NYSACDL
NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
An Affiliate of the National Association of Criminal Defense Lawyers | Founded in 1986

PRESIDENT
STEVEN B. EPSTEIN, GARDEN CITY
PRESIDENT-ELECT
JESSICA A. HORANI, MANHATTAN
FIRST VICE PRESIDENT
KEVIN M. STADELMAIER, BUFFALO
VICE PRESIDENTS
JOHN INGRASSIA, NEWBURGH
SEYMOUR W. JAMES, JR., MANHATTAN
ALAN S. LEWIS, MANHATTAN
JILL PAPERNO, ROCHESTER
CLAUDIA TRUPP, CRAGSMOOR
SECRETARY
GRAINNE E. O'NEILL, BROOKLYN
TREASURER
SAMUEL BRAVERMAN, MANHATTAN

DIRECTORS
MICHAEL T. BAKER, BINGHAMTON
STEPHANIE BATCHELLER, ALBANY
JACQUELINE E. CISTARO, MANHATTAN
XAVIER R. DONALDSON, MANHATTAN
DREW DUBRIN, ROCHESTER
LAURA A. FIORENZA, SYRACUSE
RANDALL INNIS, SUFFERN
DANIELLE JACKSON, MANHATTAN
JAMAL JOHNSON, MANHATTAN
KENDEA JOHNSON, MANHATTAN
JESSICA KULPIT, BUFFALO
LEANNE LAPP, CANANDAIGUA
LINDSAY LEWIS, MANHATTAN
GREG LUBOW, TANNERSVILLE
NATHANIAL Z. MARMUR, MANHATTAN
NOREEN MCCARTHY, KEENE VALLEY
MICHAEL MCDERMOTT, ALBANY
DONALD M. THOMPSON, ROCHESTER
ANDRE A. VITALE, JERSEY CITY
SHERRY LEVIN WALLACH, WHITE PLAINS

PAST PRESIDENTS
LAWRENCE S. GOLDMAN, MANHATTAN
PAUL J. CAMBRIA, JR., BUFFALO
JACK T. LITMAN, MANHATTAN
MARK J. MAHONEY, BUFFALO
DAVID L. LEWIS, MANHATTAN
WILLIAM I. ARONWALD, WHITE PLAINS
THOMAS F. LIOTTI, GARDEN CITY
IRA D. LONDON, MANHATTAN
JEANNE E. METTLER, COPAKE
MURRAY RICHMAN, BRONX
GERARD M. DAMIANI, NEW CITY
MARVIN E. SCHECHTER, MANHATTAN
KATHRYN M. KASE, HOUSTON, TEXAS
RUSSELL M. GIOIELLA, MANHATTAN
JAMES P. HARRINGTON, BUFFALO
RICHARD J. BARBUTO, GARDEN CITY
MARTIN B. ADELMAN, MANHATTAN
JOSHUA L. DRATEL, MANHATTAN
RAY KELLY, ALBANY
DANIEL N. ARSHACK, MANHATTAN
LISA SCHREIBERSDORF, BROOKLYN
CRAIG SCHLANGER, SYRACUSE
GEORGE R. GOLTZER, MANHATTAN
KEVIN D. O'CONNELL, MANHATTAN
RICHARD D. WILLSTATTER, WHITE PLAINS
BENJAMIN OSTRER, CHESTER
AARON MYSLIWIEC, NEW YORK
WAYNE C. BODDEN, BROOKLYN
ANDREW KOSSOVER, NEW PALTZ
JOHN S. WALLENSTEIN, GARDEN CITY
ROBERT G. WELLS, SYRACUSE
LORI COHEN, GREENPORT
TIMOTHY W. HOOVER, BUFFALO
ALICE FONTIER, MANHATTAN
BRIAN MELBER, BUFFALO
YUNG-MI LEE, BROOKLYN

EXECUTIVE DIRECTOR
JENNIFER CIULLA VAN ORT, ALBANY

June 21, 2024

Michael A. Simons, Chair,
New York State Commission on Prosecutorial Conduct
St. John's University
8000 Utopia Parkway
Queens, NY 11439

Re.: Comments to the Proposed Operating Rules and Procedures

Dear Chair Simons:

The New York State Association of Criminal Defense Lawyers (NYSACDL) offers the following comments to the New York State Commission on Prosecutorial Conduct's (the CPC) proposed Operating Rules and Procedures (herein the "proposed rules"), notice of which was published on April 10, 2024.

NYSACDL is a statewide organization of criminal defense attorneys, representing over 1,400 private attorneys and public defenders who practice in courthouses in all parts of New York State and at all levels of the court system. NYSACDL is a New York State affiliate of the National Association of Criminal Defense Lawyers, a professional bar association founded in 1958 that has over 40,000 affiliated members nationally.

1. The Proposed Confidential Letter of Dismissal and Advisement under Section 10400.1(n) is not Authorized by Judiciary Law § 499.

The proposed rule authorizing the CPC to issue a Letter of Dismissal and Advisement is not authorized by the enabling statute and is contrary to the Legislature's intent, as well as contrary to public policy. It allows for secrecy and promotes a lack of transparency; fails to contain any standard or definition of "potentially problematic conduct;" and provides an unauthorized third option shielding prosecutors from public disclosure of their

misconduct. It should be removed or amended to comply with the Legislature's goal of transparency and accountability.

THE PROPOSED RELEVANT PROVISIONS

Section 10400.3 addresses how the CPC handles notification when a complaint is dismissed. Paragraph (a) states who shall be notified of the dismissal (the complainant and in some instances the prosecutor). Paragraph (b) allows the CPC to issue the prosecutor a letter of dismissal and advisement containing confidential comments with respect to the complaint.

Section 10400.1(n) 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."

Section 10400.4 (the "revival" provision) allows the earlier confidential letter of dismissal and advisement to be used in a subsequent proceeding and considered by the CPC in determining the sanctions to be recommended with respect to the subsequent complaint.

LEGISLATIVE BACKGROUND

In June 2021, New York State enacted Judiciary Law 499 (JL) creating an independent commission tasked with investigating complaints of misconduct by prosecutors and either dismissing the same where unfounded or, upon finding evidence of misconduct, forwarding a recommendation to the Grievance Committees and publishing the same at its principal office or with the clerk of the Appellate Division where the record had been filed. The Legislature supported the new agency's accountability by creating a carefully crafted statute aimed at ending the practice of complaints disappearing into the void without any notice to the complainants. The JL specified that the CPC's recommendation could be adopted, rejected, or changed by the Grievance Committee when it considers the matter, thus providing yet another layer of review for the entire process.

This last component — publication — was the single, most important, salient change to the decades long secrecy cloaking the grievance committee system. Publication *before* the Grievance Committee makes its determination ensures that the grievance structure can no longer conceal or

ignore a published complaint. In effect, the CPC's published findings of misconduct are designed to force the Grievance Committees to act by making a public statement that ratifies, changes or dismisses the CPC's recommendation.

The CPC now proposes the above rule, pursuant to JL 499-F(6), which create a new category for dealing with misconduct, specifically the Letter of Dismissal and Advisement, which would create a loophole permitting the CPC to steer any number of cases, even those involving egregious misconduct, through a backdoor in complete secrecy while simultaneously evading the statutory publication function.

The proposed confidential comments are not authorized by the enabling statute. JL 499-F(6) provides only that a complaint be dismissed where there is no misconduct, which is consistent with the remainder of JL 499. Section 499-A authorizes the CPC "to review and investigate the conduct of prosecutors." Section 499-D delineates the power and duties of the CPC, which do not include the issuance of confidential comments accompanying a dismissal. Thus, the proposed rules go beyond the express statutory authority of the CPC.

The revival provision, with specific notice to the prosecutor when his conduct raises concerns, may have some speculative benefit, but the proposed rules still remain problematic. In particular, the secrecy afforded the advisory comments and the "potentially problematic conduct" is inconsistent with the goal of transparency, publication, and accountability intended by the Legislature. In addition, the Rules are unclear as to what conduct would fall into this category, allowing for potential misuse by the CPC to conceal misconduct otherwise warranting referral to the Grievance Committee. That the rules allow the comments and conduct to be "revived" and considered in a subsequent proceeding, for the prosecutor to be questioned about the earlier conduct during that later proceeding, and for the CPC to take such conduct into consideration when recommending sanctions, suggests that the letters will be issued even when the "problematic conduct" is serious.

The proposed rules do not address the following questions: (1) will a Letter of Dismissal and Advisement be issued in cases involving actual misconduct, or will it be limited to mistakes or conduct that does not violate the prosecutor's ethical obligations, none of which is clear in the vague

language of the proposed rules; and (2) is the cloak of secrecy removed from a revived complaint during the subsequent proceedings and, if so, is the earlier conduct publicly disclosed, or will it remain confidential despite the CPC's use of it to enhance sanctions. For transparency during the subsequent proceeding, the earlier advisory comments would need to be at least mentioned in the public finding of prosecutorial misconduct. Finally, by making the advisory comments confidential, there is no oversight as to how this potential loophole is being used by CPC, thereby defeating the aim of accountability and transparency. It is also unclear whether the substance of such comments would need to be included in the annual report under JL Section 499-D(4).[1]

The aim of Rules 10040.3 and 10040.4 is unknown as proposed. It cannot be that the CPC is concerned with creating new training opportunities for prosecutors, since the Letter of Dismissal and Advisement is secret and known only to the individual prosecutor who certainly would have no incentive to report the same to her supervisor or even the elected District Attorney. It cannot be that deterrence is the goal of these same Rules, since their secrecy is again known only to the individual prosecutor, who is free to continue in his/her errant ways for years to come until a new complaint is filed and the CPC determines that a hearing is warranted, followed by a misconduct finding warranting sanctions. Deterrence, according to the Legislature and JL 499, rests with the very specific power of the CPC to either find misconduct or dismiss the complaint as it examines each case.

What is apparent is that the Letter of Dismissal and Advisement reflects consideration by the CPC, whether intentionally or not, of a way to avoid the publication provision of JL 499. Thus, the "potentially problematic conduct" is not misconduct warranting referral to a Grievance Committee, but yet serious enough to justify its use in a subsequent proceeding, and even after subsequent misconduct has been found for the consideration of greater sanctions. It is difficult to imagine what conduct the CPC would be serious enough to warrant an increase in sanctions but not a finding of misconduct. A prosecutor who hides *Brady* material through willful choice or gross incompetence would be an individual covered by JL 499 and would require a finding of misconduct. A prosecutor who is found to have given a court a

---

[1] Section 499-D(4) requires the CPC to "report annually, on or before the first day of March in each year and at such other times as the commission shall deem necessary, to the governor, the Legislature and the chief judge of the court of appeals, with respect to proceedings which have been finally determined by the commission."

pretextual reason for keeping Black jurors off a jury would be a person who has committed misconduct. A prosecutor who questions a witness or defendant regarding the accused's silence in response to law enforcement questioning, and in which objections are sustained, but in summation goes on to comment again on the accused's silence, is guilty of misconduct. Yet in all these instances, the proposed rules would permit the CPC to dismiss the complaint and, with secret communications to the involved prosecutor, simply terminate it with, perhaps, a threat of revival should a later complaint arise before the CPC.

No doubt, there are CPC members who anticipate that they may never vote to resolve an investigative finding of misconduct with a Letter of Dismissal and Advisement. However, once the Letter of Dismissal and Advisement becomes an option, it is possible that all complaints might well be resolved in this manner, especially if the CPC members are divided on the outcome.

For example, some Commission members might argue that although there has been a finding of misconduct, there are "mitigating factors" to consider, such as the prosecutor's previously unblemished record and/or underlying appalling case facts. However, this creates an extra-legal system of adjudication, which belies and eviscerates the purpose of the CPC, namely investigating and bringing to the public's attention prosecutorial misconduct. Inventing a new sanction category, cloaked in secrecy, detracts from the mandate of the Legislature. Accordingly, the real problem with these rules is that they enable the CPC to evade its legally mandated responsibility of identifying misconduct after an investigation, by issuing a Letter of Dismissal and Advisement, thus avoiding the attendant publication duty required by a misconduct finding. Had this been intended by the Legislature, it would have stated so in JL 499-F(6).

Of course, the CPC should be concerned that dismissed complaints remain confidential. However, that concern should not lead to the creation of a new and secret category of findings or actions by the CPC, with no limit on its use and in derogation of JL 499. Should the CPC desire to include such a controversial provision in its rules, which in effect circumvents the statutory goal of transparency, the better course would be to seek legislative amendment. JL 499-D(4) specifically provides that the CPC may include in its Annual Report to the Legislature "legislative and administrative recommendations." (Emphasis supplied). The CPC can suggest this change

in its Annual Report.

Finally, we note that this is a public commission with appointees by the governor and elected legislative leaders. The JL 499 structure negates the problem which has resulted in the Grievance Committee system becoming moribund, and that is secrecy. For decades complaints were made to the Grievance Committees and the complainants never knew their outcomes were. Under JL 499, the complainant must be notified. JL 499-F(6) requires that the CPC's recommendation of a sanction be published, along with its recommendation to the Grievance Committee prior to the rendering of its decision.

Against this backdrop, and without any explanation, the CPC proposes to adopt a rule which elevates secrecy: it will dismiss the complaint and withhold from the public its concerns about the prosecutor. The resulting harm is apparent. Publication of the confidential comments would alert the bar at large, the judiciary, defense counsel, and defendants and their families to the concerns of the CPC. When a District Attorney is running for office, the voters in that County would be aware of information regarding the candidate's prior questionable conduct. Bar associations could develop new continuing legal education programs and even the New York Prosecutor's Training Institute could develop programs to better educate prosecutors.

Similarly, while JL 499 places transparency at its core and eschews secrecy, the CPC proposes a rule which condones notification to the complainant of a half-truth. Of all the criticisms of these Rules, the most noteworthy would be that the complainant is informed of the dismissal, but not informed of the CPC's confidential comments sent to the prosecutor. *In short, such a notice to the complainant would not only be misleading, but it would be made worse by the fact that a public commission, invested with ferreting out prosecutorial misconduct, would be party to concealing the record from the complainant and the public at large*. This alone should be enough to remove the proposed confidential advisory comment rule.

Finally, the proposed rules do not require that the CPC include in its annual report any letters of advisement or the reasoning behind any such letters. This effectively eliminates the ability of any watchdog organizations to police the manner in which these letters are used by the CPC, as, for example, they are used to avoid publication of prosecutorial misconduct. In short, there will be no oversight of these letters.

In conclusion, we oppose the above rules as written. The confidential nature of the advisory comments potentially allows instances of prosecutorial misconduct to be concealed and eliminates the ability for oversight to ensure that advisory letters are not being used to hide misconduct. The lack of standards and the vague definition of “potentially problematic conduct” furthers the danger of potential misuse. If conduct by a prosecutor is so problematic as to warrant advisory comments, his or her conduct should be made public, not concealed by the CPC. Nothing in the enabling statute authorizes or endorses such confidentiality.

2.` There is no limit on the jurisdiction of the CPC to review conduct by a prosecutor who has since left the DA’s office.

The jurisdiction of the CPC encompasses the conduct by all prosecutors in the course of exercising their authority, regardless of whether or not they continue to be a prosecutor at the time the misconduct is discovered. The enabling statute does not exempt the conduct of former prosecutors. Such an exemption would be at odds with public policy.

Some of the most egregious instances of misconduct took place years or even decades ago, resulting in persons convicted as a result of prosecutorial misconduct spending years of their lives in prison. Many of the prosecutors have moved on to lucrative or powerful positions, sometimes even capitalizing on the cases later reversed for prosecutorial misconduct. Certain misconduct, such as withholding *Brady* material, may not be discovered until years or even decades later as a result of the prosecutor’s unethical concealment during the trial.

Unlike most crimes, there is no statute of limitations for professional misconduct. All attorneys, whether a prosecutor or defense attorney, should be held accountable for misconduct. Limiting the CPC’s jurisdiction would, in effect, grant prosecutors immunity after leaving office, while non-prosecutors who engage in misconduct would never enjoy such a privilege. The patent unfairness is evident. In addition, the Grievance Committees are able to review the conduct of former prosecutors. In effect, the Grievance Committees will have jurisdiction over all prosecutors regardless of their current employment status, but the CPC would be restricted only to currently employed prosecutors. If this were the intended effect of the Legislature then

why create an independent commission in the first place? Limiting the CPC would thus be incompatible with the authority of the Grievance Committees and create a void unintended by the Legislature.

Accordingly, NYSACDL objects to any limitation on the CPC's jurisdiction to investigate complaints of misconduct by former prosecutors, provided that the misconduct occurred while he or she was an active prosecutor, on the grounds that it is not supported by the language of the statute, would be against public policy, and is inconsistent with legislative intent.

THE STATUTORY PROVISIONS

Judiciary Law 499 is the authorizing statute creating the Commission on Prosecutorial Conduct. Section 499-F(1) directs that CPC is to "receive, initiate, investigate and hear complaints to the conduct or performance or official duties of any prosecutor." Section 499-B defines prosecutor as a "district attorney or any district attorney." There is no language in this provision limiting the jurisdiction of the CPC to current District Attorneys or Assistant District Attorneys. There is no categorical exemption from the CPC's jurisdiction based on status or length of service. There is no language in the statute granting former prosecutors immunity for professional misconduct.

The Legislature did make a distinction in other sections of the statute, when needed for a specific purpose. For example, Section 499-C(1)(a) states that two "active, former, or retired prosecutors" shall be appointed by the governor. Section 4990C(1)(b) refers to "retired" judges. Section 499-C(1)(c) states that two "active, former or retired prosecutors" shall be appointed by the Legislature. Section 499-I provides that the CPC will retain jurisdiction over a district attorney who resigns after a recommendation is made that he be removed from office. Given the Legislature's awareness of the different types of prosecutors, its use of the term prosecutors, without the attached term "current," denotes a clear intention that the statute applies to all prosecutors whether currently employed in a prosecutorial office or not and that the statute clearly contemplates jurisdiction by the CPC over former prosecutors

LEGISLATIVE INTENT

The CPC's proposed rule limiting its jurisdiction is inconsistent with the legislative intent of JL 499. As noted, nowhere in the statute did the Legislature plainly limit the CPC's jurisdiction to current prosecutors. The intended purpose for creating the Commission is to hold prosecutors accountable for behavior that often remains undiscovered for decades. Restricting their jurisdiction to current prosecutors would obstruct this purpose. Although a Grievance Committee could receive and investigate complaints regarding former prosecutors, the CPC could not refer such complaints, even in the most egregious case. It was precisely for this purpose that the Legislature created the CPC.

To place a restrictive limitation on the CPC without any pertinent or specific language also undermines the broad scope of power given to the CPC. In Section 499-A, the Legislature authorized the CPC to investigate and review conduct committed by a prosecutor "in the course of his or her official duties or under color of state law" without limitation. The focus was on the prosecutor's conduct while in office, without regard to his current employment status once his misconduct was unveiled.

Finally, the fact that there is no statute of limitations for prosecutorial misconduct was generally recognized by various District Attorneys when the bill was originally proposed in 2018. At that time, prosecutors complained that the legislation contained no time limits on accountability, and, as a result, they could be called to defend against their actions years or even decades later. These prosecutors recognized that the CPC could hold them accountable for their misconduct, regardless of when it occurred. Despite their objections the legislation was not amended, evidencing the intent to hold prosecutors accountable for their conduct even after they leave office.

The following District Attorneys raised their objections in letters opposing the bill, which are found in the original 2018 legislative jacket to the bill.

1. In a letter to Governor Andrew M. Cuomo, dated July 2, 2018, p. 5, Bronx District Attorney Darcel Clark stated: "There is no statute of limitations. This means that a prosecutor can be called upon to answer allegations about conduct he supposedly committed decades ago."

2. In a letter dated August 14, 2018, p. 4, Orange County District Attorney David M. Hoovler wrote: “There is no statute of limitations so the Commission could entertain decades old complaints.”

3. Queens District Attorney (the late) Richard Brown, in a letter opposing the CPC legislation, p. 5, wrote: “Because there is no statute of limitations, the commission is empowered to entertain complaints from decades ago.”

At the request of Governor Andrew M. Cuomo, the New York State Attorney General reviewed the proposed CPC legislation. In her report, she made no mention of any constitutional infirmity or defect based on the fact that there is no statute of limitations and no jurisdictional limit on the CPC *vis-a-vis* current and former prosecutors. Had such a constitutional flaw existed, it would have been flagged.

We object to any limit on the CPC’s jurisdiction over the conduct of former prosecutors, as inconsistent with the legislative intent, the plain language of the statute, and public policy.

3. The verification requirement should be omitted.

The requirement that complaints be verified should be omitted. It is redundant and imposes an unnecessary obstacle for the under-represented and indigent defendants, allowing merit-based complaints to be dismissed on a procedural technicality.

Section 10400.1(e), for example, defines a complaint as “a written communication to the commission *signed and verified* by a complainant making an allegation about a prosecutor’s conduct pursuant to sections 499-a and 499-f of the Judiciary Law, or an administrator’s complaint.” (Emphasis added) By its express terms, this requires complaints to be *both* signed and verified. The term “verified” is generally understood to mean notarized. This may lead the CPC, during the first level of review, to reject complaints outright which are not notarized, lack supportive documentation, or otherwise lack acceptable “verification.” This presents a potential obstacle for many complainants, including watchdog organizations.

4. Additional provisions should be included.

A. The CPC has independent authority to initiate a complaint. Section 10400.2(e) describes the process by which a self-initiated complaint is to be filed. We recommend an additional requirement to that provision as follows:

> The Commission shall initiate a complaint in any matter where there has been a judicial finding of prosecutorial misconduct in an officially reported decision or any other judicial decision brought to the Commission's attention, whether or not a specific prosecutor is named in the decision, and whether or not the matter was reversed, modified or upheld.

We make this recommendation in light of the fact that such instances generally involve more serious misconduct, and the record is generally clear based on the transcripts and briefs. The procedures should include an automatic initiation of an investigation in those circumstances.

B. We further recommend the following provision.

> The Commission shall make a formal complaint in any case where a determination has been made that the prosecutor acted intentionally — that is, that he knew or should have known that his conduct violated his ethical obligations or the constitutional rights of a defendant.

C. We recommend a requirement that the CPC include a process whereby it can initiate an investigation as to any County in New York State with repeat prosecutorial offenders, including when advisory letters are sent (if that provision is maintained). This might include a requirement, for example, that an investigation be commenced of a District Attorney's Office whenever the CPC receives three or more substantiated complaints from the same DA's office within a three-year period. Such investigation shall include a review of the supervisory personnel involved in each instance of misconduct.

D. We recommend that the CPC adopt certain standards to ensure consistency. If, for example, the offending conduct was intentional, the

recommended sanction should be dismissal of the prosecutor. If the offending conduct was grossly negligent or reckless, the recommended sanction might be suspension for a period of time. These standards would assist in oversight of the CPC's rulings and set clear guidelines for prosecutors.

E. Finally, we recommend a requirement that whenever a prosecutor is notified by the CPC of a complaint filed against him or her, the District Attorney for that County shall also be notified and copied on the letter as well as all subsequent correspondence and/or notices to the prosecutor.

Thank you for your careful consideration of these comments. Please contact NYSACDL if you have any questions.

Sincerely,

Steven Epstein
President