

From: [Hamilton, Lucas](#)
To: [Molnar, Bradley](#); [Lake, Alana](#)
Subject: Confidential: Materials re: Legal Fees in MCV v. Jacobsen
Date: Tuesday, April 22, 2025 11:17:00 AM
Attachments: [REDACTED]

[2024 09 23 Memo re Legal Fees.pdf](#)
[2024 10 30 Letter to Lucas Hamilton.pdf](#)
[2024 11 25 Letter to Rhoades.docx](#)
[REDACTED]

The following email contains confidential attorney-client communications and should not be shared with anyone beyond its intended recipients.

Pres. Molnar and Alana,

To help you prepare for the meeting Wednesday about Commissioner Fielder's [REDACTED] [REDACTED] requests for reimbursement of legal fees, I recommend reviewing the following attachments:

- [REDACTED]
[REDACTED]
3. My September 23, 2024 Confidential Memo to Commission Leadership about payment of the legal fees in question.
 4. Quentin Rhoades' October 30, 2024 letter to me demanding payment of Commissioner Fielder's legal fees.
 5. My November 25, 2024 letter to Quentin Rhoades declining to pay Commissioner Fielder's legal fees.
- [REDACTED]
[REDACTED]

Thanks,
Lucas

Lucas Hamilton
Chief Legal Counsel
Montana Public Service Commission
406.444.6970
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**rhoades &
erickson** PLLC
trial attorneys

Quentin M. Rhoades
Robert Erickson
Gabrielle Broere

October 30, 2024

VIA FIRST CLASS MAIL

Lucas Hamilton, Chief Legal Counsel
Montana Public Service Commission
1701 Prospect Ave
PO Box 202601
Helena, Montana 59620-2601

RECEIVED

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MONT. P.S. COMMISSION

**RE: Montana Conservation Voters, et al., v. Jacobsen, Cause No. DV-25-2023-0000702-CCR
Montana First Judicial District, Lewis & Clark County.**

Dear Mr. Hamilton:

We write on behalf of our client, Public Service Commissioner Jennifer Fielder. She respectfully requests reimbursement of her attorney fees incurred in responding to a subpoena duces tecum dated August 13, 2024, served upon her by Plaintiffs in *Montana Conservation Voters, et al., v. Jacobsen*, Cause No. DV-25-2023-0000702-CCR, Montana First Judicial District, Lewis & Clark County. (See copy enclosed.)

The basis for the request is uncomplicated. Had Commissioner Fielder not been serving as a Public Service Commission (PSC) member, she would never have been subpoenaed in this action. This is why PSC management later provided her with counsel. It could have, and should have, done so in the first instance.

The PSC is familiar with the background of the case and the dispute over the subpoena served on Commissioner Fielder. We focus on the crux of the matter—the PSC's decision not to accept service of Commissioner Fielder's subpoena. Plaintiffs described those facts on page 4 of its September 5, 2024, brief opposing Commissioner Fielder's motion to quash and in Ex. 6 attached thereto:

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In light of Senator Regier's production, Plaintiffs served subpoenas for depositions and subpoenas duces tecum on Commissioners Fielder and Bukacek.² Ex. 4, Subpoenas (August 13, 2024). Plaintiffs' counsel first contacted the PSC's Chief Legal Counsel, Lucas Hamilton, to arrange waiver of service on behalf of Fielder and Bukacek. Ex. 5, Hamilton Emails (August 9, 2024). On August 13, 2024, counsel for Plaintiffs spoke with Mr. Hamilton over the phone. Ex. 6, Tsolakidis Decl. (September 5, 2024). ***Mr. Hamilton advised Plaintiffs' counsel that the PSC did not consider Fielder's and Bukacek's text message communications with Regier's official PSC communications and would therefore not accept service on their behalf. Id.*** Mr. Quentin Rhoades then contacted Plaintiffs' counsel in his capacity as counsel for Fielder and agreed to waive service on August 16. Ex. 7, Rhoades Emails (Aug. 16–28, 2024).

(Copy enclosed, emphasis added.) In other words, PSC management took the position that the PSC did not consider any communications between the Commissioners and Senator Regier about the redistricting bill as communications between the senator and the executive branch. In compliance with PSC management's position, Commissioner Fielder retained her own counsel and resisted the subpoena under the PCS's theory, arguing that she communicated with Senator Regier as a constituent and not in an official capacity. As such, she reasoned, the legislative privilege enjoyed by Senator Regier attached to those communications.

The district court, however, did not agree with PSC management's position. It ruled instead that since Commissioner Fielder is a member of the executive branch of the government, any conversation she had with Senator Regier about the bill did not and could not fall within the bounds of legislative privilege. The court ruled that Commissioner Fielder's communications with Senator Regier were, by definition, between him and the executive branch of government because, in this context, there is no distinction between "personal" and official capacity.

Similarly, this Court's recent Opinion and Order ***did not distinguish between communications with a member of the executive branch in their official versus personal capacity*** for purposes of assessing waiver. And it would not make sense to do so: once a legislator has disclosed otherwise privileged information to an official in the Executive branch, whether the legislator does so in a hearing room or at the Friday night football game, it is not reasonable to expect that official to forget what they heard when they show up for work on Monday morning or to somehow silo it away. ***Whether Fielder and Bukacek were speaking to Senator Regier as friends, candidates, constituents, or officials, knowing disclosure of privileged information to a person who is a member of the Executive branch, no matter what other hats they***

may wear, is a waiver of that privilege (emphasis added.) According to this ruling, any conversations that Senator Regier had with Commissioner Fielder regarding redistricting were, *ipso facto*, official, with Commissioner Fielder communicating as a member of the executive branch of government *per se*. In short, any conversation Commissioner Fielder had with Senator Regier about his redistricting bill was in the course and scope of Commissioner Fielder's role in the executive branch of government as a matter of law.

This analysis is consistent with the PSC's ultimate decision to provide Commissioner Fielder with counsel. It did so because her conversations with Senator Regier were in her capacity as a member of the executive branch of government. Had PSC management's legal theory prevailed with the district court, to the effect that Commissioner Fielder was not speaking as a member of the executive branch when she communicated with Senator Regier, then she would be in no position to request remittance of the fees she incurred. But PSC management's position did not prevail. The court rejected the idea and determined that Commissioner Fielder's communication with Senator Regier about his redistricting bill was in her executive branch capacity. According to the district court, the subject communications can only have been in the course and scope of Commissioner Fielder's executive branch capacity. The executive branch, therefore, had a duty to provide her with counsel—which the PSC eventually did, albeit well after first denying counsel to her and thus forcing her to obtain outside counsel and incur attorney fees in arguing PSC management's position.

An analogy illuminates the point. If a plaintiff had sued Commissioner Fielder for a moving vehicle accident during what appeared to be her business, it would not be because she is a PSC Commissioner. Such a civil action would arise from private activities. But if a court were to later find that the activities had occurred in the course and scope of Commissioner Fielder's executive branch duties—as the court found here—the state would then be obliged to indemnify her. Mont. Code Ann. § 2-9-305.

The reasons stated by the Plaintiffs for serving Commissioner Fielder with a subpoena are determinative. They said they wanted to depose her because she is a member of the PSC. Had Commissioner Fielder been a mere constituent—and not a member of the PSC—her communications with Senator Regier would not only have been protected by legislative privilege but would have been of no interest to the Plaintiffs. As they explained to the district court:

As members of the PSC, the Commissioners possess unique knowledge about the geography and political make-up of their districts, as well as the impact of the PSC redistricting on their districts. Deposing the Commissioners on these topics will likely lead to probative evidence of whether the PSC map provides a partisan advantage. The Commissioners can also speak to how county and city splits in the

new PSC map impacts their work with their constituents and in their districts, which is relevant to the state's interest in changing the districts to reflect house district lines, rather than county lines, and the fit between that interest and the enacted map. Fielder only won narrowly against her Democratic opponent in 2020 but is running unopposed for reelection to District 4 in 2024. Jennifer Fielder, Ballotpedia.org (last visited September 1, 2024). She likely possesses information on how the PSC district changes impacted the electorate in her district and her current race. This information is probative of voter dilution and whether District 4 is likely to inherit a representative who "represent[s] only members of [the Republican party], rather than their constituency as a whole." *See Shaw v. Reno*, 509 U.S. 630, 648 (1993). **Both Commissioners'** potential testimony is also material to whether SB 109 is narrowly tailored to the furtherance of a compelling state interest.

(See. Plfs' Br. enclosed, pp. 14-15 (emphasis added)). Their point is crystal clear: the Plaintiffs' insisted on Commissioner Fielder's testimony "as a member of the PSC."

Refusing to supply Commissioner Fielder with counsel and refusing to pay her attorney fees places a burden on her that benefits the PSC and the public at her private and individual expense. This defies public policy. A closely analogous statute, which reflects the underlying principle, is Mont. Code Ann. § 2-9-305. It reads: "In **any** noncriminal action brought against any employee of a state for . . . conduct of the employee committed while acting within the course and scope of the employee's office or employment, the governmental entity employer shall defend the action on behalf of the employee and indemnify the employee." Mont. Code Ann. § 2-9-305(2) (emphasis added). This statute covers "civil actions" which, interpreted in light of public policy, includes responding to civil subpoenas in the course and scope of a PSC Commissioner's duties. It illustrates the public policy of defending and indemnifying public officers for liabilities arising from actions in the course and scope of their public service well. In sum, as a general rule, the PSC should pay for legal fees occasioned—as here—by a Public Service Commissioner's service as a member of the PSC.

Indeed, this principle was followed in this case, but only after the district court entered its order on Commissioner Fielder's motion to quash. The PSC sensibly appointed Aislinn Brown to represent Commissioner Fielder. The principle should be followed in equal measure by indemnifying Commissioner Fielder for the legal fees she incurred after PSC management declined to accept service of her subpoena on a legal theory that the district court ultimately rejected.

Enclosed herewith is our billing statement for Commissioner Fielder's fees incurred with our firm in this matter. The PSC is demanded to indemnify Commissioner Fielder by paying her attorney

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fees and expenses of \$13,160.27. (See invoice enclosed.) Kindly remit payment within 30 days of the date of this letter. Thank you.

Sincerely yours,

RHOADES & ERICKSON PLLC

A handwritten signature in black ink, appearing to be 'QMR', with a long horizontal line extending to the right.

Quentin M. Rhoades

QMR/sh

Cc: Jennifer Fielder

Enclosures as stated.

Montana Public Service Commission



James Brown, President
Jennifer Fielder, Vice President
Tony O'Donnell, Commissioner
Randall Pinocci, Commissioner
Dr. Annie Bukacek, Commissioner

November 25, 2024

Via U.S. Mail

Quentin Rhoades
Rhoades & Erickson PLLC
430 Ryman Street
Missoula, MT 59802

Mr. Rhoades,

I have received your letter dated October 30, 2024, regarding legal fees incurred by Jennifer Fielder in the matter of *Montana Conservation Voters, et al., v. Jacobsen*, Cause No. DV-25-2023-0000702-CCR, Montana First Judicial District Court, Lewis & Clark County. After a review of the facts and laws outlined in your letter, the relevant briefing, and the Court's Order on Motion to Quash ("Order"), my client, the Department of Public Service Regulation ("Department"), has decided to decline to pay the requested fees and costs.

In your letter, you assert that "PSC management took the position that the PSC did not consider any communications between the Commissioners and Senator Regier about the redistricting bill as communications between the senator and the executive branch." From this, you reason that Mrs. Fielder's decision to retain your services and oppose the subpoena was "in compliance with PSC management's position" and "under the [PSC]'s theory." This reasoning ignores several important facts, including:

1. On August 16, 2024, you contacted plaintiffs' counsel to ask whether the subpoena was served on Mrs. Fielder in a personal or official capacity.¹ On the same day, Plaintiffs' counsel confirmed that the subpoena was being served in her personal capacity.²
2. On August 21, 2024, you represented to plaintiffs' counsel that Mrs. Fielder "has never communicated with Senator Regier in her capacity as a public service commissioner."³
3. On August 24, 2024, you correctly advised counsel for plaintiffs that, if they sought to depose Mrs. Fielder in her capacity as a Commissioner, they would need to serve a

¹ Principal Br. in Supp. of Jennifer Fielder's Mot. to Quash Subpoena & Subpoena Duces Tecum, Ex. JOF 001-16.

² *Id.* at 15.

³ *Id.* at 12.

subpoena on the Public Service Commission and speak with its counsel.⁴

4. In an email dated August 27, 2024, you noted that Plaintiffs' counsel identified two topics for Mrs. Fielder's deposition: (1) "PSC district maps" and (2) "her campaigns."⁵
5. In a sworn affidavit signed on August 29, 2024, Mrs. Fielder stated that she "had no communication with anyone in [her] official capacity as a Commissioner discussing SB 109."⁶ She acknowledged that the Commission took no position on SB 109.⁷ Accordingly, when she spoke to Sen. Regier about SB 109, she "did so as a private citizen."⁸ Further, she asserted that information related to her campaigns was confidential, and a deposition on the subject would impair strategy and tactics she intended to use in her bid for reelection.⁹

The fact that the communications between Mrs. Fielder and Sen. Regier were made in an unofficial, personal capacity was not a "position" or "theory" formulated by Department management. It is an undisputed fact that Mrs. Fielder has asserted in a sworn statement. Further, Plaintiffs' clear intention was to question Mrs. Fielder about her personal, political interest in how redistricting affects her campaigns, which undeniably fell outside the scope of Mrs. Fielder's official duties.

Nothing in the Court's Order on Motion to Quash retroactively altered the nature of Mrs. Fielder's communications with Sen. Regier. The Court held that the capacity in which Mrs. Fielder communicated was Sen. Regier was irrelevant to the waiver of the legislative privilege: "Whether Fielder and Bukacek were speaking to Senator Regier as *friends, candidates, constituents, or officials*, knowing disclosure of privileged information to a person who is a member of the Executive branch, *no matter what other hats they may wear*, is a waiver of that privilege."¹⁰ Contrary to your assertion, the Court did not find that all of Mrs. Fielder's actions are, "*ipso facto*, official." Instead, the Court held that Sen. Regier's "communications with Bukacek and Fielder about SB 109 or PSC redistricting are not protected by legislative privilege, *no matter the capacity in which they were communicated*."¹¹

Given the Court's analysis of legislative privilege, your analogy to a car accident is inapposite. As you noted, an employer is generally liable for torts committed by employees acting within the course and scope of their employment. Conversely, liability for an accident that occurs outside the course and scope of employment will not be imputed to the employer. The status of the employee when the accident occurs is central to the employer's liability. The same cannot be said of the Court's legislative privilege analysis. The Court made clear that Mrs. Fielder's status—as a friend, candidate, constituent, or official—is immaterial. In short, the rule governing waiver of the legislative privilege is nothing like the rule on an employer's tort liability.

While the capacity in which the communications were made is irrelevant to the waiver of the legislative privilege, it remains relevant to the Department. Your letter cites Mont. Code Ann. §

⁴ *Id.* at 8.

⁵ *Id.* at 3.

⁶ Principal Br. in Supp. of Jennifer Fielder's Mot. to Quash Subpoena & Subpoena Duces Tecum, Ex. JOF 003-2.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 3.

¹⁰ Order on Motion to Quash 6:8–12 (emphasis added).

¹¹ Order on Motion to Quash 6:24–7:2.

2-9-305 for the proposition that it is the policy of the State to defend any civil action arising from actions within the course and scope of a government employee's office or employment. Based on the undisputed, sworn statement of Mrs. Fielder, her actions with respect to SB 109 were not within the course and scope of her office or employment. The fact that Sen. Regier cannot assert the legislative privilege with respect to his personal communications with Mrs. Fielder does not mean the Department is obligated to defend and indemnify Mrs. Fielder for her private conduct. It would be inconsistent with public policy for the State to defend and indemnify every executive branch official for actions that are not within the course and scope of the official's duties.

The absence of a legislative privilege does not mean that the Department is presumed to be responsible for the statements of Commissioners acting as private citizens. This distinction is particularly important when it comes to political activities.¹² Using Department funds to defend the political activities of a Commissioner would violate the statutory prohibition against using public resources to support the nomination or election of any person to public office.¹³

The Department offered to provide a defense to the deposition only after it was clear the deposition would address only official knowledge and conduct. As noted in your letter, Plaintiffs' counsel represented to the Court that they sought to examine Mrs. Fielder *as a Commissioner*, "about the geography and political make-up" of her district and the impact of redistricting on her district. This was a reversal from Plaintiffs' prior representations that they wanted to examine Mrs. Fielder in her personal capacity and ask questions about her campaigns.

Your efforts on Mrs. Fielder's behalf successfully prevented Plaintiffs from asking questions about Mrs. Fielder's political knowledge and strategies. Consistent with Mrs. Fielder's objections and Plaintiffs' new focus on her official knowledge, the Court substantially limited the scope of the deposition. Plaintiffs were permitted to examine Commissioners about:

(1) any communications they had with Senator Regier regarding SB 109 specifically or district boundaries for PSC districts related to the 2023 legislative session; (2) the demographic, social, cultural, and economic makeup of their districts, including the various interests and interest groups found in their district or that are influential in their district; (3) how their work on the PSC and their service to their constituents is affected by demographic, social, and economic makeup of their districts; and (4) how changes in the district boundaries, including in the various proposed maps for SB 109, impact the makeup of their districts, how they perform their duties on the PSC, and how they serve their constituents.¹⁴

Three of the four Court-approved examination topics pertained to information Mrs. Fielder gained through the performance of her official duties. Equally important, the Court expressly prohibited Plaintiffs from inquiring about campaigns, electoral strategy, prospects for reelection, and other political matters.¹⁵

The Court's Order fundamentally changed the purpose and scope of the deposition. Under these circumstances, the Department offered to retain a State attorney to defend the deposition, since it

¹² See, e.g., Mont. Code Ann. § 2-2-122 (prohibiting the use of public resources for political purposes).

¹³ *Id.*

¹⁴ Order on Motion to Quash 13:20–14:4.

¹⁵ *Id.* at 12:4–15.

would focus on Mrs. Fielder's official knowledge and activities, as opposed to her personal, political knowledge and activities.

Finally, I disagree with your assertion that the Department and the public have benefited from your legal services. Although Mrs. Fielder's efforts to quash her deposition subpoena were only partially successful, they uniquely benefited Mrs. Fielder by barring any questions about her personal, political knowledge or activities. The Department has no interest in protecting or defending the private, political activities of elected officials. The Department and the public received no benefit from Mrs. Fielder's efforts to quash the subpoena. Because your representation uniquely benefitted Mrs. Fielder, she should remain liable for the associated costs and fees.

If you would like to discuss any of the above in greater detail, please feel free to call me at 406-444-6970.

Respectfully,

Lucas Hamilton
Chief Legal Counsel
Montana Public Service Commission
Department of Public Service Regulation