DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street Denver, CO 80202	DATE FILED January 16, 2026 5:59 PM FILING ID: B9EC46162D75F CASE NUMBER: 2024CV33593
TRAVIS WEINER, Plaintiff, v. COLORADO OFFICE OF THE STATE PUBLIC DEFENDER; MEGAN RING in her individual and official capacities; and MICHELE NEWELL, in her individual and official capacities. Defendants.	**▲ COURT USE ONLY ▲**
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DEFENDANT OSPD'S TRIAL BRIEF	

Defendant, Office of the State Public Defender (OSPD), through counsel, submits its Trial Brief.

BACKGROUND

Plaintiff, Travis Weiner, brings suit against Defendant OSPD under the State Employee Protection Act, § 24-50.5-101 et seq., C.R.S. (2025) ("the Whistleblower Act" or "the Act"), and against the Colorado State Public Defender Megan Ring and Deputy Public Defender Michele

Newell for alleged violations of Article II §10 of the Colorado Constitution. Plaintiff contends the Whistleblower Act and the Colorado Constitution protected his various communications with the criminal court in which he practiced.[1] Plaintiff's employment was terminated after he moved to withdraw the OSPD from representation of the OSPD's clients on three separate occasions in disregard of state statute and in willful violation of the OSPD policies and explicit directives from his supervisors. For the reasons stated herein, and as the evidence will show, the OSPD is immune from the whistleblower claim, and it must be dismissed.

ARGUMENT

I. The sole purpose of this hearing is to establish whether the OSPD has waived sovereign immunity.

"The sole purpose of a CGIA jurisdictional inquiry conducted pursuant to C.R.C.P. 12(b)(1) is to determine whether the public entity has waived sovereign immunity." *Medina v. State,* 35 P.3d 443, 454 (Colo. 2011). "[T]he effect of a waiver of governmental immunity is merely to allow the liability of the public entity to 'be determined in the same manner as if the public entity were a private person.'" *State v. Moldovan,* 842 P.2d 220, 225 (Colo. 1992) (quoting § 24-10-107, C.R.S. (2025)). "Such a required pre-trial decision permits the court to decide early whether the case is a dispute between private parties or one which involves the government. In this way, in some cases, the government is spared unneeded litigation expense." *Ferrel v. Colo. Dep't of Corr.,* 179 P.3d 178, 183 (Colo. App. 2007) (quoting *Gallagher v. Bd. of Trs.,* 54 P.3d 386, 395 (Colo. 2002)). Because the sole purpose of this hearing is to determine

[1] Defendants Ring and Newell moved to dismiss the constitutional claim under C.R.C.P. 12(b)(1) and 12(b)(5). The constitutional claim is not at issue at the upcoming *Trinity* hearing.

this Court's jurisdiction, this Court should decline to hear any additional evidence regarding Plaintiff's case-in-chief, such as evidence of damages.

II. Plaintiff must prove each element of his Whistleblower claim.

To show OSPD has waived its sovereign immunity, Plaintiff must prove all five elements of his claim under the Whistleblower Act. *Ferrel,* 179 P.3d at 183. These elements are: (1) Plaintiff made a disclosure of information as defined by the Act; (2) Plaintiff made a good faith effort to notify his supervisor about the disclosure of information; (3) Plaintiff received a disciplinary action as defined in the Act; (4) the disciplinary action was administered by his appointing authority or supervisor; and (5) the disciplinary action was administered on account of the disclosure of information. *See* §§ 24-50.5-102 to -103, C.R.S. (2025); *Taylor v. Regents of Univ. of Colo.,* 179 P.3d 246, 247-48 (Colo. App. 2007). OSPD does not dispute elements three and four. The evidence will show Plaintiff cannot prove any of the three disputed elements.

III. Plaintiff's burden of proof is by a likelihood standard.

Plaintiff bears "the burden of proving jurisdictional facts adequate to support subject matter jurisdiction." *City & Cnty. of Denver v. Crandall*, 161 P.3d 627, 632 (Colo. 2007). In its motion to dismiss, OSPD correctly stated Plaintiff's burden at the *Trinity* hearing was a preponderance of the evidence; that standard has since changed as applied to a Whistleblower Act claim. When disputed jurisdictional facts are inextricably intertwined with the merits, as they are here, the likelihood standard applies. *Jefferson Cnty. v. Dozier*, 2025 CO 36, ¶ 24. This standard demands more than a prima facie showing and requires the district court to engage in "factfinding rather than merely making a ruling of law regarding sufficiency of the evidence to present a fact question." *Id.* at ¶ 21 (quoting *Foster-Miller, Inc. v. Babcock & Wilcock Can.*, 46

F.3d 138, 146 (1st Cir. 1995)). Here, the likelihood standard is similar to the first element of a preliminary injunction analysis, requiring Plaintiff to show a reasonable probability he can prove the elements of his whistleblower claim. *Id.* The district court "is authorized to make appropriate factual findings" and must rely on these facts in deciding, as a matter of law, whether it has jurisdiction to hear the case. *Medina,* 35 P.3d at 452. Thus, as part of a *Trinity* hearing, the court must make findings of fact that are necessary for Plaintiff to establish jurisdiction, including resolving credibility determinations. *Smith v. City & Cnty. of Denver*, 2025 COA 70, ¶ 50.

IV. Plaintiff did not make a protected disclosure as required under the Whistleblower Act.

Plaintiff alleges he made three protected disclosures: two written motions to withdraw OSPD based on his personal workload and an oral motion to withdraw based on generic Sixth Amendment concerns stemming from a February 2024 malware event. None of these alleged disclosures is protected under the Act.

A. Plaintiff's communications do not disclose waste,[2] abuse of authority, or mismanagement.

The Whistleblower Act defines a "disclosure of information" as the "provision of evidence to any person, or the testimony before any committee of the general assembly, regarding any action, policy, regulation, practice, or procedure, including, but not limited to, the waste of public funds, abuse of authority, or mismanagement of any state agency." § 24-50.5-

[2] Nothing in the Complaint, the alleged disclosures, or discovery suggests Plaintiff was disclosing OSPD was wasting public funds. To the extent Plaintiff asserts this at the *Trinity* hearing, "waste" means "to consume, expend, bestow (money, property) uselessly, with needless lavishness or without adequate return; to make prodigal or improvident use of; to squander," *Oxford English Dictionary* 3d ed. 2011, def. 9(a), or "a bad use of something valuable that you have only a limited amount of." *Cambridge English Dictionary.*

102(2). A "disclosure" "must relate to information about agency conduct [which is] contrary to the 'public interest.'" *Ferrel,* 179 P.3d at 186.

However, the Whistleblower Act does not define the terms "waste," "abuse of authority," or "mismanagement." Other Colorado courts have looked to dictionary definitions and similar cases in other jurisdictions to discern the meaning of these terms under the Act. This Court should do the same. *See e.g., Cowen v. People*, 2018 CO 96, ¶ 14 ("When determining the plain and ordinary meaning of words, we may consider a definition in a recognized dictionary."); *Ferrel*, 179 P.3d at 186 (citing other jurisdiction's rulings on whistleblower claims).

1. Abuse of Authority

"Abuse" is defined as a "departure from legal or reasonable use; misuse," Black's Law Dictionary (12th ed. 2024), or "to use (something) improperly, to misuse; to make a bad use of; to pervert; to take advantage of wrongly." *Oxford English Dictionary* (3d ed. 2011). "Authority" is defined as the "official right or permission to act esp. to act legally on another's behalf; esp., the power of one person to affect another's legal relations by acts done in accordance with the other's manifestations of assent." Black's Law Dictionary (12th ed. 2024); An "abuse of power" is the "misuse or improper exercise of one's authority; esp., the exercise of a statutorily or otherwise duly conferred authority in a way that is tortious, *unlawful, or outside its proper scope.*" *Id.* (emphasis added).

2. Mismanagement

"Mismanagement" is defined as "bad or improper management or administration," or "a situation in which something such as a company or an economy is organized or controlled badly." *Cambridge English Dictionary.* Under the Oregon Whistleblower statute, O.R.S.

§ 659A.203(1)(b)(2016), "mismanagement" requires a certain magnitude of misconduct, to the degree "actually or potentially undermining the agency's ability to fulfill its public mission," rather than routine complaints about policies or practices an employee does not like. *Bjurstrom v. Oregon Lottery,* 120 P.3d 1235, 1241 (Or. App. 2005). *Ferrel*'s holding that disclosures must concern more than internal management or policy disputes supports relying on Oregon's statute as persuasive authority. *See Ferrel*, 179 P.3d at 187. The hearing evidence will show OSPD did not abuse its authority or mismanage the agency as to workloads. And Plaintiff's alleged third disclosure, his oral motion, did not provide any evidence of any action by OSPD at all. Thus, he could not have been providing evidence of abuse of authority or mismanagement.

3. Plaintiff did not disclose any abuse of authority or mismanagement by the OSPD.

Underlying all whistleblower statutes is the desire to protect employees who possess knowledge of wrongdoing and who step forward to uncover such wrongful conduct. *See, e.g., Admin. Office of the Courts v. Miller,* 468 S.W.3d 323, 330 (Ky. 2015). The Whistleblower Act's express policy is that "the People of Colorado are entitled to information" and "state employees should be encouraged to disclose information on the actions of state agencies that are *not in the public interest* . . . ." C.R.S. § 24-50.5-101 (emphasis added). Logically, just as there would be no need to declare that the People "are entitled to information" that is already known, there would be no need for the state employee "to disclose information" or provide "evidence" of conduct that is not against the public interest.

For a matter to "not be in the public's interest," it must be more than a de minimis act of mismanagement or waste of public funds. Otherwise, every state employee who has a difference in opinion as to how the agency should conduct its business would be entitled to whistleblower

protection. *See Young v. Brighton Sch. Dist. 27J,* 2014 CO 32, ¶ 11 (court must avoid statutory interpretations contrary to legislative intent or that produce absurd results). As other courts have recognized, it is "the decision to expose *illegal or unsafe* practices" that the public policy exception for whistleblowing seeks to protect. *Wagner v. City of Globe,* 722 P.2d 250, 257 (Ariz. 1986) (emphasis added); *see also Bielser v. Pro. Sys. Corp*., 321 F. Supp. 2d 1165, 1169 (D. Nev. 2004), *aff'd*, 177 F. App'x 655 (9th Cir. 2006). Thus, if the agency action "disclosed" supports the public interest or complies with the law, it cannot be a protected disclosure.

Here, the only action by the OSPD referred to in the written motions—that it allegedly trains public defenders to provide less effective representation to defendants accused of less serious offenses—is not accurate. Thus, Plaintiff did not disclose any evidence of agency misconduct. Looking at the agency conduct Plaintiff now claims to have been disclosing—not implementing workload standards and requiring supervisor approval before moving to withdraw OSPD from client cases—that conduct complies with state statute and the Rules of Professional Conduct, and it ensures defendants' constitutional rights are protected. Plaintiff did not actually provide any evidence of these new allegations. But even if he did, they are *in line with* the public interest, and therefore there is no protected disclosure.

As to the alleged third disclosure, Plaintiff did not disclose any conduct by the OSPD at all. Thus, he could not have been disclosing anything against the public interest.

B. The Act protects only disclosures regarding matters of "public concern."

The purpose of the Whistleblower Act, set forth in its legislative declaration, is to encourage "state employees . . . to disclose information on actions of state agencies that are not in the public interest." § 24-50.50-101. "[D]isclosures that do not concern matters in the public

interest, or are not of 'public concern,' do not invoke this statute." *Ferrel,* 179 P.3d at 186. Alleged disclosures concerning a single person or issues pertaining to internal management decisions are not matters of public concern. *See id.* at 187. Here, Plaintiff's written motions concerned his personal workload and alleged related management decisions, which are not matters of public concern. Similarly, the generic Sixth Amendment concerns raised in his oral motion concerned only one client, which is insufficient to be a matter of public concern.

C. If information is already publicly known, it is not a "disclosure."

At least two Colorado courts, in addition to courts in multiple other jurisdictions, have determined that information which is already publicly known cannot constitute a "disclosure" within the meaning of a whistleblower act. Ex. A, p. 55-57 (Order, *Prestwich v. Colo. Dep't of Educ.,* Denver Dist. Ct. Case No. 16CV32106)); Ex. B, p. 6 (Transcript, *Lucci-Wolgamott v. Colo. St. Bd. of Land,* Denver Dist. Ct. Case No. 05CV6141).

In *Prestwich,* the court determined that although Oregon, Kentucky, and Wisconsin's whistleblower acts had some differences from Colorado's, each shared the same underlying public policy purpose and used similar or identical language regarding the disclosure of government misconduct; violation of laws, rules, and regulations; mismanagement; waste of funds; abuse of authority; or substantial and specific dangers to public health or safety. Ex. A, p. 57. Thus, the *Prestwich* court adopted the requirement that a "'disclosure of information' must involve or relate to some type of governmental misconduct not generally known to the public at large." *Id.* This Court should adopt the same.

Like in Oregon, "[t]he purpose of the Kentucky Whistleblower Act is to protect employees who possess knowledge of wrongdoing that is concealed or not publicly known, and

who step forward to help uncover and disclose that information." *Miller,* 468 S.W. 3d at 330-31; *see also Davidson v. Com., Dept. of Military Affairs,* 152 S.W. 3d 247, 255 (Ky. App. 2004) (affirming dismissal of whistleblower claims in which plaintiff "did not report anything about procedures which were not already known, such as secretive agency procedures").

Finally, Wisconsin's whistleblower act requires that the supervisor receiving a purported "disclosure" lack knowledge of the information being "disclosed":

> If this court were to conclude that a 'disclosure' under § 230.81 does not require a lack of knowledge on the part of the recipient, then an employee who merely repeated a supervisor's statement back to the supervisor, while inwardly believing that the conduct the statement described was unlawful or inappropriate, would thereby become entitled to protection under Wis. Stat. § 230.83. This pushes the concept of 'whistleblowing' a tad too far.

State of Wis. Dep't of Justice v. State of Wis. Dep't of Workforce Dev., 875 N.W. 2d 545, 556 (Wis. 2015); *see also id.* ("a lack of knowledge on the part of the recipient is inherent in a disclosure").

Discussions about how to manage public defender workloads are public discussions. Plaintiff was entering an already ongoing public discussion. He did not disclose abuse of authority or mismanagement, or anything new to the discussion regarding public defender workloads generally. Similarly, assuming Plaintiff provided any "evidence" of agency action as to the malware event, that event was already well known to the court and the criminal legal system as a whole.

D. Disagreements with management decisions are not matters of public concern.

Mere difference of opinion about the policies or operation of a state agency is likewise not enough to represent a "disclosure of information" for establishing a whistleblower claim under the Act. *See* Ex. A, p. 53-55; Ex. B, p. 8 ("You can be a by-the-book person and you can

raise these issues, but once they're addressed, there's no specific right given to an employee to stubbornly insist that they are right and everyone else is wrong."); *see also Ferrel*, 179 P.3d at 187.

Courts outside of Colorado agree that claims based on disagreement with management decisions do not constitute public disclosures. "Courts have not recognized tort claims for whistleblowers whose complaints are based upon personal opinions about the way an organization is managed." *Barker v. State Ins. Fund,* 40 P.3d 463, 469 (Okla. 2001). Disputes with an employer which amount to a "difference of opinion" do not give rise to a whistleblower claim. *Hitesman v. Bridgeway Inc.,* 63 A.3d 230, 243 (N.J. App. Div. 2013); *see also Yost v. Dep't of Health & Human Servs.,* 4 F. App'x 900, 903 (Fed. Cir. 2001) (plaintiff's "disclosures were nothing more than his interpretation of agency rules as he believed they should apply to his request for approval of outside employment. The fact that [plaintiff's] supervisors disagreed with [his] view of the rules and regulations in denying his request did not convert that difference of opinion into a protected disclosure of government wrongdoing."); *Smith-Pfeffer v. Superintendent,* 533 N.E.2d 1368, 1371 (Mass. 1989) ("Internal policy decisions are a matter of judgment for those entrusted with decision making within the institution.").

The United States Supreme Court has characterized a matter of "public concern" in the First Amendment context as one "fairly considered as relating to any matter of political, social, or other concern of the community." *Connick v. Myers,* 461 U.S. 138, 146 (1983).[3] "Whether an

[3] The Colorado Supreme Court has indicated that First Amendment jurisprudence can be applicable to Whistleblower Act claims. *Ward v. Indus. Comm'n*, 699 P.2d 960, 968 (Colo. 1985) (applying free speech framework to whistleblower claim).

employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48.

As the Tenth Circuit Court of Appeals stated:

> In deciding whether a particular statement involves a matter of public concern, the fundamental inquiry is whether the plaintiff speaks as an employee or as a citizen. Speech that pertains to a public agency's "discharging its governmental responsibilities" ordinarily will be regarded as speech on a matter of public concern. In contrast, speech relating to internal personnel disputes and working conditions ordinarily will not be viewed as addressing matters of public concern. In distinguishing between these two categories of speech, courts must consider the content, form, and context of a given statement, as revealed by the whole record. The court will also consider the motive of the speaker to learn if the speech was calculated to redress personal grievances [and therefore spoken as an employee] or to address a broader public purpose [and therefore spoken as a citizen].

David v. City & Cnty. Of Denver, 101 F.3d 1344, 1355 (10th Cir. 1996) (cleaned up). *David*'s distinction between disclosures concerning an agency's governmental responsibilities and internal personnel disputes is in line with *Ferrel*'s reasoning, 179 P.3d at 187, making federal law persuasive authority on this issue.

While Plaintiff disagreed with some alleged management decisions at OSPD as to workloads, his disagreement does not constitute a protected disclosure under the Whistleblower Act. His comments were not akin to the types of speech involving disclosure of mismanagement, fraud, or other whistleblower-type wrongs. Rather, Plaintiff expressed his own opinions and disagreements with OSPD's decisions on how to manage public defender workloads. While Plaintiff alleges OSPD relies only on what Plaintiff calls "triage," the evidence at the hearing will demonstrate that OSPD manages public defender workloads in compliance with state law and through strategic budget advocacy to gain more resources; comprehensive training; internal legal experts; centralized processes; frequent communication between the state office, regional

offices, supervisors, and individual deputy public defenders; and responsive action to changing workload demands. Plaintiff disagreed with these methods and instead argued that legislative policy should be overturned, and, by implication, that the OSPD should not follow that legislation. The underlying rationale for Plaintiff's disagreement is grounded in workload standards, which evidence will show amount to case caps.

Here, Plaintiff's alleged disclosures were internal disputes related to the representation of OSPD's clients. Because Plaintiff's disclosures were personal disputes regarding internal management decisions, and not a matter of public concern, Plaintiff cannot show that the disclosures were protected under the Whistleblower Act.

E. The written motions themselves cannot be disclosures.

Plaintiff alleges the written motions regarding workloads were *themselves* disclosures. Compl., ¶ 47. The Court should reject this argument as a matter of law for two reasons. First, the Whistleblower Act defines a protected disclosure as the "provision of *evidence*" of agency action against the public interest. § 24-50.5-102(2) (emphasis added). The written motions contain extensive opinions and legal argument, which are not evidence. Thus, only *statements within the motions* that constitute evidence, rather than the motions as a whole, can be considered potential disclosures. Second, as explained more below, Plaintiff was disciplined for the *act* of moving to withdraw from clients' cases without supervisor approval, and that act is separate from an act of providing evidence of agency action against the public interest. Because the Whistleblower Act only protects the latter, the motions themselves, which constituted the former, cannot be considered potential disclosures.

V. Plaintiff did not make a good faith effort to notify his supervisor about the alleged disclosures of information.

Under the Whistleblower Act, a plaintiff is required to make a good faith effort to notify his supervisor about the disclosure of information. § 24-50.5-103(2). Here, Plaintiff failed to make a good faith effort to provide notification to his supervisor about his alleged disclosures of information (that is, his motions to withdraw). While Plaintiff contends he made such communications, Plaintiff also admits he did not inform his supervisor in advance of his three motions to withdraw OSPD from representation of its clients. *See e.g.*, Compl., ¶¶ 32-36, 48-49, 81-82. And no evidence at the hearing will show Plaintiff attempted to raise Sixth Amendment concerns stemming from the malware event at all before making his oral motion. Thus, Plaintiff failed to provide a good faith effort to notify his supervisor as required under the Act.

VI. Plaintiff cannot demonstrate he was disciplined or terminated on account of a protected disclosure.

To meet the last element, Plaintiff must show his alleged disclosure was a "a substantial or motivating factor" for the disciplinary action. *See Ward v. Indus. Comm'n*, 699 P.2d 960, 968 (Colo. 1985) (applying free speech framework to whistleblower claim); *Taylor*, 179 P.3d at 248. If Plaintiff meets that burden, the employer may avoid liability by showing it would have taken the same action regardless of the alleged disclosure. *Ward*, 699 P.2d at 964; *Taylor*, 179 P.3d at 248. Whether a protected disclosure was a substantial or motivating factor turns on careful consideration of circumstantial and direct evidence of the employer's intent. *Johnson v. Jefferson Cnty. Bd. of Health*, 662 P.2d 463, 476 (Colo. 1983). Relevant factors include, but are not limited to, the historical background of the employment decision, the causal nexus between the disclosure and the decision, the extent to which the employer departed from normal procedures

or policies, the evidentiary support for the reasons for the decision, and any pretextual nature of the reasons. *Id.*

Plaintiff was given a corrective action after he knowingly violated the OSPD policy and specific supervisor directives by moving to withdraw the OSPD from its clients' cases multiple times without necessary supervisory approval. Plaintiff admits he knew the OSPD policy required supervisor approval before moving to withdraw the OSPD from representation. He was expressly told he could not move to withdraw without supervisor approval. It was his insubordinate *conduct* of moving to withdraw the OSPD in violation of policy, regardless of the *content* of the motions, that led to the corrective action. *See Bd. of Educ. of Jefferson Cnty. Sch. Dist. R-1 v. Wilder*, 960 P.2d 695, 701-02 (Colo. 1998) (holding that termination of teacher who, in choosing to show a film to students, violated the district's controversial materials policy, did not violate the teacher's free speech rights); *Zorn v. Jefferson Par. Hosp. Serv. Dist. No. 2, 04-1037*, 904 So. 2d 711 (La. 2005) (employee not entitled to protection under whistleblower-like statutes where employee violated policy while reporting misconduct and where employee had previously reported misconduct without violating policy and suffered no consequences).

Plaintiff's being placed on administrative leave and then terminated also had nothing to do with the information allegedly disclosed. Plaintiff's corrective action expressly prohibited him from moving to withdraw OSPD from client cases without supervisor approval. Assuming he disclosed anything at all during his oral motion, the termination came after Plaintiff told his supervisor in writing that he had made an oral motion to withdraw to the court, in violation of his corrective action. Thus, Plaintiff was terminated for repeated insubordination, not any alleged disclosures.

VII. No reasonable basis in fact supported Plaintiff's belief in the truthfulness of his alleged disclosures regarding workloads.

The Whistleblower Act removes protection where an employee "discloses information which he knows to be false or with a disregard for its truth or falsity." § 24-50.5-103(1)(a). To overcome this exclusion, Plaintiff must show he had "both a good faith belief in the accuracy of the information disclosed and a reasonable foundation of fact for such belief." *Lanes v. O'Brien*, 746 P.2d 1366, 1373 (Colo. App. 1987).

Certain Rules of Professional conduct are relevant to the alleged disclosures concerning workloads. Rule of Professional Conduct 1.1 requires an attorney to be competent, which is defined as "legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Rule 1.3 requires an attorney to act with reasonable diligence and promptness. Rule 1.4 requires reasonable consultation with the client about objectives of the representation and keeping the client "reasonably informed" about the case. The key feature of all of these requirements is reasonableness, which is always necessarily a fact-specific inquiry. Colo. RPC 1.1, cmts. 1 & 5 (listing factors relevant to determining competency); RPC 1.4, cmt. 3 (noting that timing of consultation depends on certain factors); *see also People v. Taylor*, 41 P.3d 681, 686 (Colo. 2002) ("Reasonableness . . . is measured in objective terms by examining the totality of the circumstances."); *cf. Terra Mgmt. Grp., LLC v. Keaten*, 2025 CO 40, ¶ 6 (reasonable foreseeability standard is fact specific). Rule 1.2(a) mandates that "a lawyer *shall* abide by a client's decisions concerning the objectives of the representation." Colo. RPC 1.2(a) (emphasis added).

The Rules of Professional Conduct prohibit an attorney from representing a client where a concurrent conflict of interest exists, including where a "significant risk that the representation

of one or more clients will be materially limited by the lawyer's responsibilities to another client." Colo. RPC 1.7(a)(2). Such a conflict is not imputed to the attorney's firm, such as OSPD, if representation by another attorney in the firm does not present a significant risk of materially limiting the representation of that client. Colo. RPC 1.10(a). Pursuant to § 21-2-101, C.R.S. (2025), OSPD may withdraw from representation only where "the *state public defender* has a conflict of interest in providing legal representation." (emphasis added). In other words, the relevant question is whether OSPD, rather than an individual attorney, has a conflict.

The Rules also mandate that supervisors in a firm implement reasonable measures to ensure their subordinates comply with the Rules. Colo. RPC 5.1. Where an ethical issue involves a judgment call, the supervisor is allowed to assume responsibility for the course of action resolving the issue. Colo. RPC 5.2 and cmt. 2 to Rule 5.2. The Rules specifically contemplate the need for a consistent response to ethical issues arising within a firm. *See id.*

Next, the standards for effective assistance of counsel are relevant here. Effective assistance is defined as representation falling within an objective standard of reasonableness under prevailing professional norms. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The reasonableness inquiry requires consideration of all circumstances. *Id.* One guide to this inquiry is the American Bar Association's Defense Function Standards. But the Supreme Court has stated repeatedly that the Defense Function Standards are *only guides* and *not* inexorable commands. *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010).

Other non-binding, non-controlling, and non-mandatory guides are also relevant to Plaintiff's alleged workload disclosures. First, OSPD's enabling statute requires OSPD to provide representation "in accordance with" the Defense Function Standards. However, those

standards are "intended to provide guidance" for defense counsel, "are aspirational or describe 'best practices,'" and are "not intended to modify . . . obligations under applicable, rules, statutes, or the constitution." Def. Function Std. 4-1.1(b). The Standards state, "[d]efense counsel should not carry a workload that, by reason of its excessive size . . . interferes with providing quality representation . . . or has a significant potential to lead to the breach of professional obligations." *Id.* at 4-1.8(a). "Defense organizations and offices should regularly review the workload of individual attorneys, as well as the workload of the entire office, and adjust workloads . . . when necessary and as permitted by law . . . ." *Id.* at 4-1.8(c).

Next, both the ABA and CBA have issued non-binding opinions regarding workloads. ABA Formal Opinion 06-441 instructs that when workload threatens competent representation, a lawyer must (1) notify and consult supervisory counsel; (2) seek internal workload remedies such as reassignment, reduced intake, staffing adjustments, or resource allocation; (3) if the supervisor fails to provide appropriate relief, continue up the chain of command to the office head; and (4) only if internal remedies fail, seek judicial relief such as a motion to withdraw. ABA Op. 06-441, p. 5-6. Under the ABA opinion, the public defender office as a whole, rather than a single attorney, has responsibility for their clients' cases. *Id.* at 5, n.17. The ABA opinion expressly acknowledges that "laws, court rules, regulations, and rules of professional conduct and opinions promulgated in the individual jurisdictions are controlling." *Id.* at 1, n.1.

CBA Ethics Opinion 146, states that whether "a workload is excessive under the rules of professional conduct is necessarily fact specific." CBA Op. 146, p. 1; *see also id.* at 4 (listing factors relevant to concurrent conflict under Rule 1.7(a)(2) determination). CBA opinions are merely advisory, https://www.cobar.org/ethicsopinions, and CBA Opinion 146 expressly states it

"does not attempt to draw, nor should it be understood to offer, any bright-line rules," CBA Op. 146, p. 1.

Lastly, national workload standards released in September 2023 ("RAND Standards") can provide a red flag that may suggest an attorney's workload has exceeded ethical and constitutional obligations. The RAND Standards consist of case weights derived from national averages of the estimated amount of attorney time needed for competent, effective representation based on the charges. The RAND Standards are not binding in Colorado. When an attorney's workload exceeds these non-binding standards, the attorney should discuss their workload with their supervisor to determine whether relief is needed and, if so, what relief is appropriate. But having a workload above the RAND standards, by itself, cannot determine whether the attorney is providing ethical and/or effective representation.

Plaintiff's alleged disclosures as to workloads can be summarized as concluding (1) OSPD had a concurrent conflict of interest with the clients from whose cases he attempted to withdraw because Plaintiff's workload, and supposedly his colleagues' workloads, exceeded the RAND Standards, and (2) the OSPD trained public defenders to "triage" cases, meaning providing less effective representation to clients with less serious charges, in violation of supposed "controlling" legal authorities, resulting in Sixth Amendment violations.

The hearing evidence will show the RAND standards do not support Plaintiff's belief as to the alleged concurrent conflict and the authorities on which he relies are not controlling, binding, and/or mandatory. Instead, the actual controlling authorities, and even Plaintiff's non-binding, non-controlling authorities, show Plaintiff did not have sufficient information to have a reasonable belief that a conflict with OSPD existed or that any Sixth Amendment violations were

occurring. The evidence will also show the OSPD does not train public defenders to provide less effective representation to any of its clients and that the basis for that belief was grounded in his inappropriate interpretations of non-controlling authorities.

VIII. This Court should preclude witnesses from usurping the Court's role to make legal determinations.

This Court has the sole province to make legal determinations during the *Trinity* hearing, including determining whether there is a reasonable probability Plaintiff can prove he made one or more protected "disclosures." *Cf. Hartman v. Cmty. Responsibility Ctr., Inc.,* 87 P.3d 202, 205 (Colo. App. 2003) (holding "an expert may not usurp the function of the court by expressing an opinion regarding the applicable law or legal standards"). Thus, this Court should preclude witnesses from begging the question in their testimony by stating that any communication made by Plaintiff was a "disclosure." Other than Plaintiff who will be examined regarding his claims and allegations, witnesses should be directed to use other terms, such as "communication," "motion," "statement," or another appropriate descriptor. Likewise, other than during the examination of the Plaintiff, counsel should be directed to refrain begging the question in direct or cross examination by asking witnesses about "disclosures." Only this Court may determine if any underlying communications constituted a "disclosure" under the Act.

Respectfully submitted this 16th day of January, 2026.

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CERTIFICATE OF SERVICE

I certify that, on January 16, 2026, a true and correct copy of the foregoing **DEFENDANT OSPD's TRIAL BRIEF** was filed and served on the following parties through the Colorado Courts E-Filing System, addressed as follows:

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