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Chris P. Andrian, CSB #53073  
ANDRIAN, GALLENSON & GASKELL  
1100 Mendocino Avenue  
Santa Rosa, California 95401  
(707) 527-9381

**ENDORSED-FILED**

NOV 29 2023

CLERK OF MENDOCINO COUNTY  
SUPERIOR COURT OF CALIFORNIA

Attorneys for Defendant  
CHAMISE CUBBISON

**BONNIE-TOSTE-MILLER**

SUPERIOR COURT OF CALIFORNIA

COUNTY OF MENDOCINO

PEOPLE OF THE STATE OF  
CALIFORNIA,

CASE NO. 23CR02523-B

Plaintiff,

**DEFENSE NOTICE TO INVITE AND/OR  
MOTION TO RECUSE THE OFFICE OF  
THE DISTRICT ATTORNEY OF  
MENDOCINO COUNTY AND  
DECLARATION OF COUNSEL**

vs.

CHAMISE CUBBISON

Defendant(s).

DATE: 12/19/23  
TIME: 9am  
DEPT: A

**TO: THE CLERK OF THE ABOVE-ENTITLED COURT AND TO THE DISTRICT  
ATTORNEY FOR THE COUNTY OF MENDOCINO:**

PLEASE TAKE NOTICE that on the date and time stated above, or as soon  
thereafter as this matter can be heard in Department A of this Court, CHAMISE  
CUBBISON, by and through her counsel will invite or move for the recusal of the  
Mendocino County District Attorney pursuant to Penal Code section 1424. Said  
request will be based on the attached memorandum of points and authorities,

1 declaration of counsel and attachments, the records, the pleadings and papers on file  
2 herein, and any other evidence that may be introduced at the hearing.

3 DATED: November 28, 2023

ANDRIAN & GALLENSON

4  
5 By: 

6 Chris P. Andrian  
7 Attorneys for Defendant  
8 CHAMISE CUBBISON

9 **STATEMENT OF THE CASE**

10 On October 13, 2023, a criminal complaint was filed, charging Chamise  
11 Cubbison in Count I with a felony violation of Penal Code section 424(a),  
12 Misappropriation of Public Funds.

13 **ARGUMENT**

14 **I.**

15 **THE PROSECUTOR'S OFFICE HANDLING THIS CASE OVERSEEN BY C. DAVID**  
16 **EYSTER, MUST RECUSE PURSUANT TO PENAL CODE SECTION 1424.**

17 **A. A Conflict Of Interest Exists Based On DA Eyster's Prior Dealings With**  
18 **Ms. Cubbison.**

19 Penal Code section 1424 governs the recusal both of individual prosecutors  
20 and the District Attorney's office as a whole. A motion to recuse may be granted if "the  
21 evidence shows that a conflict of interest exists that would render it unlikely that the  
22 defendant would receive a fair trial." (Penal Code section 1424.) "[A] conflict exists  
23 under the statute when 'the circumstances of a case evidence a reasonable possibility  
24 that the DA's office may not exercise its discretionary function in an evenhanded  
25 manner.' [Citation omitted.] The prosecutorial discretion goes beyond the decision of  
26 what charges to file and the trial itself; it extends to all portions of the proceedings."  
27 (*Millsap v. Superior Court* (1999) 70 Cal.App.4th 196, 199-200.) The reasoning  
28

1 behind this standard is that the district attorney has an obligation to act impartially,  
2 "and whose interest, therefore, in a criminal proceeding is not that it shall win a case,  
3 but that justice shall be done." (*People v. Conner* (1983) 34 Cal.3d 141, 148, citing  
4 *Berger v. United States* (1935) 295 U.S. 78, 88.) According to the California State  
5 Bar, a "prosecutor has the responsibility of a minister of justice and not simply that of  
6 an advocate. This responsibility carries with it specific obligations to see that the  
7 defendant is accorded procedural justice...." (See the comment to Rule 3.8, the  
8 special responsibilities of a prosecutor.)  
9

10 District Attorney C. David Eyster is the District Attorney for the County of  
11 Mendocino and oversees the filing of criminal complaints for the county. He has been  
12 involved in the investigation and filing of charges against Chamise Cubbison. The  
13 Mendocino County District Attorney is an elected official. Mr. Eyster was first elected  
14 on November 11, 2010, and has remained in office to this date.  
15

16 Chamise Cubbison is also an elected official who was first elected on June 7,  
17 2022, to take office in January of 2023 to the combined position of Auditor-  
18 Controller/Treasurer-Tax Collector of Mendocino County. Ms. Cubbison was  
19 subsequently appointed Auditor-Controller on July 12, 2022, to fill the unexpired term  
20 of former Auditor-Controller Lloyd Weer, who had retired.  
21

22 The very nature of the relationship between an auditor, and for want of a better  
23 term, "Auditee", creates a fiscal relationship which may be inherently contentious. An  
24 auditor's job, among other things, is to probe, question, approve, and oftentimes  
25 reject, if improper, requests from county officials. Were an auditor not to do so, it  
26 would be considered a dereliction of his or her duties. Hence, an auditor's job can,  
27 does, and oftentimes should create an adversarial relationship which, put another  
28

1 way, creates a conflict of interest.

2 There can be no question that prior to the investigation of Ms. Cubbison and  
3 the filing of the criminal complaint in this matter, an adversarial relationship existed  
4 between Ms. Cubbison and Mr. Eyster.  
5

6 The conflict of interest is evidenced by the District Attorney's written and public  
7 opposition to Chamise Cubbison's appointment to the position of Auditor-Controller,  
8 his public statements that she was not qualified for the position, and his attempts to  
9 dissolve her position entirely. His prior involvement with Ms. Cubbison presents a  
10 reasonable possibility it could cloud his ability to exercise discretionary function of his  
11 office in an evenhanded manner. This potential failure to execute the function of his  
12 office makes it unlikely that Ms. Cubbison would receive a fair trial, placing her access  
13 to procedural justice in jeopardy.  
14

15 **B. District Attorney Eyster's Public Commentary and Likely Inter-Office**  
16 **Communications Regarding Ms. Cubbison Indicate His Inability To**  
17 **Uphold The Obligation Of Impartiality His Office Demands.**

18 "A district attorney may ... prosecute vigorously, but both the accused and the  
19 public have a legitimate expectation that his zeal, as reflected in his tactics at trial, will  
20 be born of objective and impartial consideration of each individual case." . . . "[para. ]  
21 . . . [Thus] we conclude that a trial judge may exercise his power to disqualify a district  
22 attorney from participating in the prosecution of a criminal charge when the judge  
23 determines that the attorney suffers from a conflict of interest which might prejudice  
24 him against the accused and thereby affect, or appear to affect, his ability to  
25 impartially perform the discretionary function of his office." (Pp. 266, 267, 269, fns.  
26 omitted.) (*People v. Conner* (1983) 34 Cal.3d 141, 146.)  
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1           In *Connor*, Mr. Braughton, a Deputy District Attorney, was a witness to, and  
2 potential victim of, the defendant's alleged criminal conduct. It was clear that his  
3 status as a witness and potential victim would impact his relationship with the criminal  
4 proceedings. The court in *Connor* found that Braughton's harrowing experience and  
5 emotional involvement in the case were communicated to his fellow coworkers  
6 through his own conversations with a substantial number of the DA's personnel, and  
7 also through the media coverage and interviews concerning the incident. The court  
8 also addressed the fact that these communications were more likely because the  
9 felony division consisted of only 25 attorneys. (*Connor, supra*, at p.148-149.) The  
10 appellate court held that "the pervasiveness of the communications regarding  
11 Braughton's relationship to the incident, and the difficulty in gauging their cumulative  
12 effect" was substantial evidence that supported the trial court's determination that  
13 there was a conflict of interest in the case. (*Id.* at p. 144-145.)

14           Mr. Eyster's tendency to use Board of Supervisors meetings to publicly  
15 challenge and undermine Ms. Cubbison's authority by refusing to adhere to the  
16 expenditure regulations set forth by her office suggests a lack of objectivity with  
17 respect to her case as evidenced by his disapproval of her, as shown by what will be  
18 referred to as "The Broiler Steak House Reimbursement Claim." The rejection of that  
19 claim was the inception for the contentious relationship that was to develop between  
20 the two offices. District Attorney Eyster's public comments and reference to the denial  
21 of The Broiler Steak House Reimbursement Claim functioned as the basis for his  
22 finding Ms. Cubbison an unqualified candidate. Additionally, his attempt to undermine  
23 Ms. Cubbison as Auditor-Controller is demonstrated by his repeated attempts to  
24 submit The Broiler Steak House Reimbursement Claim in reformatted ways in hopes  
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1 that Ms. Cubbison's office would accept it. Furthermore, Mr. Eyster's attempt to bring  
2 the claim in front of the Board of Supervisors cemented the contentious relationship  
3 between the two offices.

4  
5 The press covered the Board of Supervisors meetings, further ensuring that  
6 Mr. Eyster's animosity for Ms. Cubbison was well known throughout the small, rural  
7 county of Mendocino. Additionally, the Mendocino County District Attorney's Office  
8 consists of just 11 attorneys. With such a small office, it is not unreasonable to  
9 assume that Mr. Eyster's feelings of enmity for Ms. Cubbison would percolate  
10 throughout his office, ultimately also rendering his deputies unable to impartially  
11 prosecute Ms. Cubbison.

12  
13 After Ms. Cubbison was formally charged in this matter, she was shortly  
14 thereafter suspended without pay by the Mendocino County Board of Supervisors.  
15 Both have triggered a flurry of media articles which now surround this case.  
16 Ultimately, almost every media outlet in Mendocino County has published articles  
17 which highlight the conflict between Ms. Cubbison and Mr. Eyster. (See attached  
18 Declaration and Exhibits.)

19  
20 Should the case proceed to jury trial, the jury voir dire process will be  
21 permeated by questions asked of jurors concerning their knowledge of any disputes  
22 between Mr. Eyster and Ms. Cubbison, and as a result they may be asked questions  
23 about how they personally they feel about Mr. Eyster and Ms. Cubbison. It could  
24 create a sideshow that will undermine the integrity of the justice system and lengthen  
25 and complicate the jury selection process. Discretion strongly suggests Mr. Eyster  
26 should recuse himself. By separating himself from the above, the case will be about  
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28

1 the charges Ms. Cubbison faces, not about the personal rift between Mr. Eyster and  
2 Ms. Cubbison.

3 **C. The Mendocino District Attorney May Well Be A Witness In**  
4 **Contemporaneous Legal Proceedings.**

5 Section 1.03 of the California Rules of Professional Ethics allows a court to  
6 disqualify a lawyer who seeks to both testify and serve as advocate to protect a trier  
7 of fact from being misled or opposing party from being prejudiced. More specifically,  
8 the court “retains discretion to disqualify a likely advocate-witness as counsel...where  
9 there is a convincing demonstration of detriment to the opponent or injury to the  
10 integrity of the judicial process.” (*Doe v. Yim* (2020) 55 Cal.App.5th 573, 582, quoting  
11 *Lyle v. Superior Court* (1981) 122 Cal.App.3d 470, 482.)

12  
13 “The prohibition against lawyer’s acting as both advocate and witness ‘is a  
14 necessary corollary to the more fundamental tenet of our adversarial system that  
15 juries are to ground their decision on the facts of a case and not on the integrity or  
16 credibility of the advocates...The enforcement of that prohibition ‘is more than just an  
17 ethical obligation of individual counsel,’ but rather ‘a matter of institutional concern  
18 implicating the basic foundations of our system of justice.’” (*People v.*  
19 *Donaldson* (2001) 93 Cal.App.4th 916, 928 quoting *United States v. Prantil* (9th Cir.  
20 1985) 764 F.2d 548, 553.)

21  
22 In *Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197, 1205, the Third District  
23 provided a succinct summary: “The court has an independent interest in ensuring  
24 trials are conducted within ethical standards of the profession and that legal  
25 proceedings appear fair to all that observe them.”


26  
27 When the Mendocino County Board of Supervisors suspended Ms. Cubbison  
28 without pay on June 2, 2023, legal issues arose regarding the Board’s action. Civil

1 counsel has been engaged by Ms. Cubbison and it is reasonable that civil  
2 proceedings will be commenced during the same period that this case is moving  
3 forward. It is hard not to see Mr. Eyster becoming a sworn witness in some or all of  
4 the civil proceedings. Were Mr. Eyster to continue his role as prosecutor in Ms.  
5 Cubbison's criminal case and later (or contemporaneously) testify as a sworn witness  
6 in the imminent civil case, he would be subject to questions concerning his conduct  
7 and his dispute with Ms. Cubbison.  
8

9 **CONCLUSION**

10 The responsible decision would be for District Attorney Eyster to accept the  
11 invitation to voluntarily recuse himself, or in the alternative, at a minimum, notify the  
12 State Attorney General of his belief that he should step aside. If he declines to do so,  
13 Ms. Cubbison requests that the Office of the District Attorney of the County of  
14 Mendocino be recused from this case.  
15

16  
17 DATED: November 28, 2023 ANDRIAN & GALLENSON

18  
19 By:   
20 Chris P. Andrian  
21 Attorneys for Defendant  
22 CHAMISE CUBBISON  
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