

CENTER FOR  
THE  
ADVANCEMENT OF  
PUBLIC  
INTEGRITY

# Raising the Bar

Reducing Conflicts of Interest and Increasing  
Transparency in District Attorney Campaign Fundraising



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# Executive Summary

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The Center for the Advancement of Public Integrity at Columbia Law School (CAPI) conducted a review of the campaign fundraising practices of Manhattan District Attorney Cyrus Vance, Jr. at his request. Our review, as described in this report, encompassed research on relevant laws, regulations, and guidelines, as well as interviews with relevant stakeholders and subject matter experts, and culminates with recommended improvements to district attorney fundraising policies and procedures that are designed to address the problems of actual conflicts of interest, potential conflicts of interest that raise appearance issues, and unconscious bias, that may arise when campaign contributors also have business with a district attorney's office.

While DA Vance requested this report, it also applies to the 61 other district attorneys in New York, and CAPI's recommendations are designed to work broadly for those other offices as well.

CAPI's recommendations are summarized as follows:

1. **Apply Blind Fundraising Standards:** District attorneys who are unaware of their donors' identities more easily avoid conflicts of interest related to those donors.
2. **Refuse or Limit Contributions from Parties with Actual or Potential Conflicts of Interest:** District attorneys should not accept contributions from individuals who are parties to matters before the office, including defendants and other participants in cases, and targets of investigations. District attorneys should impose a strict cap on donations from lawyers who represent clients before the office and should also impose a cap on those lawyers' law partners.
3. **Enforce a Strict Division Between the DA's Campaign and the DA's Office:** Maintaining this separation will further insulate the District Attorney's Office from knowledge of contributions.
4. **Refuse Campaign Contributions from District Attorney Office Staff and Their Spouses.**
5. **Utilize a Comprehensive Vetting Procedure:** Vetting procedures can help determine whether it is prudent to accept a legal campaign contribution. It is typical for district attorney candidates to make these decisions, but delegating this responsibility will help to prevent actual and potential conflicts of interest.
6. **Require Donors to Certify Eligibility to Contribute:** As a first step in vetting campaign contributions, district attorney candidates should require donors to fill out forms that include a certification that the donation is in compliance with the candidate's fundraising policies.
7. **Publish Campaign Policies.**

# Background

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In October 2017, New York County District Attorney Cyrus Vance, Jr., asked the Center for the Advancement of Public Integrity at Columbia Law School (CAPI) to conduct an independent review of, and make recommendations concerning, his practices around soliciting and accepting campaign donations.<sup>1</sup> The request was prompted by media reports suggesting that charging decisions that District Attorney (DA) Vance made in two specific matters raised questions about whether those decisions may have been impacted by donations made to the Vance campaign by lawyers involved in the cases at issue. The first matter involved the DA Office's decision not to charge an allegation of groping against media mogul Harvey Weinstein.<sup>2</sup> Weinstein was represented in this matter by a former law partner of DA Vance who, at the time of the Weinstein decision, had contributed more than \$24,000 to DA Vance's campaign.<sup>3</sup> Another lawyer who did legal work on behalf of Weinstein (although not in matters before DA Vance's office) contributed \$10,000 shortly after DA Vance decided not to pursue criminal charges against Weinstein.<sup>4</sup> This attorney contributed over \$55,000 to the Vance campaign since 2008.<sup>5</sup>

The second matter that received considerable media and public scrutiny was the decision by DA Vance's office not to pursue criminal charges against Ivanka Trump and Donald Trump, Jr. over allegations that they misrepresented to buyers and potential buyers the number of condominiums that had been sold in the Trump SoHo real estate development.<sup>6</sup> In connection with the case, DA Vance agreed to a meeting requested by a lawyer representing the Trump siblings. The meeting occurred in May 2012. Prior to the meeting, DA Vance's campaign returned a previous campaign donation of \$25,000 that the lawyer had made. However, later

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<sup>1</sup> CAPI is a nonprofit research center and was not paid for its work on this report.

<sup>2</sup> Associated Press, *Manhattan DA Rethinking Campaign Donations After Dropping Harvey Weinstein Case*, *Hollywood Rep.*, Oct. 17, 2017, <https://www.hollywoodreporter.com/news/manhattan-da-rethinking-campaign-donations-dropping-harvey-weinstein-case-1049724>. CAPI's recitation of facts surrounding the investigations referenced in this section comes entirely from public records; CAPI did not have access to any confidential information regarding these cases.

<sup>3</sup> All contributions to the Vance campaign are available on the New York State Board of Elections website. For the Vance Campaign, go to <https://www.elections.ny.gov/ContributionSearchA.html>. In the search bar, type "Vance" for Candidate Name, then select "District Attorney" for office, select "New York County," date of contribution from 01/01/2008-01/01/2018, show contributions from ALL, and for amount of contribution type 1.00-100,000.

<sup>4</sup> Eli Watkins, *Embattled DA Defends Not Prosecuting Weinstein, Trumps over the Years*, *CNN*, Oct. 12, 2017, <http://www.cnn.com/2017/10/11/politics/cyrus-vance-harvey-weinstein-trump/index.html>.

<sup>5</sup> See James C. McKinley, Jr., *A Growing Call to Limit Lawyers' Donations to Prosecutors*, *N.Y. Times*, Nov. 16, 2017, at A1, <https://www.nytimes.com/2017/11/15/nyregion/defense-lawyers-donations-district-attorney.html>.

<sup>6</sup> Andrea Bernstein et al., *How Ivanka Trump and Donald Trump, Jr., Avoided a Criminal Indictment*, *New Yorker*, Oct. 4, 2017, <https://www.newyorker.com/news/news-desk/how-ivanka-trump-and-donald-trump-jr-avoided-a-criminal-indictment>.

donations by this lawyer in 2013 (after the decision to decline prosecution was made) amounted to nearly \$32,000.<sup>7</sup> The Trump siblings matter was resolved civilly and included fines and restitution to some buyers.<sup>8</sup>

In response to the coverage of these events and public reaction thereto, the Vance campaign immediately stopped accepting campaign donations, and DA Vance requested that CAPI review his campaign policies and make recommendations to improve them.<sup>9</sup>

## Scope of Review and Recommendations

In conducting this review and making actionable recommendations, CAPI has limited itself to recommending voluntary measures that DA Vance and other DAs can immediately incorporate into their campaign practices.<sup>10</sup> This approach comports with the request from DA Vance to provide him with measures that can be implemented now, without a change in the law. There are, of course, additional ways to achieve the goal of meaningful reform of campaign finance policies in district attorney races that would require legislation, as discussed below.

Our research demonstrated that one prominent and recurring suggestion is to adopt publicly financed elections for district attorneys, including significantly lower donation limits. One notable example of such a program is New York City's matching funds program, overseen by the NYC Campaign Finance Board (CFB), in which candidates for city office (but not county offices like the five district attorneys in New York City) "may qualify to receive public matching funds at a \$6-to-\$1 rate for contributions up to \$175 from individuals who reside in New York City," so long as they meet the fundraising threshold and comply with the city's campaign finance laws and regulations. The city's laws and regulations include much lower individual donor maximum amounts than those allowed by the state law that currently governs district attorney races in New

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<sup>7</sup> McKinley, *supra* note 5.

<sup>8</sup> Bernstein, *supra* note 6.

<sup>9</sup> Cyrus Vance, *Cy Vance: Independent Review Will Help Reduce the Appearance That Donations Influence My Work*, N.Y. Daily News, Oct. 15, 2017, <http://www.nydailynews.com/news/politics/cy-vance-review-appearance-money-affects-work-article-1.3565146>.

<sup>10</sup> CAPI has not evaluated and offers no opinion on either DA Vance's prosecutorial decisions on the Weinstein and Trump family investigations described above or on the Vance campaign's handling of the campaign donations associated with those investigations, which were matters beyond the scope of DA Vance's request.

York.<sup>11</sup> Adopting a public matching funds program for DA races in conjunction with lowering applicable maximum donation amounts would require legislation, however, and therefore is not further explored here.<sup>12</sup>

Second, legislation could be passed to significantly limit donation amounts for DA races, establishing either across-the-board limits for all donors or creating different limits for different categories of donors. As with public financing, this solution would have the benefit of being mandatory and, in theory, readily enforceable, and would apply to both sitting district attorneys and their challengers.<sup>13</sup>

## The Problem with Campaign Donations to Prosecutors

The vast majority of district attorneys are ethical and honest public servants, who make their decisions based entirely on appropriate, fact-based, and relevant criteria. However, as DA Vance has recognized, even where decisions are made solely on the facts of the case at hand, there can be a perception problem when someone involved in a case before the DA has donated to the DA's campaign. As aptly stated by DA Vance: "I've learned that it's not enough for me to have confidence in my independence from donors. The people of New York deserve to be confident about it as well."<sup>14</sup>

Indeed, there are several reasons why campaign contributions to prosecutors, especially by defendants, persons under investigation, or lawyers representing parties to criminal proceedings, can be problematic. First, contributions, particularly large contributions, raise the possibility of actual corruption, where the prosecutor abuses his or her position in exchange for campaign contributions through a *quid pro quo* that could be criminal in nature (and should be addressed by criminal laws against public corruption). Second, there is the more subtle (and non-criminal) possibility that prosecutors who are aware of campaign donations might be unconsciously biased in favor of their contributors, even if those prosecutors believe that their decisions are

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<sup>11</sup> How It Works, <https://www.nycclf.info/program/how-it-works> (last visited Jan. 16, 2018).

<sup>12</sup> One way to obviate altogether the need for campaign finance reform in this area would be to move to a system of appointed district attorneys, as is practiced in Connecticut, Delaware, New Jersey, and Rhode Island. Interestingly, the United States is reportedly the only country in the world that elects its local prosecutors. See Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 Yale L.J. 1528, 1569 (2012). However, CAPI does not believe that movement toward such a system is likely, and the merits of an appointed prosecutor system are well outside the scope of this report.

<sup>13</sup> We note, however, that to the extent such legislation would create categories of donors subject to limit, such as the proposal currently pending in committee in the New York State Assembly to cap donations to DA candidates at \$320 for criminal defense lawyers, A08728, 202nd Leg., 2017-18 Reg. Sess., (N.Y. 2017), available at [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A08728&term=2017&Summary=Y&Actions=Y&Text=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A08728&term=2017&Summary=Y&Actions=Y&Text=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y) (last visited Jan. 16, 2018), such legislation may suffer from difficulties with implementation, resource constraints, and enforcement.

<sup>14</sup> Vance, *supra* note 9.

entirely unrelated to the donations. Lastly, even where prosecutors are not influenced in any way by campaign contributions, there may be the appearance of undue influence. Prosecutors are expected to both be, and appear to be, impartial in the execution of their duties. Accepting substantial contributions from interested parties, even if the prosecutor is, in fact, unaffected, can create the appearance of impropriety or special treatment.

These issues arise because of the critical role prosecutors play in the criminal justice system, most notably in deciding whether sufficient evidence exists to indict a suspect. District attorneys must make these judgments with great care, as explained by the District Attorneys Association of the State of New York:

Not every person who is suspected should be arrested, not every suspect who is arrested should be prosecuted, not every case should be tried, and not every trial should be won. We have the freedom, and with it, the ethical duty not to bring a case to trial unless we have diligently sought the truth and are convinced of the defendant's guilt.<sup>15</sup>

Moreover, a prosecutor's decision not to bring charges is unreviewable by the courts.<sup>16</sup> And, given the nature of criminal matters, including confidentiality concerns and grand jury rules, much of what goes into a prosecutor's decision to charge or not charge is hidden from public view. For these reasons, while elections are the primary means of holding district attorneys accountable for their executive decisions, the voters necessarily do not have full information about charging decisions at their disposal.<sup>17</sup>

The tension that arises for elected prosecutors who are both dedicated to the fair administration of justice and compelled by the current electoral system to collect campaign contributions to run for office has been recognized by the New York City Bar Association's Committee on Professional Ethics, which stated in a 1996 report:

In cases in which the District Attorney's political interests are apparently implicated—for example, cases in which the defendant or the defendant's lawyer contributed to the District Attorney's campaign or, conversely, supported the District Attorney's opponent—there is a

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<sup>15</sup> Philip Mueller, *The Right Thing: Ethical Guidelines for Prosecutors 1* (Wendy Lehman and Tammy Smiley eds., 3d ed. 2015), available at <http://www.daasny.com/wp-content/uploads/2015/07/2015-Ethics-Handbook.pdf>.

<sup>16</sup> *See* *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 379 (1973).

<sup>17</sup> *See* *Milliken v. Stone*, 7 F.2d 397, 399 (1925).

significant risk that prosecutorial decisionmaking will appear to be biased either for or against the accused.<sup>18</sup>

There have been some cases, albeit very few, where it appears that prosecutors have actually committed crimes connected to campaign donations, operating as bribes, by deciding cases in a manner favorable to the briber. For example, one former district attorney was convicted of accepting bribes in exchange for prosecutorial leniency, with some of those bribes being campaign contributions, and a chief deputy prosecutor was convicted and disbarred for receiving a campaign contribution in exchange for supporting the early release of a convicted murderer.<sup>19</sup>

More common is a scenario in which campaign contributions raise doubts about a prosecutor's appearance of impartiality, as in the case of DA Vance, or create unconscious DA bias in favor of the donor, which is inherently difficult to detect. Some examples include Florida Attorney General Pam Bondi, whose decision not to pursue charges in the Trump University case raised questions and caused a bribery investigation in light of a \$25,000 contribution made to her campaign by Donald Trump; an investigation of Texas Attorney General Ken Paxton for accepting a \$100,000 campaign donation from a person under investigation; and charges against a Michigan prosecutor (later acquitted) for trading favorable official actions in exchange for campaign contributions.<sup>20</sup> It is for these reasons that the American Bar Association Criminal Justice Standards explicitly instruct prosecutors to “strive to eliminate implicit biases, and act to mitigate any improper bias or

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<sup>18</sup> NYSBA Comm. on Prof'l Ethics, Formal Op. 683 (1996), available at <https://www.nysba.org/CustomTemplates/Content.aspx?id=5471>.

<sup>19</sup> Press Release, FBI, Former Cameron County District Attorney Armando Villalobos Sentenced to Federal Prison in Connection with South Texas Bribery Scheme (Feb. 11, 2014), <https://archives.fbi.gov/archives/sanantonio/press-releases/2014/former-cameron-county-district-attorney-armando-villalobos-sentenced-to-federal-prison-in-connection-with-south-texas-bribery-scheme>; Tim Evans, *Document Reveals How Bribery of Former Marion County Deputy Prosecutor David Wyser Unfolded*, Chillicothe Gazette (Nov. 1, 2013, 8:49 PM), <https://www.chillicothegazette.com/story/news/2013/11/01/document-reveals-how-bribery-of-former-marion-county-deputy-prosecutor-david-wyser-unfolded/3362051/>.

<sup>20</sup> Nick Gass, *Trump's Pay-for-Play Scandal Intensifies*, Politico (July 9, 2016, 11:37 AM), <https://www.politico.com/story/2016/09/trump-pam-bondi-scandal-227823>; See also Gary Fineout, Associated Press, *Not Enough Evidence Found for Bondi, Trump Bribery Complaint*, (Apr. 6, 2017, 7:17 PM), <https://www.usnews.com/news/best-states/florida/articles/2017-04-06/insufficient-evidence-for-bondi-trump-bribery-complaint>; Matthew Choi, *District Attorney Closes Probe into Paxton Legal Defense Gift*, Texas Tribune (Oct. 30, 2017, 10:20 AM), <https://www.houstonpublicmedia.org/articles/news/2017/10/30/246917/district-attorney-closes-probe-into-paxton-legal-defense-gift/>; Associated Press, *Macomb County Prosecutor Found Not Guilty*, (Sept. 29, 2006), [http://articles.southbendtribune.com/2006-09-29/news/26979041\\_1\\_new-trial-drug-charge-marlinga](http://articles.southbendtribune.com/2006-09-29/news/26979041_1_new-trial-drug-charge-marlinga). In addition, questions were raised after it was learned that the former Philadelphia district attorney, who made an agreement not to prosecute Bill Cosby for alleged sexual assault, had received campaign contributions from Cosby's defense counsel several months earlier. Jeremy Roebuck & Laura McCrystal, *Cosby Lawyer Hosted Fund-Raiser for Castor*, Philadelphia Inquirer (Mar. 18, 2016, 3:01 AM), [http://www.philly.com/philly/news/politics/20160318\\_Cosby\\_lawyer\\_hosted\\_fund-raiser\\_for\\_Castor.html](http://www.philly.com/philly/news/politics/20160318_Cosby_lawyer_hosted_fund-raiser_for_Castor.html).

prejudice . . . .”<sup>21</sup> As noted by a Texas judge in a slightly different context (prosecutors running not for reelection as prosecutors but for the office of judge), “It is inherently a conflict when [prosecutors] are giving lawyers plea bargains at the same time [they] are asking for money or asking for a vote.”<sup>22</sup>

In conclusion, district attorney candidates should design their campaign fundraising policies to avoid conflicts of interest and the appearance thereof. In the absence of legislative solutions, prosecutors themselves are in the best position to quickly make progress on this issue. With appropriate mechanisms in place as recommended herein, it is possible to avoid actual conflicts, inadvertent biases, and the appearance of impropriety.

## Legal Background

District attorneys are local level prosecutors who handle the vast majority of criminal litigation in New York State. Each county in the state elects a district attorney; there are 62 counties in New York and 62 district attorneys. Because DAs are county-level officials, the law governing district attorney elections and campaigns is New York state law.<sup>23</sup> As discussed below, for individual persons who are U.S. citizens, there are no legal restrictions on who may give other than the laws regarding maximum campaign contributions, which are quite high. Additionally, campaigns are required to publicly disclose contributions. Lastly, sitting DAs are legally prohibited from using public resources in their reelection campaigns, and those in New York City are subject to some additional solicitation rules imposed by the NYC Conflicts of Interest Board.

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<sup>21</sup> Criminal Justice Standards for the Prosecution Function Standard 3-1.6 (Am. Bar Ass’n 2015), *available at* [https://www.americanbar.org/groups/criminal\\_justice/standards/ProsecutionFunctionFourthEdition.html](https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html).

<sup>22</sup> J. Vincent Aprile II, *May Practicing Prosecutors Ethically Run for Judgeships?*, 30 *Crim. Just.*; Chi. 31, 31-2 (2015).

<sup>23</sup> New York City law imposes much lower contribution limits on candidates seeking New York City offices than those imposed by New York State, but none of the district attorneys in New York—even those in the five city boroughs—are subject to these restrictions.

## Maximum Campaign Contributions

In New York State, the campaign contribution limits for individuals are calculated separately for the primary and general elections, including for DA races, using a formula.<sup>24</sup> In the party primaries, the formula to calculate the contribution limit is as follows:

Total number of enrolled voters in the candidate's party in the district, excluding voters in inactive status, multiplied by \$0.05, but at least \$1,000, and no more than \$50,000.<sup>25</sup>

While DA Vance ran unopposed and therefore there was no 2017 primary race for DA in New York County, based on the April 2017 Board of Elections list of active Democrat voters, the maximum possible donation would have been \$34,072 for the Vance campaign in that primary, if it had been held.<sup>26</sup>

The formula in the general election is identical, except that it is based on the total number of active registered voters, rather than just registered party members. In the 2017 DA general election, the maximum donation in New York County was \$48,963. The maximum contribution is always capped at \$50,000 per state law.<sup>27</sup> (Notwithstanding these legal limits, DA Vance imposed upon himself a voluntary \$25,000 maximum contribution limit per person for the four-year election cycle that ended in 2017.)<sup>28</sup>

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<sup>24</sup> We focus on individual giving because corporate giving is already subject to very restrictive limits. Under state law, a corporation may only contribute up to an aggregate of \$5,000 in a calendar year across all political campaigns. We also note that law firm contributions predominantly qualify as contributions from partnerships, which are considered to be a contribution from the partnership as an individual and are not required to be attributed to individual partners unless the contribution exceeds \$2,500. Law firms organized as professional corporations (PC) are subject to contribution limits for corporations, while firms organized as professional limited liability companies (PLLCs) are regulated as limited liability companies (LLCs), which are subject to the much higher individual limits. Contribution Limits, <https://www.elections.ny.gov/CFContributionLimits.html> (last visited Jan. 16, 2018).

<sup>25</sup> *Id.*

<sup>26</sup> N.Y. Board of Elections, NYSVoter Enrollment by County, Party Affiliation and Status (2017), available at [https://www.elections.ny.gov/NYSBOE/enrollment/county/county\\_apr17.pdf](https://www.elections.ny.gov/NYSBOE/enrollment/county/county_apr17.pdf). Because there was no primary for the 2017 race, the total contribution limit for the four-year cycle was the amount applicable to the general election.

<sup>27</sup> Contribution Limits, *supra* note 24.

<sup>28</sup> Contribute, Cyrus Vance For District Attorney, <https://cyvance.ngpvanhost.com/contribute> (last visited Jan. 16, 2018).

## Public Disclosure of Contributions

District attorney candidates are also subject to the New York State campaign financial disclosure rules. Candidates must maintain and provide records of all campaign donations of at least \$100.<sup>29</sup> Additionally, the candidate must keep records of all campaign expenditures. These contribution and expenditure reports from candidates are publicly available on the New York State Board of Elections (BOE) website.<sup>30</sup> The BOE is also charged with enforcing campaign disclosure and election laws generally.<sup>31</sup>

## COIB Restrictions on Campaign Solicitation and Public Funds Usage

New York City law imposes limitations on the ability of city employees and officials to participate in political campaigns, some of which apply to district attorneys in the five boroughs, including DA Vance. The relevant laws are contained in Chapter 68 of the New York City Charter.<sup>32</sup> This chapter is expanded and clarified through the binding advisory opinions of the City Conflicts of Interest Board (COIB).<sup>33</sup> First, no city employee may use city time or resources in a political campaign.<sup>34</sup> Generally speaking, city employees are also prohibited from using their offices to secure private benefits, such as campaign contributions.<sup>35</sup> New York City DAs have a unique status among the officials governed by COIB rules. Specifically, district attorneys in the five boroughs may, consistent with city law, directly solicit campaign contributions for their own races, but are forbidden from asking their subordinates for such contributions.<sup>36</sup> Finally, DAs outside of New York City are not under the COIB's jurisdiction; these laws do not apply to them.

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<sup>29</sup> N.Y. State Board of Elections, New York State Board of Elections Campaign Finance Handbook 2017 38, *available at* <https://www.elections.ny.gov/NYSBOE/download/finance/hndbk2017.pdf>.

<sup>30</sup> Contribution and Expenditure Databases, <https://www.elections.ny.gov/contribandexpend.html> (last visited Jan. 16, 2018).

<sup>31</sup> About the New York State Board of Elections, <https://www.elections.ny.gov/AboutSBOE.html> (last visited Jan. 16, 2018).

<sup>32</sup> N.Y.C. Charter § 2600-7 (1989), *available at* <https://www1.nyc.gov/site/coib/the-law/chapter-68-of-the-new-york-city-charter.page>.

<sup>33</sup> N.Y.C. Charter § 2603(c) (1989), *available at* <https://www1.nyc.gov/site/coib/the-law/chapter-68-of-the-new-york-city-charter.page>.

<sup>34</sup> N.Y.C. Charter § 2604(b)(2) (1989), *available at* <https://www1.nyc.gov/site/coib/the-law/chapter-68-of-the-new-york-city-charter.page>; COIB Advisory Opinion No. 2012-5 (2012), *available at* [http://www.nyc.gov/html/conflicts/downloads/pdf5/aos/2004-2013/AO2012\\_5.pdf](http://www.nyc.gov/html/conflicts/downloads/pdf5/aos/2004-2013/AO2012_5.pdf).

<sup>35</sup> COIB Advisory Op. No. 2017-4 (2017), *available at* <https://www1.nyc.gov/assets/coib/downloads/pdf5/aos/2017/AO2017-4.pdf>.

<sup>36</sup> COIB Advisory Op. No. 2003-1 (2003), *available at* [https://www1.nyc.gov/assets/coib/downloads/pdf5/aos/2000-2003/AO2003\\_1.pdf](https://www1.nyc.gov/assets/coib/downloads/pdf5/aos/2000-2003/AO2003_1.pdf).

## Other Guiding Frameworks

The above rules and regulations provide no clear guidance on how to address the potential conflicts of interest created by district attorneys' fundraising practices. Nor are there any widely-used campaign handbooks or other materials designed to provide such guidance for district attorney races. From the interviews conducted by CAPI during this project, it appears that the dearth of law and guidance in this area has left district attorneys to develop their own rules around accepting campaign donations, which—to the extent such rules exist at all—appear to be informal, unwritten, and unavailable to the public. For this reason, in the following section CAPI describes additional laws and standards of professional conduct which, while not binding on DAs or even directly analogous, provide models for how the issues surrounding campaign contributions may be best understood.

## Doing Business Restrictions

New York City has created the campaign finance “Doing Business” restrictions to limit the financial influence of city contractors over the political process. The rule is designed to limit the potential for, and appearance of, pay-to-play corruption by restricting the amounts that individuals doing business with the city can contribute to political campaigns.<sup>37</sup> These rules have not been held to apply to campaign contributions made to a DA by lawyers representing clients before the DA's office, since such a lawyer is only in a business relationship with his or her client and has no such relationship with the DA's office. Given that these lawyers have a financial interest in decisions made by the DA, however, it is worthwhile to examine these rules as a potential model for limiting campaign contributions.

The class of individuals subject to Doing Business restrictions in NYC is relatively small, and is limited to senior company executives, major stakeholders, and registered lobbyists.<sup>38</sup> The inclusion of lobbyists in this list is noteworthy, since arguably defense lawyers act as lobbyists before the district attorney's office. These persons are subject to office-specific campaign contribution caps, including \$250 for city council races, \$320 for borough president races, and \$400 for mayoral campaigns.<sup>39</sup> The city—through the Campaign Finance

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<sup>37</sup> Doing Business FAQs, <https://www.nycdfb.info/candidate-services/doing-business-faqs/> (last visited Jan. 16, 2018).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

Board—assists campaigns in complying with these rules through the searchable Doing Business database.<sup>40</sup> The Campaign Finance Board also enforces these rules, requiring return of excess contributions by donors.

## Standards of Professional Conduct

In addition to the relevant laws, there are standards of professional conduct with which all lawyers, including prosecutors, are expected to comply. There are two rules of professional conduct in New York that impact campaign contributions for district attorneys. First, Rule 1.11 states in relevant part that:

(f) A lawyer who holds public office shall not: . . . (3) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.<sup>41</sup>

Second, Rule 1.7 states that:

(a) A lawyer shall not represent a client if a reasonable lawyer would conclude that . . . (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.<sup>42</sup>

Lastly, while not a binding rule, an ethics handbook published by the District Attorneys Association of the State of New York (DAASNY) has several provisions on political activity that provide relevant guidance, including that:

Prosecutors may not coerce or improperly influence anyone to give money or time to a political party, committee or candidate; they may not engage in political activity during normal

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<sup>40</sup> Doing Business Search, <https://www1.nyc.gov/dbnyc/> (last visited Jan. 16, 2018).

<sup>41</sup> N.Y. Rules of Prof'l Conduct r. 1.11(f)(3) (NY State Unified Ct. System 2017), available at <http://www.nycourts.gov/rules/jointappellate/ny-rules-prof-conduct-1200.pdf>.

<sup>42</sup> N.Y. Rules of Prof'l Conduct r. 1.7(a)(2) (NY State Unified Ct. System 2017), available at <http://www.nycourts.gov/rules/jointappellate/ny-rules-prof-conduct-1200.pdf>.

business hours or use office resources; and they may not misuse their public positions to obstruct or further the political activities of any political party or candidate.<sup>43</sup>

Additionally, the handbook instructs DAs not to join organizations with a political purpose because of concerns that partisan politics damage the office's appearance of impartiality.<sup>44</sup>

## **Current Vance Campaign Vetting Practices**

The following is a summary of the Vance campaign's current practices. This information was obtained through CAPI's interviews with members of the Vance campaign staff and the General Counsel of the New York County District Attorney's Office.

First, DA Vance maintains a strict division between his campaign staff and his office staff, such that no information or communications flow between the campaign and the office, with the following exceptions: DA Vance has access to both the campaign and office sides; and DA Vance's General Counsel (and a member of the administrative, non-legal staff working at his direction) take part in a vetting procedure of campaign contributors as described below.

Second, notwithstanding the significantly higher individual donation limits permitted under state law, DA Vance imposed upon his campaign a voluntary cap on individual donations after the 2013 election of \$25,000 for the four-year election cycle ending November 2017.

DA Vance's vetting procedure for contributors works as follows. All donors fill out a contribution form, which notifies donors of the donation limits and provides other relevant information about state law limits on giving. The campaign's online contribution form requires that the contributor certify a number of statements, including that the contributor: "[is] not a foreign national who lacks permanent residence in the United States;" is making a personal contribution from his or her own funds; in the case of a contribution from an entity, that the contributor has the authority to make that contribution; and that the contributor is at least 18 years old. The online contribution form also asks donors to confirm that they "do not currently have any

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<sup>43</sup> Philip Mueller, *The Right Thing: Ethical Guidelines for Prosecutors* 19 (Wendy Lehman and Tammy Smiley eds., 3d ed. 2015), available at <http://www.daasny.com/wp-content/uploads/2015/07/2015-Ethics-Handbook.pdf>.

<sup>44</sup> *Id.*

matter presently pending with the Manhattan District Attorney's office," and that they "have not had any matter resolved with the Manhattan District Attorney's office within the past 90 days." However, these last eligibility requirements concerning pending and resolved matters "do NOT extend to attorneys representing persons or entities with matters before the Manhattan District Attorney's office."<sup>45</sup> DA Vance's printable contribution form, however, provides information on contribution limits but does not require the donor to make the certifications required on the online form.

After receiving a donation check or online donation, the Vance campaign staff runs an initial search from publicly available information about the donor and makes a note of facts like criminal records, disbarment, prior SEC violations, and anything else that might warrant returning the donation. Illegal donations from prohibited 501(c)(3) organizations or foreign nationals would be automatically flagged and returned by campaign staff, as would donations from current employees of the New York County DA's Office or their spouses, as well as individuals who work in the bail bond industry.<sup>46</sup>

The contributions list assembled by the Vance campaign is periodically assessed by a vetting committee on the campaign side, which is comprised of a small team of volunteers. The committee examines the contributions list and the corresponding public information about the donors assembled by the campaign team and then makes a judgment about whether accepting donations from these individuals is in the best interests of the campaign. If a contribution is considered not to be in the best interests of the campaign, it is returned. Note that the vetting committee does not evaluate either the conflicts of interest or campaign finance issues per se; questions about whether a contribution complies with the law or relevant regulations are referred by the campaign to the campaign's lawyer. If the vetting committee believes that DA Vance should be notified of a potentially problematic donation or feels that DA Vance should weigh in on a particular donation, the committee will send their concerns to him for a final decision about whether the donation at issue should be accepted or returned.

The next layer of vetting occurs at the Manhattan District Attorney's Office and is led by the General Counsel, assisted by a member of the administrative, non-legal staff whose job title is analyst. The analyst runs the list of contributors against the office databases of ongoing prosecutions to determine whether any donors

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<sup>45</sup> Contribute, Cyrus Vance For District Attorney, <https://cyvance.ngpvanhost.com/contribute> (last visited Jan. 16, 2018).

<sup>46</sup> See Erin Durkin, *Advocates Urge City's DAs to Reject Gifts from Bail Bond Industry*, N.Y. Daily News, Aug. 8, 2017, <http://www.nydailynews.com/news/politics/advocates-urge-city-das-reject-gifts-bail-bond-industry-article-1.3394696>.

are parties to any matters with the office, including current prosecutions or outstanding warrants. Separately, the General Counsel runs the contributors list against a database of individuals who are currently the targets of investigations within the office.

If the contributor is an individual with an active matter before the district attorney—such as a defendant in an active prosecution or a person who is the subject of an outstanding warrant—the General Counsel will inform the Vance campaign to return the contribution.

If the contributor is the target of an ongoing confidential investigation, the check is generally returned uncashed. However, if there is a risk that returning the check could alert the suspect and thereby compromise the investigation, then the check is held until the risk dissipates. The delay is designed to avoid alerting the target of the Office’s investigation. Lastly, if a contributor later becomes the target of an investigation, then the contribution is returned when it would not jeopardize the investigation.

# Methodology

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## Research

CAPI's research started with a survey of state and local laws and guidelines specifically focused on campaign donation limits for candidates for elected prosecutorial offices. CAPI also searched for scholarship and publications from good government and other advocacy groups on this issue. Aside from a few portions of the New York Handbook on Prosecutorial Ethics, no laws, guidelines, or publications directly on point were uncovered, demonstrating a clear need for more guidance on this issue.

CAPI then expanded our research to the more general fields of prosecutorial ethics and attempts to mitigate bias, which were helpful in framing the issues explored herein. CAPI also researched the analogous area of campaign contribution laws and regulations for elected judges. Lastly, CAPI compiled information on recent prosecutions and serious allegations of prosecutor bribery or influence gained through campaign contributions. Relevant findings are summarized throughout the report.

## Interviews

Additionally, over the course of our review, CAPI interviewed numerous stakeholders and subject matter experts; the offices and entities interviewed, for whose assistance and thoughts CAPI is grateful, are listed in Appendix A. Interviewees included current and former elected prosecutors and high-ranking staff members in their offices, state government officials, good government advocacy groups, scholars, research centers, and various other individuals knowledgeable on the subjects of legal and prosecutorial ethics, campaign finance law and practices, and conflicts of interest.

## Data Analysis

As part of our review, CAPI also analyzed campaign data of contributions to the DA Vance campaign and certain other district attorney campaigns. The data sets analyzed included contributions to the DA Vance

campaign from 2008 to October 2017, as well as other publicly available campaign contribution data from the New York State Board of Elections disclosure reports.

For a sense of comparison, the table below provides campaign contribution figures from the most recent competitive district attorney campaigns in New York State counties of varying sizes. Contribution limits, total contributions, and average contribution are taken from each county’s most recent competitive district attorney election. For this reason, Queens County is not included, given that Queens has not had a competitive district attorney election since 1991. For our purposes, “competitive” refers to the presence of more than one candidate in either the primary or general election.

County	Election Year	District Attorney	Population <sup>47</sup>	Contribution Limit (Primary; General)	Contributions Total <sup>48</sup>	Average Contribution
Manhattan	2013	Cy Vance, Jr.	1,643,734	\$34,484; \$50,000	\$2,814,097.95	\$1,395.88
Kings	2017	Eric Gonzalez	2,629,150	\$50,000; \$50,000	\$2,139,545.17	\$1,062.34
Bronx	2015	Darcel Clark	1,455,720	\$24,326.75; \$31,271.40	\$104,425.00	\$552.51
Richmond	2015	Michael McMahon	476,015	\$5,973.80; \$13,135.05	\$615,961.73	\$430.44
Nassau	2015	Madeline Singas	1,361,500	\$18,168.95; \$47,438.95	\$1,894,599.42	\$1,008.30
Albany	2012	P. David Soares	308,846	\$4,317.50; \$8,659.45	\$194,519.90	\$464.25
Chenango	2015	Joseph A. McBride	48,579	\$1,000; \$1,405.80	\$52,970.53	\$168.16

<sup>47</sup> Population figures are taken from U.S. Census Bureau estimates for 2016. American FactFinder (2010), <https://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml> (last visited Jan 16, 2018). In the search bar under “Community Facts,” type in the desired county name.

<sup>48</sup> Contribution totals are based on the four-year election cycle, starting the day after the previous election and ending the day of the current election. For example, the 2013 election cycle began on November 4, 2009 and ended November 5, 2013.

The figures here demonstrate the wide variation across New York State in county population sizes, total contributions to district attorney campaigns, and average contribution sizes. As shown above, there is a rough correlation between county population on the one hand and total contributions and average contribution size on the other. In larger counties, the contribution totals and average contribution sizes tend to be larger.

The Vance campaign requires that all individuals who make online campaign contributions include their names, occupations, and employers. Using this information, along with the campaign's records of contributions since 2008, we were able to focus on campaign contributions made by attorneys and law firms. We also made note of those attorneys and law firms with criminal defense practices because those contributors are much more likely to represent clients in matters before the Manhattan District Attorney's office.

From 2008 to October 2017, when the Vance campaign suspended fundraising, just over \$2 million in contributions came from attorneys and law firms.<sup>49</sup> This represents approximately 36% of the Vance campaign's total contributions over this period. Of that \$2 million, \$1,573,584.95 (approximately 25% of all contributions) was contributed either by law firms with a criminal defense practice or by attorneys employed by such firms. Narrowing even further, \$837,558.38 (approximately 13% of all contributions) was contributed by attorneys and firms specializing in criminal defense.

When aggregating contributions from attorneys employed by the same law firms, the highest contributing law firms for the period 2008 to 2017 were Boies Schiller Flexner LLP, Sullivan & Cromwell LLP, and Morvillo Abramowitz Grand Iason & Anello PC, all three of which maintain criminal defense practices.<sup>50</sup> Also among the lawyers who contributed the most were attorneys who identified as "self-employed," who collectively accounted for \$119,471.66.<sup>51</sup>

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<sup>49</sup> For reference, the exact figure is \$2,233,600.57. This is based on CAPI's analysis of the records provided by the Vance campaign.

<sup>50</sup> DA Vance was a principal at Morvillo Abramowitz from 2004 to 2009. *See* Our History, Morvillo Abramowitz Grand Iason & Anello PC, <https://www.maglaw.com/about/history> (last visited Jan. 16, 2018).

<sup>51</sup> In classifying these contributions, it is important to understand the nature of prominent law firms in New York City. Large law firms often have a criminal defense component, even if the bulk of their work is civil litigation or commercial transactions. For instance, DLA Piper has 243 lawyers in the New York office, only 11 of whom specialize in white collar criminal defense. Estimate based on search of Lawyers on DLA Piper website. *See* People Search at <https://www.dlapiper.com/en/us/people/>. Use New York for office location, then filter by White Collar and Corporate Crime Service filter. Search conducted on Jan. 12, 2018). In CAPI's classification system, DLA Piper would count as a firm with a criminal defense practice, but the individual lawyer from the firm who donated might be classified as someone who specializes in Mergers and Acquisitions. This is in contrast to smaller firms, some of which are entirely dedicated to criminal defense.

# Recommendations for District Attorneys

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CAPI's district attorney campaign finance recommendations fall into two primary categories: adopting blind fundraising practices and limiting the size of contributions. Some of CAPI's recommendations are already employed by DA Vance and others are at least partially implemented, as is made clear below. In designing our recommendations, CAPI was cognizant of differences among DA's offices in terms of caseload volume and case management capabilities. For example, the Manhattan District Attorney's Office reported handling approximately 80,000 cases in 2016;<sup>52</sup> other offices handle significantly fewer cases than that. The quality of case management systems and accuracy of data input also vary among offices. These factors may impact a DA's ability to ensure the complete accuracy of, for example, a search of databases for lawyers appearing before the office who also appear on a campaign donor list. To account for these differences, CAPI's recommendations are fairly broad to make them reasonably useful for all DA campaigns.<sup>53</sup>

## Recommendation 1: Apply Blind Fundraising Standards

CAPI recommends that district attorney candidates, whether sitting DAs or challengers, should adopt a blind fundraising system similar to that used by candidates for judicial office in New York State. There are several advantages to adopting this procedure. First, using a blind system solves the conflicts of interest problems identified above. A district attorney who does not know who has given to his or her campaign simply cannot be biased, intentionally or not, in his or her decision-making processes. Second, the blind fundraising system is much simpler and cleaner than an attempt to draw lines around different categories of donors, as explained further below. Third, the blind fundraising system can be easily applied to challengers for the DA's office as well as to incumbent candidates, so it has the benefit of being fair to both candidates in competitive races if the candidates are willing to adopt it (and, if one does not, the candidate adopting the blind procedures will have a ready-made campaign issue to raise). Fourth, the system already exists for elected judges and has been largely fleshed out through ethics opinions published by the New York Advisory Committee on Judicial Ethics. This makes it far more likely that candidates confronted with a novel issue will find reasoned guidance

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<sup>52</sup> N.Y. County District Attorney, 2016 Annual Report 5 (2016), available at <http://manhattanda.org/sites/default/files/2016%20Annual%20Report.pdf>.

<sup>53</sup> A district attorney with a superior case management system or simply a smaller caseload might be able to design more focused policies.

on the subject. While there are some differences between elected judges and elected prosecutors, it is CAPI's view that the general parameters of the judicial model, as outlined below, will work for district attorneys and will not unnecessarily hamstring their fundraising efforts.<sup>54</sup>

## The Judicial Blind Fundraising Model

Judges in New York State are obliged to use their best efforts to avoid learning the identities of contributors. As summarized by the New York State Bar Association:

To prevent the appearance of impropriety, the names of campaign contributors should be kept secret from the candidate to the extent legally permissible. The candidate should not seek access to a list of contributors, nor should the candidate seek in any other way to learn the names of contributors.<sup>55</sup>

This rule is not codified in an explicit statute, but instead has been developed by advisory opinions from the New York Advisory Committee on Judicial Ethics. The original rule on which these opinions are based reads:

A judge or candidate for public election to judicial office shall not personally solicit or accept campaign contributions, but may establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions and support from the public, including lawyers, manage

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<sup>54</sup> CAPI compared the expenditures of successful judicial and district attorney candidates in 48 New York counties to see whether there were similarities. The New York City counties were not particularly helpful because of the high number of appointed judges. In smaller counties where there were few judges and they were elected (mirroring as closely as possible the single district attorney in those counties), we found that generally speaking, despite the fundraising restrictions which bind judges, they are still able to raise substantial campaign donations. For instance, Christopher S. Ciaccio was elected in 2013 and spent over \$204,000 in his campaign. Expenditure Search by Candidate or Committee Name, Board of Elections, <http://www.elections.ny.gov/ExpensesSearchA.html> (last visited Jan 16, 2018). For Candidate Last Name or Committee Name, enter "Christopher Ciaccio." Likewise, Robert Bauer, who won election in 2016, spent over \$167,000. Expenditure Search by Candidate or Committee Name, Board of Elections, <http://www.elections.ny.gov/ExpensesSearchA.html> (last visited Jan 16, 2018). For Candidate Last Name or Committee Name, enter "Rob Bauer." We also note that Tim Sini, the newly-elected District Attorney of Suffolk County, was able to raise a significant amount of money, \$1,433,241.26, despite being barred from personally soliciting donations during the campaign due to a legal restriction on solicitations by Police Commissioners, the position Sini held at the time. See Jerry H. Goldfeder, *Ban Candidates From Soliciting Campaign Dough*, New York Law Journal (Nov. 15, 2017).

<sup>55</sup> The High Road Rules for Conducting a Judicial Campaign in New York, NYSBA, available at <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26637> (last visited Jan. 16, 2018).

the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy . . . .<sup>56</sup>

As developed by the Advisory Committee on Judicial Ethics, “the ban on personally soliciting or accepting campaign contributions carries with it an implicit recognition that a candidate should remain ignorant of who contributed to his or her campaign.”<sup>57</sup> This ethics opinion is binding in the sense that judicial actions taken in accordance with it are “presumed proper.”<sup>58</sup> On a national level, a similar state ban on personal judicial solicitation was recently upheld by the Supreme Court.<sup>59</sup>

## How District Attorney Candidates Should Adopt This Practice

CAPI recommends that candidates for DA adopt blind fundraising. Such a policy would bring these lawyers in line with the Formal Opinion on this issue of the New York City Bar Professional Ethics Committee, which states as follows:

It is the opinion of this Committee that, like candidates for judicial office, candidates for offices closely tied to the judicial process [including district attorneys] and their family members should not personally solicit campaign contributions. They should establish committees to do so and, to the extent permitted by law, avoid learning the names of the contributors and the amount of their donations.<sup>60</sup>

While this rule is not foolproof, in that district attorneys could still learn the identities of their donors through the state Board of Elections website, from their own campaigns, or from the campaign contributors directly, it solves several concerns for candidates who act in good faith.<sup>61</sup> The most important benefit is avoiding both

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<sup>56</sup> N.Y. Comp. Codes R. & Regs. tit. 22, § 100.5(A)(5) (emphasis added), available at <https://www.nycourts.gov/rules/chiefadmin/100.shtml>.

<sup>57</sup> N.Y. Advisory Comm. on Judicial Ethics, Op. 02-06 (2002), available at <http://www.nycourts.gov/ip/judicialethics/opinions/02-06.htm>.

<sup>58</sup> N.Y. CLS Jud. § 212(2)(l)(iv) (1978), available at <http://codes.findlaw.com/ny/judiciary-law/jud-sect-212.html>.

<sup>59</sup> See *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1671 (2015).

<sup>60</sup> N.Y.C. Bar Comm. on Prof'l Ethics, Formal Op. 1994-7 (1994), available at <http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-1994-7-contributions-to-candidates-campaigning-for-new-york-state-attorney-general-district-attorney-and-other-offices-closely-tied-to-the-judicial-process>.

<sup>61</sup> As with the blind fundraising system for judges, this relies in large part on the good faith of the elected official, given that state law requires publication of donations on the Board of Elections website.

conscious and unconscious bias in favor of campaign contributors. If a district attorney is ignorant of donors' identities, there is no possibility that the contributions could influence his or her decision-making.

To implement blind fundraising procedures in DA's offices, CAPI recommends the following specific steps. The DA should enforce a strict division between his or her office and the campaign, as explained further in Recommendation 3. The campaign side should handle all donor outreach and solicitations, including phone calls, mailings, advertisements, thank you letters, etc. The DA should not be involved in campaign activities that would reveal to the DA who his or her donors are or how much they have given, including work to target specific donors. The DA still would be able to work with campaign staff on policy issues, as well as matters like identifying content to be used in outreach materials, and would still be able to speak publicly and to groups about his or her candidacy.

Campaign fundraising events, which typically include the candidate's participation, create a special challenge, because fundraising events usually require that attendees make a minimum contribution. Thus, the DA's participation in those events—even if the DA does not actively solicit contributions there—means that he or she will see and undoubtedly recognize at least some donors and will be aware that these donors have given at least the minimum amount required to attend the fundraiser. This obviously undermines the DA's ability to remain entirely "blind" when it comes to this aspect of his or her fundraising. CAPI also believes, however, that to insist that DAs not attend their own fundraising events would put them at an enormous disadvantage in raising money for competitive races.<sup>62</sup> No blinding procedure is likely to be completely airtight; there is always the possibility that a donor will announce to the DA that the donor has provided financial support, for example, although we urge DA candidates to try to avoid learning this information and to take necessary action to resolve conflicts of interest presented by such a circumstance. We believe, however, that if implemented alongside Recommendation 2 below, which places limitations on contributions, this blinding procedure will go a long way to ensuring that the DA will not be impacted by actual or perceived conflicts of interest. We also note that this feature of our recommended blinding procedure is consistent with that utilized

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<sup>62</sup> The New York State Bar Association has acknowledged the necessity of allowing DAs to campaign for themselves, notwithstanding significant concerns about prosecutors' other political activities, finding in advisory opinions that while prosecuting attorneys are prohibited from campaigning for other candidates for election, DAs nevertheless may participate in their own campaigns. *See* NYSBA Comm. on Prof'l Ethics, Formal Op. 537 (1981), available at <http://www.nysba.org/CustomTemplates/Content.aspx?id=7506>; NYSBA Comm. on Prof'l Ethics, Formal Op. 272 (1972), available at <https://www.nysba.org/CustomTemplates/Content.aspx?id=8030>.

by judicial candidates in New York State, who may attend their own campaign fundraisers but may not personally solicit campaign contributions.<sup>63</sup>

If adopted by the Vance campaign, Recommendation 1 will be a substantial change from DA Vance's current policy, which does not limit the DA's personal knowledge and solicitation of contributions.

## **Recommendation 2: Refuse or Limit Contributions from Parties with Actual or Potential Conflicts of Interest**

CAPi also recommends that district attorneys refuse, or severely limit, financial contributions from persons who have conflicts of interest, or the potential for conflicts of interest, because of their dealings with the district attorney's office. This includes individuals who are parties to cases or other matters before the DA's office, the targets of investigations, and lawyers representing clients in matters before the office. Unlike CAPi's first recommendation of blind fundraising, these recommendations inherently apply only to sitting DAs, because they address conflicts and potential conflicts with the office's current work. While the unilateral nature of these recommendations means that sitting DAs will be differently situated than their challengers in elections in a way that some may see as inequitable, we believe the recommendations are necessary to address the concerns described above.

### **A. Ban on Donations by Persons with Matters Before the District Attorney**

CAPi recommends that DAs refuse contributions made by individuals who currently have matters pending before the DA's office, including: defendants in active prosecutions,<sup>64</sup> individuals with outstanding warrants, and anyone who had such a matter resolved in the preceding six months. In these cases, the contribution should be returned immediately.

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<sup>63</sup> See N.Y. Advisory Comm. on Judicial Ethics, Op. 91-37 (1991), available at <http://www.nycourts.gov/ip/judicialethics/opinions/91-37.htm>.

<sup>64</sup> While criminal defendants would be the only actual parties to cases before a district attorney's office, other case participants like witnesses and victims may also be interested in the case outcome such that a potential conflict could arise from a donation from such an individual. It is unlikely, however, that these individuals will be listed in office databases to permit a vetting official to run the relevant checks. In the event that a district attorney campaign becomes aware that a witness or victim in an active or recently closed case has contributed to the campaign, CAPi recommends that this contribution be returned.

There is non-binding precedent for such a restriction. The New York State Joint Commission on Public Ethics (JCOPE) has issued Advisory Opinion No. 16-02, holding that statewide elected officials (not including district attorneys) “may not directly solicit or accept monetary or in-kind campaign contributions from any person or entity which is the active subject of an ongoing exercise of enforcement powers of the elected official.” Although CAPI found no comparable law directly prohibiting such contributions to district attorney campaigns, this practice of refusing such donations is widely recognized, and every district attorney who spoke with CAPI—including DA Vance—indicated that he or she did not and would not accept money from this category of donors.

## **How District Attorneys Should Adopt This Practice**

The first recommended step for implementing this policy is to create a contribution form that would require any donor to certify that the donor does not currently have any matter presently pending with the district attorney’s office, and did not have such a matter resolved within the preceding six months. A contribution form setting out legal limits and campaign policies should be utilized with respect to each of these categories of individuals from whom donations should be refused or limited. This form is discussed in more detail below as Recommendation 6.

Next, DAs should have their campaign staffs create lists of donor names for cross-referencing against the office’s case management databases to ensure that donors are not parties in pending matters, and have not been parties to any matter resolved in the previous six months. If the donor has been a party in any such matter, the donation should be returned. This recommendation is already in place in the Manhattan DA’s Office, except that CAPI recommends a six-month blackout period following a matter’s resolution, which doubles the 90-day period utilized by DA Vance.

## **B. Ban on Donations by Targets of Investigation**

CAPI also recommends that DAs reject donations from any targets of their investigations, whether those investigations are public or non-public and whether the targets are individuals, corporations, or some other legal entity. This policy is already in place in the Manhattan DA’s Office. The same reasoning for refusing contributions from individuals with matters before the DA’s office also applies in many cases to contributions

from targets of investigations. For example, if a person knows that he or she is under investigation because that investigation is already public, that person may attempt to curry favor with the district attorney through campaign donations. In these cases, the donation should be immediately returned.

However, in most cases, a district attorney's investigations are not public, so targets are likely unaware of them. In these cases, the district attorney's campaign should segregate the contribution while the investigation is pending in an account separate from the main campaign account. If the investigation leads to an indictment, or otherwise is made public, the campaign contribution should be returned to the contributor at that time. The reason for delaying return of the contribution is that immediate return would signal to the target that he or she may be under investigation, which jeopardizes the investigation.

In cases where an investigation is closed without charges and is never made public, CAPI recommends that contributions from a target be donated to the New York State Interest on Lawyer Account Fund ("IOLA") or another similar organization.<sup>65</sup> IOLA is a state-sponsored program in which interest from certain accounts is used to help provide legal services to the poor. This will both maintain the confidentiality of the investigation and safeguard the district attorney's office from the appearance of undue influence arising from the campaign accepting a donation from an investigatory target.<sup>66</sup> This is a relatively minor change from the Vance campaign's current practice, which is to return the contribution as soon as doing so will not harm the investigation.

### **C. Cap on Donations by Legal Counsel Appearing Before the DA's Office**

CAPI recommends capping the amount that can be donated to a DA by a lawyer who is currently appearing before the office or has done so within the preceding six months, and from that lawyer's law partners with whom he or she shares profits. Lawyers appearing before the DA's office are obviously interested in securing favorable outcomes from the district attorney and his staff. The vast majority of criminal cases are resolved

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<sup>65</sup> IOLA is a program created by the State Legislature that helps to "provide civil legal aid to the poor and support improvements to the justice system" in New York State. About IOLA, <https://www.iola.org/about.html> (last visited Jan. 16, 2018). DAs could choose a different charitable entity, but CAPI cautions that choosing a private charity, particularly one with ties to the DA, may be perceived as taking a benefit from the contribution.

<sup>66</sup> Specifically, the IOLA program requires attorneys to deposit client funds in either interest-bearing accounts for the client's benefit or interest-bearing IOLA accounts. *See* N.Y. CLS Jud. § 497 (1983). The interest accrued by IOLA accounts is pooled to fund grants to non-profit civil legal services providers statewide. IOLA has provided over \$228 million in grants to non-profit organizations that provide legal services to low-income New Yorkers. About IOLA, *supra* note 65.

through plea bargains, and the lawyers who can secure the best deals for their clients are more valuable in the marketplace.<sup>67</sup> This, in turn, creates an incentive for lawyers appearing before the DA's office to form positive relationships with the district attorney, which could, in theory, inspire some of them to become contributors to the DA's campaign.

That said, CAPI does not recommend a complete ban on giving by lawyers working on cases before the office. There are many legitimate reasons for criminal defense lawyers and others who do business with the DA's office to contribute to the DA's campaign that have nothing to do with the pursuit of undue influence. First, like all citizens, lawyers may donate to a district attorney candidate because they genuinely support the candidate and his or her policies. District attorneys play a vital role in combating crime and are at the forefront of many issues of innovation and reform in the criminal justice system. Stakeholders in that system, including criminal defense lawyers, should be able to participate in the election process for critical players in the system, such as district attorneys. Second, lawyers may be more likely to donate to district attorney races than the average citizen because they are more aware of what that role entails. As members of the legal profession, lawyers may know a candidate's professional reputation and can better assess his or her qualifications. Moreover, lawyers who specialize in criminal law may contribute because of their strong interest in having a DA who is fair-minded and who will run the office efficiently and capably. Indeed, allowing limited contributions (to which the DA is blinded) may be the most appropriate way for the defense bar to promote the continued tenure of an efficient and fair DA, since other forms of support for a candidate, such as public praise, may also be perceived as attempts to curry favor. As mentioned above, likely for many of these reasons, a review of the Vance campaign's donations indicated that defense attorneys accounted for a substantial percentage of campaign contributions received.

CAPI recommends that New York City DAs and those in comparably populous counties adopt caps that are modeled on the Doing Business restrictions that apply to elections for New York City officials. We recommend that contributions by lawyers appearing before the DA's office be capped at \$320 per election cycle, the Doing Business contribution limit for borough president campaigns.<sup>68</sup> No city office is an exact fit with the office of district attorney, but CAPI selected the contribution limit for borough presidents because, like DAs, borough presidents are county-wide offices. Because a lawyer's law partners share in the profits of

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<sup>67</sup> We note that while most of the lawyers appearing before the DA's office represent criminal defendants, other participants in the system such as witnesses and victims often have lawyers as well.

<sup>68</sup> Doing Business FAQs, <https://www.nycclfb.info/candidate-services/doing-business-faqs/> (last visited Jan. 16, 2018).

his or her work in front of the DA's office, we recommend that individual contributions by these law partners be capped as well. We recommend that law partners of legal counsel appearing before the DA be capped at \$3,850 per partner per election cycle, the general contribution limit for borough president campaigns.<sup>69</sup>

Setting the caps in this fashion has several advantages. First, these are definite amounts that are well below the statewide limits.<sup>70</sup> For example, in New York County, even the proposed cap on law partners of appearing lawyers limits their contributions to less than 10% of what is permitted under state law. And for lawyers appearing before the DA's Office in New York County, the proposed cap is less than 1% of the state law limit.<sup>71</sup> Second, it still allows lawyers appearing before the DA to contribute to a candidate they support, albeit at a much lower level. Contributions are an important part of the political process, and defense lawyers should be able to participate. Lastly, because the contributions are capped at a relatively low level, this should minimize concerns that DAs could be improperly influenced by these donations.<sup>72</sup>

These limits are less appropriate for significantly smaller New York State counties, however. As indicated above, the 62 counties in New York vary widely in population size, and smaller counties have smaller maximum contribution limits and also tend to have lower campaign contribution totals for district attorney elections. Because of this, for counties much smaller than those in New York City, CAPI recommends limiting contributions from counsel with matters before the office and their law partners to 1% and 10%, respectively, of the contribution limits imposed on the county by state law, but with the permissible maximum donation being no less than \$250.

To give a hypothetical example of how these caps would work, the maximum contribution limit for candidates in the general election for the 2017 Albany County District Attorney race would have been roughly

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<sup>69</sup> Limits & Thresholds, <https://www.nyccfb.info/candidate-services/limits-thresholds/2017/> (last visited Jan 16, 2018).

<sup>70</sup> Another advantage of keying the cap to the Doing Business limits is that those limits periodically increase to account for inflation. See N.Y.C. Admin. Code § 3-703(7) (1998), available at <https://www.nyccfb.info/law/act/eligibility-and-other-requirements/>.

<sup>71</sup> Note that these caps would apply only for the pendency of the matters before the office and for six months afterwards. At other times during the election cycle, i.e., when there are no potential conflicts, these lawyers could contribute without being capped, although under CAPI's recommendations all contributions still would be subject to vetting for potential conflicts. It is also likely that lawyers at firms with significant criminal defense practices would be more or less constantly capped at \$3,850 (for New York County at least) because they would always have partners appearing before the DA's office.

<sup>72</sup> Based on CAPI's analysis of the list of campaign contributions received from the Vance campaign, lawyers made 11 contributions in excess of \$3,850 in the 2009 campaign cycle (out of a total of 886 lawyer donations during that cycle), 19 contributions in excess of \$3,850 in the 2013 campaign cycle (out of a total of 466 lawyer donations during that cycle), and 12 contributions in excess of \$3,850 in the 2017 campaign cycle (out of a total of 192 lawyer donations during that cycle).

\$9,217.<sup>73</sup> Under the model CAPI proposes, lawyers appearing before the Albany DA’s Office should contribute no more than \$250 toward a general election campaign, while their partners who did not appear before the DA’s office could each donate up to \$922.

The purpose behind having a variable cap is to roughly account for the differences in size and the costs of campaigning in different New York State counties. While this is by no means an exact science, capping contributions from lawyers appearing before the DA’s office and these lawyers’ partners as a fixed percentage of the state law maximum donation should permit DAs to fundraise, allow lawyers to support a DA candidate, and help reassure voters that these contributions are too small to affect the district attorney’s judgment.

There are instances in which contributing lawyers who have not technically appeared before the DA’s office—and thus will not be captured in the office’s case management system—will nonetheless have contact with the DA and his or her senior staff on case-related matters. For instance, a lawyer who has contributed to a district attorney’s campaign may not have made any appearances (in court, in the office, or otherwise) on a particular case but then may seek a meeting about the case with the district attorney or a high-level supervisor with decision-making authority.<sup>74</sup> If such a meeting (or phone call or other substantive contact) occurs, a potential conflict of interest arises at that time, but it is a conflict that would not have been flagged by the office’s standard vetting process as described above. In cases such as these, where lawyers who have contributed previously to the DA’s campaign interact directly with the DA or his or her senior staff, CAPI recommends that the names of these lawyers be provided to the campaign for cross-referencing against the contributor list. If it is determined that the lawyer in question made a contribution within the previous six months, the contribution should be refunded if possible. If the lawyer made a contribution more than six months before the case-related contact in question, CAPI recommends that the vetting committee or vetting official decide what to do about the contribution on a case-by-case basis, considering the size of the contribution, how long before the case-related contact the contribution was made, and any other relevant factors, including the circumstances of the case on which the lawyer has appeared.

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<sup>73</sup> Gathered by applying the formula, 0.05 times the number of eligible voters as reported in the 2017 BOE voter rolls. *See* Contribution Limits, <https://www.elections.ny.gov/CFContributionLimits.html> (last visited Jan 16, 2018).

<sup>74</sup> “Senior staff” may include the executive staff, and bureau/unit chiefs, depending upon the decision-making authority exercised by people in those positions. Each DA should determine which staff members in his or her office hold the authority to make final decisions about cases, and this policy should apply to those individuals.

It is important to note that, except for the procedure outlined in the paragraph above, these recommended bans and limits are not easily transferable to the campaigns of challengers to sitting DAs or in the case of a race for an open seat. A candidate who is not a sitting DA does not know which donors may be parties to a matter before the district attorney's office, targets of investigations, or attorneys appearing before the office. Furthermore, even without the information disparity, the challenger candidate simply does not have an existing conflict of interest when accepting campaign contributions from those individuals. Therefore, there necessarily will be a disparity in the fundraising abilities of the sitting district attorney and the challenger with respect to those categories of individuals. Nevertheless, such challengers should implement the blinding procedures and, if the challenger wins the race and becomes the DA, should set up vetting procedures to capture prior contributions by lawyers appearing before the office as described above. If the challenger is elected to serve as the district attorney, he or she also should attempt to discourage any discussion of prior financial support by lawyers appearing before the office.

### **Recommendation 3: Enforce a Strict Division Between Campaign Staff and DA Office Staff**

As DA Vance already does, CAPI recommends that DAs create and enforce a firm division between campaign staff and office staff, so that the staffs are kept separate in terms of personnel, workspace, and information sharing. The goal is to have very limited interactions between the staffs, so that the DA's office is unaffected by the campaign. There should be no common personnel in the office and the campaign with the exception of the DA himself or herself, and information moving between the two entities should be limited to the necessary reference checks of office databases to ensure that donation policies are enforced. The implementation of this recommendation will also assist in compliance with relevant city and state regulations prohibiting the use of government time for campaign purposes, as explained above.<sup>75</sup>

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<sup>75</sup> See N.Y.C. Charter § 2604(b)(2) (1989), available at <https://www1.nyc.gov/site/coib/the-law/chapter-68-of-the-new-york-city-charter.page>; COIB Advisory Opinion No. 2012-5 (2012), available at [http://www.nyc.gov/html/conflicts/downloads/pdf5/aos/2004-2013/AO2012\\_5.pdf](http://www.nyc.gov/html/conflicts/downloads/pdf5/aos/2004-2013/AO2012_5.pdf).

## Recommendation 4: Refuse Contributions from DA Office Staff

DA Vance does not accept contributions from employees of his office, and CAPI recommends this practice to other elected prosecutors. As already noted, the five DAs in New York City are prohibited from soliciting contributions from their staffs.<sup>76</sup> At the state (but not county) level, JCOPE has a similar rule; the reasoning is that bosses may pressure their subordinates into contributing to their campaigns.<sup>77</sup> The New York State Bar Association has already issued an ethics opinion that assistant district attorneys should not volunteer in DA campaigns.<sup>78</sup> The reason for this is that, although DAs are necessarily somewhat partisan as elected officials:

On the other hand, the Assistant District Attorneys' nonpartisanship will act as a counterweight to the District Attorney's apparent bias. As noted earlier, decisionmaking is often delegated, in whole or part, to an Assistant District Attorney and, when it is not, an Assistant District Attorney may nevertheless have a substantial role in advising the District Attorney. Thus, the nonpartisan Assistant District Attorney's responsibility for, or participation in, the case will provide some assurance that investigative decisions, bail decisions, charging decisions, plea bargaining decisions, sentencing decisions or other decisions exercised by prosecuting authorities will be, and appear to be, made in disinterested fashion, notwithstanding the District Attorney's political involvement.<sup>79</sup>

However, the ethics opinion still allows assistant district attorneys to contribute financially to DA campaigns, on the assumption that monetary contributions appear less partisan.<sup>80</sup> In our interviews, CAPI learned that while many DAs refuse donations from their employees, some do accept and even solicit such donations. CAPI's view is that district attorneys should not accept campaign donations from their staff members because of the significant pressure employees will feel to donate. DAs should include language on their campaign contribution forms and website indicating that: "Persons employed by the District Attorney's Office of County X, and their spouses, should not contribute." Then, as a backstop, contributors can be compared by

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<sup>76</sup> COIB Advisory Op. No. 2003-1 (2003), available at [http://www.nyc.gov/html/conflicts/downloads/pdf5/aos/2000-2003/AO2003\\_1.pdf](http://www.nyc.gov/html/conflicts/downloads/pdf5/aos/2000-2003/AO2003_1.pdf).

<sup>77</sup> JCOPE Advisory Op. No. 1998-12 (1998), available at <http://www.jcope.ny.gov/advice/ethc/98-12.htm>.

<sup>78</sup> See NYSBA Comm. on Prof'l Ethics, Formal Op. 683 (1996), available at <https://www.nysba.org/CustomTemplates/Content.aspx?id=5471>.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

the campaign to a list of current employees in the District Attorney's Office. Campaign staff should also look for donations from spouses of employees, which should also be returned.

## **Recommendation 5: Utilize a Comprehensive Vetting Procedure**

CAPI recommends that candidates running for DA set up formal vetting procedures to review campaign contributions. The vetting could be conducted by a committee or by a trusted individual. A vetting procedure serves two vital purposes. First, a DA who employs the blind fundraising procedures will need someone to replace him or her in making final decisions on potentially problematic donations that the campaign may wish to refuse based on a judgment call. Inevitably, there will be situations that need to be evaluated on a case-by-case basis, and if the DA is not involved, someone needs to make those decisions. We believe that a vetting committee (or individual) sitting on the campaign side is better situated to do that than a member of the DA's office staff, because it better maintains the separation between the office and campaign.

Second, even if a DA does not install the blind fundraising system, inevitably there will be donations that do not fall into categories of prohibited donors but that the DA would wish to refuse. The use of a formal vetting procedure that the DA helps create means that there will be an automatic review of all donations to catch those that fall into this category.

DA Vance already has a vetting committee in place as part of his campaign structure, but CAPI recommends that its role should be enlarged to help ensure his ignorance of campaign contributions.

## **Recommendation 6: Require Donors to Certify Eligibility to Contribute**

CAPI recommends that all district attorneys include language on their contribution webpages and forms that informs potential donors of legal limitations relevant to their giving, and also sets forth the campaign's policies. DA Vance currently utilizes a certification form that sets forth his current policies for accepting donations. The forms should require donors to certify that they and their proposed donation meet all of the relevant criteria. This procedure will assist DAs in their vetting processes by highlighting problematic donations, and by dissuading individuals who do not meet the DA's criteria from giving in the first place, obviating the need to refund the donation. Contributions made absent a signed certification form should be

returned. Utilizing a certification process for donations also helps to notify the public of the DA's campaign procedures. If adopted, it will require a minor addition to the contributor certifications utilized by the Vance campaign. A sample certification form can be found at Appendix B.

## **Recommendation 7: Publish Campaign Policies**

Finally, CAPI recommends that every candidate for district attorney publish his or her campaign policies on the campaign website. This information should include all legal limitations on potential contributions, as well as special restrictions that the DA is imposing on donations such as those described in these recommendations. We also recommend describing the campaign contribution review structure, including the vetting procedure. For the Vance campaign, this entails publishing whatever fundraising procedures are adopted on the campaign website.

Providing clearly delineated standards will help the campaign staff and office staff understand and implement the DA's standards and policies more effectively. The transparency provided by publicly displaying the policies will better ensure compliance by potential donors and will reinforce the public's trust in the district attorney's integrity and honesty.

# Conclusion

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In CAPI's view, implementation of the recommendations herein would constitute a major improvement over current practices for many district attorneys. Blinding procedures that render DAs unaware of their donors' identities coupled with proposed bans and caps on giving by interested parties as described herein would go a long way toward avoiding the actual and potential conflicts of interest and unconscious biases identified in this report. Other proposals, such as creating a strict separation between office and campaign staff and refusing to accept contributions from subordinates in the office, would underscore a district attorney's commitment to keeping politics away from his or her ultimate duties to enforce the criminal laws and seek justice.

While CAPI's recommendations would be a substantial improvement, however, they are still voluntary, unilateral measures that are virtually unenforceable. Any district attorney who adopts even some of CAPI's suggestions is going above and beyond what the law requires. It is likely that at least some DAs will choose not to employ these or similar measures and that some challengers in DA races likewise will refuse to hold themselves to those of the CAPI standards that could be applied to them.

Ultimately, mandatory, permanent, and enforceable changes in the relevant campaign finance laws must come from legislative action. Proposing such legislation is well beyond the scope of this project, but CAPI looks forward to consulting with interested district attorneys about these recommendations, studying the implementation of these recommendations over the next campaign cycle, and continuing to work toward meaningful campaign finance reform for district attorneys, in whatever form that might take.

# Appendix A:

## Interviewees and Collaborators

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CAPI wishes to thank the following District Attorney Offices, other Government Agencies, Non-Governmental Organizations, and Individuals who were consulted on this project:

Albany County District Attorney's Office  
Bronx County District Attorney's Office  
Chenango County District Attorney's Office  
Kings County District Attorney's Office  
Nassau County District Attorney's Office  
New York County District Attorney's Office  
Oneida County District Attorney's Office  
Onondaga County District Attorney's Office  
Schenectady County District Attorney's Office  
Suffolk County District Attorney's Office  
New York City Conflicts of Interest Board  
New York State Attorney General's Office  
New York State Board of Elections  
New York State Joint Commission on  
Public Ethics  
Brennan Center for Justice  
Citizens Union

National Attorneys General Training &  
Research Institute  
New York State Bar Grievance Committee  
Prosecutors' Center for Excellence  
Public Citizen  
Reinvent Albany  
Represent.Us  
Vance for DA Campaign  
Daniel Alonso, Exiger  
Kathleen Clark, Professor of Law, Washington  
University School of Law  
Jerry Goldfeder, Stroock & Stroock & Lavan LLP  
Jim Tierney, former Attorney General of Maine,  
former Executive Director of the National State  
Attorneys General Program, Columbia Law  
School

CAPI also wishes to acknowledge and thank the following Columbia Law students for their assistance on this project:

Tetsuya Ishida, LLM '18  
Sabrina Singer, JD '18  
Eric Sliva, JD '18

CAPI is grateful for the significant input and assistance of the following CAPI Advisory Board members:

Richard Briffault, Professor of Law, Columbia Law School  
Rose Gill Hearn, Municipal Integrity Principal, Bloomberg Associates  
Daniel Goldman, former Assistant United States Attorney  
Jeri Powell, NYC Department of Investigation  
Daniel Richman, Professor of Law, Columbia Law School

## Appendix B:

### Sample Certification Form for DA Candidates

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#### CERTIFICATION FORM

For compliance with New York State election law and our internal campaign guidelines (listed above), please certify the following:



I confirm that the following statements are true and accurate:

1. I am at least eighteen years old.
2. I am an American citizen or a foreign citizen lawfully admitted for permanent residence in the United States (green card holder).
3. Neither I nor my spouse works for the District Attorney's Office.
4. This contribution is made from my own funds and not those of another, and I will not be reimbursed for this contribution by any third party.
5. I am not currently party to any case or matter presently pending with the District Attorney's Office, nor have I been party to any case or matter resolved with the District Attorney's Office within the past 6 months.
6. If I or one of my law partners is currently representing or has represented a client in any matter before the District Attorney's Office within the past 6 months, my contribution complies with the specific contribution caps set forth by the campaign.

## What is CAPI?

CAPI is a nonprofit resource center dedicated to improving the capacity of public offices, practitioners, policymakers, and engaged citizens to deter and combat corruption. Established as a partnership between the New York City Department of Investigation and Columbia Law School in 2013, CAPI is unique in its city-level focus and emphasis on practical lessons and tools.

Published: January 2018 by the Center for the Advancement of Public Integrity at Columbia Law School.  
Available at [www.law.columbia.edu/CAPI](http://www.law.columbia.edu/CAPI).

The views expressed here do not necessarily represent the views of Columbia Law School or the New York County District Attorney's Office.

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