# COLORADO COMMISSION ON JUDICIAL DISCIPLINE

August 7, 2022

Members of the Colorado Legislative Interim Committee on Judicial Discipline

On July 11, 2022, the Colorado Judicial Department, through State Court Administrator Steven Vasconcellos, wrote to you with a description of the Department's interactions with the Colorado Judicial Discipline Commission regarding the Discipline Commission's efforts to examine the allegations flowing from the Masias contract. That narrative leaves the reader with several misimpressions. I am writing to correct those misimpressions on behalf of the Commission.

In this response to the Department's July 11th letter, the Discipline Commission attempts to limit its statements to objective facts, minimizing the characterizations or commentary, so that the Interim Committee may reach its own conclusions about the functioning of the current system of judicial discipline. As it has done in the past, the Discipline Commission also limits itself to correcting inaccurate statements made by the Department.

There are significant details in both this correspondence and in the appendices. But the bottom line is this: members of the Colorado Supreme Court, directly and through its senior staff, made a series of decisions and took a series of actions throughout 2021 and 2022 that limited the ability of the Commission -- made up of citizens and legal professionals who volunteer their time and energy – to do its Constitutionally mandated work. The Court chose to share documents and information with 3 other investigations, but not with the Discipline Commission. It chose delay, mixed messages, and obfuscation.

The justifiable concerns of the legislature and the legal community about these choices have led us to the work of this Interim Committee. We hope this level of detail is helpful as you continue your work.

## Subpoena and Document Production

Attached as Appendix 1 is a chronology of the Discipline Commission's interactions with the Department related to the disclosure and production of Department records regarding the Masias contract and related issues. The Department has previously released much of the

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correspondence addressed in Appendix 1. The Department released this correspondence through its Public Access to Information and Records Rules (P.A.I.R.R.) starting in January of 2022. Other than an initial notice, the Department released the correspondence between the Discipline Commission and the Department on these issues without consulting the Commission.

The Production

At page 3, Mr. Vasconcellos characterizes the Department as having produced to the Discipline Commission "a large number of documents" "last summer" and, later on the page, referring to "numerous records produced in 2021."

The Discipline Commission conducts many evaluations that require it to review Department records. On average in recent years, it reviews records in approximately 70 evaluations per year. It is accurate to state that the Department gave the Discipline Commission access to "a large number documents" on various topics in 2021. As to evaluation of the Masias contract related issues, however, the Department provided the Discipline Commission with 10 documents comprising 60 pages. These individual productions are identified in Appendix 1.

By way of context, Robert Troyer testified on July 12, 2022 that the Department provided him with approximately 12,000 documents for the RCT, Ltd. investigation. His testimony implies that this material was provided without the need of an initial request, but this was not clear. The scope of the RCT, Ltd. investigation was factually narrower than that of the Discipline Commission. For example, Mr. Troyer stated that RCT, Ltd. did not examine the misconduct allegations stated in the "Memo." Mr. Troyer also testified that RCT, Ltd. was hired by the Department in mid-October of 2021 and that he had received the vast majority of these 12,000 records within one month, or by mid-November.

In contrast, the Discipline Commission made its first affirmative request for the Department's records on these issues no later than February 8, 2021. Further requests followed as detailed in Appendix 1. The Discipline Commission's requests for records resulted in production of 10 documents over the next 10-11 months (until the end of 2021). In other words, in the same time frame, the privately hired investigator received one thousand times as many documents and received them in one tenth of the time as the Discipline Commission.

For further context, the Executive Summary of the State Auditor's report that the Department posted on February 27, 2022, stated that the Department had provided it with access to 16,000 documents.

Mr. Vasconcellos asserts that by the time of his July 11th letter, the Department had produced to the Discipline Commission approximately 1,600 documents. This means that after approximately one- and one-half years of making requests, the Discipline Commission received approximately one tenth of the materials provided to each of these two investigations.

The Discipline Commission stands by its prior statements to legislators that the Department did not provide – and still has not provided -- the Discipline Commission with "unfettered access" to its relevant files as was represented to legislators by Department leadership on January 25, 2022.

Access Agreement

Appendix 1 includes the primary events material to the "access agreement," though not every piece of correspondence is listed.

The July 11th letter proposed an explanation of the Department's delay in producing its records to the Discipline Commission. Mr. Vasconcellos offered that the Department believed that it needed an agreement under C.R.E. 502 addressing 5 bullet points in order to produce records. The letter gives the impression that the Department stated this belief to the Discipline Commission in August of 2021 and that the Discipline Commission resisted the Department's straightforward request for agreement on these five bullet points. This impression is objectively inaccurate.

On August 18th, the Chief Justice wrote to the Discipline Commission addressing various aspects of the Discipline Commission's ongoing requests for information and the Discipline Commission's concerns about the perceived inadequacy of the Department's document production to date. At the end of the letter, starting at the bottom of page 3, the Chief Justice stated, "One possible approach to ***addressing the Discipline Commission's concerns*** is for the Discipline Commission to enter into an Access Agreement with the Judicial Department" (emphasis added). The Chief Justice did not describe the purpose of an "access agreement" as addressing the issues listed in Mr. Vasconcellos' recent July 11th letter as the Department's needs. Instead, the Chief Justice asserted that the purpose of such an agreement would be to address the "***Commission's concerns***." At that time, the Discipline Commission's concern was that the Department did not appear to be complying with its existing contractual obligation under the February 5, 2010 Memorandum of Understanding (the "MOU") [1] to provide access to its records. If the Chief Justice intended to convey the concepts and conditions on future production indicated by Mr. Vasconcellos' recent July 11th description, the letter he sent did not do so.

[1] The scope of the February 5, 2010 MOU includes disclosure of information related to general and criminal complaints of misconduct involving judges. Through a separate October 1, 2012 MOU with the State Court Administrator's Office (SCAO), the CCJD had further contractual expectations for disclosure of general court and case records with mechanisms for the disclosure of enumerated "protected records."

In his July 11th letter, Mr. Vasconcellos implied that the Discipline Commission could have received the 12-16 thousand withheld documents if the Discipline Commission had simply drafted an agreement to address the Department's terms and signed it. However, the actual language of the Chief Justice's letter delivered a different message. The Chief Justice explained in the same August 18th paragraph quoted above that an "Access Agreement, however, cannot circumvent the agreements to which the Department is bound."

The Department was citing the "agreements" as a basis for withholding records from the judicial discipline system. The "agreements" that the Chief Justice said could not be "circumvented" were not identified or explained further. What these "agreements" are remains unknown. The message of the Chief Justice's letter at the time was that, even with an "access agreement," the Department would continue to withhold requested materials.

By August 18, 2021, the Discipline Commission had negotiated with the Chief Justice for six months to obtain records that should have been ministerially disclosed to the Commission under the 2010 and 2012 MOU's. Right or wrong, the primary message the Discipline Commission received from the Chief Justice's August 18th letter was that no further progress could be expected without the involvement of Special Counsel. The Discipline Commission turned its energies to getting an attorney onboard who could pursue the discovery dispute further. Conversely, the Department's leadership appears to have turned its energies to blocking that engagement as shown in Appendix 2.

The Department's July 11th letter also gives the impression that the Department was waiting for the Discipline Commission to draft an agreement addressing the Department's bullet points. The Department, however, had not expressed this expectation to the Discipline Commission and had not disclosed its expectation for required terms (i.e., the five bullet points from the July 11, 2022 letter).

The Department provided its first draft of an "access agreement" in November of 2021, nine months after the Discipline Commission began requesting disclosures from the Department. The Commission defers to the actual correspondence to address the back and forth of negotiations. The Discipline Commission would welcome working with the Interim Committee to find a procedural path that would allow it to share this correspondence if it is deemed of value.

The draft "access agreement" did not commit the Department to providing access to its relevant files. To the contrary, the draft agreement authorized the Department to withhold records from the Discipline Commission and, critical to the Discipline Commission, do so without disclosing or explaining the legal basis for such withholding. In other words, the draft agreement authorized the Department to withhold material records without the Discipline Commission ever knowing that anything had been withheld, without knowing that a claim of confidentiality was being asserted as to a pivotal record, and without knowing the basis for such claims of confidentiality or

privilege. This was not acceptable to the Discipline Commission. If the Department's privately hired investigators agreed to the terms proposed to the Discipline Commission, one must ask how they know whether they were given full access to the Department's records.

The Chief Justice requested that the full Discipline Commission meet with him, Justice Monica Marquez, and other Department leaders at the Ralph J. Carr Judicial Center on January 28, 2021. During this meeting, the Chief Justice raised the issue of the "access agreement." He represented to the Discipline Commission that the Department needed only an assurance that production of records to the Discipline Commission would not waive the Department's potential claims of confidentiality or privilege. The Discipline Commission reminded him that it had already provided an unequivocal assurance of this point in writing (through the terms of the subpoena itself stating that a responsive production would not be a waiver of such claims) and stated that this assurance could also be put in the form of an agreement if so desired.

After the meeting, the Department's counsel persisted in pursuing an "access agreement" on very different terms than those stated by the Chief Justice. As a result, the CCJD proposed a draft agreement on March 10, 2022, which directly acknowledged that disclosure to the CCJD did not waive claims of confidentiality or privilege held by the Department, the terms defined by the Chief Justice at the January 28th meeting. The Department, nevertheless, declined to accept the Commission's draft agreement.

A final agreement was not reached until after the General Assembly legislatively mandated the Department's information sharing through SB22-201. Even after enactment of SB22-201 and the CCJD proposing another draft "access agreement" in conformity with CRE 502, the Department continued to argue, *inter alia*, over including a provision confirming the Department's obligations to fully comply with its disclosure obligations. The final agreement did not include such a commitment by the Department.

Subpoena

In his July 11th letter, Mr. Vasconcellos stated, "the Department is not aware of any discussion or communication in which the Department questioned or challenged the Discipline Commission's subpoena authority or indicated that it would not comply with a subpoena." Mr. Vasconcellos may be unaware of the operative facts.

On February 24, 2022 at 1 p.m., Special Counsel met with the Department's counsel handling discovery. The Department's counsel asserted that the Discipline Commission did not have subpoena authority until formal proceedings are filed under Rule 18. The Department's counsel advised that if the parties could not reach agreement on the "access" terms proposed by the Department, the Department would seek to quash the Discipline Commission's subpoena, and the Department's counsel expressed confidence that their client, the Colorado Supreme Court, would sustain their objection.

This followed a meeting between the full Commission and the Supreme Court's Office of Attorney Regulation Counsel ("OARC") on December 17, 2021. In a case wholly unrelated to the Masias matters, the Supreme Court's OARC advised the Discipline Commission of this new view that the Discipline Commission holds no discovery or subpoena authority until formal proceedings are filed and, therefore, has no such authority during its investigation phase. These events are confirmed by two witnesses.

The Discipline Commission is relieved to learn that the Department has reversed its expressed position and now affirms that the Discipline Commission has subpoena authority during its investigation phase. Nevertheless, the statement by Mr. Vasconcellos is not enforceable. A need still exists to codify the scope of the Discipline Commission's authority to issue, and its means of enforcing, subpoenas.

## Funding

Under the heading "Funding," the Department's July 11th letter addressed the Discipline Commission's funding and the issues related to the Discipline Commission's retention of Special Counsel for the Masias matters. Appendix 2 provides a chronology of events on these topics. As with Appendix 1, the Department purports to have already released the correspondence addressing these issues months ago through P.A.I.R.R.2 responses. Both appendices address the context for communications the Department previously chose to make public.

The issues of funding for the Masias matter and the Discipline Commission's general funding are properly addressed together. The Discipline Commission's pursuit of funding for its investigation of the Masias matter led to the Supreme Court's actions that, in turn, required the Discipline Commission to obtain substitute general funding from the General Assembly.

The Department's July 11th letter notes that the new legislation provides for "independent funding for the Discipline Commission" and went on to state the Department's claimed support "for the Discipline Commission to manage its own budget independent of the Judicial Department." The letter fails to note, however, that the black letter law governing Commission funding prior the SB22-201 provided for exactly the same independent financial management. The funding access problem did not arise because of a flaw in the existing law. The problem arose because the leadership of the Judiciary sought to use its practical control over funding access to override existing law's grant of independent financial management authority to the Discipline Commission. SB 22-201 affirmed prior budget authority but substantially reduced the Judiciary's practical ability to subvert that authority.

Rule 3 of the Colorado Rules of Judicial Discipline ("Colo. RJD") authorized "the Discipline Commission to manage its own budget independent of the Judicial Department," to use

Mr. Vasconcellos' phrase. Prior to SB 22-201, Colo. RJD 3 provided the Discipline Commission's Executive Director with budget authority subject to oversight by the Discipline Commission itself. This type of budget structure, a chief executive addressing the budget subject to oversight by a board-like entity, is commonplace in the private and public sectors. The Discipline Commission's financial management was subject to further oversight by the State Auditor. Thus, the Executive Director's decisions were subject to two layers of financial oversight.

Colorado Rule of Civil Procedure 227 separately identifies the source of the Discipline Commission's funding through attorney registration fees. Rule 227 is, itself, consistent with Colorado's Constitution Article VI, § 23(3)(c) which recognizes that the Discipline Commission's expenses are "to be paid by the supreme court from its budget to be appropriated by the general assembly."

The blackletter law provided the Discipline Commission with independent financial management authority prior to SB 22-201. Problems arose because Judicial leadership asserted unwritten authority to control, and ultimately terminate, the Discipline Commission's access to its funding.

The Department's July 11th letter referred generally to communications about resources in the summer of 2021. The reader is referred to Appendix 2 for specifics. Mr. Vasconcellos stated that in one meeting, he was told "that the Discipline Commission had the resources it needed" regarding special counsel. This is an accurate statement but omits key context.

Mr. Vasconcellos appears to be referring to a meeting he had with Commission Executive Director William Campbell on or about August 31, 2021. By the time of that meeting, the Supreme Court's OARC had approve the Discipline Commission hiring private sector Special Counsel with an accepted budget estimate of up to $100,000. By the date of that meeting, the Discipline Commission was finalizing its retention of counsel on these terms discussed with the Supreme Court's OARC. Based on its discussions with Judicial leadership, the Discipline Commission believed that there were no unresolved resource needs to be addressed. Only in the months that followed did the Discipline Commission learn that the Colorado Supreme Court and OARC were moving to prevent the Commission's access to the contemplated funding.

In his letter, Mr. Vasconcellos next stated that the Discipline Commission "fail[ed] to follow defensible procurement processes" in retaining counsel and characterizes the financial conditions of the retention of counsel. This statement is false.

The Discipline Commission welcomes the opportunity finally to address the Department's claims in the open. Judicial leadership has spread these unfounded stories within the legal community for several months. The Discipline Commission has received persistent questions about these misstatements from lawyers throughout the year, with the most intensity following the

appearances of Justices at the Colorado Bar Association in March of 2022. The most common versions of the narrative being circulated are that a) the Discipline Commission hired its Special Counsel without competing bids and without obtaining permission from the Department or the Court and b) that the Discipline Commission agreed to pay full market rates. These are both objectively false, as demonstrated in Appendix 2. The notion that the Discipline Commission would need permission from the Department or the Court to conduct an investigation is itself reflective of the significant structural conflicts presented through the Masias matter.

Procurement Process

The Discipline Commission asked the Supreme Court's OARC (still an apparent collaborative partner at that time) what procurement process for retention of private counsel was required in July of 2021. The Supreme Court's OARC represented to the Discipline Commission that no procurement process was required. OARC further advised the Discipline Commission that it would only have to enter a written engagement letter agreement and provide a copy for the contracting file. The Discipline Commission later learned that the Supreme Court's OARC had (and has) no written procurement code. The Department likely presumes that the Discipline Commission did not follow a procurement process because the Court, through OARC, had itself advised the Discipline Commission that none was required. The Discipline Commission, however, did not view the recommended course to be responsible in this situation. Therefore, the Commission solicited bids from the market.

Confidentiality restrictions made the solicitation process challenging. The Supreme Court's OARC provided recommendations of individual firms for the Discipline Commission to consider hiring. The vast majority of the firms the Discipline Commission approached declined to submit a bid once they learned that the Judicial Department itself could be an adverse party (recall, the first task contemplated for Special Counsel was overcoming the Department's objections to disclosing documents). Three firms were courageous enough to submit proposals. The Discipline Commission studied the three private sector proposals and that of the AG's office, balanced the pros and cons of each, and selected one firm. The Department's persistent representation that no procurement or bidding process was followed by the Discipline Commission is simply false.

Budget Approval

As highlighted in the Department's July 11th letter, the expense of hiring Special Counsel was not in the Discipline Commission's original 2021-22 budget. The need to hire counsel was not known to the Discipline Commission at the time the budget was prepared. The Discipline Commission traditionally accessed its funding through the Supreme Court's OARC and they provided administrative support for the budgeting process. After initial discussion in June, the Discipline Commission sought further guidance from the Supreme Court's OARC in July of 2021. OARC advised the Discipline Commission that no budget approval was required, only notice of the expenditure to allow coordination among those entities sharing the same funding source. They asked for a budget estimate, and the Discipline Commission provided the figure of up to

$100,000. (At the time, the Discipline Commission did not anticipate the degree of resistance it would ultimately encounter from the Department in producing its records). As described in Appendix 2, the Supreme Court's OARC accepted the estimate and confirmed that no formal budget process was required.

These discussions were handled informally as the Supreme Court's OARC was seen as a collaborative partner at the time. The Discipline Commission continued exploring the possibility of sharing an investigator with OARC but few primary source documents exist. However, a small number of email exchanges detailed in Appendix 2 confirm the material points. Contemporaneous secondary source documentation also exists confirming these facts.

Rates

The more common version of the narrative promoted by Judicial leadership has been that the Discipline Commission is paying full market hourly rates for its private sector Special Counsel. This is inaccurate.

When the Discipline Commission asked what procurement requirements existed, it was told that none existed. It was not informed of any requirement to obtain discounted hourly rates. Nonetheless, the Discipline Commission thought it reasonable to request discounted rates despite the unusually high degree of professional risk any lawyer would be taking in this engagement. The Discipline Commission obtained discounted rates. When requested by the Supreme Court's OARC, the Discipline Commission documented that the rates were discounted in early October of 2021. Also in October, the Colorado Solicitor General approved, in writing, the rates being charged in this matter as reasonable for private sector lawyers retained by the State of Colorado. The Attorney General's Office further approved the terms of the engagement of Special Counsel.

Despite these prior approvals, the Supreme Court's OARC refused to release funds for the Discipline Commission's Special Counsel once the Discipline Commission identified the firm hired. The Supreme Court's OARC also raised objections to the engagement of counsel itself. On April 22, 2022, after public pressure was applied, the Department (through the Supreme Court's OARC) finally entered a written agreement to allow the Discipline Commission access to funds to pay Special Counsel. The agreement simply implements the authority the Discipline Commission has always held under its Rules 2(aa) and 3(d). Mr. Vasconcellos personally participated in the creation of that agreement. Thus, the persistence in asserting objections to that engagement based on erroneous facts is difficult to understand.

The term of that agreement has now expired. The Discipline Commission's Special Counsel has billed a total of less than one-tenth of the amount budgeted by the Department for the same time frame for the Colorado Supreme Court's privately hired counsel. This comparison does not account for the taxpayer dollars also spent on the team of AG's representing the Supreme Court, the team of inhouse counsel for the Department, the work of the State Auditor's office

undertaken for the Chief Justice, or the work of the Denver District Attorney's office. The focus on Special Counsel's hourly rates and circulation of misinformation about those rates is misplaced in this context.

Control

The Department's July 11th letter asserts that the Department leadership did not attempt to "control" or limit the scope of the Discipline Commission's investigation of the Masias matters. It also asserts that the Supreme Court's OARC had no reason to "impede" the Discipline Commission's investigation.

The Attorney Regulation Counsel, Jessica Yates, was directly appointed by the Supreme Court and serves at its pleasure. At various times, Ms. Yates has been presented as the Court's designated "fiduciary" of attorney registration fees held on behalf of specifically listed beneficiary under C.R.C.P. 227, including the Discipline Commission as well as the OARC itself. No legal authority for this asserted authority has ever been provide in response to requests.

When Ms. Yates met with members of the Discipline Commission on September 27, 2021, she explicitly stated that the Commission's outside Special Counsel could not address certain issues unless the Discipline Commission obtained prior approval from the Colorado Supreme Court. Ms. Yates also stated, as the chief attorney-ethics-enforcement officer in Colorado, that the Special Counsel would be violating ethical rules if Counsel asserted positions that contradicted the positions of the Department. These are examples of efforts by Judicial leadership to exercise direct control over the investigation and the work of Special Counsel.

## Other

The July 11th letter includes several statements that create misimpressions beyond those listed here. Some have been addressed by prior materials or can be corrected by review of the governing rules. Correcting each and every misstatement does not appear to be productive or fully necessary at this time. Therefore, the Discipline Commission will not attempt to do so here.

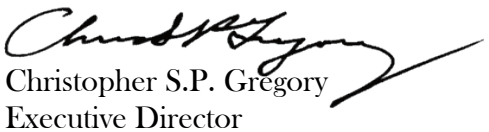
## Conclusion

The Department's July 11th letter reflects a broader context of ongoing efforts by the leadership of the Judiciary, and specifically the Colorado Supreme Court, to endorse a specific narrative relating to the Masias contract related issues. The Department's leadership has promoted a version of disputed facts, endorsed the credibility of some witnesses and denigrated the credibility of other witnesses while also subverting the system of judicial discipline charged by the Colorado Constitution with the task of impartially and independently investigating these same facts and witnesses. The overt actions of the leadership of the Department to promote publicly a specific narrative and avoid an impartial judicial discipline investigation themselves illustrate the depth of the flaws in the functionality and credibility of Colorado's current system of judicial discipline that need to be remedied.

The events of 2021-2022 illustrate the many conflicts of interest that are deeply ingrained at several levels of Colorado's current structure for judicial discipline. Nevertheless, the basic overall structure remains sound and the avenues of improper influence can be restricted with a small number of relatively straightforward reforms, such as those the Discipline Commission has proposed.

Chief Justice Boatright represented to the General Assembly in early 2022 that the Court's primary goal was to get Judicial "out of the business" of judicial discipline. This is the central challenge to be addressed. The Discipline Commission has proposed that the Interim Committee recommend granting the Chief Justice's request and creating a new multi-perspective, citizen and bar involved entity to replace the Colorado Supreme Court as the ultimate decision-maker in judicial discipline cases. The Discipline Commission has further recommended mechanisms to reinforce reliable information disclosure and stable, conflict-free funding of the judicial discipline process.

Sincerely,



Christopher S.P. Gregory
Executive Director

Appendices (2)