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BEFORE THE OHIO CONSTITUTIONAL COMMISSION'S JUDICIAL BRANCH AND
ADMINISTRATION OF JUSTICE COMMITTEE

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In Ohio, the grand jury system has come under recent criticism. The public is disenchanted with the grand jury process, viewing the grand jury as merely an extension of an unchecked prosecutor. Notably, statistics show that the grand jury returns indictments in more than 99% of its investigations, but routinely fails to indict police officers in charges involving excessive force. This discrepancy should come as no surprise, considering the control of the prosecutor in the grand jury process and the relationship prosecutors have with law enforcement.

One way to promote public confidence in the grand jury is to create separation between the prosecutor and the grand jury, restoring independence to the process. A Grand Jury Legal Advisor (GJLA) is one solution that can facilitate this return to independence without dramatically altering the traditional functions of the grand jury. A GJLA is a licensed attorney who neither advocates on behalf of nor represents anyone appearing before the grand jury. Rather, the GJLA serves as counsel to the grand jurors. Her main responsibility is to provide grand jurors unbiased answers to their questions, legal or otherwise.

Upon its inception in the United States, the grand jury was an independent body. At that time, the prosecutor had a very limited role in the process. The grand jury had the ultimate control and was even permitted to exclude prosecutors from the grand jury room. This distinction engendered public confidence in the criminal justice system and promoted fairness and justice in the community. When communities were small and crimes were simple, the grand jurors were actually more knowledgeable than the prosecutor regarding both the law and the

controversies giving rise to the investigations. When the population increased and the prosecutors became more specialized, the grand jury requested assistance to facilitate their understanding of the crimes charged. The court's solution was to further inject the prosecutor into the grand jury process.

In fact, in Ohio, the grand jury is instructed that one of the duties of the prosecutor is to address any questions of law. The grand jury is specifically instructed by the court to follow the advice of the prosecutor. Furthermore, they are instructed that while they may call for further instructions from the court, the information provided by the prosecutor "will probably be sufficient." With the prosecutor taking the role of both presenter of evidence and advisor of law, the balance of power is reconfigured to greatly favor the prosecutor. The grand jury no longer carries out its role as an independent body, promoting fairness and justice in the community. Instead, the grand jury is viewed by the public as the arm wielding the prosecutor's sword at his whim.

Historically, the grand jury facilitated community involvement in the criminal justice process, as the grand jury served as the bulwark between the accused and the government. Deciding not only questions of probable cause, the grand jury also has the ability to decide the wisdom of criminal laws or their applicability to certain behaviors and situations, as traditionally, the grand jury has the power to fail to indict even on the finding of probable cause. While it is the petit jury that makes the final determination of guilt, it is the grand jury's determination of probable cause that ultimately starts the criminal justice process. With the loss of independence, the benefits associated with the grand jury have been dramatically reduced.

Independent grand jurors can better root out weak or incorrect indictments because they are more engaged in the process and less inclined to passively accept what the prosecutor tells

them. This independence enables the grand jury to dig deeper and ask questions, which in turn requires the prosecutor to bring better evidence to persuade grand jurors.

Introducing a GJLA to the process is one possible solution to restoring grand jury independence. An independent advisor is successfully used by the State of Hawaii and the military. If implemented in Ohio, the GJLA could be appointed by a Common Pleas judge who would also be responsible for settling any disputes between the GJLA and the prosecutor, which rarely arise. The GJLA's main job will be to support grand jurors in their determination of whether to issue an indictment. The GJLA will also be called upon to research and respond to questions posed by the grand jurors. However, there is no duty for the GJLA to present exculpatory evidence or to advise witnesses, which dramatically alters the traditional functions of the grand jury. Finally, the proposed GJLA typically serves for one or two year terms and is present during all grand jury proceedings.

The GJLA provides benefits to all the players in the criminal justice system to include members of the prosecution. A prosecutor can obtain substantial advantages from having the GJLA participate in the process. With the assistance of the GJLA's legal input, better informed grand jurors will be more likely to scrutinize the evidence and the law. Prosecutors may initially perceive this more probative process to be an obstacle, but the renewed independence of the grand jury will ultimately serve to strengthen the prosecutor's case. Informed grand jurors are better able to screen cases and alert prosecutors to situations that may result in a not guilty verdict at trial. The grand jury, with the aid of the GJLA, will assist the prosecutor in testing different legal theories, both correcting and improving the prosecutor's case. In addition, the credibility of the indictment will be strengthened, improving the prosecutor's hand in approaching plea deals that more accurately reflect pending charges. Finally, a more

independent grand jury allows the prosecutor to avoid the appearance of impropriety which currently plagues the process.

If Ohio desires to restore public confidence in the grand jury process, it is essential that the grand jury establish independence from the prosecution. With autonomy, the public may once again come to trust the grand jury as the community's instrument of fairness and justice in the criminal justice system. Even the perception of autonomy will go a long way in improving the public view of the criminal justice system, reducing concerns of bias and reestablishing public confidence in the process.