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June 14, 2024

The Jeffrey Deskovic Foundation for Justice hereby submits the following comments on the proposed Operation Rules and Procedures for the New York State Commission on Prosecutorial Conduct. This letter addresses the changes needed to effectuate the goals of the Commission.

At the end of this letter, please find a chart with specific textual changes we think necessary.

A. Introduction

The New York judicial system has a miserable track record of discipline regarding prosecutors. Studies have documented dozens of court findings of prosecutorial misconduct with no consequence. In state history, the coalition Accountability NY's research revealed just *three* prosecutors who have received a temporary license suspension for on-the-job misconduct—and *zero* who have been disbarred. As the *New York Times* Editorial Board wrote in 2018, “there’s no reliable system for holding prosecutors accountable for their misconduct, and they certainly can’t be entrusted with policing themselves.”¹

B. Transparency and Accountability of the Commission.

Transparency has long been missing from discipline investigations around prosecutorial misconduct. Three of the proposed rules unnecessarily preclude the public and/or the complainant from knowing what the Commission is doing with allegations of prosecutorial misconduct.

1. **Section 10400.3 provides: “(b) Notwithstanding the dismissal of a complaint, the commission may issue the prosecutor a confidential letter of dismissal and advisement containing confidential comments with respect to the complaint.” The “confidential” letter and comments are not shared with the complainant or the public. Section 10400.7 (f) echoes this same proposed “confidential comments”.**

The secrecy of this proposed rule would undermine the very purpose of the Commission on Prosecutorial Conduct, which is intended to be “dedicated to investigating prosecutorial conduct in New York State, serving to strengthen oversight of New York’s prosecutors and to hold them to the highest ethical standards in the exercise of their duties.”

CPC was created to provide accountability and transparency to prosecutors, particularly those whose conduct may have contributed to the human catastrophe of a wrongful conviction. A confidential letter does not provide accountability, transparency, or deterrence. It leaves the public in the dark as to the CPC’s findings, the prosecutor’s conduct, and what remedial steps, if any, have been taken or suggested. It also fails to provide notice to other prosecutors or encourage them to take any steps suggested in the CPC’s “confidential” letter. Furthermore, such confidentiality denies the complainant of information on CPC’s findings and communications with the prosecutor that they should be entitled to.

A prosecutor is a public servant who serves the public interest. It would disserve the public interest to hide CPC letters concerning prosecutorial conduct. If the comment letter exonerates the prosecutor, the public should know. If CPC finds that dismissal is warranted, since a prosecutor made an honest mistake, but it also recommends the prosecutor take steps to avoid such mistakes going forward, that too should be made public. In some cases, the Comment will note concerning conduct that the public has a right to know about, even if the facts are not sufficiently proven or severe to require discipline. This is clear from CPC’s proposed rules stating

¹ Editorial Board, *Prosecutors Need a Watchdog*, NY Times (Aug. 14, 2018), available at <https://tinyurl.com/4ntvsv85>.

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that conduct giving rise to a “confidential” comment may be used when investigating or sanctioning subsequent prosecutorial conduct.

While the Grievance Disciplinary Committee does issue all attorneys letters of admonition, the role of the Grievance Committee that regulates conduct of a private attorney is not the same as that of the Commission. Further the Grievance Committees use of this confidential procedure an offending DA or ADA is one of the reasons the legislature and Governor established the CPC. The use of private censure completely undermines the intended public transparency and accountability for which the Commission was established.

Prosecutors are public officers, with the power to deprive people of their liberty. Their conduct should not be shielded from the public, least of all by a Commission that was created to end the utter lack of accountability that has existed for decades. The CPC will be trusted only insofar as its work is transparent, and rightly so.

We ask that this provision be amended to allow for full public disclosure of all investigative findings.

- 2. Section 10400.7 (c) allows that the Commission’s findings and recommendations and the record of its proceedings be made available for public inspection at its office and at the court clerk’s office.**

Making only hard copies of records available in physical locations during business hours is far too cumbersome to ensure transparency. There is no reason that the records should not be published online. In our modern era, keeping physical records in a particular office is tantamount to keeping them secretly. This provision should be modified to require that all such records are posted on the Commissions website and made available for public inspection at the offices mentioned.

- 3. Section 10401.1 lacks a definition for “complainant.”**

The Commission’s Rules should explicitly define complainant with the same language found in the Rules for Attorney Disciplinary Matters, that is, “a person or entity that submits a complaint to a Committee.”²

Adding this definition is necessary in light of the machinations of at least one Grievance Committee. Recent filings in the *CRC v. Cushman* case reveal that the Grievance Committees have given scant information to the Accountability NY professors who filed more than 50 ethics complaints alleging prosecutorial misconduct. Even worse, at least one Grievance Committee did so by redefining the word “complainant.” Though state regulations define a “complainant” as simply “a person or entity that submits a complaint to a Committee,” the Grievance Committee for the 2nd, 11th and 13th Judicial Districts redefined “complainant” as someone with personal knowledge of the misconduct or the respondent. With that new definition in hand, the Grievance Committee’s position is that the notice requirement under the state regulations—providing that the complainant is entitled to notice if the complaint is dismissed and a brief description of any discipline—simply does not apply to the professors.

- 4. Section 10400.6 (I) provides that the complainant “may” be notified when the Commission orders a formal complaint.**

There is no reason why the Commission should exercise discretion over which complainants to notify, in which matters, and which complainants receive no notice whatsoever.

² N.Y. Comp. Codes R. & Regs. tit. 22, § 1240.2(e).

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Contacting the complainant is also in the interests of the Commission and the public at large. At the stage of filing a formal complaint, the Commission has a reason to suspect that the respondent prosecutor has violated at least one ethical rule. The complainant may be aware of additional cases that the prosecutor has handled that deserve a proper investigation by the Commission, as “[a]n apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover.”³

All complainants should be notified when there is a hearing on a formal complaint. The “may” should be changed to “shall.”

5. Complainants Have No Right to Appeal

The proposed rules grant the Commission the power to dismiss a complaint (Section 10400.3) but do not contain any remedy for a complainant when their complaint has been dismissed in this manner.

This complete lack of any appellate remedy is in direct contrast with the state’s Rules for Attorney Disciplinary Matters, which provides that if the Grievance Committee’s Chief Attorney dismisses a complaint, the complainant has 30 days to “submit a written request for reconsideration to the chair of the Committee . . . The Chair shall have the discretion to grant or deny reconsideration, or refer the request to the full Committee, or a subcommittee thereof, for whatever action it deems appropriate.”⁴ This is far from unusual: a quick review reveals that complainants have a similar right to a limited appeal with attorney ethics complaints in Massachusetts,⁵ Pennsylvania,⁶ and California.⁷

The Proposed Rules must add that a complainant has the right to request reconsideration if their complaint is dismissed.

6. Section 10400.8 provides that the confidentiality of the commission’s records shall be governed by section 499-g of the Judiciary Law.

We have no objection to this language’s intent but it should include the provision that this confidentiality provision only applies to the commission and staff, not complainants or other members of the public. This clarification is necessary to avoid a clear violation of the First Amendment. The federal district court in *CRC v. Cushman* ruled in 2022 that the similar⁸ confidentiality statute Judicial Law 90(10) would violate the First Amendment if it were deemed to bind complainants or other members of the public.

7. There Is No Annual Reporting Requirement or Other Mechanism for the Public to Assess the CPC’s Actions and Results.

It is common, if not nearly universal, for government agencies to report their results on at least an annual basis. No such requirement appears in the proposed rules.

We ask that the rules add a section requiring that annually, the CPC publish on its website a report listing at least the following information:

1. The number of total matters reviewed, including, and delineating: (a) complaints received and (b) self-initiated (*sua sponte*) investigations the CPC conducted (absent any outside complaint);

³ Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.3 Comment [1].

⁴ N.Y. Comp. Codes R. & Regs. tit. 22, § 1240.7.

⁵ <https://www.massbbo.org/s/complaints>.

⁶ <https://www.padisciplinaryboard.org/for-attorneys/rules/rule/7/disciplinary-board-rules-and-procedures>.

⁷ <https://www.calbar.ca.gov/Public/Complaints-Claims/Complaint-Review-Process>.

⁸ Section 499-g: “[A]ll complaints, correspondence, commission proceedings and transcripts thereof, other papers and data and records of the commission shall be confidential and shall not be made available to any person...”.

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2. The number of matters that were dismissed absent an investigation;
3. The number of matters where the CPC received a response letter from the prosecutor or their attorney;
4. The number of matters that were investigated;
5. The numbers of matters that resulted in a formal complaint;
6. For all matters where there was a formal complaint, the number of matters that resulted in each type of final recommendation, e.g., public admonition, additional training, license suspension, disbarment, and removal from office.
7. For all matters where there was a formal complaint, whether the CPC's investigation concluded that the improper conduct was related to, or directed by, an office policy or management/supervisor;
8. The number of matters where a violation of Rule 5.1 was found;
9. The number of matters dismissed following an investigation where no formal complaint was filed;
10. For each category of data #1-9 above, the report shall include a statistical breakdown of the following categories:
 - a. The county where each matter took place;
 - b. The type(s) of potentially improper conduct involved;
 - c. Whether the prosecutor is a current prosecutor or a former prosecutor;
 - d. Whether the prosecutor is or was an elected DA, a supervisor, or a line ADA; and
 - e. Whether the prosecutor was represented by counsel;
11. The number of subpoenas issued during that calendar year;
12. The number of witnesses interviewed by the CPC during that calendar year; and
13. The number, and duties, of CPC staff during that calendar year.

C. Jurisdiction of Commission Investigations

Prosecutors who have committed egregious misconduct may, long before the misconduct has been exposed, move on to another attorney job, using their law license. For example, Suffolk County prosecutor Glenn Kurtzrock resigned from the District Attorney's Office when his egregious misconduct came to light in 2017—but continued to freely practice law until 2021, when the Appellate Division finally suspended his license.⁹

Under the proposed rules, a prosecutor could try to avoid the Commission's jurisdiction simply by leaving their job as a prosecutor. The proposed rules must be amended to clarify that the Commission has jurisdiction over all conduct by an attorney when that attorney was a prosecutor, whether or not the attorney is still a practicing prosecutor.

1. 10400.1(m) defines "prosecutor" as "a district attorney or any assistant district attorney of any county of the State..."

This language should be modified to "district attorney or any assistant district attorney *at the time of the alleged misconduct* of any county of the State..."

The current rules may limit the Commission's jurisdiction to only investigating "active prosecutors," which would directly collide with the Commission statute. Judiciary Law 499 is the authorizing statute creating the Commission on Prosecutorial Conduct. The mandate of the Commission outlined with specificity in 499-F(1) is to receive, initiate, investigate and hear complaints to the conduct or performance or official duties of **any prosecutor**. 499-B further defines prosecutor as a "district attorney or any district attorney," again no specific limiting

⁹ Rayman, Graham. Former Suffolk County prosecutor slapped with two-year law license suspension for withholding key evidence. NY Daily News (January 1, 2021). Available at <https://tinyurl.com/5cen3np7>.

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language. There is no language denoting any specific kind of prosecutor (e.g., former, retired, current, etc.) nor is there any language anywhere in the statute defining “prosecutor” by time period (e.g., prosecutors since 2001, prosecutors from 1980 to 2000 are exempt, etc.).

The Legislature was keenly aware when creating the structural framework of the statute that differences between types of prosecutors existed and that depending on context needed specific defining language. Thus in 499-C(1)(c) language defines that the appointing authorities can consider “active, former or retired prosecutors.” In the same section, prosecutors are only eligible for appointment if they are “active former or retired” and have had at least “five years experience.” In 499-E the Legislature specified that the Administrator could not be “a prosecutor.....”. Again with no restrictive language the Legislature clearly meant any prosecutor. In 499-I, the Legislature using specific explanatory language dealing with the situation of the Commission having made recommendations for removal of a prosecutor does not lose its jurisdiction if the prosecutor resigns. Since the situation being defined refers to a prosecutor who is still in office attempting to evade the Commission’s jurisdiction no specific language was needed to define “prosecutor.” It could only mean a prosecutor who is currently working at the time of the recommendation.

It is beyond comprehension, if not nearly impossible, to extract from any language in the statute the notion that the Commission’s jurisdiction is limited only to current prosecutors. Aside from running afoul of the intended purpose for having the Commission -to hold prosecutors accountable for behavior that often remains hidden for decades before it is discovered, the Commission, if limited to just current prosecutors, would find itself making recommendations to the Grievance Committees who have jurisdiction over licensed attorneys regardless of whether they are former, retired or active attorneys. Indeed the anomalous situation could arise that the Grievance Committee, which under the 499 authorizing statute can reject a finding of the Commission could do so on the grounds that (s)he was not a current prosecutor, thus defeating the entire purpose of the accountability objective of 499 and the independence of the Commission itself.

To place a restrictive limitation on the Commission without any pertinent or specific language also undermines the broad scope of power given to the Commission. In 499-A the Legislature gave the Commission the authority to investigate and review the conduct of *prosecutors that have committed conduct in the course of his or her office*. The “conduct in the course of office” also is not limited to only current prosecutors.

D. Verification Unnecessary

There is no need for the complainant to verify the complaint. There is no such requirement for a complainant to make a complaint to the Grievance Committee. It would contradict the goals of the Commission—and likely be unlawful—for a resident who reports misconduct by prosecutors to have a greater burden than a resident who reports misconduct by another type of attorney. Moreover, such a requirement would tend to discourage the filing of complaints and undermine the Commission’s objectives.

1. 10400.1(e) defines a complaint as a document “signed and verified by a complainant”
2. 10400.2(b) states that a complaint “shall be . . . verified”

The verification language in these two sections should be removed.

E. Self-initiated complaints (sua sponte investigations) by the CPC

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Section 10400.2(e) of the Proposed Rules permit the Commission to initiate its own complaint as “an administrator’s complaint.” However, the rules contain no standards or guidance for how the Commission may come to identify matters to investigate.

It is essential that the Commission investigate matters on its own, as most instances of even exposed prosecutorial misconduct do not become the basis of an ethics complaint. Indeed, many defense lawyers, accused persons, and community members are undoubtedly intimidated by the power prosecutors hold and fear that such power will be exercised in a retaliatory fashion against those who file a complaint.

The Rules should add language to this section requiring that the Commission do the following:

- Monitor all appellate decisions for instances of improper prosecutor conduct, including, but not limited to the following: opening statement and summation misconduct, *Batson* violations, *Brady*, *Rosario* and other discovery violations, violations of court orders and *in limine* rulings, *Napue* violations, any dishonest or misleading conduct, improperly prosecuting a charge without sufficient evidence, vindictive prosecution, an improper failure to recuse the prosecutor or the prosecutorial office, and the intimidation of a witness. The CPC shall initiate investigations following any trial or appellate court decision finding prosecutorial misconduct, whether or not the decision names the prosecutor.
- Each quarter, CPC should ask the Administration Board of the New York Courts to collect and report any instances of potential prosecutorial impropriety, including all post-conviction matters in the Supreme Courts where improper prosecutorial conduct is suspected, which may otherwise be harder to track than appellate court decisions.
- The Commission shall initiate its own complaint when it encounters any matter where there is a reason to suspect that improper conduct by a prosecutor may have been involved.

F. Supervisor & Office Responsibility

Unlike most lawyers, prosecutors do not have individual clients and are, to a more extreme degree, subject to the rules of their offices and the directions of their superiors. Indeed, Rule of Professional Conduct 5.1 outlines very clear and specific circumstances where a lawyer’s manager or supervisor bears direct responsibility for the improper conduct of a subordinate. Despite that reality, investigations of prosecutorial misconduct oddly tend to focus on individual “bad apples” without little, if any, attention paid to whether the improper conduct was the direct or indirect result of action or inaction by the prosecutor’s supervisors, office policies, and/or training.

Thus, the Rules should also specify that the Commission investigate the application of Rule 5.1 in any matter that is investigated. We suggest the following:

- In every matter investigated by the Commission, the Commission must include an investigation into whether Rule of Professional Conduct 5.1 was violated. This investigation shall include, but is not limited to, examining any circumstance that may suggest the allegedly improper conduct was related to a policy from the elected District Attorney, any other formal or informal office policy, whether written or unwritten, a decision, suggestion, or direction from any DA Office employee superior to the line prosecutor, such as a supervisor or manager, and/or improper training provided by the District Attorney’s Office.

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- In every matter where the Commission contacts the subject prosecutor to request more information, whether in writing or orally, the Commission shall ask at least the following: (1) whether the prosecutor consulted with any supervisor or manager about the issue, and whether such consultation was before or after the Commission contacted them; (2) whether any supervisor or manager was consulted during the pendency of the criminal case, and if so, what advice or suggestion they provided in the matter; (3) whether any office policy (whether written or unwritten, official or unofficial) is related to their actions in the matter; and (4) whether any training they received is related to their actions in the matter.

G. Standards for Commission Decisions

The Proposed Rules permit the Commission to choose whether to dismiss the complaint, direct further investigation, request a written response from the prosecutor, direct the filing of a formal written complaint, “or take any other action authorized by law” (Section 10400.5(h)). But the Proposed Rules offer no standard (or any other guidance) for the Commission to know how to choose between these drastically disparate outcomes.

The standard should be as follows: if the Commission determines that there is probable cause that the prosecutor violated one or more of the Rules of Professional Conduct (or other applicable ethics standard), the Commission shall file a formal written complaint.

If there is not probable cause, but there is a reasonable suspicion that one or more rules were violated, the Commission shall request a written response from the prosecutor and/or conduct further investigation.

If there is no reasonable suspicion that one or more of the rules was violated, the Commission can exercise its discretion as to whether to request a written response from the prosecutor and/or conduct further investigation.

H. Appearance of the Prosecutor

Section 10400.5 (e) does not identify what the consequences are for a DA or ADA who fails to appear as requested, during an investigation. To wit, “The commission may require the appearance of the prosecutor involved before it.... A prosecutor’s appearance during an investigation shall take place at a commission office, or if the commission so directs, may be conducted virtually; and at least one member of the commission or referee designated by the commission shall be physically or virtually present.” However, it is notable that sections 10400.6 “Formal Complaint Procedures” includes serious consequences for a different type of failure to appear. That section states, “Failure to answer the formal written complaint or address specific factual allegations shall be deemed an admission of its allegations.” It Could Happen To You believes that failure to appear in person or virtually, as is required by Section 10400.5 (e), is damning and should be the cause for the Commission to recommend to the Grievance Committee that the prosecutor be disciplined.

Sincerely,



Jeffrey Deskovic, Esq (Exoneree)
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