



Preparing for the Next Scandal: Valuable Insights from the 2019-2023 Judicial Corruption Scandal

Abstract

The Colorado Judicial Department scandal broke in July 2019. It stemmed from multiple allegations of governmental corruption. The scandal was entirely confined to that department.

Since then, various entities have investigated the corruption: its nature; extent; and root causes. A long list of proposed reforms was proposed, with many adopted.

This report compares these responses to the accepted best practices for the investigation and prosecution of governmental corruption, and suggests anti-corruption strategies for the inevitable future corruption scandals (including a discussion of special prosecutor options).

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What is Corruption?

The Colorado General Assembly's Office of State Auditor summarizes its working definition of corruption as:

"Corruption involves state employees or officials using their influence in a business transaction, contrary to their duty to the State or the rights of another, in order to procure some benefit for themselves or another person.

Common examples include:

Soliciting or accepting a bribe or kickback

Bid rigging

Illegal gratuities

Extorting funds from third parties

Engaging in transactions where a conflict of interest is present." 1

The United Nations anti-corruption agency defines governmental corruption as the

"use of public office for private gain." 2 3

Investigating and Prosecuting Corruption - Best Practices

Nearly 20 years ago, The United Nations Office on Drugs and Crime (UNODC) adopted and published guidelines and best practices for investigating and prosecuting corruption. The purpose was to assist governments in dealing with corruption.

The United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators identifies these four key responses to governmental corruption:

- 1. **Criminal or administrative prosecutions**, leading to possible imprisonment, fines, restitution orders, or other punishment;*
- 2. **Disciplinary actions** of an administrative nature, leading to possible employment-related measures such as dismissal or demotion;*

1 [HTTPS://LEG.COLORADO.GOV/AGENCIES/OFFICE-STATE-AUDITOR/WHAT-FRAUD](https://leg.colorado.gov/agencies/office-state-auditor/what-fraud)

2 UNITED NATIONS HANDBOOK ON PRACTICAL ANTI-CORRUPTION MEASURES FOR PROSECUTORS AND INVESTIGATORS (2004), 23.

3 WORLD BANK GROUP, *HELPING COUNTRIES COMBAT CORRUPTION: THE ROLE OF THE WORLD BANK*, (ENGLISH)(WASHINGTON, D.C., 1997), 8.

3. **Civil proceedings** in which those directly affected (or the State) seek to recover the proceeds of corruption or ask for civil damages; and
4. **Remedial actions**, such as the retraining of individuals or restructuring of operations in ways that reduce or eliminate opportunities for corruption (but without necessarily seeking to discipline those involved).⁴

The UNODC handbook is a compilation of peer-reviewed anti-corruption methodologies.⁵

Basic Facts

Colorado’s court system is administered by the Judicial Department, which is centrally managed by the Chief Justice of the Supreme Court. To assist the Chief Justice, the Supreme Court appoints the State Court Administrator (SCA). The Department has more than 300 judges and 3,600 support staff members.⁶

We learned in 2022 that the Colorado Judicial Department had, for many years, covered up allegations of judicial misconduct.⁷

Colorado had established the existing system of investigating and resolving allegations in 1966. Judicial misconduct complaints were to be referred to the Colorado Commission on Judicial Discipline (“CCJD”). The Judicial Department’s systemic failure to do so formed the foundation of this scandal.

This scandal emerged after years of covering up complaints of wrongdoing from within the Judicial Department. For example, of the 6 judicial misconduct complaints referenced in the “Memo” and sampled by the Investigative Law Group, the Department had referred only 1 to the Commission on Judicial Discipline.⁸

⁴ THE UNITED NATIONS HANDBOOK ON PRACTICAL ANTI-CORRUPTION MEASURES FOR PROSECUTORS AND INVESTIGATORS (2004), 45); [HTTPS://WWW.UNODC.ORG/DOCUMENTS/TREATIES/CORRUPTION/HANDBOOK.PDF](https://www.unodc.org/documents/treaties/corruption/handbook.pdf)

⁵ PROFESSIONAL PEER REVIEW OF THE UNODC RESEARCH FUNCTION, FINAL REPORT, MAY 2018. [HTTPS://WWW.UNODC.ORG/DOCUMENTS/DATA-AND-ANALYSIS/PPR_REPORT.PDF](https://www.unodc.org/documents/data-and-analysis/ppr_report.pdf)

⁶ ARTICLE VI, COLO. CONST.; JUDICIAL DEPARTMENT, FISCAL YEAR 2024 PERFORMANCE PLAN, NOVEMBER 1, 2023), 3. [HTTPS://WWW.COURTS.STATE.CO.US/USERFILES/FILE/ADMINISTRATION/PLANNING_AND_ANALYSIS/SMART%20ACT/FY23-24%20SMART%20ACT%20REPORT.PDF](https://www.courts.state.co.us/userfiles/file/administration/planning_and_analysis/smart%20act/fy23-24%20smart%20act%20report.pdf)

⁷ ROBERT C. TROYER & NICHOLAS E. MITCHELL, INDEPENDENT INVESTIGATION INTO THE LEADERSHIP SERVICES CONTRACT AWARDED BY THE COLORADO JUDICIAL DEPARTMENT TO THE LEADERSHIP PRACTICE, LLC (2022)[HEREINAFTER TROYER REPORT], 42-43.

⁸ INVESTIGATIONS L. GRP., COLORADO JUDICIAL BRANCH INVESTIGATION REPORT AND ASSESSMENT OF WORKPLACE CULTURE (2022) [HEREINAFTER ILG REPORT], 9. <https://www.courts.state.co.us/userfiles/file/announcements/ILG—Colorado%20Judicial%20Branch%20Final%20Report—7-11-2022.pdf>

The Masias affair

Senior Judicial Department officials withheld those complaints. The senior Department official who became most closely associated in the public mind with withholding the misconduct allegations was the Department's chief of staff, Mindy Masias. She served at the pleasure of the Supreme Court and was slated to be terminated from her chief of staff position "for cause."

She worked in the Department for many years. In early 2019, through another colleague, she approached the supreme court's Chief Justice with a threat and a proposal. They presented the chief justice, in his role as administrative head of the Department, with the threat that the senior employee was prepared to go public with past judicial misconduct allegations and other "dirt" that had been covered up over the years. The document listing examples of past allegations suppressed became known as the "Memo." As an alternative to disclosure, she offered to resign and keep quiet if she was awarded a \$2.75 million contract and given additional benefits.

Rather than being terminated for cause as planned before the "Memo" threat, the chief of staff was allowed to quickly resign on her own terms. She signed a nondisclosure agreement promising to keep secret information about her employment, which included the "Memo" topics. They gave her the benefits she requested and assured her of a good recommendation. A short time later, she was also awarded the \$2.75 million contract previously requested.

The contract award violated Judicial Department procurement rules. As the state auditor explained, senior Department officials attempted "to influence the [Request for Proposals], sole source contract, and related processes in favor of [the chief of staff], and ultimately resulting in the award of a sole source contract to [the chief of staff]."⁹ While some details remain disputed, even the Department's investigator concluded that the Department's senior leaders entered this contract to silence the chief of staff and buy her happiness.¹⁰

Investigative findings support the notion that the events fit within the definition of "corruption." This is what corruption looks like. We next ask if there was a "cover-up" of this corruption.

Cover-up

A "cover-up" is an attempt, whether or not successful, to conceal evidence of wrongdoing, error, incompetence, or other embarrassing information.¹¹

⁹ COLO. STATE AUDITOR, *EXECUTIVE SUMMARY OF FRAUD HOTLINE INVESTIGATION REPORT* (FEBRUARY 4, 2022), 5-6; [HTTPS://LEG.COLORADO.GOV/SITES/DEFAULT/FILES/IMAGES/LCS/OSA_EXECUTIVE_SUMMARY.PDF](https://leg.colorado.gov/sites/default/files/images/lcs/osa_executive_summary.pdf); SEE ALSO CHIEF JUSTICE'S LETTER TO JUDICIAL DEPARTMENT PERSONNEL, COLORADO JUDICIAL BRANCH (FEB. 7, 2022), 3.

¹⁰ HEARING BEFORE THE LEGIS. INTERIM COMM. ON JUD. DISCIPLINE HEARING ON JUNE 12, 2022, 73RD GEN. ASSEMB. (COLO. 2022) [HEREINAFTER LEGIS. INTERIM 6/12/22], STATEMENT OF RCT, LTD., AT TIME STAMP 04:43.

¹¹ TIMOTHY KUNDRO, *UNDERSTANDING WHEN AND WHY COVER-UPS ARE PUNISHED LESS SEVERELY*, 64 ACADEMY OF MANAGEMENT JOURNAL 120 (2021).

A list of classic cover-up methods has been compiled from famous cover-ups such as the Watergate Scandal, Iran-Contra Affair, My Lai Massacre, Pentagon Papers, the cover-up of corruption in New York City under Boss Tweed and the tobacco industry cover-up of the health hazards of smoking.¹²

There is evidence of a long-lasting and extensive practice of covering-up and not reporting instances of misconduct within the Judicial Department. The Department’s own investigators found a culture of not reporting misconduct and gathering “dirt” on people to be used as leverage for personal power and gain at a later time.¹³

It also should come as no surprise that there was evidence of continued cover-ups after the scandal broke into public view in July 2019.

An example of ongoing cover-up: withholding the “Memo”

The “Memo” provides an important focal point.

First, the “Memo” is a smoking gun in the classic sense of the term. It was written by people with personal knowledge of the events it described. And, it documented facts, the disclosure of which formed one side of an alleged quid pro quo scheme. Second, its gradual and grudging disclosure shows how the Judicial Department attempted to cover up its existence, even as details of the scandal unfolded.

The Supreme Court’s seven members comprised a “collegial court” which had a close working relationship among themselves and with the Department’s chief of staff. It is reasonable to infer that, most likely, the justices would have known of her pending termination and her threat to disclose “dirt” about the court itself. Probably this would have been a topic of some discussion. Whether the justices had physically viewed the “memo” they likely had learned of its contents. Ultimately, these inferences were confirmed to be the case.

Table I - The “Memo” Timeline - from Creation to its Disclosure

January 2019	Eric Brown reads “Memo” to Chief Justice Coats (who, eventually, asks him to stop reading). The “Memo” references information Mindy Masias had secretly recorded during meeting and enumerates Masias’s grievances. ¹⁴
Sometime in 2019	Justice Hart was quoted in the media as testifying under oath in 2021 that she and other justices knew about the “Memo” sometime in 2019. ¹⁵

¹² [HTTPS://EN.WIKIPEDIA.ORG/WIKI/COVER-UP](https://en.wikipedia.org/wiki/Cover-up)

¹³ TROYER REPORT, 39.

¹⁴ ILG REPORT, 7.

¹⁵ DAVID MIGOYA, *COLORADO SUPREME COURT JUSTICES KNEW ABOUT MEMO ALLEGING MISCONDUCT 2 YEARS BEFORE IT BECAME PUBLIC*, THE GAZETTE (DEC. 15, 2021).

July 18, 2019	First media story about Leadership Contract ¹⁶
Nov. or Dec. 2020	Publicly released audit report determined that the contract award violated rules and had an appearance of impropriety. ¹⁷
February 3, 2021	“Memo” mentioned first time in media. Judicial Dept. initially refuses to disclose (claiming privileged as work-product). ¹⁸
February 4, 2021	Judicial Dept. issued cease and desist order re: disclosure of “Memo.” ¹⁹
February 5, 2021	Office of State Auditor publicly asked to include additional contract into the investigation it has been doing for the last 1-1/2 years. Judicial Department refuses to release “Memo.” ²⁰
February 7, 2021	Media reports a litigant will seek production of “Memo” in her ongoing EEOC against Judicial Dept. ²¹
February 8, 2021	“Memo” released to the media. ²²
February 9, 2021	In an email to all Justices, Judges and all Judicial Personnel, the Supreme Court states: “Today, we met as a court and viewed the memo for the first time.” [02-08-2021] ^{23 24}
December 15, 2021	Media reports Justice Hart’s testimony that the justices knew of “Memo” in 2019, contradicting court’s narrative that it only learned of the “Memo” in February 2021. ²⁵

This appears to be an attempt to cover up the Memo’s existence and the allegations which it contained. Throughout this saga there are multiple reported instances of the Judicial Department controlling the investigations, stonewalling requests for information, limiting access to evidence, and causing unexplained delays, i.e. classic tactics of a “cover-up.”

¹⁶ DAVID MIGOYA, *COLORADO’S CHIEF COURT ADMINISTRATOR RESIGNS AMID DENVER POST INVESTIGATION INTO CONTRACT*, THE DENVER POST (JULY 18, 2019). [HTTPS://WWW.DENVERPOST.COM/2019/07/18/COLORADO-JUDICIAL-DEPARTMENT-RESIGNATION/](https://www.denverpost.com/2019/07/18/colorado-judicial-department-resignation/)

¹⁷ OFFICE OF STATE AUDITOR, *PERFORMANCE AUDIT OF THE STATE COURT ADMINISTRATOR’S OFFICE PERFORMANCE AUDIT*, (NOVEMBER 2020), 59

¹⁸ DAVID MIGOYA, *COLORADO JUDICIAL DEPARTMENT GAVE \$2.5 MILLION CONTRACT TO PREVENT TELL-ALL SEX-DISCRIMINATION LAWSUIT ABOUT JUDGES*, THE DENVER POST (FEB.3,2021).

¹⁹ DAVID MIGOYA, *COLORADO JUDICIAL DEPARTMENT SAYS CONTRACT-FOR-SILENCE ALLEGATIONS BY FORMER TOP OFFICIAL ARE FALSE - CHRISTOPHER RYAN, FORMER STATE COURT ADMINISTRATOR, STANDS BY HIS STORY*, THE DENVER POST (FEB.3, 2021).

²⁰ DAVID MIGOYA, *COLORADO AUDITOR TO INVESTIGATE ALLEGATIONS OF CONTRACT FOR SILENCE AT JUDICIAL DEPARTMENT LEGISLATORS CONSIDERING OWN INDEPENDENT INQUIRIES*, THE DENVER POST (FEB.5, 2021)

²¹ CHRISTOPHER OSHER, *LAWSUIT MAY SHED LIGHT ON MISCONDUCT ALLEGATIONS IN STATE’S JUDICIAL DEPARTMENT*, THE GAZETTE (FEB.7, 2021).

²² DAVID MIGOYA, *COLORADO SUPREME COURT RELEASES MEMO CITING EXAMPLES OF SEX-DISCRIMINATION, JUDICIAL MISCONDUCT THAT LED TO ALLEGED CONTRACT FOR SILENCE: MEMO BEHIND \$2.5 MILLION CONTRACT RELEASED AND HIGH COURT MAINTAINS THERE WAS NO QUID-PRO-QUO*, THE DENVER POST (FEB.9, 2021).

²³ BRIAN BOATRIGHT, C.J., *SUPREME COURT MESSAGE TO THE DEPARTMENT*, COLORADO JUDICIAL BRANCH (FEB.8, 2021);

²⁴ In light of the later disclosure at Justice Hart’s deposition, this statement appears to have been carefully crafted to leave the incorrect impression that the supreme court justices had never heard of the allegations contained in the memo, when they most likely knew of them from the outset, nearly 2 years earlier.

²⁵ See Footnote 14, *supra*.

Why corruption should be investigated.

The contract for silence allegation represents an issue going to the very heart of judicial integrity and public confidence in our judicial system. As the Chief Justice stated in early 2021, the existence of the allegations caused a “crisis of confidence” in Colorado’s judiciary. In our system, the judiciary is the most trusted branch of government. By the same token, it is also the branch whose effectiveness is most dependent on maintaining that public trust.

Consider the implications: If a sitting supreme court justice does not report a clear extortion attempt regarding a \$2.75 million *administrative* decision, how would the justice respond to a similar attempt if it involved a \$2.75 million *judicial* decision? If the Department covers up for a colleague accused of succumbing to extortion, how is the public to have confidence that our judges are protected from extortion or bribery? Extortion attempts should be reported and dealt with promptly.

Special Prosecutor—suggested at the outset

As the allegations first came to light, there were multiple calls that a special prosecutor be appointed to investigate and prosecute any criminal violations. The Denver Post Editorial Board urged the appointment of a special prosecutor “to get to the bottom” of the contract-for-silence question.²⁶

Similarly, Alec Garnett, Speaker of the Colorado House of Representatives, said: “I support the call for a special prosecutor to look into the specific allegations of inappropriate contracts that were issued with taxpayer money at the Judiciary,”²⁷

Others called for any investigation “to be totally independent of the state’s legal ecosystem.”²⁸

Ultimately, no special prosecutor was appointed to investigate and prosecute potential criminal charges. Unlike our federal system, Colorado does not have a readily available mechanism for a special prosecutor. As a consequence, several separate and uncoordinated investigations each addressed only small portions of this scandal. As events unfolded, the Judiciary kept control of nearly all of these efforts.

The highest profile investigators who looked into this case did so without subpoena power to compel testimony or production of documents. Their much publicized findings and conclusions (about the contract-for-silence allegations) are based on limited information from fewer than

²⁶ DENVER POST EDITORIAL BOARD, *EDITORIAL: HIRE A SPECIAL PROSECUTOR TO ROOT OUT THE BAD APPLES IN THE JUDICIAL DEPARTMENT*, THE DENVER POST (FEB. 12, 2021), [HTTPS://WWW.DENVERPOST.COM/2021/02/12/COLORADO-JUDICIAL-DEPARTMENT-MEMO-SUPREME-COURT-SCANDAL](https://www.denverpost.com/2021/02/12/colorado-judicial-department-memo-supreme-court-scandal)

²⁷ DAVID MIGOYA, *COURT: BRANCHES CAN PICK AUDITORS POSSIBLE INVESTIGATORS WOULD EXPLORE ALLEGED EFFORT TO KEEP JUDICIAL MISCONDUCT QUIET*, THE DENVER POST (FEB. 16, 2021).

²⁸ SHELLY BRADBURY, *LAWYERS WANT PROBE TO BE MODELED AFTER THE McCLAIN INQUIRY*, THE DENVER POST (MARCH 3, 2021).

all the “key players.” In fact, for the main allegations, they appeared to have been provided only one side of the story.

The most serious misconduct related to the contract occurred from November 2018 through March 2019. No criminal information or indictment was filed before the applicable felony statute of limitations probably ran out in March 2022. The highest profile investigations did not release until after this date.²⁹

Compare how California recently investigated another legal system scandal. That scandal involved a prominent personal injury attorney who had avoided discipline because of an inappropriately special relationship with certain employees within California’s attorney regulatory body. The scandal investigators were “empowered under the [California’s] Business & Professions Code to issue subpoenas, take testimony of witnesses, and compel the production of documents.”³⁰

In Colorado, the target agency controlled the investigations of its own conduct. The corruption allegations were entirely centered within one agency, i.e. the Judicial Department. Thus, it was that agency which was the target of all the investigations.

While, the target agency was the Colorado Judicial Department, confusion is understandable because the Chief Justice of the Colorado Supreme Court oversees that agency. Unlike, say, for example, the Department of Transportation, this agency has a unique aura. We are accustomed to seeing the Supreme Court as incorruptible and as the last word on contested matters. But, in fact, the Supreme Court performs dual roles: both as judicial decision maker and as administrator of the judicial system’s bureaucracy.

Throughout the ensuing investigations, these agency roles were blurred and confused. This probably contributed to the inadequacy of the response to this corruption scandal.

When this scandal was first exposed to the public in July, 2019, the Supreme Court jumped out in front of calls for a special prosecutor and proposed “independent” investigations into the alleged wrongdoing. The Court issued a press release: “[T]he Colorado Supreme Court today announced it has invited the state’s other government branches to select external investigators who will independently examine allegations of sexual harassment and gender discrimination within the Judicial Branch, and of claims that a training services contract was awarded improperly to a former senior administrator.”³¹

²⁹ TROYER REPORT (PUBLISHED ON 06-22-2022); ILG REPORT (PUBLISHED ON 07-11-2022); STATE AUDITOR’S FRAUD HOTLINE EXECUTIVE SUMMARY (PUBLISHED 02-04-2022).

³⁰ HALPERN, MAY, YBARRA, GILBERT LLP, *INDEPENDENT INVESTIGATION FOR THE STATE BAR OF CALIFORNIA: REPORT OF INVESTIGATION* BY (FEBRUARY 4, 2023) [HTTPS://WWW.CALBAR.CA.GOV/PORTALS/0/DOCUMENTS/REPORTS/MAY-REPORT-AND-ADDENDUM-REDACTED.PDF](https://www.calbar.ca.gov/Portals/0/Documents/Reports/May-Report-and-Addendum-Redacted.pdf)

³¹ COLORADO JUDICIAL DEPARTMENT, *PRESS RELEASE: COLORADO SUPREME COURT REQUESTS OUTSIDE PANEL TO SELECT INDEPENDENT INVESTIGATORS* (FEB.16, 2021). [HTTPS://WWW.COURTS.STATE.CO.US/MEDIA/RELEASE.CFM?ID=1962](https://www.courts.state.co.us/Media/Release.cfm?id=1962)

The state’s other government branches organized a special panel which then issued a request for investigation proposals. The panel then *selected* two law firms to conduct investigations into some of the allegations. It is important to note that, these investigations were only independently *selected*.

The investigators were RCT, Ltd. and ILG. Describing these investigations as “independent” is wrong because they remained under the employing agency, the same agency being investigated. Even though the request for proposals described questions to be investigated, the agency changed the scopes of these investigations; placed certain issues off limits; negotiated and administered the contracts; kept fiscal control; had ultimate and unreviewable control of the information to be provided; failed to enforce important compliance with the RFP; and most importantly, controlled the timing and content of criminal referrals to law enforcement.

Because of the Supreme Court’s dual role, i.e. as final word on privilege claims and as the target agency, it had unreviewable control over the investigators’ access to information. This was a fundamental conflict of interest.

Prior statements by those at the top of the Judicial Department made it clear how the Supreme Court intended the “contract-for-silence” investigation to come out: “The Judicial Department *categorically denies* that the contract for leadership training was awarded to The Leadership Practice in June 2019 due to blackmail or to keep information about the Department quiet.” (emphasis supplied)³²

This scandal and ensuing calls for investigations broke at the beginning of the 2021 legislative session, when legislators were busy with the usual press of legislative business. When the Judicial Department stepped forward, proposing what sounded like full cooperation and investigations, the public outcry subsided.

The public and the media then focused their attention on the eventual outcome of these investigations. Few realized the degree of control that the subject of the investigation would exert over the investigations.

Various investigations of the scandal

The following table lists and summarizes the various investigations into the Judicial Department scandal. It lists them in the order in which they began and shows the dates when they were active.

³² COLORADO SUPREME COURT, LETTER TO “ALL JUDGES AND COURT PERSONNEL” (FEB.4, 2021).

Table II: Investigations prompted by Judicial Department scandal

<u>Investigating agency</u>	<u>Start Date</u>	<u>End Date</u>	<u>Scope of Investigation</u>	<u>Result</u>
State Auditor Fraud Hotline Investigation	05-29-2019 ³³	02-04-2022	Four (4) instances of occupational fraud	Referred the Judicial Department’s Chief of Staff, head of Human Resources Division and Court Administrator to law enforcement authority.
State Court Administrator	Approx. 04-30-2019	Unknown	Unknown	Referred to by Chief Justice Boatright during testimony at SMART hearing. ³⁴
State Auditor Performance Audit	March 2020 ³⁵	11-18-2020	Performance audit of State Court Administrator’s Office. Started because of the Fraud Hotline report. ³⁶	Many deficiencies noted, including appearances of impropriety in violation of the Judicial Code of Conduct, including a sole source contract.
FBI and US Attorney ³⁷	at least before 09-30-2021	unknown	4 people questioned regarding the contract award.	Unknown
RCT, Ltd.	October 2021	06-22-2022	Whether contract-for-silence	No contract-for-silence on part of Coats, but in testimony RCT said contract given by the Judicial Department for silence ³⁸
Investigations Law Group (ILG)	11-03-2021	07-11-2022	Incidents listed in memo - and institutional culture at Judicial Department.	Mixed - culture was toxic - recommendations

³³ SUPRA AT FN 8, PAGE 1

³⁴ *Hearing of Reference* (statement of Brian Boatright, Chief Justice of Colo. Sup. Court, January 25, 2022, at time stamp 12:05:20).

³⁵ OFFICE OF STATE AUDITOR, PERFORMANCE AUDIT OF THE STATE COURT ADMINISTRATOR’S OFFICE, NOVEMBER 2020, 6

³⁶ *HEARING OF REFERENCE* (TESTIMONY OF MICHELLE COLIN, DEPUTY STATE AUDITOR, LEG. INTERIM COMM. 06-14-2022, AT TIME STAMP 05:44-:45)

³⁷ DAVID MIGOYA, *FBI STARTS OWN PROBE OF CONTRACT*, THE DENVER POST (SEPT. 30, 2021).

³⁸ TROYER REPORT, 43

Denver District Attorney	Approx. 02-04-2022	05-30-2022	Potential criminal charges against SCAO officials arising out of "Leadership Contract"	Declined prosecution - too close to statute of limitations & evidence withheld by Judicial Department. ³⁹
Interim Committee on Judicial Discipline	05-20-2022	12-2022	Consider legislative remedies to restore public confidence in the judicial discipline system	Change funding for judicial discipline commission; Change discipline procedures and reporting obligations. Limit uses of nondisclosure agreements, provide Ombudsman for complainants. Amend state constitution
Office of Attorney Regulation Counsel	Unknown	01-20-2023	Investigated whether former CJ Coats should be professionally disciplined.	Declined to discipline.
Colorado Commission Judicial Discipline	Unknown	05-04-2023	Potential violations of Code of Judicial Conduct by former Chief Justice Coats.	C.J. Coats agreed he violated the Code of Judicial Conduct. He was publicly censured.

Office of State Auditor - Fraud Hotline Investigation

This was the first of the approximately ten (10) investigations spawned by this scandal. Notably, while it began first, it was among the last to finish.

Of the two OSA investigations, this was the first. It was in response to an anonymous tip that carried a statutory mandate to investigate. Under statute, the target agency, in this case the Judicial Department, elected to have the OSA conduct this investigation on behalf of the Department. From the beginning, the Judicial Department knew this audit could result in criminal referrals to law enforcement.

³⁹ SHELLY BRADBURY, *NO CRIMINAL CHARGES IN WAKE OF AUDITOR'S REPORT OF FRAUD, MISUSE OF PUBLIC FUNDS BY COLORADO JUDICIAL DEPARTMENT EMPLOYEES: DENVER DA'S OFFICE SAYS IT WAS UNABLE TO ACT ON STATE AUDITOR'S REPORT BEFORE STATUTE OF LIMITATIONS EXPIRED*, THE DENVER POST (JUNE 1, 2022)

How much time is needed for a complete investigation? The OSA Performance Audit of the State Court Administrator’s Office was completed within 8 months. The “Leadership Contract” investigation by RCT, Ltd. required 8 months. Similarly, the Investigations Law Group, LLC (ILG) investigation, also lasted 8 months.

For further comparison, the OSA Performance Audit evaluated the time to complete the Judicial Department’s nine (9) internal investigations occurring during Fiscal Years 2017 through 2020. They lasted between 27 and 60 days.⁴⁰

Despite the Fraud Hotline investigation beginning shortly after the alleged occupational fraud in March-April 2019, the final report was not completed and sent to law enforcement until just before the 3-year statute of limitations ran, i.e. more than 2-1/2 years. This was over 4 times as long as the 3 other investigations into the same set of circumstances. The auditor’s delay in referring for possible criminal charges to Denver DA was attributable to slow-walking by the Judicial Department, until it was too late for the DA to investigate and file within the statute of limitations.

Office of State Auditor - Performance Audit

The anonymous tip which triggered the OSA Fraud Hotline investigation, which in turn prompted a separate audit (“Performance Audit”) of conduct and practices within the Judicial Department.⁴¹

Unlike the Fraud Hotline investigation, this audit was independent of the agency being audited and was not hindered by confidentiality claims. The investigation began in March 2020 and completed with a public report issued on November 18, 2020.⁴²

Among many other adverse findings, the audit specifically found the \$2.75 million sole-source contract award by the Judicial Department had been attended by an “appearance of impropriety.”

There has been no sign that either the Judicial Department or the OSA reported this official audit finding to law enforcement or ethics oversight entities for further investigation or consideration of criminal charges.⁴³

RCT, Ltd—“Contract Investigation”

The Judicial Department tasked RCT investigators to fulfill the RFP that the special panel had issued. However, the firm’s actual contract for its work was negotiated, administered, controlled, and paid by the target agency itself.

⁴⁰ COLO. STATE AUDITOR, PERFORMANCE AUDIT JUDICIAL DEP’T, STATE COURTS ADMIN. OFFICE (2020), 32.
[HTTPS://LEG.COLORADO.GOV/SITES/DEFAULT/FILES/DOCUMENTS/AUDITS/2052P_STATE_COURT_ADMINISTRATORS_OFFICE_PERFORMANCE_AUDIT_NOVEMBER_2020.PDF](https://leg.colorado.gov/sites/default/files/documents/audits/2052p_state_court_administrators_office_performance_audit_november_2020.pdf).

⁴¹ SEE FOOTNOTE 35, SUPRA.

⁴² SEE FOOTNOTE 35, SUPRA.

⁴³ ID

A vital part of administering this contract was insuring that the investigators actually answered the question posed by the RFP, i.e.:

(2) Contract Investigation: an independent investigation into circumstances surrounding the award of a contract for leadership services to a former Chief of Staff in the Office of the State Court Administrator, Attachment 2 (the “Leadership Services Contract”), including allegations that the contract was approved in order to keep confidential alleged misconduct in the Judicial Department. Additionally, the Contractor shall make recommendations to the Colorado Supreme Court and State Court Administrator regarding process improvements to its procurement and contracting processes for accountability, fairness, and transparency. (emphasis supplied)⁴⁴

RCT’s report concluded: “We found no credible evidence that [Chief Justice] Coats’s attitude, conduct, or motive was influenced by a desire to hide the alleged misconduct in the Judicial Department.”⁴⁵(emphasis supplied)

But this conclusion addresses only part of the broader question posed by the RFP, i.e. Was the leadership contract approved in order to keep confidential alleged misconduct in the Judicial Department?

During testimony before a legislative committee, the RCT investigators conceded that:

*“ [the Department’s] three most senior and powerful officials were able to engineer this contract for Mindy Masias for their own reasons.
...
There was mismanagement. There was misjudgment. There was misconduct.”⁴⁶*

The Judicial Department’s most senior and powerful civilian official, former State Court Administrator Chris Ryan, stated that the Judicial Department awarded the contract to Masias in order to keep her silent.⁴⁷

⁴⁴ REQUEST FOR PROPOSAL - INDEPENDENT INVESTIGATION SERVICES, EXHIBIT A, SCOPE OF WORK, A-1 (2), PAGE 24.

⁴⁵ TROYER REPORT, 46.

⁴⁶ HEARING BEFORE THE LEGIS. INTERIM COMM. ON JUD. DISCIPLINE HEARING ON JUNE 12, 2022, 73RD GEN. ASSEMB. (COLO. 2022) [HEREINAFTER LEGIS. INTERIM 6/12/22] (STATEMENT OF RCT, LTD., AT TIME STAMP 04:43).

⁴⁷ DAVID MIGOYA, DENVER GAZETTE, *WHISTLEBLOWER TESTIFIES OF EFFORT TO “PROTECT ... THOSE WHO WEAR THE ROBES.”*(AUGUST 10, 2022)

The assigned question had been whether the contract was awarded to cover up threatened disclosure of misconduct allegations. RCT’s written report sidestepped answering the question, but ultimately, RCT’s oral testimony confirmed that the answer was: Yes. ⁴⁸

Several members of the Interim Committee and other critics viewed RCT’s written conclusion skeptically. Given the limitations of the process and the report, this skepticism was inevitable.

Investigations Law Group (ILG)—relevant findings from its “workplace investigation”

The RFP required the Investigations Law Group (ILG) to perform a fair, objective and neutral investigation into alleged discrimination, sexual harassment and hostile work environment (“Work Environment Investigation”); consider referrals of violations of the code of judicial conduct to the Colorado Commission on Judicial Discipline and process for such referrals and to develop a comprehensive record of allegations and evidence supporting and refuting the allegations to enable the Colorado Supreme Court and Judicial Department to make informed decisions regarding the matters in the allegations. ⁴⁹

This investigation shall include but not be limited to alleged incidents described in the Memorandum and incidents of alleged discrimination including but limited to, sex discrimination, sexual harassment, and a sexually hostile work environment, alleged to have occurred within the past 5 years as follows:

Sex-based discrimination and harassment—both individual incidents and systemic patterns—pertaining to any judicial district, the Colorado Court of Appeals, the Colorado Supreme court and all employees of the Colorado Judicial Branch. ⁵⁰

The investigation shall consider the following:

1. All allegations from the Memorandum of discrimination including but not limited to sex discrimination, sexual harassment, sexually hostile work environment or other misconduct alleged in recently released documents, even if more than 5 years old, including the extent to which such allegations were reported, known, and/or investigated; . . . ⁵¹

⁴⁸ ID.

⁴⁹ RFP, 25

⁵⁰ RFP, 25

⁵¹ RFP, 25, A-2

ILG made findings regarding the alleged incidents of misconduct against judges. While ILG investigated many other allegations, this report focuses only on those of judicial misconduct. They are:

INCIDENT: Anonymous letter alleging misconduct of then-Chief Justice Rice.

The “Memo” alleged that several members of leadership received a written complaint alleging “potentially unlawful behavior” against the Chief Justice and an IT leader.⁵² It alleged the director of the Human Resources division was instructed not to investigate the allegations. Importantly, the “Memo” also alleged that the HR director was instructed to destroy the complaint.

ILG’s investigation found that, despite several copies of the complaint existing and several of the justices recalling seeing it, no copies (paper or digital) survived. It concluded that the complaint should have been investigated under the Judicial Department’s Anti-Harassment and Anti-Discrimination policy but that it was not.⁵³ ILG found leadership discounted the letter.⁵⁴ Without talking to the HR director, ILG could not determine if the HR director had been instructed to destroy the missing letter.

ILG rightfully takes issue with the failure to investigate this anonymous discrimination complaint. In doing so, ILG quotes from then-subsection (3) of Chief Justice Directive [CJD] 08-06. But, ILG did not refer to that CJD 08-06’s duty to report the allegation to the Colorado Commission on Judicial Discipline. No such referral appears to have been made.

While ILG’s written report discounted the characterization in the “Memo,” the objective facts discovered by ILG appear to support its allegations that (a) leadership directed that the complaint not be investigated and (b) that the records of the complaint be destroyed.

INCIDENT: Complaint against two supreme court justices

Among other things, ILG was publicly tasked with investigating all the incidents described in the “Memo.” One such incident was the “EEOC Complaint against two Justices.” This referred to what became the case of *Brown and Maikovich v. Colorado Judicial Department*⁵⁵. This was a claim of racial and age discrimination implicating, among others, two sitting Supreme Court justices. “ILG was directed to remove this item from the scope of work because the matter was in current litigation.”⁵⁶ Even though the matter was in litigation at the time the scope of work was defined and when ILG was tasked with investigating it, there should have been some

⁵² ILG REPORT, 10-11

⁵³ ILG REPORT, 15

⁵⁴ ILG REPORT, 15

⁵⁵ 1:16-CV-03362-MEH)(D.COLO.)(FILED 09/17/2018); DISMISSAL AFFIRMED 10TH CIR. CT. OF APPEALS, 22-1065 (07/23/2023).

⁵⁶ ILG REPORT, 8.

attempt to look into this matter. Or, a request to change the Judicial Department’s earlier directive should have been made. Multiple depositions had occurred in this case and would have provided evidence from which to evaluate the allegation.

INCIDENT: Harassment Complaint against Court of Appeals judge, now justice of the Supreme Court

Another of the “Memo’s” allegations was that a court of appeals judge had been accused of sexual harassment by a female member of his staff. Coincidentally, the accused was applying for a position on the Supreme Court. The “Memo” alleged that “per the chief justice,” HR was directed to negotiate a release agreement to protect that judge from negative consequences and particularly to protect him in his application for higher office. Although the Judicial Department’s HR division investigated the staff member’s complaint, ILG determined that the required HR file was incomplete and lacked important documentation.⁵⁷

HR did not refer the allegation against the court of appeals judge to the Colorado Commission on Judicial Discipline. A nondisclosure agreement was negotiated with the staff member. While three people know what happened, without subpoena power, ILG could only get the accused judge’s version of events.

As with the complaint against the chief justice, the objective facts ILG uncovered appear to support the core allegations that a cover-up occurred here.

ILG not permitted to investigate all incidents of alleged discrimination from the past 5 years.

As the scandal first came to light, the Chief Justice announced the Judicial Department would hire investigators to conduct the investigations defined by the special panel’s scope of work. Request for Proposal No. 21022, Colo. Jud. Dep’t, 25–26 (Apr. 20, 2021) [hereinafter RFP] (on file with the Colo. Jud. Dep’t) (“This investigation shall include . . . incidents of alleged discrimination . . . [which] occurred within the past 5 years . . .”).⁵⁸ However, the Judicial Department does not appear to have allowed all of this part of the promised investigation.

RCT’s report showed that the Department has engaged in suppressing allegations of judicial misconduct for many years. The failure of the Department to implement the special panel’s scope of work with ILG means we do not know the extent of, types of misconduct involved in, or tactics used in that suppression of all complaints.

Despite limitations placed on ILG’s work, its investigation discloses a pattern of protecting those in leadership positions or on the Supreme Court.

⁵⁷ ILG REPORT, 22.

⁵⁸ RFP, 26.

- **Denver District Attorney**

The Fraud Hotline investigation resulted in a referral of 3 people for possible criminal charges. It made the referral to the Denver DA. However, the Judicial Department withheld from the Denver DA the evidentiary support for the allegations made. The Judicial Department delayed the referral until the eve of the statute of limitations expiration. As a result, the Denver DA could not take action or investigate.⁵⁹

- **Interim Committee on Judicial Discipline**

Senate Bill 22-201 established clear rules for the Judicial Department to follow in providing information about judicial misconduct complaints to the CCJD. The bill was designed to prevent the withholding of information, and established a separate funding source for the CCJD so the minimize the Judicial Department's influence over the commission.

Additionally, SB22-201 established an Interim Committee on Judicial Discipline to review Colorado's system of judicial discipline. The committee conducted hearings in the Summer and Fall of 2022, and issued a report which proposed legislation and constitutional changes to restructure Colorado's system of judicial discipline.

These legislative proposals have now been enacted as law. A proposed constitutional amendment awaits a vote of the people in November, 2024.

The Interim Committee only considered legislative changes to the judicial discipline system. The Interim Committee was not tasked or empowered to investigate the facts of the Judicial Department's corruption scandal.

- **Office of Attorney Regulation Counsel (OARC)**

Attorney Regulation Counsel serves at the pleasure of the Colorado Supreme Court.⁶⁰⁶¹The OARC has authority over enforcing the code of ethics for lawyers.

The OARC has been implicated in enabling the ill-fated felony prosecution of Sen. Pete Lee with a false affidavit.⁶² The OARC was also implicated in a series of efforts to block the investigation by the Colorado Commission on Judicial Discipline including its issuance of written threats of

⁵⁹ DAVID MIGOYA, DENVER GAZETTE, *NO CHARGES IN COLORADO JUDICIARY SCANDAL INVESTIGATION; PROSECUTORS CITE DELAYED REPORT*, (MAY 26, 2022), [HTTPS://DENVERGAZETTE.COM/PREMIUM/NO-CHARGES-IN-COLORADO-JUDICIARY-SCANDAL-INVESTIGATION-PROSECUTORS-CITE-DELAYEDREPORT/ARTICLE_AE2125AC-DAE0-11EC-9D16-E7FD1239AF2E.HTML](https://denvergazette.com/premium/no-charges-in-colorado-judiciary-scandal-investigation-prosecutors-cite-delayedreport/article_ae2125ac-dae0-11ec-9d16-e7fd1239af2e.html)

⁶⁰ C.R.C.P.251.3(A); *IN RE CHESSIN V. OFFICE OF ATTORNEY REGULATION COUNSEL*, 19SA118, 2020 CO 9 (FEBRUARY 10, 2020), ¶13.

⁶¹ [HTTPS://WWW.COLORADOSUPREMECOURT.COM/ABOUTUS/ABOUTUS.ASP](https://www.coloradosupremecourt.com/aboutus/aboutus.asp)

⁶² [HTTPS://WWW.CPR.ORG/2022/10/21/JUDGE-DISMISSES-THE-CASE-ALLEGING-COLORADO-STATE-SEN-PETE-LEE-VOTED-OUTSIDE-THE-DISTRICT-HE-LIVES-IN-AND-REPRESENTED/](https://www.cpr.org/2022/10/21/judge-dismisses-the-case-alleging-colorado-state-sen-pete-lee-voted-outside-the-district-he-lives-in-and-represented/)

sanctions to members of the Colorado Commission on Judicial Discipline.⁶³ It is difficult to imagine these OARC actions taking place without the foreknowledge and approval of the Chief Justice.

OARC engaged private counsel to investigate a portion of the judicial corruption scandal. Like the Judicial Department, OARC did not relinquish control over the outside investigation. While OARC had authority to examine the conduct of all the lawyers involved, it limited its outside counsel to reviewing just the former chief justice as a lawyer. After finding a violation of lawyer ethics, the outside counsel recommended no action be taken. In addition, the report indicated that two unnamed lawyers also acted unethically.⁶⁴

- **Colorado Commission on Judicial Discipline (CCJD)**

The CCJD has authority over enforcement of judicial ethics. The CCJD pursued an investigation of the judicial corruption scandal. Media reports indicate the Department raised a series of obstacles to the CCJD's work. Many of these appear to be addressed in the reform package approved by the legislature and need not be addressed further here.

Ultimately, a special tribunal of the Colorado Supreme Court publicly sanctioned the former chief justice for failing to "perform judicial and administrative duties competently and diligently," as required by Canon Rule 2.5(A) of the Colorado Code of Judicial Conduct.⁶⁵

- **Federal Bureau of Investigation (FBI)**

The Denver Post reported in September 2021 that the FBI had questioned at least 4 persons regarding the leadership contract award. No further developments have been made public since.

Anti-corruption Best Practices were not followed in this case

Target agency was allowed to control the investigations

Here is a summary of the major investigations. Notes show which agency had control over each, the investigation's scope, and the basic outcome of each.

⁶³ DAVID MIGOYA, DENVER GAZETTE, COLORADO DISCIPLINE COMMISSION ACCUSES LEGAL SYSTEM'S CHIEF OF ILLEGAL INTIMIDATION(MARCH 9, 2023).

⁶⁴ STATEMENT OF THE LEGAL REGULATION COMMITTEE, DATED 1/20/2023.
[HTTPS://WWW.COLORADOSUPREMECOURT.COM/PDF/1.20.23%20REV%20STATEMENT%20OF%20THE%20LEGAL%20REGULATION%20COMMITTEE.PDF](https://www.coloradosupremecourt.com/PDF/1.20.23%20REV%20STATEMENT%20OF%20THE%20LEGAL%20REGULATION%20COMMITTEE.PDF)

⁶⁵ IN THE MATTER OF THE PEOPLE OF THE STATE OF COLORADO AND NATHAN B. COATS, 2023 CO 44 (AUGUST 7, 2023)

Table III—Summarizing Control, Scope and Outcomes of various investigations

Investigating Agency	Controlled by:	Scope	Outcome
RCT, Ltd.	Supreme Court	Narrow, Coats’s role in contract	Report did not state whether the Judicial Department had traded contract for silence.
Investigations Law Group	Supreme Court	Broad: Memo allegations and departmental culture	Found multiple workplace problems and multiple judicial misconduct allegations unreported to Judicial Discipline Commission
OSA Fraud Hotline	Chief Justice - as head of agency being investigated.	Narrow, Employee Fraud	Found corruption within the Judicial Department and referred to law enforcement, but critical delay by the Department
Office of Attorney Regulation Counsel	Supreme Court	Narrow, Coats’ ethics as a lawyer	
Commission on Judicial Discipline	Supreme Court partially, but partially independent	Narrow, Coats’ ethics as a judge	Recommended public censure of Chief Justice Coats.
OSA Performance Audit	Independent	Narrow, financial controls	Found appearance of impropriety surrounding award of contract
Denver Dist. Attorney.	Independent	Narrow, 3 person criminal referral without evidence	Unable to prosecute before statute of limitations because of Judicial Department withholding of information

Piecemeal investigations lacked comprehensive strategy or coordination

There was no strategic coordination of these investigations or anti-corruption measures. They each had limited scope and tools with which to gather information. The department being investigated controlled most of the investigations.

Silencing of critics

The Supreme Court's Office of Attorney Regulation Counsel (OARC) issued a false affidavit which was the basis of felony charges brought against a key legislative critic. Hearings looking into the Supreme Court's corruption scandal were underway when the convening committee's chair, Senator Pete Lee voluntarily withdrew from the committee because of the felony charges. The charges were eventually dismissed but not until after this key critic had been silenced.⁶⁶

The Court's OARC similarly threatened action against attorney and judge members of the Colorado Commission on Judicial Discipline (CCJD) in response to testimony about the Court's hindering of CCJD's investigation into the scandal.⁶⁷

During the Interim Committee proceedings, the Colorado Coalition Against Sexual Assault presented the written testimony of a victim of judicial sexual harassment. The victim's testimony explained that in 2022, long after the corruption scandal allegations became public, she was subjected to intimidation tactics when she made a complaint against a judge. These tactics, employed by OARC personnel, were so severe the victim reported she contemplated suicide rather than move forward with her complaint against an abusive judge.

Use of Nondisclosure Agreements from Key Witnesses

The Judicial Department routinely procured nondisclosure agreements from employees being terminated.⁶⁸ Such agreements likely impeded the investigators' ability to interview witnesses investigating various aspects of this scandal.

Since this scandal, the use of NDA's by state agencies is now generally prohibited under similar circumstances.⁶⁹

⁶⁶ MARIANNE GOODLAND, *INDICTMENT AGAINST STATE SEN. PETE LEE DISMISSED*, DENVER GAZETTE (OCT. 21, 2022), [HTTPS://DENVERGAZETTE.COM/POLITICS/ELECTIONS/INDICTMENT-AGAINSTSTATE-SEN-PETE-LEE-DISMISSED/ARTICLE_8107E8BB-B15E-55AE-9137546E79CDDDB92.HTML](https://denvergazette.com/politics/elections/indictment-againststate-sen-pete-lee-dismissed/article_8107e8bb-b15e-55ae-9137546e79cddb92.html)

⁶⁷ DAVID MIGOYA, DENVER GAZETTE, *COLORADO DISCIPLINE COMMISSION ACCUSES LEGAL SYSTEM'S DISCIPLINE CHIEF OF ILLEGAL INTIMIDATION*, (MAY 9, 2023)

⁶⁸ TROYER REPORT, 39-40.

⁶⁹ SENATE BILL 23-053 (SIGNED INTO LAW JUNE 2, 2023) WHICH ENACTED SECTIONS 22-1-1355, 24-50.5-105.5 AND 29-1-1601, C.R.S.; ILG REPORT, 9.

Slow-Walking the State Auditor’s Fraud Hotline investigation and its referrals to law enforcement

The Judicial Department appears to have “slow-walked” the Office of State Auditor’s Fraud Hotline investigation. Drawn out negotiation over extensive claims of privilege, scope and demands for review and redactions were such that ultimately the referrals for prosecution came with too little too late. An auditor testified before the Interim Committee:

“I would say the [Judicial Department’s] review process extended our investigation time line - quite extensively.”⁷⁰

Michelle Colin, Deputy State Auditor

As listed at **Table II**, above, the Fraud Hotline Investigation took more than 2 years, 7 months to complete. This was 4 times longer than any of the other investigations. The Judicial Department, reportedly demanded that the final Fraud Hotline Report contain major redactions of certain content—before it could be disclosed to law enforcement.⁷¹

By the time prosecutors got the cases, they could not proceed before the 3-year statute of limitations would run.⁷² Regardless of the Judicial Department’s motivation, its conduct effectively hindered law enforcement investigation and prosecution of the Department’s officials.

Delayed referrals to Colorado Commission on Judicial Discipline

The ILG investigation of judicial misconduct allegations revealed that, despite an obligation to do so, the Judicial Department failed to refer complaints to the Colorado Commission on Judicial Discipline. ILG found that of a sample of 6 complaints, only 1 had been referred to CCJD.

Colorado has time limitations for bringing a judicial misconduct complaint. So, the longer the Judicial Department delayed reporting to CCJD or providing requested discovery materials, the greater the likelihood that the complaint would never see the light of day.

⁷⁰ HEARING BEFORE THE LEGIS. INTERIM COMM. ON JUD. DISCIPLINE HEARING ON JUNE 14, 2022, 73RD GEN. ASSEMB. (COLO. 2022) [HEREINAFTER LEGIS. INTERIM 6/14/22] (STATEMENT OF MICHELLE COLIN, DEPUTY STATE AUDITOR, AT TIME STAMP 15:08).

⁷¹ Shelly Bradbury, *No criminal charges in wake of auditor’s report of fraud, misuse of public funds by Colorado Judicial Department employees: Denver DA’s Office says it was unable to act on state auditor’s report before statute of limitations expired*, The Denver Post (June 1, 2022)

⁷² DAVID MIGOYA, *NO CHARGES IN COLORADO JUDICIARY SCANDAL INVESTIGATION; PROSECUTORS CITE DELAYED REPORT*, DENVER GAZETTE (MAY 26, 2022), [HTTPS://DENVERGAZETTE.COM/PREMIUM/NO-CHARGES-IN-COLORADO-JUDICIARY-SCANDAL-INVESTIGATION-PROSECUTORS-CITE-DELAYEDREPORT/ARTICLE_AE2125AC-DAE0-11EC-9D16-E7FD1239AF2E.HTML](https://denvergazette.com/premium/no-charges-in-colorado-judiciary-scandal-investigation-prosecutors-cite-delayedreport/article_ae2125ac-dae0-11ec-9d16-e7fd1239af2e.html)

Mistakes made at start of scandal investigation

- Failure to recognize why the Judicial Department quickly stepped forward with a plan to hire and control *its own* law firms to investigate *its own* alleged corruption.
- No one appointed with subpoena power to compel testimony and document production.
- Failure to anticipate that the Judicial Department would ultimately control the flow of information to the investigators.
- Failure to recognize the Supreme Court’s dual role which gave it the final say on what testimony and documents could be investigated. Unlike other state agencies, the Colorado Judicial Department is administered by a judicial officer, the Chief Justice of the Colorado Supreme Court. The Supreme Court also serves in a judicial function which gives it the power to decide disputes over its claims of privilege or scope. Making any decision to withhold evidence unreviewable.
- The Office of State Auditor lacked a deadline for completion of its Fraud Hotline examination. It lacked any mechanism to prevent slow-walking of its investigation by the Judicial Department.
- The Fraud Hotline statute ⁷³does not specify a trigger date for when the OSA must make a law enforcement referral. But the OSA believed it needed to wait until it completed its report and the Judicial Department finally signs off.⁷⁴
- There has been no inquiry into the apparent failure of officials at the Judicial Department to approach law enforcement for investigation and prosecution of governmental corruption. Neither are we aware of any investigation of the obstruction and delay of investigations that occurred after 2021.
- RFP process used to hire the outside investigators (RCT and ILG) was deficient because:
 - It provided no mechanism allowing the retained investigators to compel testimony and document production;
 - There was no restriction upon the Judicial Department being investigated from changing the scope of the investigation;

⁷³ SECTION 2-3-110.5, C.R.S.

⁷⁴ LEGIS. INTERIM 6/14/22] (STATEMENT OF MICHELLE COLIN, DEPUTY STATE AUDITOR)

- There was no mechanism for contesting and resolving Judicial Department objections information requests;
- The investigators were to be paid by the Judicial Department, thereby creating an appearance of dependence;
- The RFP failed to specify the legal relationship between law firm investigators and the Judicial Department, i.e. not attorney-client;
- The RFP failed to require that the investigators cite standards of conduct applicable to the various scandal participants, i.e. Judicial Department employees, attorneys, judicial officers.

Summary of How Anti-corruption Best practices were applied

1. Criminal or administrative prosecutions: *No special prosecutor was appointed. No formal criminal investigation or prosecution was instituted. The target agency, i.e. Judicial Department, controlled the timing and scope at critical stages.*

2. Disciplinary actions of an administrative nature: The Judicial Department's chief executive head, the Chief Justice, was publicly censured for his involvement in the scandal.

3. Civil proceedings seeking recovery of the corruption proceeds: The leadership contract was unilaterally canceled, without litigation. No public funds were paid under this contract.

4. Remedial actions: The legislature instituted wide-ranging reforms of the judicial discipline system. Multiple investigations recommended wide sweeping reforms at the Judicial Department, which has assured the public that these recommendations have or will be adopted.

Conclusion and Recommendations

Conspicuously absent from this corruption scandal is a criminal prosecution. This is despite multiple indicators of criminal wrongdoing. The State Auditor's Performance Audit found multiple appearances of impropriety in violation of Judicial Code of Conduct, including the procurement of a multimillion dollar sole source contract. The Fraud Hotline investigation made multiple referrals for criminal prosecution.

There has never been closure on the scandal. In February 2021, the Chief Justice acknowledged a "crisis of confidence" in the judiciary. The lack of a complete or credible investigation of the corruption allegations and the cover-up during the investigations themselves have stoked rather than eased that crisis.

Was everyone (all agencies) relying on someone else to get to the bottom of this scandal? i.e. divided uncoordinated response?

This happens when the target agency may control the investigation. From the denials and slow disclosure of the "Memo" throughout the investigative process to the slow-walking of the final Fraud Hotline Report, it appears that cover-ups dominated from beginning to end.

Colorado needs to develop a mechanism capable addressing the next governmental corruption scandal. The mechanism needs to be effective and able to demonstrate its credibility to the People of Colorado. We need to enact a mechanism for appointing a truly independent entity to investigate allegations whether aimed at the judiciary or leadership in any other branch of government. This investigator needs the authority to follow the evidence wherever it leads and have the tools to do so. The investigator also must be authorized to pursue whatever criminal or ethical consequences are warranted.

Colorado currently lacks a standing mechanism for appointing a special prosecutor under circumstances like this.

Special Prosecutors for Public Corruption Cases

The appointment of a special prosecutor at the outset of this scandal would have resulted in a more thorough, quicker, and efficient investigation. Having independent investigators with power to subpoena information and to prosecute where appropriate would have preserved faith in the outcome.

We normally would expect corruption and potential crimes to be investigated and prosecuted by either the attorney general's office or a local district attorney. But in cases of governmental corruption it is not always so simple. For instance, in Colorado the attorney general is "legal counsel and advisor of each department, division, office, board, commission, bureau, and

agency of state government . . .”⁷⁵ Therefore, the attorney general would have an inherent conflict of interest in cases involving investigation and prosecution of corruption within state agencies and departments. For example, several lawyers from within the attorney general’s office were witnesses to events at the heart of this recent judicial scandal.

Definition and Authority of Special Prosecutors

A special prosecutor is " [a] lawyer appointed to investigate and, if justified, seek indictments in a particular case."⁷⁶

The need for a special prosecutor may arise because the original "prosecuting attorney is legally precluded from proceeding due to a conflict of interest"; because she or he "is faced with a difficult case beyond [her or] his investigative and legal abilities"; or because there "is corruption within the judicial/governmental system, and public confidence requires an 'uninvolved' outsider to investigate and prosecute."⁷⁷

The need for a special prosecutor may also come from the "common sense realization that the continued integrity of the system demands one."⁷⁸

We usually reserve special prosecutors for rare situations where a law enforcement gap or crisis renders the ordinary process defective.^{79 80}

Depending on state law, a judge, governor, attorney general, or legislature may appoint a special prosecutor.⁸¹

Colorado Special Prosecutor Options

Current Colorado law allows the appointment of a special prosecutor only under limited circumstances. Those are when a judge determines that (1) a district attorney has a conflict of interest or (2) the refuses to prosecute a case without justification.⁸²

⁷⁵ SEE SECTION 24-31-101 (1)(A), C.R.S.

⁷⁶ SPECIAL PROSECUTOR, BLACK'S LAW DICTIONARY (10TH ED. 2014). A TERM SOMETIMES USED INTERCHANGEABLY WITH "SPECIAL PROSECUTOR" IS "INDEPENDENT COUNSEL," WHICH IS DEFINED AS "AN ATTORNEY HIRED TO PROVIDE AN UNBIASED OPINION ABOUT A CASE OR TO CONDUCT AN IMPARTIAL INVESTIGATION." INDEPENDENT COUNSEL, BLACK'S LAW DICTIONARY (10TH ED. 2014).

⁷⁷ 4 WAYNE R. LAFAVE, ET AL. CRIMINAL PROCEDURE, § 13.3(F) (4TH ED. 2015).

⁷⁸ LAWRENCE TAYLOR, A NEEDED SPECIALTY: THE SPECIAL PROSECUTOR, 61 JUDICATURE 220, 223 (1977).

⁷⁹ LAWRENCE T. KURLANDER & VALERIE FRIEDLANDER, PERILOUS EXECUTIVE POWER - PERSPECTIVE ON SPECIAL PROSECUTORS IN NEW YORK, 16 HOFSTRA L. REV. 35, 35(1987).

⁸⁰ SABRINA G. SINGER, EMBRACING FEDERALISM IN SPECIAL PROSECUTION MODELS: AN ANALYSIS OF EXPERIMENTATION IN THE STATES, 51 COLUM. J.L. & SOC. PROBS. 431, 434-435 (2018).

⁸¹ SINGER, 435.

⁸² See, Sections 20-1-107, and 16-5-209, Colo. Revised Statutes.

Neither of these existing options would likely facilitate the investigation, grand jury proceedings or other steps necessary to investigate and prosecute high-level government corruption.

Special Prosecutor Options Available in Other States

For example, New York law provides for the appointment of a special prosecutor by a criminal trial court judge, the legislature, or the governor.⁸³

“As presently codified in section 63 of New York’s Executive Law, the duties of the attorney general identify several specific areas of criminal law enforcement in which the attorney general may have direct involvement. In addition to the prosecutorial power defined under Executive Law section 63(2), they also include several other broad investigative or prosecutorial powers often associated with the office of a so-called state special prosecutor: the power, at gubernatorial or state agency request, to investigate and prosecute criminal offenses which occur within the authority or business of state agencies; the power, also upon gubernatorial direction or approval, to investigate matters involving public peace, public safety, and public justice; and the power to prosecute cases of perjury committed during the course of any such investigations or prosecutions. In addition, under section 63, the attorney general has authority to prosecute offenses in several specifically defined areas of law: the corruption of members of the Legislature and criminal violations of anti-discrimination laws; and to investigate, review complaints, or take civil action in cases involving misappropriation of public funds and fraudulent or illegal business activities.”^{84 85}

In New Jersey, the attorney general has jurisdiction over all criminal matters.⁸⁶ In New Jersey, as in Connecticut and Maine, when the local prosecutor may have a conflict of interest, such as a use-of-force incident involving a police officer, the attorney general may appoint a prosecutor from a different jurisdiction, order a prosecutor's recusal, or take any "other actions as may be needed to ensure the impartiality and independence of the investigation."⁸⁷

Factors Related to Enabling Legislation

The Singer law review article compares various mechanisms for enabling special prosecutor functions at the state level. Although focused on New York, the analysis is instructive.⁸⁸ The author highlights issues that are commonly addressed by enabling legislation. Such factors are:

⁸³ KURLANDER & FRIEDLANDER, 35.

⁸⁴ KURLANDER & FRIEDLANDER, 37-39

⁸⁵ See, NY Exec L § 63 (2022).

⁸⁶ See, N.J.S.A. 52:17B-98.

⁸⁷ N.J. ATT’Y GENERAL SUPPLEMENTAL LAW ENFORCEMENT REGARDING UNIFORM STATEWIDE PROCEDURES AND BEST PRACTICES FOR CONDUCTING POLICE-USE-OF-FORCE INVESTIGATIONS, 4 (JULY 28, 2015), [HTTP://WWW.NJDCJ.ORG/AGGUIDE/DIRECTIVES/2006-5_SRT-OIS.PDF](http://www.njdcj.org/agguide/directives/2006-5_SRT-OIS.PDF) [[HTTP://PERMA.CC/6W55-YT2S](http://perma.cc/6W55-YT2S)].

⁸⁸ SINGER, 435.

TRIGGERING CONDITION

A request for a special prosecutor may be made by the legislature, the governor, the state's attorney general, a local district attorney or a court. Some states automatically trigger special prosecutor appointments in certain types of cases, for example, police shootings.

APPOINTMENT AND TENURE

The appointing authority should narrowly define the special prosecutor's authority. The options are whether to provide for ad hoc appointments to address specific scandals, versus, permanent special prosecution units with unlimited tenure. Some states such as New York and New Jersey may have more corruption scandals than a smaller state like Colorado - and therefore need a permanent unit for special prosecution. The ad hoc model seems more appropriate for Colorado.

SELECTION

The variables in the selection process are whether to have a pre-approved list of attorneys to act as special prosecutors, as opposed to individuals selected by the appointing authority. Scandals will involve different varieties of subject matter. We should tailor appointments to allow for selecting special prosecutors with appropriate expertise for the particular case. Colorado does not yet have enough need to warrant the maintenance of a pre-approved panel of special prosecutors. Thus, the ad hoc model would seem more appropriate here.

FUNDING

The source of funding for a special prosecutor often depends on which entity made the appointment and whether that entity has its own appropriation available.

ADDITIONAL CONSIDERATIONS

Additional considerations relative to adopting special prosecution mechanisms, include (1) the degree of a special prosecutor's independence from voters; (2) disclosure and transparency, and (3) legal and political feasibility.⁸⁹⁹⁰

⁸⁹ SINGER, 464-468

⁹⁰ ABOUT THE AUTHOR: ALAN HIGBIE RETIRED IN 2017 AFTER 42 YEARS OF PRACTICING LAW. HE SERVED FOR 8 YEARS ON THE 4TH JUDICIAL DISTRICT JUDICIAL PERFORMANCE COMMISSION.