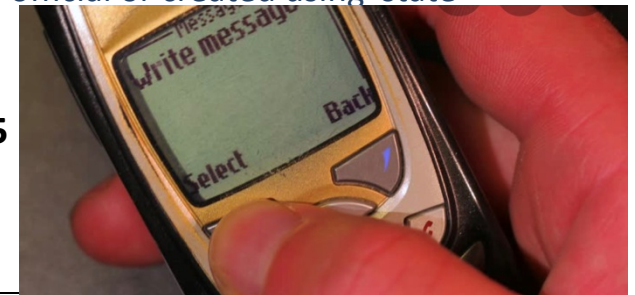
# CRS 24-72-204.5 - Adoption of electronic mail policy

- (1) On or before July 1, 1997, the political subdivision that operates or maintains an electronic mail communications system shall adopt a written policy on any monitoring of electronic mail communications and the circumstances under which it will be conducted.
- (2) The policy shall include a statement that correspondence of the employee in the form of electronic mail may be a public record under the public records law and may be subject to public inspection.

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Senator Wells, sponsor, explained these amendments to CORA:

- Designed to treat e-mail the same way facsimiles and postal mail were treated under the original CORA provisions.
- Not intended to extend to “personal information,” including “facts about lives” that inherently convey an “expectation of confidentiality.”
- The inquiry into whether or not e-mail messages are public records must be a content-drive inquiry. Only records made, maintained or kept in the performance of official duties (related to the public function) are subject to disclosure.
- “Simply because an email message was produced by an elected official or created using ‘state equipment’ does not make it a public record.”



- ❖ **Interesting to note that email became widely used around 1995**
- ❖ **While Text messages became commonplace around 2002...**



# What about Sexting?



## ***Denver Pub. Co. v Board of County Com'rs of County of Arapahoe, 121 P.3d 190 (2005)***

- Sexually explicit and romantic emails between county recorder and assistant chief deputy were not “public records” within the scope of mandatory disclosure provisions of CORA.
  - Messages were not used in the performance of public functions or involve the receipt of public funds.
  - A message sent in furtherance of a personal relationship does not fall within the definition.
  - The fact that a public employee sent or received a message while using publicly owned equipment is insufficient to make the message a “public record.”
- Employees had a reasonable expectation that the public disclosure of such highly personal and sensitive information would be limited.
- Not only would we “discourage public service, we would create an arena of gossip and scandal instead of facilitating a forum of open and frank discussion about issues concerning public officials and the citizenry they serve” citing *Wick Communications Co. v Montrose Bd. of County Comm'rs, 81 P.3d 360 (2003)*
- Private communications may be redacted and excluded, where public functions are also addressed.



# Records Retention and Archiving

## State Archives Statute:

- “Permanent records are maintained due to the legal, historical or administrative value or significance of the record.” (C.R.S. 24-80-102)
- Those records determined to be of no legal, administrative or historical value shall be disposed of by the custodian. (C.R.S. 24-80-103)

According to its Preface, “**Colorado Municipal Records Retention Schedule** is intended to provide a comprehensive records retention schedule for most records typically kept by” Colorado municipalities.

- Text messages are not mentioned in retention schedule; most cities and towns don’t address texts.

However, State Archives Statute and Retention Schedule are content based:

- Makes clear that public records are to be retained for certain specified periods based on their content – not the format of the record.
- If the content of a text message applies, is it subject to retention? (and should not be deleted?)

*No record may be destroyed under this Retention Schedule if it is pertinent to any current, pending or anticipated investigation, audit or legal proceeding. **The minimum retention periods specified in this schedule apply to the information contained within the record copy, regardless of the physical format of the record copy (paper, microfilm, electronic).** Each municipality must decide on the physical format for each type of record, ensuring authenticity, readability and accessibility for the entire retention period. **Duplicate Copies**: Retain duplicated copies until no longer needed but not longer than the record copy.*



## Following sections of retention schedule could apply to a content-based test:

### **40.100 CORRESPONDENCE AND GENERAL DOCUMENTATION**

*Correspondence* is a written communication that is sent or received via the U.S. mail, private courier, facsimile transmission or electronic mail, including letters, postcards, memoranda, notes, telecommunications and any other form of written communications. The term *general documentation* is intended to cover a wide variety of records created in the normal course of business.

#### **A. Enduring Long-Term Value**

Documentation or correspondence, including e-mail messages, with lasting long-term administrative, policy, legal, fiscal, historical or research value; records that relate to policy issues and actions or activities in which an important precedent is set; records of historic events; and other similar records and documentation.

Retention: Permanent

#### **B. Routine Value**

Routing operating documentation or correspondence with limited administrative, legal, fiscal, historical, informational or statistical value. Includes routine e-mail messages, letters or memoranda, reading or chronological files that contain duplicates of memos or letters also filed elsewhere, routine requests for information, transmittal documents, etc.

Retention: 2 years

#### **C. Transitory Value**

General documentation or correspondence of extremely short-term value, including advertisements, drafts and worksheets, desk notes, copies of materials circulated for informational "read only" purposes, other records, including e-mail messages, with preliminary or short-term informational value.

Retention: Until material has been read



## Following sections of retention schedule could apply to a content-based test:

### **40.350 WORKSHEETS, DRAFTS AND OTHER PRELIMINARY WORKING MATERIAL**

Documents such as rough notes, calculations or drafts assembled or created and used to prepare or analyze other documents; records of a preliminary or working nature which do not represent significant steps in the preparation of the final version of documents; draft or working material relating to a matter that is never completed; includes informal notes, preliminary drafts of letters, memoranda, reports, computer or printer output used to verify information entered into a computer and not considered to be a final copy, etc.

Retention: Until no longer needed

### **80.030 LEGAL COMMUNICATIONS**

Communications and legal advisory opinions written by legal counsel to give advice regarding the legality or legal consequences of various courses of action and to present the basis and rationale for legal recommendations.

#### ***A. Enduring Long-Term Value***

Legal counsel communications that have long-term administrative, policy, legal, fiscal, historical, informational, reference or research value.

Retention: Permanent

#### ***B. Routine Value***

Routine legal counsel communications that contain no long-term significant administrative policy, legal, fiscal, historical, informational, reference or research value.

Retention: 2 years, then evaluate prior to destruction to determine that there is no further value



## APPENDIX A

### NON-RECORDS

The following types of administrative materials have no public record retention value and may be disposed of as soon as they have served their purpose at the discretion of the custodian:

1. **Catalogs, trade journals and other printed materials** received from other offices, commercial firms or private institutions, which require no action and are not needed for documentary purposes.
2. **Informational or extra copies** of correspondence, completed forms, bulletins, newsletters, etc., prepared for reference and information distribution.
3. **Letters of transmittal** that do not add any information to the transmitted materials.
4. **Miscellaneous memoranda or notices** that do not relate to the functional responsibility of the municipality, such as notices of community affairs, employee meetings, holidays, etc.
5. **Preliminary drafts** of letters, memoranda, reports, worksheets and informal notes that do not represent significant basic steps in the preparation of record documents.
6. **Routing slips, sheets, post-it notes or memos** used to direct the distribution of documents.
7. **Outdated or superseded stocks of publications** kept for supply and hand-out purposes.
8. **Telephone messages** that convey nonpolicy informational messages.
9. **Library or museum material** acquired for reference or exhibition purposes.
10. **Identical duplicate copies** of records.
11. **Notes, tapes or recordings** that have been transcribed.
12. **Temporary or transitory material** with little or no bearing on decision-making.
13. **Training material** from conferences, workshops or other types of external training opportunities.
14. **Unused blank forms** that are obsolete.



## What about self-deleting messaging apps? (eg: Signal and Confide)

- Retention schedule does not address these (most states do not)
- What is the retention policy, if messages automatically delete?
  - Is this similar to shredding letters, or permanently deleting emails?
- According to an October 2019 Denver Post article, at least half (50%) of CO state legislators use either Signal or Confide.
  - Many other public officials, including political staffers, use these apps.
  - Rep. Chris Hansen admitted to using Confide “sparingly” and acknowledged the “technology is changing faster than the statutory framework. It is something we need to collectively discuss.”
- CORA does not address the use of such communications by elected officials and public employees.





# Open Meetings Law (C.R.S. 24-6-402)

- Meetings of Council, boards or commissions must be open to the public, and preceded by a full and timely notice – which could not be accomplished with a **group text**.
- "**Meeting**" defined as any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication.
  - Does not apply to chance meeting or social gathering where discussion of public business is not central purpose.
- A **meeting** is part of the policy-making process when the meeting is held for the purpose of discussing or undertaking a rule, regulation, ordinance, or formal action.
- "**Public business**" means a public body's policy-making functions, discussing or undertaking a rule, regulation, ordinance, or formal action of the public body.
- "If elected officials use e-mail to discuss pending legislation or other public business among themselves, the e-mail shall be subject to the requirements of this section." (C.R.S. 24-6-402)
- **What about members texting during a regular City Council meeting?**
  - With each other about issues listed on the agenda (instead of for all to hear)?
  - With staff?
  - With developers/applicants/lobbyists?



## How are other States and municipalities addressing these issues?

- Some cities in various states have outright banned, limited or discouraged City Council members from texting or using cell phones during meetings.
- Some states and cities have tried to ban the use of self-deleting texting apps for public business.
- Recent updates to the Texas Open Records Act:
  - Requires public officials to preserve personal-device text messages that concern public business for at least 2 years, or transfer them to an official government account.
  - Makes it clear that these records are subject to the retention schedules.
  - Some have opined that the new law should effectively outlaw the use of private-messaging apps for official government business, but concede that it will come down to how a particular government entity embraces or implements the law.



## How are other States and municipalities addressing these issues?

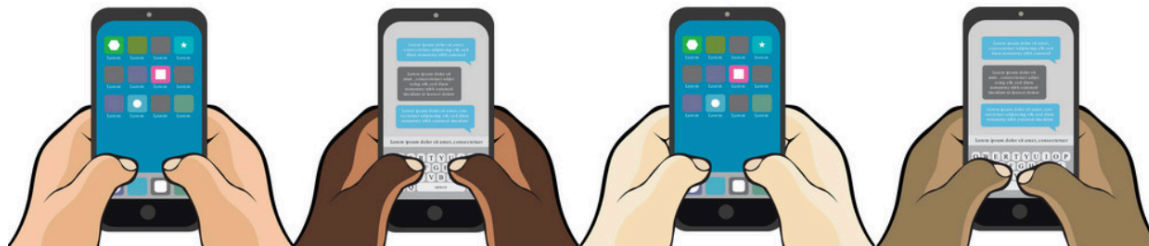
- A record advocacy group in 2018 sued Missouri Gov. Eric Greitens, asking a judge to order him and his staff to stop using the auto-delete app Confide, saying it violates the state's public records law.
  - A judge denied the request, partly because of a lack of evidence that the staff had used the apps for official government business.
  - A circuit court judge later ruled the governor had not violated the law, concluding the apps were like a phone call, which exists only for a moment.
  - Efforts by some lawmakers to ban the apps were unsuccessful.
- In 2017, White House Press Secretary Sean Spicer, advised staff that using apps that automatically delete messages was a violation of the Presidential Records Act. In response, the House Oversight Committee issued a letter to the Trump administration warning that apps such as Signal and WhatsApp could circumvent federal record-keeping and transparency laws.
- In 2018, governor of Kansas signed an executive order that required employees in the governor's office to use official email accounts to conduct official state business.



# Practical Considerations

Some other things to keep in mind:

- (1) Timekeeping
- (2) Boundaries
- (3) Plan of Action



## **Timekeeping**

- If you have to track your time, consider how you're going to capture reading and responding to text messages – it's easy to lose sense of time because texting is often on the go or during/between other things

## **Boundaries**

- Text is great – it's convenient, fast, and cuts through email clutter. Also, texts usually get seen and get a response. In addition, voicemail feels cumbersome to retrieve and texting is sometimes less stressful than a phone call. Sometimes we want to keep it off email (!!)
- The challenge with text – it's 24/7 and feels less intrusive than a call to the sender

## **Make a Plan of Action (Personal or More Formal)**

- Think about how to incorporate a conversation about texting into annual trainings and into new staff/new councilmember trainings. If needed, establish a clear protocol to set expectations: “Email and my direct office line are always the best ways to reach me, but here's my cell to call or text if it's urgent”)
- Create your own template response: “Thanks for this! Moving this over to email – just sent so check your inbox and call or email me back” or “Thx! Calling you!!”)



# Thank you!

Questions?



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