DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK

PRESIDENT
MICHAEL E. MCMAHON
RICHMOND COUNTY

June 21, 2024

Michael A. Simons
Chair, New York State Commission on Prosecutorial Conduct
Regulations@cpc.ny.gov

RE: Comments on Proposed Regulations

Dear Mr. Simons:

The District Attorneys Association of the State of New York (DAASNY) represents the elected and appointed prosecutors of the 62 New York State district attorneys' offices. New York's prosecutors share a common goal: to do justice on behalf of the People of our state, by convicting the guilty, exonerating the innocent, and safeguarding the integrity of the criminal justice system. I write on behalf of New York State's prosecutors and ask you to take into consideration our comments and suggestions regarding the Commission on Prosecutorial Conduct's proposed operating rules and procedures.

DAASNY believes that New York's prosecutors should be held to the highest ethical standards that the law demands. DAASNY supports a fair and robust attorney discipline process and has long been part of the conversation about how to improve the discipline process when it comes to allegations of misconduct. We must, however, also make sure that any investigation into the conduct of a district attorney or assistant district attorney does not infringe on the due process or equal protection rights of prosecutors and does not unlawfully interfere with the core functions of the district attorneys' offices.

The statute creating the Commission on Prosecutorial Conduct has a long history and has seen several iterations, amendments, and tweaks. It is important that the rules and regulations that are finally promulgated are clear and well thought out, and do not lead to confusion, misinterpretation, or further litigation. If those interests are not met, the regulations could damage the criminal justice system and erode New Yorkers' confidence in it.

As you read the suggestions below, we ask you to keep two things in mind. First, our comments should not be construed as DAASNY's implicit agreement that the Commission's enabling legislation is constitutional. As you know, DAASNY successfully challenged an earlier version of that legislation, *see Soares v. State*, 68 Misc.3d 249 (S. Ct., Albany Co. 2020), and we continue to believe that there are constitutional defects in the statutory scheme. Any challenges to the constitutionality of the statute are beyond the scope of this public comment period related to the proposed regulations, but would be appropriately made in other proceedings. Second, our comments should not be construed as DAASNY's implicit agreement

that exercises of prosecutorial discretion are subject to the Commission's authority. If the Commission were to review acts of prosecutorial discretion, that action "would cross the boundary into a prosecutor's constitutional authority." *Soares v State*, 68 Misc 3d 249, 270 (S. Ct., Albany Co. 2020).

The Commission's Jurisdiction

Proposed Regulation 10400.2(a) would allow the Commission to receive complaints against a respondent prosecutor with respect to, among other things, the respondent prosecutor's "qualifications" and "fitness to perform." The Commission's enabling legislation, however, *see* Judiciary Law Section 499-f(1), does not permit the Commission to consider complaints against respondent prosecutors about those issues, but permits the Commission to address only "complaints with respect to the conduct or performance of [a prosecutor's] official duties." "Qualifications" and "fitness to perform" are within the purview of a respondent prosecutor's employer, in the case of an assistant district attorney, and within the purview of the electorate, in the case of a district attorney, and cannot be considered by the Commission. Accordingly, Proposed Regulation 10400.2(a) should be amended to allow the Commission to consider only complaints relating to a respondent prosecutor's "conduct and performance of official duties." Indeed, the terms "qualifications" and "fitness" are so vague as to give the Commission authority to regulate a district attorney's hiring and promotion decisions, authority that is unauthorized by the enabling legislation and would violate the separation of powers.

In addition, Judiciary Law Section 499-f(1) provides that the Commission has jurisdiction to make recommendations to the Governor related to a respondent prosecutor's persistent failure to perform official duties. The notion of a failure to perform official duties must be limited. Acts of prosecutorial discretion or policy decisions that result in the failure of a prosecutor to bring or maintain charges cannot be considered failures to perform official duties. On the contrary, those acts and decisions cannot be second-guessed in Commission proceedings. Accordingly, the terms "duty," "official duty," and "prosecutorial duty" should be defined to refer to the duties that are delineated in County Law Section 700 and must not refer to the independent applied judgment of prosecutors for which they are solely responsible to their respective electorates, in the case of elected district attorneys, or to their elected district attorneys, in the case of assistant district attorneys. At most, only the persistent failure to perform the duties of a prosecutor at all could be subject to Commission action. Otherwise, the Commission could exercise supervisory control over the day-to-day operations of a district attorney's office, control that would plainly infringe on the separation of powers.

Due Process Concerns

Attorney disciplinary proceedings are considered "quasi-criminal" proceedings, and, as a result, attorneys subjected to those proceedings are entitled to procedural due process. *In re Hallock v. Grievance Committee*, 37 N.Y.3d 436, 442 (2021) ("An attorney disciplinary proceeding is an 'adversary proceeding[ ] of a quasi-criminal nature' and the lawyer charged with misconduct is 'entitled to procedural

due process, which includes fair notice of the charge' and an 'opportunity to be heard"); *In re Ruffalo*, 390 U.S. 544 (1968) (attorneys in disbarment proceedings are "entitled to procedural due process, which includes fair notice of the charge"; "These are adversary proceedings of a quasi-criminal nature."). Thus, respondent prosecutors who are the subject of Commission actions should be entitled to full due process protections. We believe that there are several areas in the Proposed Regulations where procedural due process protections should be enhanced.

Pleading Procedures. Due process requires, at a minimum, that a prosecutor brought before the Commission be given sufficient notice of the misconduct being alleged. That notice includes both factual allegations and the specific provisions of the law that the prosecutor purportedly violated, since both are essential to a proper defense. Specificity in the factual portion of the complaint is critical because, as the proposed rules now stand, the prosecutor is required to admit or deny each factual allegation, or else he or she will be assumed to have admitted the conduct in question. Specification of the legal rule is essential because, putting aside the constitutionality of the entire statutory scheme that created the Commission, its enabling legislation allows it to investigate not only violations of the Rules of Professional Conduct but also transgressions of any New York statute or decision. Indeed, New York's Administrative Procedures Act Section 301(2)(c) requires that notice of a hearing contain "a reference to the particular sections of the statutes and rules involved, where possible." Commission proceedings should permit no less specificity. Given the vast expanse of the possible rules at issue and the potential differing interpretations of any given decision or set of decisions from the courts of this state, many of which are conflicting, the prosecutor cannot meaningfully respond to the complaint unless the legal principle at issue is specifically set forth. Indeed, the prosecutor is entitled under the rules to move to dismiss the complaint, presumably because, among other reasons, the factual allegations do not make out a transgression of the rule set forth, but without knowing the specific conduct in question or the rule allegedly violated, no such motion could be made.

Unfortunately, the proposed regulations do not require that a complaint before the Commission make specific factual allegations regarding the prosecutor's actions or identify the rule or decision that those actions purportedly transgressed. A "complaint" need only "make an allegation about a prosecutor's conduct" and even a "formal written complaint" by the administrator need not specify the rule that the prosecutor's conduct allegedly violated.

To ensure that the charging instrument aligns with due process mandates, Proposed Regulation 10400.6(b) should be amended to require that:

> Any complaint before the Commission must contain a detailed writing, signed by the complainant and verified, that specifies the conduct alleged against the prosecutor. Information to be alleged shall include, at a minimum: the prosecutor's name; the prosecutor's employer; the specific event or events that gave rise to the complaint; the specific sources or bases of the information supporting the complaint; the specific result or injury alleged to have been caused by the prosecutor's conduct; the exact standard, rule,

> principle, procedure, or case that the prosecutor is alleged to have violated; and the specific facts supporting the alleged violations. Any complaint that does not contain that minimum set of allegations shall be summarily dismissed.

Limitations on Record Access. The nature of a prosecutor's work necessarily presents legal barriers to the ability of prosecutors to defend themselves in proceedings before the Commission. Indeed, prosecutors may be precluded from speaking in their own defense or responding to Commission subpoenas because of statutes prohibiting disclosure that are applicable to criminal cases generally, and to prosecutors specifically. For example, an allegation of misconduct against a felony prosecutor might involve records that are legally unavailable, such as materials subject to a protective order; grand jury materials, *see* CPL §190.25(4)(a) ("grand jury proceedings are secret"); Penal Law § 215.70 (unlawful grand jury disclosure is a class E felony); wiretap information; cases where the records are sealed pursuant to several Criminal Procedure Law statutes, including the recent "Clean Slate" legislation; sealed search warrants and their underlying applications, *see Matter of Search Warrants Directed to Facebook Inc. & Dated July 23, 2013*, 2013 NY Slip Op 52346(U), 2013 N.Y. Misc. LEXIS 7037 (Sup. Ct. NY Co. Sept. 17, 2013) (finding that the court possesses specific authority to seal or order the nondisclosure of search warrants and their applications); or ongoing investigations, *see In re New York Mayor's Office of Special Investigations*, SCID NO. 30030-2020, Investigation No. 2019-02510, 2020 N.Y. Misc. LEXIS 829 (Sup. Ct. NY Co. Feb. 26 2020) ("the Court is authorized to seal papers and proceedings had in connection with applications in support of investigations"). There is currently no legal mechanism to allow disclosure of such records that may be necessary for prosecutors to defend their conduct. Furthermore, there may be situations where the respondent prosecutor's office may have a legitimate reason to prevent the respondent prosecutor from disclosing information, such as in situations involving ongoing, sensitive investigations. There must be some mechanism established in the Commission's procedures to provide relief for respondent prosecutors who could defend their conduct, but who are legally precluded from doing so due to such statutes or decisions of their offices.

Accordingly, the proposed regulations should be amended in three respects.

> First, Proposed Regulation 10400.6(i)(1) should be amended to require the Commission to obtain a court order authorizing disclosure of any materials that respondent prosecutors need to mount a defense, but that they are legally precluded from obtaining, due to barriers such as those described above.
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> Second, Proposed Regulation 10400.7(a) should be amended to provide for a favorable inference to be drawn in favor of respondent prosecutors who show that the unavailability of necessary material has prejudiced their defense.

> Third, any provisions of the Proposed Regulations that set time limits for respondent prosecutors to comply should provide for an extension of time for the respondent prosecutor to secure, if possible, otherwise unavailable materials.

The Prosecutor's Answer to the Complaint. Proposed Regulation 10400.6(c) requires that a respondent prosecutor file a written answer to the complaint, setting forth that each allegation in the complaint is "either denied, admitted, known or believed to be untrue, or is an allegation about which the prosecutor lacks knowledge or information sufficient to form a belief." That Proposed Regulation should be amended to provide for two additional categories of response. The first would address situations described above where legal barriers or the integrity of investigations prevent a respondent prosecutor from disclosing relevant facts. The second would allow respondent prosecutors to assert their Fifth Amendment privilege, without an adverse inference being drawn against them, in those rare situations where Commission proceedings overlap potential criminal investigations of a respondent prosecutor. In those situations, respondent prosecutors should not be penalized for asserting their privilege against self-incrimination.

In addition, Proposed Regulation 10400.6(c) provides that a prosecutor has only 20 days to answer the complaint, and that failure to answer within that period is deemed an admission of the allegations of the complaint. Although the 20-day period is set forth in the Commission's enabling legislation, *see* Jud. L. 499-f(4), the default penalty of admission of the allegations is not contemplated by the statute. Considering the unnecessarily short time frame provided to answer the complaint, the default penalty should be removed from the Proposed Regulations. Indeed, it is entirely possible that a prosecutor who is away or on leave might not even receive notice during that time frame, much less be able to prepare an adequate defense. That time frame is inconsistent with fundamental considerations of due process.

The Burden of Proof. 10400.6(j) establishes the burden of proof in Commission hearings as preponderance of the evidence. The burden of proof should, instead, be clear and convincing evidence. *See* American Bar Association Model Rules for Lawyer Disciplinary Enforcement, Rule No. 18(D) (recommending clear and convincing evidence standard). Given the tremendous potential for an adverse effect on a respondent prosecutor's livelihood, and the likelihood that some criminal defendants may attempt to derail legitimate prosecutions against them by complaining to the Commission about the prosecutors handling their cases, a more substantial burden of proof is essential to the fair administration of the Commission's authority. Notably, assistant district attorneys are public servants who work long hours at low pay compared to opportunities available in the private sector. Their livelihoods and careers should not be placed in jeopardy under a mere preponderance of the evidence standard. Furthermore, in cases where the Commission recommends the removal of an elected district attorney, a heightened standard of proof should be used, due to the potential for interference with matters exclusively within the purview of the district attorney, and due to the possibility that the Commission might recommend the removal of a constitutional officer.

Letters of Dismissal and Advisement. Proposed Regulations 10400.1(n) and 10400.4 provide for the issuance of a "letter of dismissal and advisement," and for the subsequent use, without clear limitation, of those letters in subsequent Commission proceedings against the respondent prosecutor. That procedure is not contemplated by the Commission's enabling legislation. Under Judiciary Law § 499-f, the Commission is authorized either to dismiss the complaint (subdivision 6) or to make findings and recommendations that are transmitted to the attorney grievance committee of the Appellate Division and, under certain circumstances, to the Governor (subdivision 7). The Commission is not authorized to make findings in connection with a dismissal.

This distinction is important and raises two fundamental issues of fairness. First, it appears from the Proposed Regulations that the Commission may dismiss a complaint after an initial review and inquiry by its staff, and issue a letter of dismissal and advisement, without the respondent prosecutor even having been notified of the initial complaint. *See* Proposed Regulations 10400.2(c) & (d) (describing initial review and inquiry, including Commission staff's recommendation for dismissal of complaint or authorization for investigation); 10400.3 (authorizing letter of dismissal and advisement when complaint is dismissed); 10400.5(b) (permitting investigation to commence after initial review and inquiry; requiring that respondent prosecutor be notified after investigation is authorized). Under those circumstances, a respondent prosecutor would be confronted with a letter of dismissal and advisement, which could be used against the prosecutor in a later Commission proceeding, without even having known about the complaint and without having been given an opportunity to defend against it. Thus, the Commission would be commenting on the respondent prosecutor's alleged conduct without even giving the prosecutor an opportunity to deny the allegations or explain why the conduct was justified.

Significantly, a letter of advisement is a "finding." Section 10400.1(n) of the proposed rules states that a letter of dismissal and advisement may be issued where a respondent prosecutor has engaged in "potentially problematic conduct." Thus, this is something more than a "dismissal" of a complaint. By analogy, the uniform Appellate Division rules separate a "dismissal" from the issuance of a letter of advisement. *See* N.Y. Rules of Court § 1240.7(d)(2)(iv). A letter of advisement is a specific type of disposition, separate from a dismissal, that is issued when the respondent attorney "has engaged in conduct requiring comment that, under the facts of the case, does not warrant imposition of discipline." The Commission's proposed rules here incorrectly characterize a letter of advisement as a type of "dismissal."

Second, the proposed rules do not permit a prosecutor to contest a finding in a letter of dismissal and advisement. This, too, is inconsistent with fundamental fairness. The Appellate Division's uniform rules for grievance proceedings recognize this fact and provide for review of findings contained in a letter of advisement. Specifically, a respondent may write to the chair of the grievance committee to seek reconsideration of the findings in a letter of advisement. N.Y. Rules of Court § 1240.7(e)(1)(i). If reconsideration is denied, the respondent may seek review by the Appellate Division "upon a showing that the issuance of the letter was in violation of a fundamental constitutional right." N.Y. Rules of Court § 1240.7(e)(1)(ii).

Similarly, here, a respondent prosecutor should have the right to seek review of findings in a letter of dismissal and advisement.

Review is important, because findings in a letter of dismissal and advisement could have adverse consequences for a prosecutor's career. Although the letter is confidential when issued, it may be considered, under Section 10400.4 of the proposed rules, in subsequent proceedings against a respondent prosecutor, and it may be used to justify an enhanced sanction against a respondent prosecutor. Presumably, then, it will become part of the public record of the new disciplinary proceeding. It is inconsistent with due process to permit the use of a letter of dismissal and advisement against a respondent prosecutor, and potentially to release that letter to the public at large, without giving the prosecutor an opportunity to contest those findings.

We submit, therefore, that a respondent prosecutor must be (1) notified about the complaint before such a letter is issued and (2) given the opportunity to contest such a letter, including but not limited to, providing a reasonable opportunity for the respondent prosecutor to rebut use of the letter if the prosecutor deems the substance of the letter to be factually or legally incorrect.

Parties and Witnesses. Several provisions of the Proposed Regulations should be amended to the extent that they address the appearance or testimony of parties or witnesses.

> The Complainant. The complainant should be required to personally appear and should be required to testify under oath. No accusation against a respondent prosecutor should be permitted to be sustained through hearsay evidence.
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> Witnesses. Proposed Regulation 10400.5(f) provides that in a Commission investigation only interviews taken pursuant to a subpoena are to be recorded and transcribed. It appears that statements of willing witnesses, not subject to subpoena, such as, for example, the complainant, may be oral and not recorded in any way. Such a procedure lends itself to injustice, where willing witnesses come forward to allege misconduct against respondent prosecutors, without the respondent prosecutors being able to cross-examine those witnesses or to even have access to the witnesses' prior statements to Commission investigators. The Proposed Regulations should be amended to require that all statements taken from all witnesses be transcribed and given under oath.

Discovery. Proposed Regulation 10400.6(i) requires the respondent prosecutor to make a written request to the Commission for documents related to the subject matter of the complaint. Furthermore, the types of documents that the Commission must disclose are limited to documents that the administrator intends to present at the hearing, a list of witnesses the administrator intends to call to give testimony, and any written statements made by those witnesses. The Commission is not required to provide the respondent prosecutor with any other aspects of the

Commission's investigation, except for what it deems to be exculpatory information. Finally, the Commission is not required to provide even that limited class of documents until just five days before the hearing.

Those limited discovery procedures constitute, essentially, trial by ambush. Respondent prosecutors, whose careers and livelihoods are at stake, require full information and an adequate opportunity to defend against the charges. This State has recognized the need for prosecutors to provide full and fair discovery to every accused person, including automatic discovery of all materials relevant to the subject matter of the case, *see* C.P.L. Article 245. Respondent prosecutors are entitled to the same due process. The Proposed Regulations should be amended to provide that discovery be automatic, and not subject to a request by the respondent prosecutor; that discovery not be limited, but that the Commission be required to provide open-file discovery to the respondent prosecutor; and that discovery be provided well in advance of the hearing, rather than only five days before it. *See* ABA Model Rule 15 (discovery to include names and addresses of individuals with knowledge and depositions, as in a civil case). *See also Matter of Tobin*, 417 Mass. 87 (1994) ("There is authority for the proposition that an administrative agency must grant discovery to a party in a contested case regardless of whether the enabling statute or agency rules provide for it, if refusal to grant discovery would so prejudice the party as to amount to a denial of due process.").

Extensions of time. The Proposed Regulations contain several provisions that establish time limitations for certain actions that a respondent prosecutor must perform. In most cases, those time limitations do not allow for extensions. Fundamental fairness demands that those time limitations be subject to extension, upon reasonable request. Surely, the proper administration of justice in Commission proceedings should prevail over arbitrarily short time limitations that do not provide for reasonable extensions. Accordingly, the Proposed Regulations should be amended, in all appropriate sections, to provide: "The Commission shall grant reasonable requests for extensions of time, and may do so even after the [ ]-day deadline has passed." Specifically:

> Answer to the Complaint. Proposed Regulation 10400.6(c) requires the respondent prosecutor to file an answer to the complaint within twenty days, with no provision for an extension of time under any circumstances. As written, the Proposed Regulation does not permit much time for a respondent prosecutor to secure counsel or to gather documents necessary to mount a defense to the complaint. In addition, the proposed time limit does not account for situations where a respondent prosecutor is out of the office for an extended period and may not be able to answer the complaint within the prescribed time.
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> Motions to Dismiss. Proposed Regulation 10400.6(g)(4) requires that a motion to dismiss a formal written complaint be made within 30 days of the complaint's service. As noted above, a respondent prosecutor has only 20 days to answer the complaint, and then only ten more days to make a motion

to dismiss it. Those time limitations are arbitrarily short, if no extensions of time are permitted.

Motions to Disqualify a Referee. Proposed Regulation 10400.6(g)(5) gives the parties only ten days to move to disqualify an appointed referee based on a conflict of interest or bias. Information reflecting such a conflict or bias, however, may not come to a respondent prosecutor's attention until after that arbitrarily short period has passed.

Hearings. Proposed Regulation 10400.6(h) provides that a respondent prosecutor must be notified 20 days before a hearing on the complaint, or 22 days, if the notice is sent by certified mail. If the respondent prosecutor fails to appear for the hearing, the hearing must continue in the respondent prosecutor's absence. The provision does not allow for adjournment of the hearing and does not contemplate any possible valid professional, medical, or personal reason that the respondent prosecutor might have for failing to appear in that short time frame.

Motions to Reconsider. Proposed Regulation 10400.6(g)(6) requires a respondent prosecutor to file a motion to reconsider a determination within 30 days of service of the determination. To make that motion, the respondent prosecutor must demonstrate that there is new evidence that could not have been discovered with due diligence at the time of the hearing, and that that new evidence would have resulted in a different outcome. Given the possibility that such new evidence might come to light at any time, and that it is extremely unlikely that new evidence will be discovered in that short time, there is no valid reason to put a time limit on motions to reconsider based on the discovery of new evidence. Any time limitation on such motions to reconsider should begin to run from the date of the discovery of the new evidence.

Interference with Criminal Investigations

Considering the potential that legitimate criminal investigations could be disrupted by Commission proceedings, several provisions of the Proposed Regulations should be amended, or new provisions added, so that any Commission investigation into a respondent prosecutor does not interfere with or impede ongoing investigations and prosecutions or undermine prosecutorial discretion. The disruption of legitimate investigations would result in injustice to those accused of crimes, to those who are victims of crimes, and, frankly, to all of New York State's residents, businesses, and visitors. Several changes to the Proposed Regulations should be made to ensure that criminal investigations are not disrupted. Relevant prosecuting agencies must be given notice of Commission actions and must be permitted to intervene when necessary to protect the integrity of ongoing investigations.

1) All relevant prosecuting agencies shall be notified of any Commission action involved in an investigation of a respondent prosecutor. Furthermore, those agencies shall be provided with copies of all documents relevant to

the Commission's investigation, including a copy of any complaint, any investigative documents or subpoenas, and any Commission findings. Relevant prosecuting agencies must be given the opportunity to intervene or to seek deferral of further proceedings before the Commission.

2) Any Commission investigation of a respondent prosecutor shall be deferred until completion of any underlying criminal investigation or prosecution that is related to the Commission complaint. Although Judiciary Law Section 499-d(1) sets forth time periods during which the Commission is required to defer its proceedings, the Proposed Regulations should provide that the Commission's proceedings be deferred until all activity on any underlying criminal investigation or prosecution is complete. Deferring Commission action is the only way to fully protect the integrity of ongoing criminal investigations.

3) Any prosecuting agency conducting a relevant investigation or prosecution should be permitted to object to, and to withhold disclosure of information sought by the Commission, until completion of any criminal investigation underlying the subject matter of the complaint. To be effective, such a right to object must include notice of any subpoenas issued in the Commission's investigation, so that the prosecuting agency may evaluate the scope of those subpoenas to determine whether confidential or sensitive information is sought.

4) The Proposed Regulations should contain provisions that specify how the Commission will refrain from burdening active criminal investigations. The Commission's enabling legislation, *see* Judiciary Law Section 499-d(1), allows a prosecuting agency to submit an affirmation notifying the Commission that its proceedings will interfere with an active case, and requires the Commission to act in ways that do not burden an active investigation. The Proposed Regulations do not, however, contain provisions directed at complying with that language in the Judiciary Law. For example:

   The Proposed Regulations do not require the Commission to notify relevant prosecuting agencies of its investigation of a respondent prosecutor or of actions taken during that investigation.

   The Proposed Regulations do not specify what would constitute a sufficient affirmation from the prosecuting agency to cause the Commission to refrain from interfering in an investigation.

   The Proposed Regulations do not recognize the likelihood of extended investigations or provide a mechanism for a prosecuting agency to extend the Commission's forbearance from exercising its powers during an extended investigation. Judiciary Law 499-d(1) provides that, after the filing of an affirmation by the prosecutor's office, the Commission may not exercise its powers in a manner that interferes with an ongoing investigation, indefinitely, and prevents

> the exercise of any of its powers for a period of one year. The latter provision was undoubtedly included in the statute because the Commission and prosecutors may otherwise disagree about what constitutes interference, and to ensure that prosecutors can maintain the integrity of proceedings in the face of actions that they believe are harmful to a prosecution. The rules should allow the prosecutor to apply for an extension of the one-year ban on Commission actions, upon explanation of the reasons for it, to ensure that the Commission does not unknowingly interfere in criminal investigations outside the very short one-year period specified in the statue.

(5) The Commission has authority to grant transactional immunity, under Judiciary Law Section 499-d(2), but the Proposed Regulations do not have any provisions that provide guidance or limitations on the Commission's exercise of that authority. Specifically, Judiciary Law Section 499-d(2) provides only that the Commission must give the prosecuting agency 48 hours' notice before granting immunity to a witness. Given the possibility that unwise grants of immunity might result in the irrevocable extinguishing of legitimate criminal cases, the Proposed Regulations should contain provisions to limit the Commission's grants of immunity. For example, the Proposed Regulations should provide for the district attorney to file an affirmation, similar to that applicable to Judiciary Law Section 499-d(1), where the district attorney may disapprove of a grant of immunity for stated reasons, or may specify other investigations that would be compromised by a grant of immunity. In addition, the Proposed Regulations should contain provisions precluding the Commission's grants of immunity in cases where a prosecutor's office objects.

(6) Section 10400.5 of the Proposed Regulations should contain provisions that limit the scope of the Commission's investigations when they might intrude into areas where secret or privileged information is involved. For example, materials relevant to a Commission investigation might include documents that are the subject of a protective order in an underlying criminal proceeding; grand jury evidence; confidential informant information; documents in files that are sealed pursuant to various provisions of the Criminal Procedure Law; or medical information of third parties. Those types of information, and others, have independent reasons to maintain their confidentiality, and the Commission's regulations should contain provisions that limit the collection of that information.

(7) The Proposed Regulations should limit the public disclosure of information and documents involved in active criminal investigations. Judiciary Law Section 499-f(7) and Proposed Regulation 10400.7(c) require that the Commission's determination, findings, and conclusions, and the record of its proceedings, must be made public at some point. Those public disclosures, however, may contain testimony or documentary evidence received from a prosecutor's office that contains confidential information related to pending criminal investigations or prosecutions. Furthermore, the Proposed

Regulations provide no mechanism to redact confidential information from the Commission's files before those files are made public. The Proposed Regulations should be amended to contain provisions to limit those public disclosures of confidential information.

Conclusion. As outlined above, we believe that the Commission's Proposed Regulations should be supplemented and/or amended. Otherwise, the Commission's proceedings will deny due process to respondent prosecutors; infringe on the separation of powers; interfere with ongoing investigations; and potentially impose an undue burden on victims, witnesses, and others who come into contact with the criminal justice system.

Yours,

Michael E. McMahon
Richmond County District Attorney
DAASNY President