ADVISORY MEMORANDUM
TO
THE SUPERIOR COUNCIL OF THE MAGISTRACY
ON THE PROTECTION OF JUDGES AND PROSECUTORS
FROM UNWARRANTED ATTACKS

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QUESTION: HOW AND TO WHAT EXTENT SHOULD THE SUPERIOR COUNCIL OF THE MAGISTRACY (SCM), AS THE OFFICIAL GUARANTOR OF JUDICIAL INDEPENDENCE, RESPOND TO ITS OBLIGATION TO PROTECT JUDGES AND PROSECUTORS AGAINST ACTS THAT THREATEN THEIR INDEPENDENCE, IMPARTIALITY, AND PROFESSIONAL REPUTATION.

SECTION ONE: WHAT ARE THE SPECIFIC PROVISIONS IN THE LAWS THAT RELATE TO THE SCM’S OBLIGATIONS:

A. LAW ON JUDICIAL ORGANIZATION (LJO) Section 2 of Article 1 tasks the SCM with guaranteeing the independence of justice.

“The Superior Council of the Magistracy is the guarantor of the independence of justice.”

B. LAW ON THE SUPERIOR COUNCIL OF THE MAGISTRACY (LSCM): Section 1 of Article 30 sets forth the following:

“The Superior Council of the Magistracy is entitled and obligated to take note, even ex officio in order to protect judges and prosecutors from any acts that could affect their independence or impartiality or that could give rise to suspicion with regard to these. Also, the Superior Council of the Magistracy shall protect the professional reputation of judges and prosecutors.”

Section 2 of Article 30 provides the following:

“A judge or prosecutor who considers that his or her independence, impartiality, or professional reputation are being affected in any manner may address the Superior Council of the

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1 Article numbers in the text refer to the Romanian version of the laws as published on 13/09/2005 in the Official Journal of Romania.
Magistracy, which may, the case being, ordain that the aspects signaled be verified, that the results of verification be published, may notify the competent body to decide upon the measures called for or may ordain any other measure that is appropriate, according to law.”

C. LAW ON THE STATUTE OF MAGISTRATES (LSM) Sections 1 & 2 of Article 75 set forth the following:

“The Superior Council of the Magistracy is entitled and obliged to protect judges and prosecutors against any act that is likely to affect their independence and impartiality or to give rise to suspicion with regard to these.”

“Judges and prosecutors who deem that their independence or impartiality are affected in any way by acts of interference with the professional activity may address the Superior Council of the Magistracy, in order for the necessary measures to be ordained, according to the law.”

The authority granted to the SCM to protect magistrates in these laws is broad. Essentially, the SCM is authorized, even when it is only suspicious that one or more acts possibly could affect the independence and impartiality of judges and prosecutors, not only to take specific action but, in addition or as an alternative, to “…ordain any other measure that is appropriate, according to law.” The SCM has similar authority to invoke such measures to protect the professional reputation of judges and prosecutors. The laws do not provide much in the way of specific detail as to how the SCM should exercise this authority or what the limitations on the use of such authority are in light of, for example, Article 10 of the European Convention of Human Rights or how the European Court of Human Rights has interpreted and applied Article 10. Section IV of this Memorandum discusses the extent to which the SCM’s pursuit of criminal or civil liability in the courts of law should be

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2 Judicial and prosecutorial independence and impartiality can be compromised by threats, intimidation, physical violence, and other acts that endanger or create vulnerability for them, their families, and their property. Responsibility for protecting judges and prosecutors from those categories of acts, however, rests not with the SCM but with the Ministries of Justice, Administration and Interior. See Article 77 of LSM.
constrained by the European Convention on Human Rights and the Article 10 jurisprudence of the European Court of Human Rights.

We note that the protective authority of the SCM extends beyond individual or groups of judges and prosecutors. Based on the provision cited above in the LJO, the authority also extends to protecting the independence of the judiciary and the prosecution as institutions in addition to the populations that staff them. To that extent, the SCM’s responsibility extends to responding to and attempting to hinder acts that threaten or undermine the independence, impartiality, and professional reputation of the institutions of justice, whether these acts originate with persons who are representatives of those institutions or outsiders. The history of judicial and prosecutorial systems in general include instances in which some of those who were authorized to exercise prosecutorial and judicial authority misused and perverted it in ways that served to undermine and harm the independence, impartiality, and professional reputation of those systems.

**SECTION TWO: HOW MIGHT THE SCM PROTECT THE INDEPENDENCE, IMPARTIALITY, AND PROFESSIONAL REPUTATION OF JUDGES, PROSECUTORS, AND THE INSTITUTIONS OF JUSTICE WITH REGARD TO DAMAGING ACTS COMMITTED BY OTHER JUDGES AND PROSECUTORS THAT UNDERMINE OR HARM THOSE VALUES:**

We review in this section what preventative and punitive action the SCM is authorized to take with regard to the broad categories of acts committed by judges and prosecutors that have the potential to undermine the independence, impartiality, and professional reputation of the magistracy and its institutions. For purposes of clarity, we refer to such acts as *internal* as opposed to *external* acts committed by persons or organizations that fall outside of the judicial and prosecutorial systems, such as media representatives or politicians. We might organize these internal acts under disciplinary liability, civil liability, and criminal liability.

A. **INTERNAL ACTS THAT NEGATIVELY IMPACT JUDICIAL OR PROSECUTORIAL INDEPENDENCE, IMPARTIALITY, OR PROFESSIONAL REPUTATION AND TRIGGER DISCIPLINARY LIABILITY:** Section 2 of Articles 64 and 67 of the LJO provide practical examples of one type of threat to prosecutorial independence and authorize those so threatened to raise objections with the SCM.
“In the solutions that they ordain, prosecutors are independent, according to the law. Prosecutors may object with the Superior Council of the Magistracy, within the proceedings for checking the conduct of judges and prosecutors, against any interventions from the hierarchically superior prosecutors, occurring either in the criminal prosecution or in the adoption of a solution.” (Article 64(2))

“Prosecutors shall be free to utter in court the conclusions that they deem as well-founded, according to the law, while taking account of the evidence provided in the case. Prosecutors may object with the Superior Council of the Magistracy against any interventions by the hierarchically superior prosecutors, which are aimed at influencing the conclusions in any manner.” (Article 67(2))

In these and other instances of prosecutorial or judicial disciplinary liability for acts that negatively impact the independence, impartiality, and/or professional reputation of judges and prosecutors, the disciplinary action to be taken by the SCM is set forth in Article 100 of the LSM. In effect, the LSM clearly lays out how the SCM should deal with acts committed by those who are within the system – judges and prosecutors -- that threaten to undermine judicial and prosecutorial independence, impartiality, and professional status or reputation. To the extent that the SCM moves promptly and judiciously to address these acts with the appropriate discipline, its actions will serve as a warning to other judges and prosecutors and, presumably, have a deterrent effect. The SCM also takes preventative action by ensuring that the National Institute for Magistrates conduct regular education and training programs for judges and prosecutors on ethics and related matters and that these programs routinely cover the importance of protecting their independence, impartiality, and professional reputation and of reporting promptly to the SCM any efforts on the part of their superiors to intrude on or otherwise affect that status. Judges and prosecutors also should be regularly assured at such programs that if they do report such intrusions to the SCM, they will be protected from any and all forms of retaliation, demotion, or any other forms of harassment or punishment.
Finally, the SCM should ensure that the public is informed through a variety of measures of its right, pursuant to Article 96(1) of the LSM, to report to the SCM inappropriate activity or conduct, breaches of professional duties, and commission of disciplinary transgressions by a judge or magistrate. The Consultative Council of European Judges, in Opinion No. 7 (2005) emphasizes the importance of creating direct relations between courts and the public at large. On the assumption that incorporating justice into society requires the judicial system to open up and learn to make itself known, the CCJE recommended that national judiciaries: (i) create offices in courts in charge of public relations; (ii) distribute printed materials and open internet sites; (iii) organize in courts calendars educational forums and/or regular meetings open to citizens, public interest organizations, policy makers, students. Such outreach programs, the CCJE advised, should become common practice, as they, going beyond the scope of general information to the public, aim at shaping a correct perception of the judge’s role in society. Courts should conduct surveys, organize focus groups, and provide networks for professional teacher development.

This effort to inform might include any combination of the following:

♦ A notice on all judicial, prosecutorial, and Ministry of Justice websites designed to provide public information on topics related to the administration of justice. This should include both national websites and the local websites of individual courts and prosecution offices. The notice should include links to downloadable complaint forms and how to transmit them, the deontological code, and the specific disciplinary offenses outlined in Article 99 of the LSM.

♦ A brochure available in all courts and prosecution offices outlining the same information and providing directions on where to obtain, how to complete, and where to transmit the complaint forms. Finland publishes a circular to inform the public about deontological code for judges and distributes them through their courts. Belgium also has issued circulars that explain the process for investigating and holding members of the judiciary responsible for disciplinary violations.
♦ Every year, prepare a press release that briefly outlines the misconduct complaint process. Some media may elect to publicize it simply as a reminder.

♦ The SCM president and other SCM officials may, from time to time in public and/or media appearances, mention the right of the public to the effective administration of justice and, in that context, briefly reference (i) the SCM’s role as the guarantor of judicial independence, and (ii) the process whereby the public can notify the SCM of problems with how justice is administered. We recommend that such efforts be cast as much as possible in constructive and upbeat language. The instances in which the public is able to hear from its judicial system leaders outside of the courtroom typically are rare, and the message should be one that, as much as possible, dignifies and builds up the magistracy.

B. INTERNAL ACTS THAT NEGATIVELY IMPACT JUDICIAL OR PROSECUTORIAL INDEPENDENCE, IMPARTIALITY, OR PROFESSIONAL REPUTATION AND TRIGGER CIVIL LIABILITY: If a judge or prosecutor commits an error that triggers civil liability, any suit filed by a party alleging harm must, pursuant to Article 96(6) of the LSM, name the state rather than the magistrate as the defendant. However, after the state has satisfied the judgment, it may in turn file an action against the judge or prosecutor for recovery of the reparations if the error was attributable to bad faith or serious negligence. In effect, magistrates have immunity from civil suits unless the state, having made reparations as a result of the consequences of the magistrate’s error, elects to try to recover those reparations. Conceivably, the publicity generated by a case involving gross and inexcusable negligence could result in a negative public backlash against the judiciary and a call for greater judicial accountability and less independence that is fanned and fueled by the media. Whether the SCM would have any responsibility, under its broad mantle to protect, to initiate separate disciplinary action against the judge or prosecutor is unclear. Presumably, the only action it might take would depend on whether the offense fit within those described in Article 99 of the LSM.
C. **INTERNAL ACTS THAT NEGATIVELY IMPACT JUDICIAL OR PROSECUTORIAL INDEPENDENCE, IMPARTIALITY, OR PROFESSIONAL REPUTATION AND TRIGGER CRIMINAL LIABILITY:** If a judge or prosecutor is criminally liable, having been charged with and convicted of one or more criminal actions, the SCM has no role under the law in adjudicating the case. Those charged are subject to criminal prosecution under Romanian penal law. The SCM’s role, as set forth in Article 62 of the LSM, is limited to (i) suspending the charged official from office without pay and without accumulation of time in service while the matter is adjudicated, (ii) restoring pay and time in service if the charged official is acquitted, and (iii) removal from office if the charged official is convicted.

If the judge or prosecutor so charged is convicted of some or all of the charges, the resulting harmful publicity is likely to negatively affect public perceptions about the independence, impartiality, and professional reputation of the judicial profession. It does not appear, however, that the SCM has any role under the law to pursue, for example, additional criminal prosecution or disciplinary sanctions for those acts whose consequences undermined public perceptions of the magistracy and its independence. Indeed, the LSM authorizes the SCM to exercise certain protective intervention authority when a judge or prosecutor is to be charged and arrested. Article 95 of the LSM provides in Section 1 that “Judges, prosecutors, and assistant-magistrates may be searched, held in custody or under preventive arrest only with the approval of the sections of the Superior Council of the Magistracy.” Section 2 provides that “In the case of flagrant offenses, judges, prosecutors and assistant-magistrates may be held in custody and searched according to the law. The body that ordained the custody or search shall be obliged to inform at once the Superior Counsel of the Magistracy.” Presumably, then, the only circumstance under which the SCM might take additional action against a magistrate who is criminally liable is if either the criminal offence itself or any associated act falls within one of the types of disciplinary offenses set forth in Article 99.

In summary, then, the SCM’s protective role in actions or acts that (i) undermine or harm judicial and prosecutorial independence,
impartiality, or professional reputation and (ii) are committed by judges and prosecutors, is fourfold:

1. Provide regular ethics and related training for all judges and prosecutors;
2. Encourage judges and prosecutors to report to the SCM any efforts by superiors to infringe on or affect their independence and impartiality;
3. Provide public notice that violations by judges and prosecutors of the sort set forth in Article 97(1) of the LSM should be promptly reported to the SCM; and
4. Investigate allegations and administer appropriate discipline promptly and consistently to punish the wrongdoer and create a deterrent effect.

Only for actions that specifically fall within the types of offenses described in Article 99 of the LSM does the SCM have clear authority to administer appropriate sanctions as set forth in Article 100 of the LSM: a warning; a temporary reduction in salary; a temporary disciplinary transfer; or a recommendation for removal from office as a judge or prosecutor. Remedial action for lesser disciplinary offenses, for example those that reflect negatively on the professional reputation of judges and prosecutors can be pursued by the SCM through the evaluation process set forth in the LSM.

SECTION THREE: HOW MIGHT THE SCM PROTECT THE INDEPENDENCE, IMPARTIALITY, AND PROFESSIONAL REPUTATION OF JUDGES AND PROSECUTORS AND THEIR RESPECTIVE INSTITUTIONS FROM HARMFUL ACTIONS THAT UNDERMINE THOSE VALUES AND THAT ARE COMMITTED BY THOSE OUTSIDE THE MAGISTRATES’ SYSTEM

The three laws referenced above, The Law on Judicial Organization (LJO), the LSM, and the L SCM, do not address how the SCM should specifically deal with acts or actions that harm or damage judicial and prosecutorial independence, impartiality, and professional reputation and that committed by those who are outside the system. This includes elected officials and politicians; bar members/practicing attorneys; media representatives such as journalists, reporters, bloggers, etc; law professors; general public; etc. The only guidance is general, viz., the SCM may “…ordain that the aspects signaled be verified, that the results
of verification be published, may notify the competent body to decide upon the measures called for or may ordain any other measure that is appropriate, according to law.” (Article 30(2) of the LSCM) Moreover, notwithstanding the SCM’s protective role in such matters, the 2005 Code of Ethics for Judges and Prosecutors provides in Article 19 that judges and prosecutors have the “…right to reply in the situations where in newspaper articles or radio and TV shows slanderous statements were made about them.” We discuss later in this Memorandum whether such activist self-defense policy may be counter-productive and wonder whether it originated as a result of magistrates’ impatience with the SCM’s history of responding slowly, if at all, to media attacks on and criticism of them.

Prospective approaches that the SCM might adopt fall into two general categories. The first are proactive measures. The second are reactive measures. We examine each of these in turn.

A. PROACTIVE MEASURES: We begin by asserting that the SCM’s mandate to serve as the guarantor of the independence of justice entails both proactive and reactive responsibilities. That is, although the SCM is clearly obliged to protect judges and prosecutors from acts that could affect their independence, impartiality, and professional reputation, serving as the guarantor of the independence of justice also implies that the SCM should take proactive measures designed to promote and strengthen judicial and prosecutorial independence, impartiality, and professional status or reputation.

In many of the countries of the former Soviet Empire, judicial system leaders have struggled to change public perceptions about the dependence of the justice system on the political power structure rather than the rule of law. As judicial leaders commenced the slow and often painful process of achieving judicial and prosecutorial independence, they were subjected to unrelenting negative analysis and criticism by a newly enfranchised media. The media, emboldened by a citizenry anxious to express frustration and disappointment with how the justice system had been perverted and used as a political tool, challenged the integrity of judges and prosecutors and leveled charges of corruption and incompetence in what sometimes were irresponsible and poorly substantiated attacks. Frequently, the
media criticism was either incited or confirmed by unscrupulous and predatory politicians from other branches of government eager to divert attention away from their own difficulties and incompetence.

Judges and prosecutors often responded with counter-attacks that assailed the credibility and integrity of the media, creating an atmosphere of confrontation and hostility. Some responded with reduced media access to justice system officials, judicial proceedings, and case information. As a consequence, the media were less informed; in response, their reporting reflected increased levels of criticism, contempt, and inaccuracy. Progressive judicial and prosecutorial system leaders eventually concluded that these hostile relationships not only were unproductive, but that the frequently negative reporting generated increasingly negative public sentiment about the role and functions of judges and prosecutors in newly emerging democracies. The more innovative among them eventually adopted tactical changes in how they dealt with the media. The purpose of these changes was to modify the paradigm from a negative to a positive orientation and to shift the pattern of confrontation to one of cooperation. We list below proactive measures that the SCM might consider adopting.

a. Explore means to engage media leaders in a cooperative effort to maximize access to judicial and prosecutorial system information and to promote accurate reporting: Responsible and professional media leaders generally prefer to have (i) honest and cooperative working relationships with government leaders, and (ii) open access to government records not subject to lawful confidentiality requirements. However, they do not always understand or appreciate the legal constraints under which judges and prosecutors must conduct their work. Where this has not already been undertaken, we recommend that court presidents and/or vice presidents initiate a process whereby they meet with media leaders on a regular basis to discuss issues of common concern relating to improving reporting on the judicial and prosecutorial systems. This is being done with great success in some other countries. In its Opinion No. 7, the CCJE called on judges to develop contact
with media professionals, to provide mutual understanding of their respective roles. Reception and information services in the courts could work with the media to guarantee access to judicial information in a transparent and non-discriminatory way.

Vojkan Mitrovic, President of the Commercial Court in Nis, Serbia, for example, meets regularly at the end of the work week with select media representatives to respond to their questions and to clear up misunderstandings. Among his several goals in scheduling such meetings are (i) promoting greater transparency, and (ii) responding to complaints about individual judges. He conducts these meetings in his office, refusing offers to meet in a less formal setting such as a bar or restaurant for such discussions over drinks or dinner. Although no formal evaluation has been conducted of this effort which was largely undertaken by President Mitrovic on his own initiative, the outcome has been four-fold: First, relations between the court and the media have reached a new level of professionalism and cooperation. Acrimony in personal relationships has been replaced by cordiality. The court now provides as much information as is permitted under law regarding cases and how they are progressing. Second, because the court president uses these meetings as an opportunity to educate media representatives on various legal issues and procedures, the quality and accuracy of reporting about the court and cases it processes has significantly improved. Third, the nature of the reporting has become much more objective and the incidence of negative attacks on judges and/or decisions has dropped dramatically. Fourth, most complaints regarding individual judges are handled in a discrete manner in these meetings rather than being exposed in the public media in a typically negative and demeaning context.

Some courts in the United States and other countries have established permanent bench/media committees that meet regularly to discuss matters of common concern, to facilitate understanding, to resolve issues, and to plan occasional public forums and other events designed to highlight the important of transparent courts and a responsible media.
b. **DEVELOP AND DISSEMINATE ORIENTATION AND INSTRUCTIONAL MATERIALS FOR THE MEDIA ON THE LAW AND COURTS:** Numerous media organizations cannot afford to dedicate full positions to cover justice system reporting. Frequently, media correspondents and journalists cover several reporting areas of which courts, judges, and prosecutors comprise only one. Because they typically are not trained lawyers and have little, if any, background in the law, they lack both the expertise and the experience to accurately report on matters relating to judges, prosecutors, and courts. Some court systems have developed orientation and training materials specifically for media representatives to facilitate their understanding and ability to report on courts and cases. One of the best examples of such efforts is the *Croatian Journalists’ Guide to Criminal Procedure* authored by Judge Marin Mrcela of Zagreb’s County Court. The 43-page guide covers all important topics in criminal procedure in non-legal terminology in a systematic, easy-to-understand, and well-organized format. The SCM might wish to consider extending a request to the Romanian Judges Association to work with media representatives to develop similar types of media orientation and training materials.


c. **DEVELOP TRAINING PROGRAMS AND MATERIALS FOR OFFICERS EMPLOYED AS COURT INFORMATION AND PUBLIC RELATIONS OFFICIALS:** Articles 116(1)(d) and 117 of the LJO provide for the creation and staffing of information and public relations offices (PR offices) in all courts and prosecutorial offices. These PR offices have the potential to mitigate and resolve issues and prospective complaints at the local level before they regress into full-blown acerbic disputes and virulent exchanges that are waged in public media forums to the detriment of the courts, judiciary, and prosecution. To effectively serve that role, the officials who manage and operate these offices should be provided with appropriate training and materials that will prepare them for this role.

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3 To access the Guide in English and Croatian, go to http://www.abanet.org/ceeli/publications/cro_journ_crim_code/home.html
Ideally, the training programs would include instruction and role-play sessions on how to mediate disputes, how to defuse volatile situations, how to handle difficult people, how to empathize and respond to grieving litigants, etc. To the extent that funding is a concern, the SCM might explore with the international donor community the possibility of securing funding and/or expertise to help develop either face-to-face training programs or an interactive program that can be distributed to individual offices on CD. The SCM is aware of the need to prepare these spokespersons and has provided some training. It also recently issued a guide with recommendations on how to effectively work with media representatives. Although the guide was developed for court and prosecution office public relations spokespersons, we encourage the SCM to consider distributing either copies or a shorter summary version designed as a quick reference to all magistrates for their use.

d. PROMOTE PUBLIC KNOWLEDGE AND UNDERSTANDING OF JUDICIAL AND PROSECUTORIAL INDEPENDENCE: Public opinion is largely shaped by the mass media through newspapers, magazines and journals, television, and increasingly the internet. Where judicial systems fail to take advantage of mass media to inform public knowledge and understanding, they are missing an important opportunity to do so and thereby putting themselves at risk when they require public support for their survival and their initiatives. Surveys of the public in a number of countries, including the United States, have shown that although school curricula typically include civics instruction on the structures and functions of the institutions of government, the majority of adults can recall very little when surveyed. Moreover, what they do recall is likely to be inaccurate. This is particularly significant for countries of the former Soviet Block in the areas of judicial independence and impartiality. We propose several ways in which judicial

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4 Indeed, the British Government, through the Global Opportunities Fund – RE-UNITING EUROPE PROGRAMME 2006/2007, has committed to work with the Alternativa Sociala to support a series of seminars scheduled to commence in November 2006 that will involve magistracy spokespersons and media representatives.
systems can promote public knowledge and understanding. All of these efforts can be coordinated through the information and public relations offices that, pursuant to Articles 116-117 of the LJO, are to be established in all courts and all prosecutorial offices.

We make these proposals advisedly, aware that the Romanian magistracy is substantially understaffed and that judges and prosecutors are coping with large caseloads, insufficient support staff, and a paucity of resources with which to effectively execute their responsibilities. Some courts and prosecutorial offices may find it impossible, given current workloads, to follow through on any of these proposals. That likelihood notwithstanding, we urge the SCM to consider the CCJE’s Opinion No. 7 and suggest that it call on the international donor community to contribute to such efforts. The strength of a nation rests in good part on having a knowledgeable public, and as the typically weakest of the three powers of government, the magistracy is more dependent than the others on the support, understanding, and good will of the people for its legitimacy and status.

i. **SCHOOLS:** The public school system offers an ideal opportunity for judges and prosecutors to supplement the instruction offered by teachers in two ways. First, by inviting schools to bring students into the courts for occasional field visits where they can see justice in action and receive briefings from judges and prosecutors on what they have experienced. Second, by having judges, prosecutors, or other representatives from the courts and prosecutors’ offices visit the schools to explain concepts such as judicial independence and impartiality and why they are critical to the effective administration of justice. Such opportunities are valuable in two ways. They not only help to inform students; frequently, they also help to inform participating teachers’ knowledge and understanding, which has a ripple effect. Some Romanian courts have held annual open days for students, although the practice may have stopped
because of constraints on magistrates’ time. Some court systems have taken the additional step of providing special instructional courses or programs specifically for public school teachers in the justice system, the rule of law, and the roles of judges and prosecutors. Such courses or programs are made available through the law faculties of local universities and taught after hours once a week for a period of several weeks to several months. Teachers who complete these special courses are in a much better position as a result of them to provide accurate and meaningful instruction on court and prosecution systems.

ii. **TELEVISION:** In some countries, justice systems or individual courts and prosecutors’ offices have worked with television officials to schedule special public information forums or similar programs that serve to inform the public about the roles and functions of judges, prosecutors, defense counsel, and courts. A variety of models have been used that range from panel discussions with or without a public audience in the studio to live call-in sessions where justice system officials, with the assistance of a professional moderator, take telephone calls from members of the public.

iii. **PUBLIC FORUMS:** Some court systems have worked with public officials to stage public forums on various justice-related topics in which members of the public are cordially invited to participate. For example, the federal and local courts in the Washington DC area of the United States occasionally convene such forums, each of which focuses on a topic of interest to the public. One such forum dealt with the purposes and operations of the jury system and featured as panelist judges, court administrators, prosecutors, defense council, and select persons who recently had served as jurors. Such programs enhance public understanding about the importance of the role of independent and
impartial courts in protecting human rights and freedoms.

iv. **INTERNET WEBSITES:** The internet has become a very effective and inexpensive mass media resource for distributing information. Many court systems are taking advantage of it to increase their transparency and promote the services they provide in administering justice. Court, and to a lesser extent prosecutorial websites, offer enormous potential as a means not only to help educate the public but to provide access to justice through self-help tools, downloadable court forms, access to legal assistance, links to related sites, and alternatives to formal litigation. An informed and knowledgeable public is an essential element in safeguarding the independence and impartiality of the judiciary, and the SCM at a relatively modest cost could either create a new website or enhance an existing one designed to promote and support those concepts.

Perhaps the best regional example of a website that provides a range of educational activities for school children is that developed by Ireland’s Court Service.\(^5\) Options include learning about the day-to-day functions of select court officials, participating in online mock trials, history of the law, courts in action, etc.

e. **PROMOTE PUBLIC KNOWLEDGE AND UNDERSTANDING OF JUDICIAL AND PROSECUTORIAL ACCOUNTABILITY:** Public support for and protection of judicial independence, impartiality, and the professional reputation of judges and prosecutors is a function of public confidence in a judiciary that is accountable. The judiciaries of Brazil, state as well as federal, offer some excellent examples of systems in which full-blown independence has been achieved in the areas of

\(^5\) The rather lengthy website address is: http://www.courts.ie/courts.ie/Library3.nsf/pagecurrent/847E9F9287986C2C80256DA9003D14D8?opendocument
self-governance, resources, and minimal interference from the other branches of government. However, those systems also suffer, to varying degrees, from insufficient accountability. As a consequence, some systems or parts of systems are excessively slow, inefficient, backlogged, and non-responsive to the needs of the people. One of the dangerous consequences is that in some parts of the country, individual citizens are pursuing alternatives to the formal mechanisms of justice to achieve what they believe is justice. It is setting a dangerous precedent that has drawn the attention of officials in the executive and legislative branches who now are threatening to intervene. Independent and impartial judicial and prosecutorial systems must be accountable judicial and prosecutorial systems, and they must promote and communicate that accountability to the people in order to ensure that there is broad public support for and appreciation of the need for judicial and prosecutorial independence.

A critical element in any promotional agenda is transparency in how judicial and prosecutorial systems function and in how cases are processed and determined. We commend the SCM for the transparency it demonstrates in announcing on its website the upcoming agendas for its weekly public meetings and for publishing and making available the outcomes and decisions of those meetings.

f. PROVIDE A MEANS FOR THE PUBLIC TO SUBMIT FORMAL COMPLAINTS ABOUT JUDICIAL AND PROSECUTORIAL PERFORMANCE: We outlined the importance of developing a formal procedure for submitting and processing complaints in the earlier memorandum on ethics and discipline. That such a process exist and that it be easily accessible to the public is critical for establishing a public commitment to judicial and prosecutorial accountability. It should be available both on the SCM and individual court and prosecutorial office websites. It also should be available in hard-copy format at local courts so that individuals who inquire about such a process can easily access it electronically or obtain the paper version at courthouses and prosecutors’ offices.
B. Reactive Measures: The SCM’s mandate to protect the independence, impartiality, and professional reputation of judges and prosecutors implies establishing procedures for soliciting, registering, and reviewing any acts that (i) could negatively affect those values, and (ii) create reasonable suspicion of intent to negatively affect such values. The SCM’s options for action generally can be classified into three categories based on the interests it seeks to protect:

a. **Protection of Individual Professional Reputation:** Such actions are undertaken to protect against the dissemination of false allegations of fact and may qualify as civil or criminal acts. The question of truth or falsity is at issue. However, because the SCM has no authority to initiate formal court action, its role in this regard is rather limited. The plaintiff in such actions must prove not only that the defendant made a defamatory statement but did so in a manner that triggered civil or criminal liability, for example, proving that the defendant knew or should have known that the statement was false. The burden of proof is a difficult one, and it is just as well that it not falls on the SCM.

b. **Protection of Individual Professional Self-Esteem:** Such action is taken to protect against statements or acts that injure professional self-esteem and may trigger either civil or criminal liability. Such statements or acts may either allege facts or state opinions; truth or falsity is not an issue. Such actions typically impose a greater burden on plaintiffs and are more difficult to successfully litigate in a court of law.

c. **Actions for the Protection of Government Institutions or Officials as a Class or Group:** Such actions are taken to protect the professional status, independence, and impartiality of government institutions as opposed to individuals. It does not matter whether the statements allege facts or are expressions of opinion. Generally, these trigger criminal liability where the country in question has enacted statutes which, as with many
fledgling democratic states, exist to protect the sometimes fragile institutions of government against the abuse of expressive rights. The presumption is that such statutes help to preserve the democratic order and that any punishment imposed must be proportional to the ends sought.

Although acts that fall under these categories presumably would come to the attention of prosecutors through the police or other investigative and law enforcement agencies, they also are likely to be brought directly to the attention of the SCM by a judge or prosecutor. Section 2 of Article 75 of the LSM directs that

"Judges and prosecutors who deem that their independence or impartiality are affected in any way by acts of interference with the professional activity may address the Superior Council of the Magistracy, in order for the necessary measures to be ordained, according to the law."

Section 2 of Article 30 of the LSCM elaborates on this mandate.

"A judge or prosecutor who considers that his or her independence, impartiality, or professional reputation are being affected in any manner may address the Superior Council of the Magistracy, which may, the case being, ordain that the aspects signaled be verified, that the results of verification be published, [may] notify the competent body to decide upon the measures called for or may ordain any other measure that is appropriate, according to law."

When such actions are brought to the SCM’s attention, the SCM should, through its inspectorate, verify the allegations, publish such verification, then, at its discretion, alert the appropriate body to pursue appropriate further action. Where the inspectorate reviews such acts and determines that they merit appropriate action on its part, we might organize the reactive action into categories according to the relative severity of the act.

d. **Acts that may qualify for criminal prosecution:** First is SCM action against acts that may qualify as a violation of the penal laws of Romania. Examples include speech, media
programs, or print material that is or conspires to be libelous, inspires hatred and/or violence, challenges the authority of government institutions, advocates their overthrow or destruction, or undermines their foundations such as the independence and impartiality of the judicial or prosecutorial systems. The laws should clearly articulate what constitutes a violation of the right to expression and what, if anything, constitutes an appropriate defense of the right to free expression. In actions where the allegations involve criminal violations and the verification process supports such allegations, the SCM should refer processing of such matters that are brought to its attention to the appropriate prosecutorial authority for further investigation and criminal tribunal action. Remedies would include fines and under egregious circumstances, possibly imprisonment.

Because criminal prosecution is the most severe response to expressive acts, liberal use of it is likely to have a commensurate chilling effect on free expression. Moreover, where the expressive acts target judges and/or prosecutors who essentially control the criminal justice system, their use of it to punish their detractors is likely to diminish and inhibit free and critical expression within the community. Such expression is a key element to informing public opinion and to maintaining the political health of a democratic society. To that extent, we urge the SCM to invoke criminal prosecution for only the most serious, blatantly hostile, and potentially destructive expressive acts. When it does opt to pursue criminal prosecution, the proceedings must be public and conducted before independent courts whose decisions are subject to review by higher independent courts. The relevant laws should carefully distinguish the competence and jurisdictional boundaries of the various categories of courts.

If the verification process yields results that do not support the allegations of criminal violations, then the SCM has the discretionary authority to determine whether the matter qualifies for review by a civil court or whether other action is appropriate and should be pursued.
e. **Acts that may qualify for adjudication in civil court proceedings:** Second is SCM action against acts that may be eligible for civil proceedings for the purpose of seeking civil remedies. The determination to pursue such actions should begin with a comparative review of (i) the interests that are affected by the act, such as preserving and safeguarding independence, impartiality, and professional reputation, and (ii) the interests of the society in protecting the rights of expression in a democratic society. Remedies the SCM as plaintiff might seek on behalf either of individual judges or prosecutors or judicial and prosecutorial institutions include retraction, monetary damages, and right of reply with appropriate conditions attached. Here again, we urge the SCM to exercise caution. Where the plaintiff against whom insults, defamatory statements, or other negative expressions are directed is a public official exercising his public duties, courts generally impose a higher burden of proof than on other, non-public plaintiffs. Perhaps the most extreme example is the United States whose laws generally reject a cause of action against an individual, publication, media organization, etc., for criticism of the government, one of its agencies, or one of its offices on both a civil and criminal basis.

f. **Acts that do not trigger statutory liability but that, in the judgment of the SCM, warrant a response:** Apart from acts that trigger statutory liability, criminal and civil, there are myriad other actions that may be construed as challenging or disparaging judicial independence, impartiality, and the professional reputation of judges and prosecutors and their respective institutions. The SCM will be approached by judges and prosecutors with requests that it formally react on their behalf to such acts. Given human nature, some will approach the SCM with such requests only in serious cases where an institutional response is warranted. Others will approach the SCM with less serious cases where, although feelings may have been hurt and professional integrity questioned, an institutional response clearly is not required.
For acts that rise to the level that warrants SCM intervention, we recommend that the SCM develop a formal process for submitting and vetting such requests. The process would require the subject of a qualifying act to complete an incident report utilizing a standard format designed by the SCM. This format would include detailed questions about what prompted the act(s), the identity of the actors, the names and contact information of any witnesses, etc. This will help to streamline the SCM’s investigative role and to inform and expedite the vetting process.

We recommend further that the SCM develop a standards-based matrix that can be used to evaluate requests from judges and prosecutors for SCM responses to acts that do not justify pursuing civil or criminal liability. The matrix should be based on a set of specific standards according to which the relative severity of the acts can be categorized. The standards would reflect incremental levels of severity, from lesser to greater. The matrix also would include a set of responses linked incrementally to the severity standards. For acts that fall within the lower severity standards, the corresponding responses might be that no formal SCM response is warranted. Clearly, many types of offensive acts do not deserve a formal SCM response; indeed, responding to them is likely to spawn more such acts. At the higher end of the standards/response matrix, the response from the SCM might be to send to the individual, newspaper, or other media organization a formal letter setting the record straight or exposing and correcting the false information. In matters where the offensive act involves strictly local or domestic issues, the matrix might delegate the responsibility for responding from the SCM to the information and public relations office of the resident court or prosecution office where officers and staff should have the training, materials, and expertise to competently address such matters. Doing so will diminish the SCM’s burden of having to respond to numerous requests.

We also would recommend that the matrix, once it has been drafted and approved, be supplemented with explanatory material, perhaps in the form of a brochure or small
handbook that includes instructions on how to deal with aggressive, negative, and hostile acts – a kind of user guide. This guide then should be distributed to all judges and prosecutors as part of an orientation and training session in its use. Having this matrix and guide will help to prepare judges and prosecutors to more effectively deal with such acts and what steps they should take where the acts are particularly egregious. The more informed judges and prosecutors are about how to deal with such actions, the more effectively they and the SCM will be able to deal with them.

Having such a matrix will serve two important purposes for the SCM. First, it will be an effective tool for use in assessing and responding to requests for assistance from judges and prosecutors. If the matrix is carefully designed and consistently applied, it will aid the SCM to respond to a variety of requests in will be perceived to be an objective manner. Second, the judges and prosecutors will have a much better idea of what types of acts should be handled on the local level through the information and public relations offices of their respective organizations.

SECTION FOUR: TO WHAT EXTENT SHOULD THE SCM’S DETERMINATION TO PURSUE CRIMINAL OR CIVIL LIABILITY IN THE COURTS OF LAW BE CONSTRAINED BY THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE ARTICLE 10 JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Defendants who have been successfully prosecuted in the civil or criminal courts of countries, including Romania, that are parties to the European Convention on Human Rights (Convention) for damaging expressive activity retain the right to have the matter heard by the European Court of Human Rights (ECHR) under the provisions of Article 10 of the Convention. Article 10 comprises two sections, as follows:

Section 1: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and
regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television, or cinema enterprises.”

Section 2: “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions, or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation of rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

Where Section 1 sets forth the basic safeguards that govern expressive activity, Section 2 establishes restrictions on the conditions for engaging in expressive acts and the responsibilities that attach to doing so. A state may interfere with the exercise of such acts when those restrictions are breached. Defendants in actions brought by a state who seek the protection of the ECHR must successfully argue that their case meets three basic conditions. First, that the claimant engaged in a form of expressive activity that is protected by Article 10(1); second that the action taken by the state against the claimant constituted interference with the exercise of Article 10(1) rights; and third, that the conditions set forth in Article 10(2) do not constrain the claimant’s right to freely engage in the expressive activity – that such activity essentially is protected.

The ECHR functions as a full-time tribunal that, among other responsibilities, adjudicates individual complaints against contracting states for alleged violations of the Convention, including Article 10. In reviewing such matters, the ECHR balances competing interests, engages in careful factual analysis, and relies on select principles and values that have evolved in its jurisprudence and on which it relies to inform its decision making. The ECHR’s judgment in Nilsen and Johnsen v. Norway provides a useful overview of how it construes expressive activity:

“Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfillment. Subject to paragraph 2 of Article
10, it is applicable not only to ‘information’ or ‘ideas’ that are favorably received of regarded as inoffensive or as a matter of indifference, but also to those that offend, shock, or disturb. Such are the demands of that pluralism, tolerance, and blindness without which there is no democratic society.”

The ECHR’s position vis-à-vis the media is also instructive.

“One factor of particular importance … is the essential role the press fulfills in a democratic society. Although the press must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. In addition, the Court is mindful that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.”

In its interpretation and application of Article 10 of the Convention, the ECHR has maintained that (i) the status of the plaintiff determines the extent to which critical speech must be tolerated, and (ii) public officials are expected to tolerate a higher level of critical review than are private citizens. However, there is evidence that the ECHR makes exceptions where the public officials are judges with a lower standard for justifying state interference. In Prager and Oberschlick v. Austria, the ECHR explained how it views expressive acts that intrude on the judiciary’s role in a democratic society.

“The Court reiterates that the press plays a pre-eminent role in a State governed by the rule of law… This undoubtedly includes imparting information and ideas on questions concerning the functioning of the system of justice, an institution that is essential for any democratic society. The press is one means by which politicians and public opinion can verify that judges are discharging their heavy responsibilities in a manner that is in conformity with the aim which is the basis of the task entrusted to them.”

“Regard must, however, be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a law-governed State, it must enjoy public confidence it if is to be successful in carrying out its duties. It may therefore prove necessary to protect
such confidence against destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been criticized are subject to a duty of discretion that precludes them from replying."

We recommend that the SCM not constrain itself from pursuing civil and criminal liability remedies for acts where there is clear evidence that a party intended to undermine, damage, or seriously threaten the independence, impartiality, or professional reputation of judges and prosecutors or their respective institutions. Such acts strike at the political foundation of a democracy, and reasoned and proportional interference from the institution charged with protecting those values is not only permissible but necessary. There may be instances in which the ECHR disagrees, but the SCM should not shy away from exercising its mandate because of that possibility.

We do, however, recommend that the SCM reconsider the wisdom of permitting judges to exercise on their own the "...right to reply in the situations where in newspaper articles or radio and TV shows slanderous statements were made about them" as provided for in Article 19 of the 2005 Code of Ethics. A number of countries either preclude or caution their judges and prosecutors from engaging their critics in public media forums for good reason. In England and Wales, for example, although judges are allowed to exercise their freedom of expression with the media, they are instructed to do so with great caution. In Italy, when speaking to the media, judges are expected to exhibit balance and restraint. Judges in France are obligated to exercise reserve in dealing with the mass media.

In many instances, public replies by judges to personal criticism in the media are promoted by defensive reactions and serve only as provocation which further motivate the detractors and spawn additional criticism, condemnation, or slander in the public arena. Neither judges or prosecutors nor the institutions they represent benefit from such negative and public engagements. Where a response may be called for on the domestic or local level to correct false or supplement incomplete reporting, the preferable venue for preparing and releasing a response is through the spokesperson in the office information and public relations office attached to the court or the prosecutor’s office. Where a response is called for on a national basis, it should originate with the SCM.