**CENTER for JUDICIAL ACCOUNTABILITY, INC.**

*Post Office Box 8101* *Tel. (914)421-1200* *E-Mail: mail@judgewatch.org*
*White Plains, New York 10602* *Website: www.judgewatch.org*

December 28, 2016

TO: John P. Connors, Jr., Esq./Chair
Attorney Grievance Committee
for the Second, Eleventh, and Thirteenth Judicial Districts

FROM: Elena Sassower, Director
Center for Judicial Accountability, Inc. (CJA)

RE: (1) Reconsideration of CJA's October 14, 2016 complaint entitled "Testing the efficacy of New York's attorney disciplinary committees in policing district attorney conflicts of interest and obligations to report attorney misconduct" – Committee File #K-1827-16; Q-1828-16; R-1829-16
(2) FOIL request: written conflict-of-interest procedures utilized by the three district attorney offices within the Committee's jurisdiction – including as relates to their handling of public corruption complaints

Pursuant to §1240.7(e)(3) of the Rules for Attorney Disciplinary Matters [22 NYCRR §1240.7(e)(3)], I hereby file this written request for reconsideration of the November 30, 2016 letter of Chief Counsel Diana Maxfield Kearse, informing me that "it has been determined" that my October 14, 2016 conflict-of-interest/misconduct complaint "does not provide a sufficient basis to conduct an investigation" of the three complained-against district attorneys within the Committee's geographic jurisdiction. According to Chief Counsel Kearse, "the Committee is unable to assist [me]."

§1240.7(e)(3), entitled "Review of Dismissal or Declination to Investigate", states:

> "Within 30 days of the issuance of notice to a complainant of a Chief Attorney's decision declining to investigate a complaint, or of a Committee's dismissal of a complaint, the complainant may submit a written request for reconsideration to the chair of the Committee. Oral argument of the request shall not be permitted. The Chair shall have the discretion to grant or deny reconsideration, or refer the request to the full Committee, or a subcommittee thereof, for whatever action it deems appropriate."

At the outset, I object that Chief Counsel Kearse's letter does not apprise me of my right to seek reconsideration pursuant to §1240.7(e)(3). Is the Committee's normal and customary practice to conceal this right from complainants?

Likewise, I object that Chief Counsel Kearse's letter falsely makes it appear that it was the Committee that determined that "[my] complaint does not provide a sufficient basis to conduct an investigation". As reflected by §§1240.7(b), (d), and (e)(3) of the Rules, the Committee plays NO role in the decision to decline to investigate a complaint. Rather, that power is vested in the Committee's chief attorney – in other words, Chief Counsel Kease. Is the Committee's normal and customary practice to have its chief attorney not directly apprise complainants that the determination is hers alone – for which reason, the rules entitle complainants to the safeguard of seeking reconsideration pursuant to §1240.7(e)(3).

I also object that Chief Counsel Kearse purports that "careful review" underlies the determination that my complaint "does not provide a sufficient basis to conduct an investigation". No "careful review" could produce the mischaracterization of my complaint on which is founded the deceit that it is insufficient to warrant investigation.

According to her letter,

> "The substance of [my] complaint alleges that the subject attorneys, acting in their respective capacities as a District Attorney, either elected, appointed, or acting, each engaged in a 'conflict of interest/misconduct' by not undertaking an investigation or prosecution of alleged criminal corruption, and further engaged in a 'larcenous pocketing' of salary increases they knew to be unlawful. It is not the function of the Committee to serve as a review mechanism over the actions and decisions within the discretion of a duly constituted District Attorney and made in the ordinary course of the performance of duties vested in that office by law. Clearly among such duties is the determination of whether or not to conduct a criminal investigation or prosecution." (underlining added).

Yet, no district attorney has "discretion" to "sit on" a public corruption complaint in which he has financial and other interests – as Albany County District Attorney Soares has been doing with respect to the three public corruption complaints I filed with him on July 19, 2013, January 7, 2014, and June 21, 2016 in which he and his fellow district attorneys have HUGE financial and other interests. Nor do his fellow district attorneys have "discretion" to ignore particularized, full-documented notice of District Attorney Soares' willful nonfeasance with respect to those three corruption complaints, financially benefiting him and them, without incurring criminal liability for colluding in his self-interested, corrupt conduct. This includes the three district attorneys within this Committee's geographic jurisdiction.

The Committee's function and duty is to punish attorneys who violate ethical rules of professional conduct. The "substance" of my complaint – and so-reflected by its "RE clause" title – is the district attorneys' violations of ethical rules governing conflict of interest and the duty to report attorney misconduct. Indeed, the applicable ethical rules are both cited and quoted by my complaint, *to wit*, New York's Rules of Professional Conduct: Rule 1.7 entitled "Conflict of Interest: Current Clients"

and Rule 8.3 entitled "Reporting Professional Misconduct", subsection (a); the National Prosecution Standards of the National District Attorneys Association, Section 1-3.3 entitled "Specific Conflicts", subdivision (d); Section 1-3.4 entitled "Conflict Handling"; Section 1-3.5 entitled "Special Prosecutors"; and Section 1-1.6 entitled "Duty to Respond to Misconduct". As stated by my complaint:

> "These provisions are all relevant to the situation at bar with respect to the July 19, 2013, January 7, 2014, and June 21, 2016 corruption complaints. Yet, D.A. Soares and his fellow district attorneys have ignored my explicit assertions to them of their conflicts of interest, have not come forward with their protocols and procedures for handling conflicts of interests, and have gone full steam ahead in profiting from HUGE salary increases that are completely unlawful as they are based on judicial salary increases that are fraudulent, statutorily-violative, and unconstitutional, as the evidence furnished by those complaints resoundingly establishes." (at p. 7, underlining and capitalization in the original).

Is it your position, Mr. Chairman, that attorneys, let alone district attorneys, have "discretion" to ignore mandatory conflict-of-interest rules that the Committee is charged with enforcing? Likewise, mandatory rules pertaining to reporting attorney misconduct?

Chief Counsel Kearse then adds to her pretense that my complaint "does not provide a sufficient basis to conduct an investigation". She states:

> "Further, it is beyond the power of the Committee to determine the propriety of a District Attorney's acceptance of a salary increase paid to him in his official capacity. Whether or not such increase was 'unlawful' is an issue that must be addressed and resolved in another more appropriate forum."

This is utterly disingenuous. The "appropriate forum" for addressing and resolving whether the district attorney salary increases are "unlawful" are the district attorneys, who are its beneficiaries. Their function is to evaluate lawfulness and, upon determining penal law violations, to bring legal proceedings based thereon. This is the gravamen of my complaint: that the district attorneys are not discharging their function to determine the penal violations that underlie their district attorney salary increases because of their financial interest in maintaining the increases, as to which, in violation of ethical rules, they are not following mandatory conflict-of-interest protocols. Determining their conflict-of-interest violations, as likewise their violations of the ethical rule requiring the reporting attorney misconduct, is squarely within "the power of the Committee".

As for Chief Counsel Kearse's further claim:

> "Moreover, it appears from your complaint that this issue is the subject of a pending legal proceeding",

this, too, is utterly disingenuous. The pending legal proceeding, identified at p. 7 of the complaint, is a citizen-taxpayer action to secure declarations of statutory violations, fraud, and unconstitutionality. It has nothing to do with punishing district attorneys for willfully violating ethical rules governing conflicts of interest and reporting attorney misconduct – the subject of the complaint. Surely, you are familiar with the different purposes served by judicial and disciplinary proceedings.

Needless to say, if you believe that any of the serious and substantial issues encompassed by my October 14, 2016 complaint are better resolved in some unidentified "more appropriate forum" or by a legal proceeding – excepting, of course, the violations of mandatory rules pertaining to conflict-of-interest and duty to report attorney misconduct, as to which the Committee's disciplinary jurisdiction is exclusive – the Committee is empowered to make referrals and I expressly request that it do so. Indeed, entirely ignored by Chief Counsel Kearse is the referral relief expressly sought by the third branch of my complaint's "RE clause", elaborated upon by the complaint's concluding paragraphs as follows:

> "And will you be referring D.A. Soares and his D.A. co-conspirators to criminal authorities so that they can be prosecuted for their crimes. Most fitting would be prosecutions pursuant to the 'Public Trust Act' (Penal Law §496), which, as recited by the July 19, 2013 and June 21, 2016 corruption complaints, the district attorneys clamored for as a necessary tool for rooting out government corruption. In the words of Governor Cuomo, in announcing the 'Public Trust Act' on April 9, 2013, arm and arm with the district attorneys:
>
> > 'Let us affirm and expand a simple fact: If you are a public official and if you break the law, you will get caught, you will be prosecuted, and you will go to jail'.
>
> Surely, the attorney disciplinary committees, whose jurisdiction is disciplinary, not criminal, have mandatory obligations to make criminal referrals, where, as here, the violations of standards of attorney and district attorney conduct are in furtherance of corrupting government and other criminal acts." (p. 8, underlining in the original)

There being no basis in fact or law for Chief Counsel Kearse's November 30, 2016 letter declining to investigate my October 14, 2016 complaint or to otherwise assist me, your duty, as the Committee's chair, is to grant reconsideration and direct the investigation which Chief Counsel Kearse was mandated to authorize pursuant to Rule §1240.7(b). This includes a direction to the three complained-against district attorneys that they each "provide a written response to the complaint". This, they already have a head-start on, since – as reflected by the complaint (at p. 8) – I provided each of them with a copy for the two-fold purpose of their response and as a FOIL request for records responsive to the question:

> "What are your procedures for handling public corruption complaints, filed with your district attorney offices, where you have financial and other conflicts of interest?"[1]

I have received no responses from them.

As the Committee should reasonably have copies of the written conflict-of-interest procedures utilized by the three district attorney offices within its jurisdiction – including as relates to their handling of public corruption complaints – I take this opportunity to request copies thereof from the Committee pursuant to FOIL (Public Officers Law Article VI).

Needless to say, you and the other 20 members of the Committee are all appointed by the Appellate Division, Second Department (§1240.4) – whose statutorily-violative, fraudulent, and unconstitutional judicial salary increases underlie the district attorney salary increases. As each of you have professional, political, and personal relationships and interests that may impact upon your ability to impartially discharge your responsibilities, I trust you will be adhering to applicable rules of disclosure and disqualification – and that you will demand same, as well, from Committee staff.

In that connection, please be advised that Chief Counsel Kearse did not author the November 30, 2016 letter she signed. Rather, she has copied it, *verbatim*, from a November 23, 2016 letter signed by staff counsel Glenn Simpson of the Attorney Grievance Committee for the Ninth Judicial District – a fact she might have identified, but did not. In so doing, she replicated what Chief Counsel Mitchell T. Borkowsky of the Attorney Grievance Committee for the Tenth Judicial District did, two days earlier, by a November 28, 2016 letter.[2]

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[1] National Prosecution Standards of the National District Attorneys Association, Section 1-3.4: "Conflict Handling":

> "Each prosecutor's office should establish procedures for handling actual or potential conflicts of interest. These procedures should include, but are not limited to:
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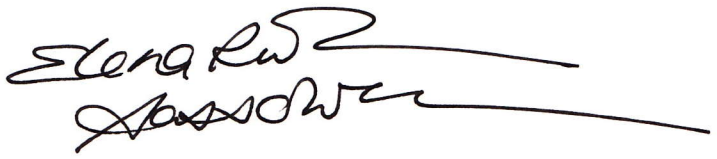
> a. The creation of firewalls and taint or filter teams to ensure that prosecutors with a conflict are not improperly exposed to information or improperly disclose information; and
>
> b. Methods to accurately document the manner in which conflicts were handled to ensure public trust and confidence in the prosecutor's office."

Cited and quoted at p. 6 of my October 14, 2016 conflict-of-interest/misconduct complaint.

[2] Mr. Simpson's November 23, 2016 letter and Chief Counsel Borkowsky's November 28, 2016 letter are posted on CJA's website, www.judgewatch.org, on the webpage of responses to the October 14, 2016 conflict-of-interest/misconduct complaint. That is where my written requests for reconsideration thereof are also posted – essentially identically to this written reconsideration request. The webpage is accessible *via* the prominent homepage link: "NO PAY RAISES FOR NEW YORK's CORRUPT PUBLIC OFFICERS: The

Chief Counsel Kearse likely conferred with her counterpart at the Grievance Committee for the Ninth Judicial District – its Chief Counsel, Gary Casella – and knows whether he is the actual author of Mr. Simpson's November 23, 2016 letter, responsible for the determination it reflects. Chief Counsel Kearse may be presumed to know that if Chief Counsel Casella believed himself disqualified from acting in his own name, pursuant to §§1240.7(b) and (d), his duty was to disqualify himself and have no role whatever in the disposition of the complaint. To have allowed Chief Counsel Casella to extend his improper behind-the-scenes involvement to the complaint filed with this Committee is itself misconduct – and all the more so because Mr. Simpson's signed letter cannot be justified, as Chief Counsel Kearse reasonably knew.

Thank you.



cc: The three complained-against district attorneys within the Committee's jurisdiction:
Queens County District Attorney Richard Brown
Richmond County District Attorney Michael E. McMahon
Office of the Kings County District Attorney

Chairs and ranking members of the Senate and Assembly committees and joint commissions with oversight jurisdiction over New York's 62 district attorneys, their salaries & New York's attorney disciplinary committees

Money Belongs to their Victims!" It brings up a menu page whose #14 entry is entitled "A New Round of Disciplinary & Criminal Complaints".