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July 11, 2022

Members of the Legislative Interim Committee on Judicial Discipline,

Based upon the materials provided to the Interim Committee and the discussions that took place in its first meeting on June 14, 2022, the Judicial Department feels compelled to respond to a number of issues that were raised.

The situation that has developed over the past year and a half is novel and unprecedented. We are working to navigate some very difficult issues in areas that are uncharted. We have done our best to balance many competing interests and proceed deliberately and thoughtfully to minimize unintended consequences and liability to the state. We are all learning as we go through this. I want to make this clear up front – the Judicial Department and the Supreme Court *want* each investigator to have all the information and resources necessary to do their job.

While a back and forth between the Department and the Judicial Discipline Commission is something that we have tried to avoid, we must respond to some of the comments from the Commission and statements in the report it provided to the Interim Committee on June 14. Many of the Commission's statements about recent events are missing important background and context and are not consistent with the Department's understanding of events. Up to now, the Department has viewed these matters as confidential under the Constitution and related state law and has felt unable to respond. The Commission clearly interprets the law differently, and it is now a disservice to the Department, the supreme court, the bar, and the public to not address some of the Commission's statements. We will not comment on the nature or substance of any investigation, but we feel obligated to provide procedural details to inform this Committee's work. We have worked to develop and improve the Department's relationship with the Commission over the past few months. My intent in providing these responses is not to attack the Commission or say who is right or wrong in these matters. However, to the extent that the Interim Committee is identifying problems in the system that need to be fixed, it is important to present additional context and explanation.

Subpoena and Document Production

Not surprisingly, the investigations related to the public accusations of misconduct involve requests for privileged and confidential information of the Judicial Department. Depending on the investigation, this may include information that is confidential pursuant to federal law, state law, and the Department's binding legal agreements, and can include privileged discussions with internal and external legal counsel. In the course of producing documents

for the various investigations, the Department has two basic options. First, the Department can produce documents without regard to whether doing so violates the law or a contract, or waives a privilege, thus potentially subjecting the state to financial liability. Alternatively, the Department can work with the investigators to produce the same documents in a manner that renders the documents protected, thus minimizing potential liability to the state. We have chosen the latter.

Perhaps there is some fair criticism that I and the supreme court have cared too much about compliance with the law and protection of privileges. However, in my view, if the Department can provide the same information to investigators and at the same time protect the state, that is the right decision. Through the course of the various investigations, the Department has developed an understanding that two things allow the Department to provide external investigators with access to privileged and confidential information while minimizing potential liability for the state: 1) a subpoena, and 2) an agreement under Colorado Rule of Evidence ("C.R.E.") 502 or its federal counterpart, which we have called an Access Agreement or Access and Confidentiality Agreement. The need for a subpoena stems from prior agreements of the Department that do not permit disclosure of information to any third party "absent a valid subpoena or court order." With a subpoena, that information can be shared more freely while minimizing liability to the state. Similarly, C.R.E. 502 allows, in some circumstances, attorney-client privileged information to be shared among governmental agencies without waiving the protections of the privilege. An agreement under C.R.E. 502 memorializes the parties' understanding of how privileged and confidential information will be treated in the investigation process. The basic provisions of the Department's C.R.E. 502 agreements are:

- A recitation of the purpose and scope of the investigation;
- A recognition by the parties that the Department is producing privileged and confidential information;
- A commitment by the parties to treat the information as privileged and confidential;
- A process for the Department to assert its privileges in subsequent proceedings; and
- A process to resolve disputes arising under the agreement.

Although C.R.E. 502 agreements can take different forms, it requires more than just a promise or requirement of confidentiality for the entity receiving the privileged information. The provisions of an agreement look slightly different for the different investigations, and the Department has been open to negotiating the provisions of the agreement to address individual concerns of the investigators.

Here is how that has played out with the other external investigations.

For the investigation by the external investigators hired by the Office of Attorney Regulation Counsel, the Department requested a subpoena and worked with the investigators to enter into a C.R.E. 502 agreement that was acceptable to both parties. The investigators then received the Department's confidential and internally privileged documents that were responsive to their subpoena.

For the investigation by the F.B.I., the Department again requested a subpoena and worked with investigators to enter into a C.R.E. 502 agreement that acceptable to both parties. The F.B.I. and U.S. Department of Justice very quickly acknowledged the Department's concerns. In the span of just a few brief conversations, the agreement was finalized and document production began immediately.

For the investigation by the Denver District Attorney's Office arising out of the State Auditor's Fraud Hotline Investigation, the State Auditor provided the D.A. with a report that had attorney-client

privileged information redacted. When we were contacted by the D.A.'s investigator, we responded the same day, explaining both the redactions and proposing a process for the D.A.'s office to obtain an unredacted report and all relevant documents. Our attorneys drafted a C.R.E. 502 agreement that same day and the D.A.'s office indicated they understood the need for and purpose of the agreement. The next day, the D.A.'s office notified us that they had decided not to pursue the case. We remained ready and willing to work with the D.A. to provide complete information. I will discuss the Office of the State Auditor's ("OSA's") investigation separately and in more detail below.

In contrast to the above, discussions with the Judicial Discipline Commission have been more challenging. Last summer, the Department produced a large number of documents to the Commission and identified some documents that could be produced only with a subpoena. To protect the state from financial liability in the form of a lawsuit from former employees and to honor the Department's preexisting agreements, in June 2021 we asked the Commission to issue a subpoena for those records we could not immediately produce. As the Commission stated, we invited a subpoena. Similarly, in August 2021, we proposed that the Department and the Commission enter into an Access and Confidentiality Agreement so that the Department could produce privileged and confidential records. We made it clear at that point that an access agreement could not circumvent the agreements to which the Department is bound, so some records may still require a subpoena. We urged the Commission to speak with the Attorney General's Office if it needed assistance in drafting a subpoena. I do not know whether that discussion occurred, but the Commission did not respond initially to the Department's suggestion of an Access and Confidentiality Agreement. Throughout this process, the Department asked that the Commission work cooperatively to address legal concerns so that the requested documents and information could be shared thoughtfully and responsibly.

In November 2021, the Department proactively sent the Commission a proposed C.R.E. 502 agreement so that it could provide privileged records to the Commission. The Department made clear that it was open to discussing any of the Commission's concerns with the proposed agreement. Without first receiving a response to the draft agreement, the Department received a subpoena from the Commission in January 2022. The Department immediately accepted and waived service of the subpoena, began discussions with the Commission's counsel regarding the manner and timing of production, and sought clarification of date ranges for the subpoena requests. At the same time, the Commission and the Department ***agreed*** that the production of any privileged documents under the subpoena would be stayed pending the approval and signing of a C.R.E. 502 agreement. The Department received a response to its November draft C.R.E. 502 in February 2022.

Within two weeks of receiving a subpoena, the Department produced nearly 1,600 records and continued to supplement the production of documents through May. These records are in addition to the numerous records produced in 2021 prior to any subpoena. The Department also had queued up many hundreds more records that could be immediately produced upon execution of a C.R.E. 502 agreement.

The Department tried numerous times, and through numerous channels, to develop a C.R.E. 502 agreement acceptable to the Commission. We exchanged around 10 different drafts of a C.R.E. 502 agreement with the Commission between November 2021 and June 2022, sometimes through counsel and at other times directly between the Chief Justice and the Commission's Executive Director.

Throughout these discussions, the Department emphasized the critical components of the agreement, which are reflected in S.B. 201's requirements for a C.R.E. 502 agreement.

On June 29, the Department and the Commission signed an acceptable C.R.E. 502 agreement, and the Department immediately produced over 1300 additional records. The Department is now producing additional documents requested by the Commission. Just as it has always done, the Department will continue to honor its obligations to provide the Commission with information relevant to its evaluations of potential judicial misconduct.

Contrary to the Commission's Report and testimony, the Department is not aware of any discussion or communication in which the Department questioned or challenged the Commission's subpoena authority or indicated it would not comply with a subpoena. I'm perplexed by the Commission's statement to this Committee on June 14 that the Department did not "feel the need to comply with the subpoena." This statement and the resulting media reports clearly left the Committee and the public with the impression that the Department directly ignored a subpoena from the Commission. Arguably, that's not what the Commission stated, but the media reports that the Department ignored a subpoena are wholly inaccurate, as indicated above. If the Commission believes more clarification is necessary in the Rules regarding its subpoena authority and an enforcement mechanism, the Court is more than willing to discuss those topics directly with the Commission.

Funding

S.B. 22-201 thankfully provides independent funding for the Commission. We have supported this idea since late last year and fully agree it is appropriate for the Commission to manage its own budget independent of the Judicial Department.

Last summer, the Commission raised concerns about resources. Chief Justice Boatright offered the Department's assistance in resolving questions about resources, and I met personally with the executive director of the Commission in August of 2021 to discuss the resource needs of the Commission. At that time, I was told that the Commission had the resources it needed and did not need the Department's assistance. Subsequently, the Commission decided to enter into a contract with a private law firm to serve as special counsel. Without delving too deeply into details regarding the funding for special counsel, what I will say is that the Office of Attorney Regulation Counsel's ("OARC") concerns raised with the Commission's hiring of special counsel had nothing to do with an intent to interfere with or impede an investigation. OARC harbored legitimate concerns with the Commission's failure to follow defensible procurement processes and the Commission obligating an unknown (and unbudgeted) amount of attorney registration fee revenue at hourly rates nearly double the reduced government rates typically used, without any cap or other cost containment measures. OARC's concerns were borne solely from its fiduciary obligation over attorney registration fees, not any intent to control the Commission's investigation. Indeed, it would make no sense for OARC, which had commissioned its own independent investigation into the same public allegations of misconduct (and which is being paid from the same pool of attorney registration fee revenue), to impede the Commission's investigation. Earlier this spring, the Department and the Commission agreed on interim funding for the remainder of FY 22 and delegated fiscal oversight to the Executive Director of the Commission over expenditures of special counsel, with the OSA having ultimate oversight over these Commission expenditures.

The Commission has asserted that the Department limited or attempted to limit the scope of special counsel assignments. Again, this is not accurate. OARC, which has a fiduciary obligation over attorney registration funds, raised concerns that the scope of engagement with the Commission's special counsel extended to undefined recommendations for process improvements. This undefined and unlimited engagement exceeded the purpose of special counsel in Commission investigations and created the potential for a conflict of interest in special counsel's recommendations. None of these discussions implicated the scope of an investigation.

In light of the untenable position the Court was in related to approving Commission's expenditures on special counsel, the Department, through the Chief Justice, reached out to the Commission and expressed support for independent funding through the legislature. In the SMART hearing in January, we emphasized the need for the Commission to have its own funding. We have continued to fully support independent funding, and I appreciate the funding created by S.B. 22-201.

The 2010 Memorandum of Understanding ("MOU")

In 2010, the Commission and the SCAO's Human Resources Division entered into a MOU that provided for the Department to conduct investigations and to refer judicial misconduct to the Commission. The 2010 MOU requires the HR Division of the SCAO to provide the Commission the HR Division's "investigatory notes and findings" related to the alleged misconduct. The documents requested by the Commission go well beyond what is contemplated in the 2010 MOU, and we are aware of no other investigations by the Commission that have requested information subject to privilege or confidentiality concerns (whether statutory or contractual). That is why we have asked to work with the Commission on a subpoena and C.R.E. 502 agreement. In every other investigation by the Commission, these steps have simply not been necessary. So in that sense, this investigation has proceeded differently than others.

The Role of the Supreme Court in Judicial Discipline Proceedings

A number of statements in the last hearing overstated the Supreme Court's current role in judicial discipline proceedings. For all but a very few complaints, the Court never sees them or knows anything about them. The Commission, comprised of a majority of non-judges, evaluates the complaint and decides whether action on the complaint is warranted. The Court has no role in this evaluation process. Only if the Commission itself determines to institute formal proceedings and requests the appointment of special masters does the Court, through the Chief Justice, become involved. The Chief Justice alone selects three conflict-free judges to serve as special masters in the case. The Chief has only very limited information about the allegations and the subject judge. The special masters then hold a hearing, similar to a trial, and make a recommendation to the Commission itself. The Commission then decides whether to follow that recommendation, make a different recommendation, or dismiss the complaint. Again, the Supreme Court has no involvement in these decisions. It is only when the Commission recommends formal, public discipline, or when the Commission recommends a temporary suspension pending an investigation, that pleadings are filed with the court. The vast majority of disciplinary proceedings never make it to this stage. And the court is not aware of any public discipline recommended by the Commission that the Court rejected as being too harsh.

More specifically, in the last interim committee hearing, the Commission stated that the Supreme Court is briefed often on the proceedings pending before the Commission. That is inaccurate. In Chief Justice Boatright's State of the Judiciary Address, he stated that he had requested all allegations of harassment or discrimination to be brought to his attention. This statement was made to assure the Department and the public that allegations would be taken seriously and properly handled or referred. When a complaint involves a judicial officer, the Chief Justice is briefed on the situation, the HR response, and whether the proper referrals have been made. After a matter is referred to the Commission, the Chief Justice has no more information or control over the disciplinary proceedings and does not brief the full Supreme Court on these matters. The rest of the Court learns of these allegations only if a recommendation from the Commission for public discipline or request for temporary suspension is filed with the Court.

Supreme Court Recusal

The Supreme Court believes that its recusal obligations under the Code of Judicial Conduct applies in judicial discipline proceedings and understands that one or more of the justices may need to recuse in any given case. The Court has acknowledged its recusal obligation to the Commission on multiple occasions and on June 28 proposed a rule amendment to the Commission to address this issue now. The Commission asked for more time to respond to the proposed rule chance; to accommodate the Commission's request, the Court has delayed publication of the proposed rule.

OSA Fraud Hotline Investigation

In the previous Interim Committee hearing, questions were raised about the timeline for the OSA's Fraud Hotline Investigation. The Committee's questioning suggested that the Department delayed the investigation so that the statute of limitations would run on any potential criminal charges arising from the investigation. I can say unequivocally that is false. At the start of the investigation, the OSA and the Department agreed that the OSA would conduct onsite review of privileged documents and not retain custody of them. We worked with the AG's office to establish multiple workstations for onsite review and accommodated the OSA's schedule for reviewing documents. Onsite review was proceeding until the COVID-19 pandemic began, at which point onsite review became much more difficult, but we worked with the OSA to provide an isolated workstation for onsite review. When Chief Justice Boatright took over as Chief Justice, he agreed with the previous State Auditor to hold weekly status meetings to move the investigation along as quickly as possible. Through those discussions, we prioritized document production, modified how the OSA could access privileged documents offsite, and responded promptly to any request from the State Auditor or her staff.

There was never any discussion between the Department and the OSA about what potential charges might be brought, any statute of limitations, or when a referral to law enforcement should be made. The Department was not even aware of which law enforcement agency the matter would be referred to. Prior to the referral to law enforcement, the Department was provided an opportunity by the OSA to propose redactions of privileged information as well as information protected by federal law that was not part of the law enforcement referral. My understanding was that once the matter was referred, we would be able to quickly enter into a C.R.E. 502 agreement with the law enforcement agency receiving the referral and provide all requested information. As stated above, when we were contacted by the

Denver District Attorney's Office, we responded immediately and provided a quick path for the D.A. to receive complete information.

In the category of "lessons learned," I will note that the process the Department and the OSA agreed to at the start the Fraud Hotline Investigation turned out to be clunky and largely unworkable. During the early stages of the investigation, we engaged with the legislature, identified the privilege concerns, and spoke of the need for a statutory fix that would allow full production of privileged information without the risk of waiving privilege. Our understanding is that those discussions progressed at the legislature when we raised this issue years ago, but work on a statutory fix was later abandoned.

Even with this context and explanation, I have no doubt the Department and OSA would handle the investigation, production, and review issues quite differently if they were presented today.

Commission Recommendations

Aside from the Commission's characterization of events, the Department believes that the Commission's recommendations to the Interim Committee are important and should be thoroughly discussed. The Commission's recommendations are in bullet points and the Department's initial thoughts follow.

> **•Subpoena Authority: Codify subpoena authority for the Discipline Commission to investigate judicial misconduct allegations akin to other investigative bodies and grand juries.**

Department Response: The Department supports the Commission's subpoena authority and, as stated above, has not challenged the Commission's authority to issue subpoenas. If subpoena authority is codified, the legislation should also clarify the forum for dispute resolution so as to preserve due process for any subpoena disputes or issues. If the Commission has specific suggestions for a rule change related to a subpoena that could become effective more quickly than legislation, the Court is certainly open to them.

> **• Disclosure/Discovery Enforcement Mechanism: Codify a conflict free mechanism for addressing disputes with the Colorado Judiciary over claims of privilege or confidentiality as well as compliance with the statutory duties to document and disclose complaints of judicial misconduct.**

Department Response: The Department supports an independent dispute resolution mechanism that provides due process.

> **• Rulemaking Authority: Grant the Discipline Commission rulemaking authority over judicial discipline on the model of the Colorado Commissions on Judicial Performance**.

Department Response: In reviewing the rules for Judicial Discipline in other states, the rules are remarkably similar regardless of which entity holds rulemaking authority. The Department is in the process of reaching out to other states with varying rulemaking authorities to understand the benefits and detriments of moving rulemaking authority away from the Supreme Court. The Department does not have a position on this recommendation at this point.

• Special Masters: By rule or statute, create a continuing pool of judges that are qualified to act as special masters in judicial discipline matters to foster institutional expertise.

Department Response: The Department is concerned that a pool of special masters will be too small to handle the workload involved in these cases, which is on top of the judges' other responsibilities. The Department sees value in maintaining the ability to ensure geographic, gender, and racial diversity depending on the nature of the proceeding. The Department further sees merit in ensuring that the judges serving as special masters are familiar with the work of the judge being investigated. For example, an appellate judge may not be the best choice for evaluating the conduct of a part-time rural county court judge. The considerations at play for selecting special masters lend themselves to a broader pool of judges who can effectively and impartially evaluate the case. The Department is open to more discussions about the issue attempting to be addressed with this recommendation.

• Commission Member Terms: Extend the current four year terms of Commission members to provide greater subject matter expertise and greater insulation for political influence. For similar reasons, District Court Judges serve six year terms and appellate judges serve ten year terms.

Department Response: Commission members can already serve for a period of eight years on the Commission. These are volunteer assignments, and it can be difficult to convince potential appointees to commit to longer terms. It is unclear whether the Commission is seeking to extend the terms of the current Commissioners through this proposal. The Department does not understand the basis for concerns about the current term length, but it is open to further discussions on this issue.

• Conflict Free Final Decision Makers: Maintain the current two-tier judicial discipline system but change the final decision-maker to a conflict free, multi-perspective, citizen involved entity with representatives from the bench, bar, and citizenry. Address appointment power and term lengths to assure insulation from undue influences.

Department Response: The Department and the supreme court are mindful that conflicts can and will arise with special masters or with the supreme court itself. It recently submitted a proposal to the Commission for a rule change that would address conflicts of the supreme court. The Department believes strongly that judges are an integral voice in the disciplinary process and are trained to act impartially and objectively in applying facts to the law and ensuring appropriate burdens are met and legal standards are clearly applied. The Department agrees that the final decision-making body should be free of real or perceived conflicts. However, the Department believes further discussion is necessary about the appropriate final decisionmaker and has concerns if constitutional violations by a new decision-making entity would need to be resolved by additional proceedings in the supreme court. Any changes to the system must include appropriate checks and balances

- **Disqualification Standards: Codify clear, uniform, and consistent disqualification standards for all decision-makers involved in judicial discipline. Apply same standards that have been previously established for judge disqualification and define meaning of disqualification.**

Department Response: The standards in the Code of Judicial Conduct already apply equally in judicial discipline matters, whether a judge is serving as a special master or a judge. A conflicted judge has a duty and obligation to disqualify in a matter. If the disqualification rules need to be clarified to explicitly state that the Code of Judicial Conduct applies in judicial discipline proceedings, the court and Department are open to that.

- **Transparency: Evaluate the policy considerations and determine whether the border between confidentiality and transparency in Colorado's judicial discipline system should be altered.**

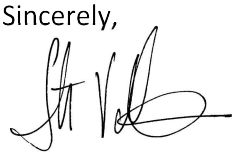
Department Response: This decision involves significant policy decisions that have to be made thoughtfully to balance accountability, transparency, and to ensure that the discipline process is not used as a political or retaliatory tool. The Department is open to discussions about how to make the current process more transparent, the various points in the process where transparency can be increased, and the information that is shared between judicial oversight entities.

- **Funding: Evaluate the viability of funding the judicial discipline system through a source that is insulated from politics and variations in the economy consistent with the model used for the Colorado Commissions on Judicial Performance.**

Department Response: There is no funding source that is insulated completely from an economic downturn or the checks and balances experienced by any state agency. The Department supports fully independent funding for the Commission, with no ties to the Department, as with any other agency of

the state. The Department does not have a position on where this funding should come from, other than that if it comes from the Department's budget in any way, it will renew arguments that the Commission is dependent on the Department for its operations.

Sincerely,



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