

Appendix 2

Chronology of Resourcing Communications¹

June 11, 2021 Vasconcellos letter to Chair Gregory. After four months of seeking documentation, the Commission had received minimal records and only vague suggestions of possible objections. Mr. Vasconcellos invited the Commission to “talk to your own legal counsel” about discovery issues. With this letter, the Commission realized that it would need the assistance of a lawyer to pursue disputed discovery from the Department.

June 25, 2021 Regular bimonthly meeting of Commission. The Commission authorized retention of Special Counsel on the Masias matters. Consistent with existing practice, the Commission planned first to reach out to the Supreme Court’s OARC to ask them to supply an attorney/investigator.

June 25, 2021 Vasconcellos letter to Chair Gregory advising that promised documents on “Allegation Three” would not be provided but inviting a subpoena to obtain these documents. Also provided limited records requested on a separate incident involving long retired judge.

June 30, 2021 Chair Gregory telephone conversation with a senior OARC representative, Employee 1. Chair Gregory asked if the Supreme Court’s OARC could provide counsel on a matter. Employee 1 predicted that if the matter involved the Supreme Court, the OARC likely had a conflict and would not be able to provide counsel to the Commission.

Commission members began to understand that obtaining resources to fund retention of Special Counsel would be a challenge and that the Commission members did not know how to approach the issues.

¹ In early 2022, the Judicial Department began releasing the correspondence listed in this Appendix to the media. The Department’s publication of these records was done independent of the Commission. The Commission understands that the Department has purported to release correspondence on the issues listed here. Thus, most of the communications listed can be confirmed by reference to the documentation released by the Department.

Brainstorming began on how to approach the issue. Various ideas and options were brainstormed.

July 1, 2021 Chair Gregory telephone conversation with Employee 1 in which the employee confirmed that OARC had a conflict on the matter. Employee 1 directed the Chair to a statement on OARC's website. Employee 1 advised that the OARC had hired conflict free counsel for itself from the private sector and recommended the Commission do the same.

In a subsequent conversation the same day, Chair Gregory learned from Employee 1 that funding solutions may be available through OARC to facilitate an investigation. Employee 1 explained that the funds could be spent even though not in the prior budget with a request for a budget variance by letter at the end of the year. Employee 1 invited further discussion of the options. Employee 1's discussion of the budget variance process also included explanation of a liaison Justice having authority to approve a requested budget exception. Chair Gregory participated in this call and can confirm these facts as a direct witness. These facts are further confirmed through contemporaneous secondary documents.

Chair Gregory's term on the Commission ended at this time. With his departure and the resulting transition, the specific funding scheme he had discussed with Employee 1 was not immediately pursued.

Mid-July of 2021 A series of oral communications occurred between ED Campbell and representatives of the Supreme Court's OARC, primarily Employee 1 and a senior member of the Advisory Committee. ED Campbell confirmed that OARC had hired private sector counsel to handle its investigation, as discussed in Chair Gregory's July 1, 2022 conversations with OARC. ED Campbell explored the possibility of a joint or partially shared investigation. This did not prove to be an option. Contemporaneous secondary source documentation confirms these facts.

July 22, 2021 ED Campbell emails the AG's office to ask if they can provide Special Counsel on this matter.

July 23, 2021 Vice Chair Prince letter to Chief Justice Boatright explaining problem with resourcing Special Counsel. The Vice Chair stated “The Commission is attempting to explore options but will appreciate any insights you can offer on meeting these resource needs” at page 2.

Late July of 2021 ED Campbell pursues a series of oral communications. ED Campbell talked to the Supreme Court’s OARC representatives shortly before July 26th. OARC explained “that it isn’t unusual for expenses to come up that aren’t fully budgeted. She told me to run it by Jessica Yates and [Employee 1], and give them a guess/estimate of what we’d need for special counsel and investigators. If they feel the need to confer with Boatright, we’ll go that route as well.” Contemporaneous secondary documentation confirms this account.

July 27, 2021 ED Campbell assigns a member of the Commission to take the lead on follow up discussions with the Supreme Court’s OARC on resourcing and identifying a process for retaining special counsel.

July 27, 2021 at 1:44 p.m.² Commission member emails Yates and Employee 1 of Supreme Court’s OARC about resources. The email stated the ED’s understanding that the OARC wanted the Commission to “run our request for special counsel to be appointed to assist by the two of you for approval.” The email went on to ask, “In what format would you like your request for funding special counsel and what information do you need in the request?”

At 1:58, Employee 1 replied with a copy to Ms. Yates. “***Bill does not need to run his request past Jessica [Yates] or myself for approval.*** When [OARC Employee 2] and Bill spoke yesterday, [Employee 2] merely tried to inform him that since we are all funded from one source, he may want to let Jessica know that the Commission could end up over budget at the end of the fiscal year due to this expense.” (Emphasis added.)

² Given that this item of communication contradicts later statements in correspondence by OARC and provides key context for statements in the recent July 11th letter to the Interim Committee, a reasonable question is whether this item was included in the package of correspondence the Department released to the media on these topics.

Subsequent representations by the leadership of the Department that the Commission did not investigate the procurement process before engaging counsel are simply false.

July 29, 2021 ED Campbell has conversation with Chief Justice Boatright in Carr Building parking garage. The AG's office had advised the Chief Justice that the Commission was asking for it to provide Special Counsel. Chief Justice Boatright advised ED Campbell of his desire to have the AG represent the Commission (rather than private sector counsel) and that he would work to get them to agree.

End of July and early August of 2021 Commission member looking at special counsel retention process pursues series of telephone conversations with Supreme Court's OARC about budgeting and procurement process for special counsel retention. As these were oral communications, no primary source records can exist. However, contemporaneous secondary source documents confirm the facts stated here.

The Commission was asked for an estimate of the budget expected, consistent with prior email traffic. Based on the budget the Department announced of over \$300,000, the Commission estimated a budget of up to \$100,000. The OARC accepted this estimate as 'fine,' noting that the funds could be spent and addressed by a budget variance at the end of the year.

When asked about a procurement process, the OARC stated that 'no particular process' was required. The Supreme Court's OARC asked only that a copy of the engagement letter entered be provided for OARC's contracts file.

The Commission began a process of soliciting proposals from law firms. The OARC personnel suggested a few lawyers to contact, noting that they had previously hired them on conflict matters. Under its confidentiality rules, the Commission could not directly identify the matter on which it was seeking counsel. As firms realized the engagement may require them to be adverse to the Judiciary, the large majority declined to submit a proposal. Three law firms ultimately submitted proposals.

August 11, 2021 ED Campbell emailed the AG's office to advise them that proposals from private counsel were being solicited and asking if the AG's office had made a decision on whether it could offer representation.

August 12, 2021 AG's office communicated to ED Campbell that it believed it could provide representation to the Commission. The AG's office advised that it believed it could address the conflict issues as it had several "lanes" available. The office did not identify what the conflict issues were.

August 16, 2021 The full Commission was provided with the 3 proposals from private law firms. This was in addition to the August 12th notice that the AG felt it could address undisclosed conflict issues and provide representation.

Representations that Special Counsel for the Masias matters was retained through a "no bid" or "single bidder" process are simply false.

August 20, 2021 Regular bimonthly meeting of the Commission. The full Commission examined the options for Special Counsel and selected a proposal. Retention of the Special Counsel was authorized.

August 31, 2021 Vasconcellos meeting with ED Campbell. Mr. Vasconcellos was following up on the Commission's request for insights on how to handle resourcing Special Counsel. ED Campbell accurately reported to him that the resource issues had been addressed (as described above). Mr. Vasconcellos offered to hire investigators in the future jointly between the Department and the Commission.

September 9, 2021 Commission executes engagement letter with Special Counsel.

September 10, 2021 Commission identifies publicly the firm hired as Special Counsel to provide credentials for their legitimacy in dealing with third parties. ED Campbell also emailed OARC a notice.

September 17, 2021 Special Counsel introductory meeting with representatives of Supreme Court's OARC.

September 21, 2021 Ms. Yates telephoned ED Campbell. Ms. Yates expressed to ED Campbell that she had "procedural and due process concerns"

resulting from the retention of Special Counsel. Ms. Yates also expressed concerns about whether the Supreme Court would approve payment of a special counsel that raised challenges to certain processes. Ms. Yates asked to meet with the Chair, Vice Chair, and ED of the Commission to discuss her concerns. Contemporaneous secondary documentation confirms this recitation.

September 27, 2021 Zoom meeting between Yates, Chair, Vice Chair, and ED of Commission.

Ms. Yates began by explaining that there were no fiscal rules governing the situation but that she would set them, noting ‘I don’t know how things should be handled, but I know how things will be handled.’ Ms. Yates laid out a billing submission and payment process and noted that the Commission’s alternative was to seek a special appropriation from the General Assembly. However, the process described by Ms. Yates was acceptable to the Commission (in essence, the same process that would be re-established in the agreement of April 21-22, 2022).

Ms. Yates stated that she was concerned that the Commission had failed to negotiate a discounted rate. (The ED had erroneously told Ms. Yates that full rates were being charged.) The Commission members corrected this misunderstanding and agreed to provide documentation establishing that the rates being charged reflected a discount. (The documentation was provided in the following days.)

Ms. Yates stated her concern about the scope of Special Counsel’s engagement and advised that certain issues could not be addressed by Special Counsel without prior Supreme Court approval.

Ms. Yates stated that Special Counsel would be breaching ethical duties if he failed to comply with the OARC’s billing standards. (Again, Ms. Yates is the chief lawyer ethics enforcement officer in Colorado. Therefore, her warnings of an ethics violation carry significant weight. When the billing standards at issue were requested, Ms. Yates advised that no written standards existed.)

Ms. Yates stated her concern that Special Counsel would seek to have the Commission impose sanctions on a judge without due process of

law. Ms. Yates stated that if Special Counsel did so, this would be an ethical violation. When asked for the basis of this concern and what violation of due process she had in mind, Ms. Yates never gave a clear explanation. The Commission representatives stated that this seemed to be an unlikely development but assured Ms. Yates that the Commission would not authorize imposition of discipline without due process. (As best the Commission could discern from the context, Ms. Yates appeared to be referring to the conflict of interest concerns for this matter related to members of the Supreme Court acting as decision-makers in this case. In the meeting with Commission members, Ms. Yates described her prior discussion with Special Counsel as involving an assertion that the discipline system was “rigged.” In the meeting with the Commission members, Ms. Yates explained that raising such an issue would violate a lawyer’s ethical duties.)

Ms. Yates stated her concerns that Special Counsel would assert positions contradictory to positions taken by the Department. Ms. Yates warned that if Special Counsel did so, this would be an ethics violation. When asked for an example of her concern, Ms. Yates declined to provide one. However, Ms. Yates made reference to a claim for civil liability pending against the Department and asserted that Special Counsel could not take positions that could support the person making a claim against the Department. Ms. Yates appeared to be expressing a concern that Special Counsel’s work may put the Department at risk of civil liability and contending that Special Counsel’s ethical duties included avoidance of that risk.

Other issues were discussed but this summary provides a flavor of the meeting.

The facts in this description have been confirmed with two witnesses and this recitation is confirmed by contemporaneous secondary source documentation.

September 28, 2021 Ms. Yates email to Chair, Vice Chair, and ED. This note purported to summarize the September 27th meeting and “provide some additional information.” The letter changed the billing process and now appeared to require the Commission to disclose confidential

attorney-client communications and work product to three entities with conflicts of interest on the matters, the Supreme Court's OARC, the Supreme Court, and the Advisory Committee.

September 30, 2021 Vice Chair email to Ms. Yates with documentation of discounted nature of hourly rates being charged. Ms. Yates responded the same day "I do not think we will need further documentation" as to hourly rates.

Subsequent representations by leadership of the Department that Special Counsel was engaged without discounted rates are simply false.

October 7, 2021 AG's Office issues Appointment of Special Assistant Attorney General letter for Commission's Special Counsel. This letter confirms prior oral approval of engagement of Special Counsel consistent with C.R.S. § 24-31-111.

October 8, 2021 Chair letter to Ms. Yates raising concerns about the summary provided by Ms. Yates. The Chair asked for a citation to the OARC's source of authority to control funding of Special Counsel's work and other pieces of information. The Chair also asked Ms. Yates to provide OARC's billing standards, which Ms. Yates had tasked the Commission with enforcing and whose violation Ms. Yates had asserted would be an ethics violation.

Ms. Yates responded by email that same day and indicated that rates for government engagement of private counsel are capped at \$250 per hour, citing a sample schedule from the State Auditor.

October 11, 2021 Ms. Yates email to Chair and Vice Chair. Ms. Yates again noted that Colorado government caps lawyer hourly rates at \$250 per hour. Ms. Yates stated, however, that she would be willing to consider rates charged in "comparable governmental contracting arrangements" in relation to the rates being charged here.

October 12, 2021 The Department executed its contract with RCT, Ltd. The contract included an initial price term of \$75,000 without describing which specific funding source the Department was using.

Mid October, 2021 An attorney from the AG's office undertook representation of the Commission to finalize the retention of Special Counsel with the Supreme Court's OARC. A series of discussions with OARC, oral and written, ensued over the following weeks and months that will not be detailed here other than highlights. In general, the AG had an experience similar to that of the Commission members. The bulk of an oral agreement was struck with Ms. Yates for a payment system in an early discussion. Ms. Yates later disavowed the oral agreement by email a short time later.

On October 11, 2021, in response to a pending request from the Commission listed above, Ms. Yates advised that OARC has no written billing guidelines for its counsel. (The Commission had been asked to enforce OARC's billing guidelines and warned that a violation of them would be unethical by the attorney.)

On October 15, 2021, the Solicitor General of Colorado provided a written opinion that the Special Counsel rates set in this matter were "well within the range" paid in other cases. (The Solicitor General reviews all private counsel retentions by state entities.) This written approval was provided to Ms. Yates.

Ms. Yates confirmed that she was conferring with members of the Supreme Court in addressing the Special Counsel retention issues.

Ms. Yates stated on October 20, 2021 that the "Commission will need to own the consequences of entering into an agreement without checking as to what procurement process or fee reimbursement process would apply" and "the firm will be running the risk of not being reimbursed at the hourly rate set forth." (*See contra* July and August discussion with OARC described above researching the procurement process. The assertion that the engagement was entered "without checking" on the procurement process is simply false.) Ms. Yates further explained that the "Lodestar" analysis that traditionally governs disputes over the reasonableness of attorneys fees does not apply to state contracts.

A tentative agreement was reached to have the AG's office handle the review of Special Counsel's billing records and fee review being required by the Supreme Court's OARC. The Commission

understood that this process was being used or contemplated for the private investigators being hired by the Supreme Court. By email, Ms. Yates later rejected the tentative oral agreement.

Ms. Yates continued to assert that the scope of the Special Counsel engagement was unacceptable and involved conflicts of interest. (Ms. Yates had previously declined to provide an actual description of the facts that led the OARC to declare itself to have a conflict on these matters.)

November 2, 2021, Ms. Yates email to the AG assisting the Commission on retention of counsel. Ms. Yates explained that she would withhold from the Commission investigative and special counsel resources contemplated under C.R.C.P. 227³ in at least one of the Commission's unrelated pending cases until issues relating to the retention of outside special counsel in the Masias matter were resolved. Ms. Yates stated, "We received yet another request from the CJD for investigative assistance, and *we are delaying any commitment to assist pending this discussion* [about funding special counsel for the Masias matter]." (Emphasis added.)

November 8, 2021, Ms. Yates email to the AG assisting Commission on retention of counsel. Ms. Yates explained the history of the relationship between the Supreme Court's OARC and the Commission. Ms. Yates identified C.R.C.P. 227 as the only written authority providing funding for the Commission. Although Colo. RJD 3(d)(8) provides for the Commission's Executive Director to "Prepare the Commission's budget and administer its funds," Ms. Yates interpreted this authorization as merely an obligation for the Executive Director to follow OARC's fiscal standards (however these unwritten standards may be defined by OARC) with the Commission's funds ultimately controlled by OARC and approved by the Supreme Court. Ms. Yates went on to explain that the Supreme Court's OARC had no obligation to resource the Commission by providing office space, providing temporary personnel, providing retirement support to ED Campbell,

³ C.R.C.P. 227(1)(c) recognizes that attorney registration fees may be used to "defray the costs of the Office of Attorney Regulation Counsel" including the costs of providing "counsel to Commission on Judicial Discipline." In addition, C.R.C.P.(1)(c) recognizes that attorney registration fees may be used directly to fund the expense of the Commission on Judicial Discipline itself.

providing technology assistance, providing office equipment, providing payroll services, or providing administrative support. In Ms. Yates' words, "at this time there is a rule (C.R.C.P. 227) allowing the use of fees for the CJD and an annual budget approval process setting forth what fee revenues will be available for what purposes in the coming fiscal year; ***but there is nothing requiring OARC to provide the administrative support currently provided, nor to act as special counsel upon request.***" (Emphasis added.) (The Commission found this discussion disconcerting and worried that Ms. Yates was suggesting that these resources, effectively all of the Commission's funding, were in danger of being terminated in response to the request for funding of Special Counsel on the Masias matters.) Ms. Yates further highlighted a history of the Commission having to "rel[y] on the Attorney General's office to provide investigative support when the OARC declined."

Ms. Yates also appeared to indicate that she interpreted the disciplinary rules as not providing the Commission authority through which to retain private counsel or investigators. (*See contra* discussion above that OARC originally recommended that the Commission retain private sector counsel and investigator.)

December 1, 2021 Chief Justice Boatright letter to ED Campbell. The Chief Justice expressed his support for the Commission's financial independence. He stated "I've asked the SCAO's Financial Services Division to draft a general fund budget request for the Commission. It would be up to the Commission to present the proposal to the Joint Budget Committee and to work with the Committee to refine the proposal."

The Commission was concerned that this note, following Ms. Yates' comments of November 8th, indicated that the Commission's access to its funding was being terminated in response to the Commission pursuing the retention of Special Counsel to examine the Masias related matters.

December 15, 2021 Chair letter to Chief Justice. The Commission asked if the Chief Justice's December 1st letter was trying to convey that access to

C.R.C.P. 227 funding was being terminated overall or only for purpose of funding special counsel.

December 17, 2021 Chief Justice letter to the Commission. The Chief Justice asserted that the idea of changing the Commission's funding came from the Commission. He stated that he supported creating a new funding system. He stated "I have not and will not insert myself into the funding discussions with OARC related to the Commission's operations or the appointment of special counsel." The Chief Justice offered the services of the Department to obtain new funding.

Further communications ensued. The end result was that when the Commission sought funding for Special Counsel to examine the Masias contract issues, the Commission's access to its traditional source of funding under C.R.C.P. 227 was terminated. However, the General Assembly enacted legislation that established a new and conflict free funding system. Absent the assertion of control by the Colorado Supreme Court and its OARC, the prior funding system as written in C.R.C.P. 227 and Rule of Judicial Discipline 3(d) was conflict free as well. Judicial leadership, however, effectively destroyed the integrity of the prior conflict-free funding system by asserting that it had unwritten authority to direct and control that funding. This assertion of unwritten authority is what created the conflict in the preexisting system.

Overall, the experience of the Commission in pursuing the retention of Special Counsel for the Masias contract related issues has been, and continues to be, fully consistent with the findings of the Troyer report and the ILG report, which recognize the existence of a toxic culture within the Department and a prevalence of "retaliation" or "fear of retaliation" created by the Department's leadership.