

**Request for Investigation of Macomb County Prosecutor Peter J. Lucido**

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The views expressed in this writing are those of the authors and do not necessarily represent those of any university or organization.

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Michigan Attorney Grievance Commission  
535 Griswold, Suite 1700  
Detroit, MI 48226

**Re: Request for Investigation of Macomb County Prosecutor Peter J. Lucido, Reg #: P41237**

Dear Grievance Administrator:

We write to urge the Michigan Attorney Grievance Commission to investigate Macomb County Prosecutor Peter J. Lucido for using his newly elected office to pursue a politically-motivated investigation against the Governor of Michigan to advance his own partisan political interests. This raises serious issues that you should review under the conflicts of interest rules that govern the legal profession and the prosecutor's office in Michigan.

Before turning to the specifics of this case we note our interest in this matter. We are scholars who specialize in legal ethics, among other fields, and are called upon regularly to

comment on legal and ethical matters. We submit this request in our personal capacities only, based on concern for the public welfare and for the integrity of the profession.<sup>1</sup>

We have grave concerns about Mr. Lucido's behavior with respect to the standards governing the legal profession, the prosecutor's office, and the rule of law. It appears that Mr. Lucido has a personal, political axe to grind regarding Governor Whitmer. As a state legislator and a political candidate Senator Lucido alleged that Governor Whitmer was responsible for COVID-related nursing home deaths and suggested she might be criminally liable for the deaths. Newly-elected Prosecutor Lucido now alleges that Governor Whitmer is responsible for these deaths and suggests there may be criminal liability. He also now asks county residents who lost family members in nursing homes due to COVID-19 to file "wrongful death" complaints with local police offices.

Mr. Lucido may have been within his rights to use the tools of his prior office to advance his cause, but his actions as a prosecutor raise serious questions under the rules governing the legal profession and the prosecutor's office. In light of his public pronouncements regarding the guilt of a potential defendant prior to an investigation, Mr. Lucido's continued involvement in this matter implicates a conflict of interest between his personal political interests and the duties of a

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<sup>1</sup> Prof. Lawrence Dubin became a faculty member of the University of Detroit Mercy School of Law in 1975, where among other courses, he taught Professional Responsibility as well as a seminar in advanced legal ethics issues. He currently has emeritus status. He was appointed by the Michigan Supreme Court to serve two terms as a member of the Michigan Attorney Grievance Commission. He was elected as both vice-chairman and chairman during his tenure on the Commission. He is a member of the Michigan Bar in good standing.

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prosecutor to exercise his discretion in a disinterested, nonpartisan fashion.<sup>2</sup> As the U.S. Supreme Court observed nearly a century ago in *Berger v. U.S.*, a prosecutor “is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.”<sup>3</sup>

Mr. Lucido’s failure to formally recuse himself from any criminal matter involving Governor Whitmer based on these allegations may violate Rule 1.7 of the Michigan Rules of Professional Conduct (MRPC), which prohibits an attorney from pursuing a representation that is “materially limited” by his “own interests.”<sup>4</sup> If he continues to represent Macomb County on this matter, he will be unable to exhibit the disinterested posture required of prosecutors. As a result, he should be investigated to determine whether he is engaging in conduct that is “prejudicial to the administration of justice,” an act of misconduct under Rule 8.4.<sup>5</sup> His continuing statements to the press and the public insinuations regarding Governor Whitmer’s potential criminal responsibility should be investigated to assess whether they are extrajudicial statements that “will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter,” prohibited by Rule 3.6.<sup>6</sup>

We note that as a prosecutor, Mr. Lucido must be assessed under an even higher standard than attorneys generally. Under Rule 3.8 a prosecutor’s job is “that of a minister of justice and not simply that of an advocate.”<sup>7</sup> It was one thing for Mr. Lucido to make such allegations as a politician; it quite another thing for him to do so as a prosecutor. As the Court observed in *Berger*,

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<sup>2</sup> Other states also recognize the political independence of the prosecutorial function. *See, e.g.*, N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 683 (1996) (maintaining that a prosecutor must “exercise [his or her] discretion in a disinterested, nonpartisan fashion,” and therefore may not exercise prosecutorial discretion “to advance his or her own political interests or those of another”).

<sup>3</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935).

<sup>4</sup> MRPC 1.7(b).

<sup>5</sup> MRPC 8.4.

<sup>6</sup> MRPC 3.6(a).

<sup>7</sup> MRPC 3.8.

insinuations of criminal liability are highly destructive when uttered by prosecutors, whose “improper suggestions [and] insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.”<sup>8</sup> Note that this would be the case even if there were good grounds for suspecting the governor of a crime, though in this case the public record has provided none of which we are aware.

It is also worth noting that under the Macomb County ethics ordinance, a public servant has a conflict of interest where he “[h]as an actual or apparent . . . political interest which is or may be incompatible with the County’s actual or apparent interests.”<sup>9</sup> As described below, a reasonable observer may find it hard to distinguish between Mr. Lucido’s present conduct as an elected prosecutor and his prior statements as a political candidate and as a state senator on this matter, raising the concern that he may be subordinating the County’s interests to his own partisan political interests.<sup>10</sup>

We urge the Commission to investigate Mr. Lucido’s behavior for violations of his duties in his capacity as a prosecutor for Macomb County.

## **I. *Factual Background***

On April 1, 2020, State Senator Peter Lucido launched a campaign for Macomb County prosecutor.<sup>11</sup> Two weeks later, Governor Whitmer signed Executive Order 2020-50 “Enhanced protections for residents and staff of long-term care facilities during the COVID-19 pandemic”

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<sup>8</sup> *Berger*, 295 U.S. at 88.

<sup>9</sup> Enrolled Ordinance 2019-05 §§ 4(k), 6, <https://www.macombgov.org/sites/default/files/content/government/ethics/pdfs/2019-05%20Ethics%20Ordinance.pdf>.

<sup>10</sup> *Id.* § 5.

<sup>11</sup> Christina Hall, *State Sen. Peter Lucido announces run for Macomb County prosecutor*, DETROIT FREE PRESS, Apr. 1, 2020, <https://www.freep.com/story/news/local/michigan/macomb/2020/04/01/state-sen-lucido-announces-run-macomb-county-prosecutor/5108262002/>.

(hereinafter, the “EO”).<sup>12</sup> The EO directed nursing homes to create dedicated COVID units, and stated that if a nursing home was unable to create a dedicated COVID unit, it would have to transfer a COVID-positive patient to a designated regional hub.<sup>13</sup> The EO was consistent with guidance issued in prior weeks from the Centers for Disease Control & Prevention (CDC) and Centers for Medicare & Medicaid Services (CMS).<sup>14</sup>

On May 13, the Michigan Senate Oversight Committee, on which Senator Lucido served, held a hearing about the EO.<sup>15</sup> On May 18, Senator Lucido called for state and federal prosecutors to investigate the EO, alleging that the EO was “exposing and endangering” nursing home staff and residents to COVID, calling the policy “reckless and negligent.”<sup>16</sup> On June 3, Senator Lucido introduced Senate Bill 956, that would fully prohibit admitting COVID-positive patients into nursing homes in Michigan (even those with a dedicated COVID unit), and require the state to

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<sup>12</sup> Gov. Whitmer Executive Order 2020-50, Enhanced Protections for Residents and Staff of Long-Term Care Facilities During the Pandemic, <https://www.legislature.mi.gov/documents/2019-2020/executiveorder/pdf/2020-EO-50.pdf>.

<sup>13</sup> *Id.*

<sup>14</sup> See CMS, “Guidance for Infection Control and Prevention of Coronavirus Disease 2019 (COVID-19) in Nursing Homes,” (2020), <https://www.cms.gov/files/document/3-13-2020-nursing-home-guidance-covid-19.pdf> (addressing directly the question of when a nursing home should accept a resident who was diagnosed with COVID-19 from a hospital and stating that the facility could readmit the resident if it could follow the CDC’s guidance concerning “Transmission-based Precautions.”) The guidance also recommended that nursing homes “should if possible, dedicate a unit/wing exclusively for any residents coming or returning from the hospital.”); CMS, “[COVID-19 Long-Term Care Facility Guidance](https://www.cms.gov/files/document/4220-covid-19-long-term-care-facility-guidance.pdf),” (2020), <https://www.cms.gov/files/document/4220-covid-19-long-term-care-facility-guidance.pdf> (making clear that long-term care facilities “should . . . designate separate facilities or units within a facility to separate COVID-19 negative residents from COVID-19 positive residents.”); CDC, “Responding to COVID-19: Considerations for the Public Health Response to COVID-19 in Nursing Homes,” (2020) (laying out guidance for creating COVID-19 care units for residents with confirmed COVID-19 and directing that newly admitted residents and readmitted residents with confirmed COVID-19 who are still contagious should go to the designated COVID-19 care unit).

<sup>15</sup> Rod Meloni & Kayla Park, *Michigan’s Policy of Housing COVID-19 nursing home patients with uninfected patients comes under scrutiny*, CLICK ON DETROIT, May 13, 2020, <https://www.clickondetroit.com/news/local/2020/05/13/michigans-policy-of-housing-covid-19-nursing-home-patients-with-uninfected-patients-comes-under-scrutiny/>.

<sup>16</sup> Mark Hicks, *State Sen. Lucido seeks probes of Whitmer’s nursing home pandemic orders*, DETROIT NEWS, May 18, 2020, <https://www.detroitnews.com/story/news/local/michigan/2020/05/18/state-rep-lucido-seeks-probes-whitmers-nursing-home-pandemic-orders/5217735002/>.

create eight dedicated facilities exclusively for the treatment of COVID-positive nursing home patients.<sup>17</sup>

On June 19, Senator Lucido escalated his attacks on the Governor’s policies. He appeared on the podcast, the “No Bullshit News Hour,” and told host Charlie LeDuff, “What our governor has done is literally cold-blooded killed the most injured parties that are out there. The ones that have compromised immune systems—cold-blooded.”<sup>18</sup> Senator Lucido added that “only she has the blood on her hands with the death of those individuals.”<sup>19</sup> Asked if he would prosecute Whitmer if he was elected prosecutor, Senator Lucido answered, “If we have the information that supports a conviction . . . *you’re damn right she’s going to get charged because she deserves to own up to those deaths in those nursing homes.*”<sup>20</sup> This exchange on LeDuff’s podcast resulted in the Breitbart News headline “State Senator: Gretchen Whitmer ‘Cold-Blooded Killed’ Nursing Home Patients; Vows to Prosecute Governor.”<sup>21</sup> Governor Whitmer eventually vetoed Senator Lucido’s bill, citing a lack of sufficient safeguards for all the transfers of nursing home residents that the bill would require.<sup>22</sup> Senator Lucido then published an opinion piece in *Macomb Daily*

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<sup>17</sup> S.B. 956, 2020, Reg. Sess. (Mich. 2020) available at <http://www.legislature.mi.gov/documents/2019-2020/billintroduced/Senate/pdf/2020-SIB-0956.pdf>. In an accompanying statement, Senator Lucido alleged that “Nursing homes and long-term care facilities were never equipped to deal with a virus like COVID-19 that has been so infectious and so dangerous to our elderly and vulnerable populations. I firmly believe this never should have happened.” Press Release, Michigan Senate Republicans, Lucido Introduces Bill to Prohibit Placing Patients with COVID-19 in Nursing Homes (June 3, 2020), <http://www.misenategop.com/lucido-introduces-bill-to-prohibit-placing-patients-with-covid-19-in-nursing-homes>.

<sup>18</sup> Kyle Olson, *State Senator: Gretchen Whitmer ‘Cold-blooded killed’ nursing home patients; vows to prosecute Governor*, BREITBART, June 23, 2020, <https://www.breitbart.com/politics/2020/06/23/state-senator-gretchen-whitmer-cold-blooded-killed-nursing-home-patients-vows-to-prosecute-governor/#>.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* (emphasis added).

<sup>21</sup> *Id.*

<sup>22</sup> Natasha Dado, Michigan governor vetoes nursing home bill calling it ‘a political game’, Aug. 1, 2020, CLICK ON DETROIT, May 13, 2020, <https://www.clickondetroit.com/news/local/2020/08/01/michigan-governor-vetos-nursing-home-bill-calling-it-a-political-game/>.

arguing that 2,000 senior nursing home residents' deaths were "because of [Gov. Whitmer's] executive orders that brought [COVID-19] through their doors."<sup>23</sup>

Senator Lucido won his November election for Macomb County Prosecutor and took office on January 29, 2021. Breitbart published a piece saying that newly-elected Macomb County Prosecutor Lucido had retreated from his campaign promise to prosecute Governor Whitmer.<sup>24</sup> The piece quoted Prosecutor Lucido as instead calling for a Blue Ribbon Panel of the Prosecuting Attorneys Association of Michigan (PAAM) "to review COVID-19 [coronavirus] cause of deaths of otherwise healthy persons confined to Nursing Homes and then exposed to COVID-19 active residents ordered transferred to their facilities under Executive Orders that appear to have been concluded by our State Supreme Court to have been unconstitutional acts, which were arguably not shielded by sovereign immunity or executive privilege."<sup>25</sup> PAAM later declined Prosecutor Lucido's request.<sup>26</sup>

On February 25, 2021, Prosecutor Lucido told a Michigan Senate Oversight Committee that if the Governor had signed his bill (Senate Bill 956) to prevent sending any COVID positive resident into a designated unit within nursing homes, instead of sending them to separate facilities, "We could have circumvented the death of nursing home patients."<sup>27</sup> He did not offer evidence for this allegation.

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<sup>23</sup> Sen. Peter L. Lucido, *Lucido: Michigan has a new opportunity to stand together against COVID-19*, MACOMB DAILY, Oct. 20, 2020, [https://www.macombdaily.com/opinion/lucido-michigan-has-a-new-opportunity-to-stand-together-against-covid-19/article\\_adda32e0-1463-11eb-9662-8b2dc073737f.html](https://www.macombdaily.com/opinion/lucido-michigan-has-a-new-opportunity-to-stand-together-against-covid-19/article_adda32e0-1463-11eb-9662-8b2dc073737f.html).

<sup>24</sup> Kyle Olson, *Prosecutor calls committee to investigate Gretchen Whitmer for nursing home deaths*, BREITBART Jan. 29, 2021, <https://www.breitbart.com/politics/2021/01/29/prosecutor-calls-committee-investigate-gretchen-whitmer-nursing-home-deaths/>.

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

<sup>26</sup> Jim Kietzner, *Macomb County prosecutor says criminal charges possible against Governor Whitmer over nursing home deaths*, WXYZ, Mar. 8, 2021, <https://www.wxyz.com/news/coronavirus/macomb-county-prosecutor-says-criminal-charges-possible-against-governor-whitmer-over-nursing-home-deaths>.

<sup>27</sup> Taryn Asher & David Komer, *State Republicans want Whitmer investigated for senior facility restrictions, COVID-19 deaths*, FOX 2 DETROIT, Feb. 25, 2021, <https://www.fox2detroit.com/news/state-republicans-want-whitmer-investigated-for-senior-facility-restrictions-covid-19-deaths>.

On March 8, 2021, Prosecutor Lucido told a local news station that he was asking people who lost loved ones to COVID as residents of nursing homes “to go back to the nursing homes and gather the vital information surrounding deaths and take it to local police to file a wrongful death report” because “with HIPAA [Health Insurance Portability and Accountability Act] laws, he can’t get that information in his own investigation.”<sup>28</sup> He appeared on camera saying, “If we find there’s been willful neglect of office, if we find there’s been reckless endangerment of a person’s life by bringing them in then we would move forward with charges against the Governor. Of course, we would. Nobody’s above the law in this state.”<sup>29</sup> He continued, “this is not political everyone, this is about people who passed away at the behest of a policy that was created by our governor . . . . Why did my mom or why did my dad, brother, sister, or aunt die? Was it because of the policy by bringing in COVID-infected patients that spread to my mom that killed my mother?”<sup>30</sup> At a press conference soon thereafter, Mr. Lucido provided the public with further instructions on how to file complaints with local police if they had lost a family member due to COVID in a nursing home, on a unique form that he had created for the purpose that he posted to his website.<sup>31</sup> When asked if he was still looking at possible charges such as reckless endangerment

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<sup>28</sup> See Kietzner, *supra* note 26.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Jack Nissen & Amber Ainsworth, *Macomb County prosecutor introduces process for reviewing nursing home COVID-19 deaths*, FOX 2 DETROIT, Mar. 11, 2020, [https://www.fox2detroit.com/news/macomb-county-prosecutor-announcing-reporting-protocol-for-covid-nursing-home-investigation?fbclid=IwAR1GBzCjdA7vSmY1UCultJ\\_9BGlWmKSlsZ-rVaEi\\_bHBuQj1o5ArbCPosks](https://www.fox2detroit.com/news/macomb-county-prosecutor-announcing-reporting-protocol-for-covid-nursing-home-investigation?fbclid=IwAR1GBzCjdA7vSmY1UCultJ_9BGlWmKSlsZ-rVaEi_bHBuQj1o5ArbCPosks).

As of this writing, the form, titled “Nursing home COVID-19 patient, transfer, incident or death Request for Review” still appears on the landing page of Mr. Lucido’s professional website, [www.yourmacombcountyprosecutor.com](http://www.yourmacombcountyprosecutor.com):

against Governor Whitmer as he had said on local news earlier that week, Prosecutor Lucido answered: “that is what is being looked at because those actions were taken unilaterally without the legislature.”<sup>32</sup> When asked if those charges would be felony charges and whether he would consider manslaughter, Prosecutor Lucido responded “There could be a host of charges, but in addition there could be no charges.”<sup>33</sup>

Mr. Lucido also said that he had heard of “hundreds” of cases that might be implicated by this investigation.<sup>34</sup> When asked about the “hundreds” of cases he had referred to, he said “as a lawmaker as a former state senator and House member, I’ve had them taken from letters phone calls direct contact, coffee hours that I had throughout the county . . . . I also took direct calls. My concern is that we look at this in the light most favorable to those that need this closure.”<sup>35</sup>

On March 23, 2021 Mr. Lucido tweeted a letter he signed on his official letterhead responding to an allegation made by Judge Lisa McCormick that Mr. Lucido had inappropriately touched her. In this letter, he said the accusation was politically motivated and pivoted from the allegation back to his “investigation” of “Governor Whitmer’s policies and subsequent actions for handling elderly COVID-19 patients that may have significantly increased the deaths from the



<sup>32</sup> See Nissen & Ainsworth, *supra* note 31.

<sup>33</sup> See Eggert, *supra* note 33.

<sup>34</sup> See Nissen & Ainsworth, *supra* note 31.

<sup>35</sup> *Id.*

virus in long-term care facilities.”<sup>36</sup> He added that “since I announced my investigation earlier this month, the Macomb County Prosecutor’s Office has received more than 1,500 statements in support of my Office’s efforts as well as communications expressing complaints or serious questions about the deaths of elderly family members at long-term care facilities located in Macomb County.”<sup>37</sup>

## II. *Mr. Lucido’s Behavior Implicates Core Codes of Attorney and Prosecutorial Conduct*

Mr. Lucido’s conduct raises conflict of interest concerns under MRPC 1.7(b). He has used his office as Macomb County prosecutor to escalate the partisan policy dispute he began as state senator with his political adversary, Governor Whitmer. As a legislator and candidate for county prosecutor, Mr. Lucido went on the record saying, without evidence, that Governor Whitmer had “cold-blooded killed” nursing home residents and strenuously suggested he would prosecute her.<sup>38</sup> His statements were later reported as a “vow” to prosecute her.<sup>39</sup> Now as elected prosecutor he continues to insinuate and allege that Governor Whitmer is criminally responsible for nursing home deaths, to the public and in the press, despite Michigan rules barring attorneys from making public statements that could prejudice adjudicative proceedings. His words and actions suggest that he seeks to vindicate his prior claims, which would be counter to the black letter and spirit of rules of professional conduct that forbid attorneys from client representations where they have a conflict of interest, and that hold prosecutors to even higher standards.<sup>40</sup> As the Michigan Attorney Disciplinary Board has said: “The fair administration of justice relies, in large part, upon the

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<sup>36</sup> Peter J. Lucido (@peterlucido), Twitter (Mar. 23, 2021, 3:22 PM)  
<https://twitter.com/PeterLucido/status/1374456614648868866/photo/1>.

<sup>37</sup> *Id.*

<sup>38</sup> See Olson, *supra* note 18.

<sup>39</sup> See Olson, *supra* note 24.

<sup>40</sup> Am. Bar Ass’n., Formal Op. 92-363, Use of Threats of Prosecution in Connection with a Civil Matter, (1992).

integrity, honesty and trustworthiness of prosecutors, and where misconduct causes a prosecutor's ethics to be questioned, the entirety of the criminal justice system is called into question.”<sup>41</sup> As a result of this apparent conflict of interest, Mr. Lucido may be engaging in conduct that is prejudicial to the administration of justice.

**A. MRPC 1.7, Conflict of Interest; MRPC 1.11 Successive Government and Private Employment.**

Under the Michigan Rules of Professional Conduct (MRPC) Rule 1.7, which governs conflicts of interest, Michigan attorneys are barred from representing a client if such representation “may be materially limited . . . by the lawyer’s own interests.”<sup>42</sup> Rule 1.11 applies the conflicts of interest principles to a lawyer serving as a “public officer,” and forbids his participating “in a matter in which the lawyer participated personally and substantially” while in previous employment.<sup>43</sup> The rules define a “matter” as “any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties.”<sup>44</sup> The rule further clarifies that when a public official has moved between offices of government employment, each respective employing body “should be treated as a private client for purposes of this rule.”<sup>45</sup>

Here, there are serious questions about whether Mr. Lucido’s own political loyalties and personal interests “materially limit” his duty as a lawyer to his new client, Macomb County. Mr. Lucido has gone on the record multiple times—both from the campaign trail on a popular right-wing podcast and as a newly seated prosecutor in testimony before the Michigan Senate Oversight

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<sup>41</sup> *Grievance Administrator v. Karen K. Plants*, Case Nos. 11-27 -A, at 25 (internal citations omitted). <http://data.adbmich.org/coveo/opinions/2012-03-20-11o-27.pdf#search=%22prosecutor%203.8%22>.

<sup>42</sup> MRPC 1.7(b).

<sup>43</sup> MRPC 1.11(c)(1).

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

<sup>45</sup> *Id.*

Committee—to state that Governor Whitmer is responsible for COVID-related nursing home deaths. This raises a significant concern about whether any investigation he might conduct of Governor Whitmer’s potential responsibility for COVID-related nursing home deaths will be driven by his own bias in the matter, and his desire to vindicate his own prior allegations. His decision to now solicit “wrongful death” complaints from residents in the absence of any evidence of wrongdoing further suggests that Mr. Lucido’s personal and political interests are driving his actions rather than the interests of his client, Macomb County. Mr. Lucido has already confirmed that in pursuing this matter, his chief “concern is that we look at this in the light most favorable to those that need this closure.”<sup>46</sup> In fact, Mr. Lucido’s duty is to his client, Macomb County, “a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all,”<sup>47</sup> and not to any other party.

A persuasive authority on this point is a 2012 Arizona Supreme Court decision ordering the disbarment of elected Maricopa County Prosecutor, Andrew Thomas, and his deputy for, among other wrongs, conflicts of interest.<sup>48</sup> The conflict grew out of Thomas’s prosecutions of a County Supervisor who was Thomas’s political nemesis, and of a judge who had ruled against Thomas’s office. The disciplinary judge concluded that personal animosity motivated Thomas, drawing in part on the fact that no evidence supported his prosecutions.<sup>49</sup> This personal animosity amounted a conflicting interest under the disciplinary rule. Here, although Mr. Lucido has not yet filed charges, he is similarly using the tools of his office against a political foe, apparently without an evidentiary predicate. And just last week he wrapped the political controversy surrounding his

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<sup>46</sup>See Nissen & Ainsworth, *supra* note 31.

<sup>47</sup>*Berger*, 295 U.S. at 88.

<sup>48</sup>*In re* Member of State Bar of Ariz., Thomas, PDJ-2011-9002, No. 09-2293, 232 (Ariz. Apr. 10, 2012).

<sup>49</sup>*Id.* at ¶¶ 105–109, 300–302, 483–485.

investigation of the Governor into the completely unrelated matter of an inappropriate touching allegation against him by a sitting judge.

Mr. Lucido's personal political interest in criminally implicating Governor Whitmer suggests that to protect the interests of Macomb County, the integrity of his office, and his own fidelity to the MRPC, Mr. Lucido should recuse himself from any matter concerning possible liability for Governor Whitmer as to COVID-related nursing home deaths.

### **B. MRPC 3.6, Trial Publicity.**

MRPC Rule 3.6 prohibits attorneys who have participated or are participating “in the investigation or litigation of a matter” from making “extrajudicial statements” that they “know or reasonably should know . . . will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”<sup>50</sup> As chronicled above, on at least eight separate occasions over the past year, five of which were after he took office as prosecutor, three of which were while or after he announced his investigation into nursing home deaths, Mr. Lucido has made comments to the media, the public, and the Michigan Senate, either directly alleging or strongly insinuating that Governor Whitmer is responsible for nursing home deaths. Decisions of the Michigan Attorney Discipline Board demonstrate that county prosecutors are not immune from discipline for Rule 3.6 violations.<sup>51</sup> We urge the Commission to investigate these events and statements as potential MRPC violations.

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<sup>50</sup> MRPC 3.6 (a).

<sup>51</sup> See, e.g., *Grievance Administrator v. Michael Riley*, Case No. 94-185-GA (holding that a county prosecutor's comments to local media about a criminal trial during its pendency violated MRPC 3.6 and that discipline was warranted); *Grievance Administrator v. David Gorcyca*, Case no. 08-37-GA (in which a county prosecutor pleaded no contest to the allegation that he made extrajudicial statements that a reasonable person would expect to be disseminated by means of public communication that he knew or reasonably should have known would have a substantial likelihood of materially prejudicing an adjudicative proceeding, in violation of MRPC 3.6).

### **C. MRPC 8.4, Misconduct.**

As a result of Mr. Lucido's representation of Macomb County despite his apparent conflict of interest, and his extrajudicial statements concerning Governor Whitmer's criminal responsibility, he has also raised serious issues under MRPC 8.4(c) which forbids attorneys from engaging "in conduct that is prejudicial to the administration of justice."<sup>52</sup> Mr. Lucido is using his newly elected office to vindicate claims he began making as a legislator and political candidate, and confirms that in pursuing this his chief "concern is that we look at this in the light most favorable to those that need this closure,"<sup>53</sup> referring to the family members of people who had nursing-home related COVID deaths. The administration of justice requires a dispassionate investigation into what the facts themselves reveal. To commit at the outset of an investigation to regard a set of facts "in the light most favorable" to any party to a legal dispute is definitionally to "prejudice" the administration of justice.

### **D. MRPC 3.8, Special Responsibilities of a Prosecutor.**

The question of whether Mr. Lucido has violated conflict of interest rules should be assessed in light of the fact that he is a prosecutor, which means the Michigan rules hold him to higher standards of ethical conduct than attorneys generally. As the MRPC states, "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."<sup>54</sup> The Michigan Attorney Discipline Board has explained that as a result, "the prosecutor's violation of ethical rules is compounded by his additional duty to the public."<sup>55</sup> The American Bar Association (ABA) has

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<sup>52</sup> MRPC 8.4(c).

<sup>53</sup> See Nissen & Ainsworth, *supra* note 31.

<sup>54</sup> MRPC 3.8, Comment.

<sup>55</sup> *Grievance Administrator v. Karen K. Plants*, Case Nos. 11-27 -A, at 25 (internal citations omitted). <http://data.adbmich.org/coveo/opinions/2012-03-20-11o-27.pdf#search=%22prosecutor%203.8%22>.

explained that this “minister of justice” standard has special bearing on the prosecutorial investigation context. According to established ABA standards, prosecutors—even elected ones—are required to set politics aside in investigations and must instead “ensure that criminal investigations are not based upon partisan or other improper political or personal considerations.”<sup>56</sup>

It is hard to distinguish the allegations that Senator Lucido levied against Governor Whitmer while he was a political candidate and legislator (taking to the airwaves to claim that Governor Whitmer “cold-blooded killed” Michigan nursing home residents<sup>57</sup>), from the allegations he made once he assumed office as Macomb County Prosecutor (in late February telling the Michigan Senate Oversight Committee, where until just two months prior he had served as state senator, that had Governor Whitmer only yielded to his own policy preference, she would have spared nursing home residents’ lives<sup>58</sup>). Shortly after taking his new office, Prosecutor Lucido was directing Macomb County residents to file “wrongful death” reports with local police, stating that he was doing so to get around HIPAA, and build his case against the Governor. Yet, suggestions and insinuations of an individual’s criminal liability carry very a distinct weight when made by a prosecutor, as the Court noted in *Berger*, “when they should properly carry none.”<sup>59</sup>

### **III. *Mr. Lucido’s Conduct Also Implicates Macomb County Ethics Rules***

Mr. Lucido is also bound by Macomb County Enrolled Ordinance 2019-05, which establishes ethics standards for all countywide elected officials. Under the Ordinance, a public servant “shall not engage in a Conflict of Interest, including influencing, attempting to influence,

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<sup>56</sup> ABA Prosecutorial Investigation Standard 1.2(d)(ii).

[https://www.americanbar.org/groups/criminal\\_justice/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_pinvestigate/](https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_pinvestigate/).

<sup>57</sup> See Olson, *supra* note 16.

<sup>58</sup> See Asher & Komer, *supra* note 26.

<sup>59</sup> *Berger*, 295 U.S. at 88.

or participating in the decision making process or taking action which . . . [f]urther the Public Servant's . . . Partisan Political Interests.”<sup>60</sup> A “Partisan Political Interest” means “having a direct or indirect political stake, deriving a direct or indirect personal political benefit, or realizing a private political gain from a proposed County . . . decision or other discretionary action which benefits the subject Public Servant, or the subject Public Servant’s political party” and where the “direct or indirect political benefit or political gain is different . . . than the political benefit or political gain bestowed upon the general public. . . .”<sup>61</sup>

As described above, Mr. Lucido began his allegations against Governor Whitmer as a state senator in the context of a political dispute and intermingled them with his campaign for Macomb County Prosecutor. We question whether the public can have faith that any prosecutorial action undertaken by the County now could be distinct from Mr. Lucido’s partisan political interests. This is not a case of a prosecutor promising to be “tough on crime” and then enforcing laws aggressively in office; Mr. Lucido promised to be tough on one particular alleged crime and one particular alleged defendant. His political history is bound up in those allegations, potentially implicating relevant ethics rules.

#### **IV. Conclusion**

The political policy dispute between Governor Whitmer and then-State Senator Peter Lucido became his allegations against Governor Whitmer on the campaign trail while Mr. Lucido ran for Macomb County Prosecutor. Serious questions now arise as to whether Prosecutor Lucido is using the tools of his new office, which is governed by professional ethical rules binding

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<sup>60</sup> Enacted Ordinance 2019-05 § 6, <https://www.macombgov.org/sites/default/files/content/government/ethics/pdfs/2019-05%20Ethics%20Ordinance.pdf>.

<sup>61</sup> *Id.* § 4(aa).

prosecutors, to vindicate his own partisan campaign promises. Throughout his tenure as both political candidate and prosecutor, Mr. Lucido has made extrajudicial comments alleging or insinuating Governor Whitmer's criminal liability. In all of this, Mr. Lucido may be subordinating the interests of his client, Macomb County, to his own, thereby violating the conflicts of interest provisions of the MRPC and the Macomb County ethics ordinance. His conduct should be assessed under the heightened "minister of justice" standard governing his role, because it threatens the integrity of the criminal justice system and of his office.

For the foregoing reasons, we request you to promptly investigate this conduct and determine an appropriate remedy, including but not limited to requiring Mr. Lucido to recuse from participation in this investigation of the Governor in which he has a conflict of interest.