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To: Regulations@cpc.ny.gov

Michael A. Simons, Esq., Chair,

New York State Commission on Prosecutorial Conduct

St. John’s University

8000 Utopia Parkway

Queens, NY 11439

ec: Simons, Michael (CPC) michael.simons@cpc.ny.gov

Re.: Comments to the Proposed Operating Rules and Procedures of the Commission on Prosecutorial Conduct;

Dear Mr. Simons:

I am an attorney who practiced criminal defense as part of my general practice of law since September, 1977. At that time I was appointed Chief Public Defender of Greene County, which was a part time position and which I held for 27 years. In my criminal law practice I have appeared in Supreme, County and town and village courts in more than 20 counties throughout the Hudson Valley, the Capital district and central New York over the past 47 years.

Throughout my career I have been an active member in various professional associations involved in criminal law including the New York State Defenders Association, the New York State Association of Criminal Defense Lawyers and the New York State Bar Association where I recently was the co-chair of the subcommittee on Justice Courts of the Task Force on the Modernization of Criminal Practice, whose report was adopted by the NYSBA’s House of Delegates in June, 2023

I have testified at various NYS legislative (Senate, Assembly and joint) hearings, Commission hearings and participated in panel discussions concerning the future of the justice courts, as recently as November, 2019.

 I offer these comments to the proposed Operating Rules and Procedures of the New York State Commission on Prosecutorial Conduct’s (the CPC), notice of which was published in the April 24, 2024 State Register.

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I. The Commission’s jurisdiction must include the ability to investigate allegations of misconduct by attorneys who are now former prosecutors, not just currently employed district attorneys and assistant district attorneys.

A). Section 10400.1 (m) defines “prosecutor” as “a district attorney or any assistant district attorney of any county of the State in an action to exact any criminal penalty, fine, sanction or forfeiture.” This definition must include those attorneys who are now former prosecutors, or those who might become former prosecutors. After all, it is the misconduct of district attorneys and their assistants in years past, and the inadequate disciplining of such bad actors, that brought about the creation of the commission

New York’s legal community is often seen as a leader in many areas of jurisprudence. Sadly, New York also is among the national ‘leaders’ in wrongful convictions. Those convictions often come as a result of prosecutorial misconduct. It is the ‘attorney’ – the person who is privileged to be admitted as a member of the New York State Bar – working in their capacity as a prosecutor, who is the person who may have committed the misconduct. Should the Commission decide that only current prosecutors are subject to its investigative powers, and the discipline that may follow, it would be exonerating whole segments of the Bar – former prosecutors – from being held accountable for their unethical misconduct. It is the person, not the title that is subject to discipline. Such a whitewash is not the intent of the statute which created the Commission I response to those prior acts of misconduct.

For instance, the Commission should look at the decision of Hon. Joseph A. Zayas, Supreme Court, Queens County – before Justice Zayas became the Chief Administrative Judge for all the courts of the State of New York – in People v Bell, Bolt and Johnson (71 Misc. 3d 646). There, in a death penalty eligible case involving the murder of 2 men, one being on off duty NYPD officer, the Queens District Attorney’s office repeatedly denied the existence of *Brady* material that pointed to other individuals as the perpetrators. As Justice Zayas found, “Testagrossa's and Leventhal's vociferous denials, however, were completely false. It is now abundantly clear that their office possessed a significant amount of material that implicated the Boone-led Speedstick gang in this crime.” (at 660); and “Equally clear is that Testagrossa had knowledge of this information, as evidenced by his own handwritten notes.” (at 660).

The convicted defendants spent decades in prison for crimes they did not commit. Compounding this matter is that Charles Testagrossa was the chief of the Queens District Attorney’s office’s Career Criminal/Major Crimes bureau at the time and Brad Leventhal a senior attorney in that office. How many assistants did each of these ADA’s teach how to prosecute the most serious of crimes? I believe that each of these attorneys is no longer a prosecutor. To allow Justice Zayas’ findings to go uninvestigated by this Commission would be a travesty of justice of the highest order. This are the very actions of prosecutors that this Commission was created to investigate.

Should an investigation by the Commission result in a referral to the appropriate Disciplinary or Grievance committee of the Appellate Division, what sanctions, if any, are to be imposed are imposed against the person, not the office they held at the time they committed the misconduct.

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B). Could a current ‘prosecutor’ against whom a complaint has been filed, avoid an investigation by the Commission simply by resigning their position as a prosecutor and move on to practice law in another capacity?

Section 10400.1 (o) defines ‘retirement’ “the voluntary or mandatory cessation of active employment as a prosecutor, as demonstrated with proper proof”.

One cannot escape accountability for one’s past actions by simply ‘retiring’ from being a prosecutor. The discipline that the Commission recommends to the Grievance Committee and the discipline the Grievance Committee recommends to the Court would be imposed upon the individual attorney and will address that person’s fitness to practice law as an attorney.

An analogous situation can be found in 22 NYCRR §1240.10 (1) which allows an attorney to resign while under investigation if it is done so ‘voluntarily’ and with an admission that the attorney could not defend themself against the charges or allegations. With such admissions, the attorney is disbarred by the Court. Should a prosecutor, or former prosecutor under investigation wish to resign under those circumstances, they should be allowed to in accordance with 22 NYCRR §1240.10(1), and be disbarred. A prosecutor should not be permitted to avoid an investigation, and accountability, by ‘retiring’ from being a prosecutor.

“Retirement” as used here is not analogous to the definition of ‘retired’ found in 22 NYCRR §7000.1 (p) which applies ONLY to a judge who is incapable of performing their judicial duties due to physical or mental incapacity, not misconduct.

The definition of ‘retirement’ has no purpose here and should be removed. To the extent that it suggests that a ‘retired’ former prosecutor is not a ‘prosecutor’ subject to the jurisdiction of the Commission it is void. The definition of ‘prosecutor’ must include former district attorneys and former assistant district attorneys, including ‘retired’ district attorneys and their ‘retired’ assistants.

II. A “letter of dismissal and advisement” is not authorized by statute and undermines the purpose of the Commission.

Section 10400.1 (m) defines a “Letter of dismissal and advisement” as “a written notice issued by the commission, informing the prosecutor that the complaint has been dismissed, but advising them about potentially problematic conduct identified during the review process.”

The purpose of the Commission, as set forth in 499-a of the Judiciary Law is clear – ‘review and investigate the conduct of prosecutors” to examine whether they committed conduct in violation of the law, and the rights of private persons. Nowhere in the enabling statute is there a provision, or even a hint that the Commission’s purpose is to advise prosecutors about ‘potentially problematic conduct’.

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If a prosecutor has engaged in ‘potentially problematic conduct’, a term that is nowhere defined in the statute, the regulations or by case law, that conduct is either misconduct, which should result in a finding and recommendation to the appropriate Grievance Committee, or it is not.

The Commission is not charged with advising prosecutors of what some might call ‘best practices’. This definition, along with Section 10400.3 (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; and Section 10400.7 (f) which includes: “In connection with dismissal, the commission may issue a letter of dismissal and advisement to the prosecutor containing confidential comments, suggestions, and recommendations with respect to the complaint, initial review, inquiry, or investigation.” are simply not authorized by the Judiciary Law.

Nor is the threat found in Section 10400.7 – where the letter of advisement could be considered if the prosecutor has further difficulties. In the most simplistic terms, this ‘caution’ is how a parent may discipline a child – What you did was wrong but I am not going to punish you this time, but if you do it again, well, I will remember that you did it this time.

Either the ‘problematic’ conduct rose to the level of misconduct, or it did not.

No doubt this notion was appropriated from the similar provisions found in the regulations of the Commission on Judicial Conduct – 22 NYCRR 7000.1 (o); .3 (c); and .4. However, there are significant differences between the two Commissions. The purpose of THIS Commission is the investigate allegations that a prosecutor violated the rights of private persons in the performance

of their duties as a prosecutor. The purpose of the Commission on Judicial Conduct is different. That constitutional commission has, as its purpose, to investigate the “…conduct, qualifications, fitness to perform…” the duties of a judge or justice. (NYS Constitution, Article VI; § 22). Implicit in the Constitution is that among the sanctions the Court of Appeals can impose upon a finding of unfitness, are lesser, or even no sanction. In other words, the Court, and therefore the Commission (acting under authority of the Court) has the leeway to educate an errant judge or justice in the proper circumstance, hence, a letter of caution.

Not so the errant prosecutor. All of the proposed rules pertaining to this ‘letter of advisement’ and the pointing out of ‘potentially problematic conduct’ must be removed.

III. Findings of fact and recommendations should be sent to the attorney grievance committee of the appellate division in the department where the attorney is currently practicing.

Section 10400.7(b) provides for the findings of fact, recommendations and the record to be transmitted to the attorney grievance committee of the appellate division in the department where the attorney was first admitted. Many attorneys no longer practice in the department where they were first admitted. The appropriate grievance committee to receive and consider the findings of

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fact and recommendations of the Commission would be the department where the attorney is currently practicing; in the case of a former prosecutor, where they currently maintain their office; if the former prosecutor no longer maintains a physical office, then perhaps, where they reside (if in New York State) or, perhaps in the department where they were employed as a prosecutor at the time of the alleged conduct; or, as a last resort, to the department where they were first admitted.

IV. Findings of fact and recommendations should be sent to the complainant.

Section 10400.7(c) provides for the findings of fact, recommendations and the record to be transmitted to the attorney grievance committee, and upon service on that committee being completed, to be made available to the public. The findings of fact, recommendations and the record should also be sent by the grievance committee to the complainant, if there was one. This is not only courteous, but consistent with the transparency inherent and intended in this statute.

Thank you for the opportunity to address the proposed rules for the operation of the Commission on Prosecutorial Conduct.

Should you have any questions, or wish to discuss any of my comments, please do not hesitate to contact me.

Very truly yours,

*Greg D. Lubow, Esq*

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