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MEMORANDUM

TO: Michael A. Simons, Chair, New York State Commission on Prosecutorial Conduct
(via email Regulations@cpc.ny.gov)

FROM: Susan Bryant, Executive Director, New York State Defenders Association

DATE: June 24, 2024

RE: Comments on the Commission on Prosecutorial Conduct's proposed rulemaking that would add a new Part 10400 to Title 9 NYCRR

The New York State Defenders Association (NYSDA) offers these comments on the Commission on Prosecutorial Conduct's proposed rulemaking that would add a new Part 10400 to Title 9 NYCRR — Operating Rules and Procedures. These comments supplement the group comments NYSDA submitted joined with other organizations, including It Could Happen to You. We appreciate the opportunity to comment on the proposed rules and procedures.

NYSDA has long supported establishing a prosecutorial conduct commission and we are encouraged to see that the Commission is finally becoming a reality in New York. While the proposed operating rules and procedures are an important step for the Commission, we have significant concerns about the lack of transparency, reporting, and detail that the proposed regulations provide.

Prosecutorial misconduct in New York State is rampant, but it often goes unreported and unpunished. Public defenders and private criminal defense attorneys, who are constitutionally bound to represent individual clients, yet often have multiple concurrent cases with the same assistant district attorneys, cannot be simultaneously tasked with instigating complaints against those prosecutors for misconduct they observe. Even after a case is closed, ethical obligations of confidentiality may bar defenders from discussing specific instances of prosecutorial misconduct. And the filing of a complaint can have negative consequences for the defender's clients who are being prosecuted by the same assistant district attorney or district attorney's office.

As the defense is ethically and pragmatically deterred from reporting prosecutorial misconduct, public and private criminal defense attorneys have had to rely on the judiciary and the internal policies and personnel actions of district attorney offices themselves to address ethical violations. Neither have shown they are up to the task. For example, even when judges acknowledge blatant violations of discovery laws, they almost never file complaints against prosecutors, instead defining the violations as harmless error or quietly dismissing the case without naming the prosecutor. And while the uptick in conviction integrity units inside District Attorney offices is to be applauded, they are insular by design and rarely disclose their methods, procedures, or decision-making.

In this context, the Commission on Prosecutorial Conduct's statutory role to find, investigate, adjudicate, and report on prosecutorial violations is invaluable. Yet some of the proposed regulations thwart or undermine those statutory responsibilities.

1. Rules Should Establish a Standard for Dismissal of Complaints

Section 10400.2 of the proposed rules indicates that the Commission can dismiss a complaint unilaterally without completing an investigation but does not discuss how or when that would be acceptable or feasible to do so. The rules need to establish a standard for dismissal, both before and after an investigation. Not every complaint may need to be investigated -- surely there will be some complaints that do not, on their face, allege misconduct. But under the proposed rules, the Commission would have the power to unilaterally dismiss complaints with no clear guidelines, rationale, or reporting requirements, which could fundamentally cripple the stated purposes of the Commission.

2. Rules Should Encourage, Not Deter Filing of Complaints

Proposed Section 10400.2 also requires that complaints be verified, which is permitted but not required by Judiciary Law 499-f. The Commission should not unnecessarily deter people from filing complaints by requiring verification in all cases. To the extent the Commission believes that verification is required in certain limited circumstances, it should specify those circumstances in the rules.

While the proposed rules require complaints to be signed by the complainant, as provided in Judiciary Law 499-f, the Commission should establish rules that provide a mechanism for a complaint to be initiated and, to the extent feasible, investigated confidentially. Without some level of confidentiality, except in rare circumstances, accused or convicted individuals or their counsel would likely delay filing a complaint until the criminal case and the appellate process have concluded. Many New York State trial and appellate courts have significant case backlogs, which will inevitably allow misconduct to go unreported for years.

3. Rules Should Identify Methods for the Commission to Identify Misconduct

The proposed rules appropriately allow for the Commission to initiate a complaint themselves (see Section 10400.2(e)), but they do not explain how that may come about. The rules should specifically task the Commission with duties and responsibilities for identifying possible misconduct around the state and establish mechanisms for them to do so. This is especially important when the Commission itself is centered in New York City. For example, a section should be added to the rules that specifically require the Commission to conduct campaigns to educate the public about the Commission's work and the complaint process; meet with local bar associations, community groups, and court watching programs to learn about issues that may be arising in a particular county; review published and unpublished court decisions; and monitor local news media.

4. Rules Need to Define “Potentially Problematic Conduct”

The proposed rules and procedures are far too vague as to what prosecutorial actions will result in the filing of a formal complaint and what amounts to “potentially problematic conduct”¹ that will be identified in a letter of dismissal and advisement.² If the prosecutor has engaged in “potentially problematic conduct,” why is the complaint being dismissed?

The regulations also need some explanation of what remedies the Commission can suggest or require if “potentially problematic conduct” has been found, even when a letter of dismissal and advisement is being sent. In its current form, the proposed rules allow the Commission to find misconduct but still dismiss the complaint with no explanation for its actions or suggested remedies, which is in direct tension with the purpose of the Commission.

5. Rules Must Foster Transparency

The proposed rules and procedures contradict another stated purpose of the Commission, which is to shine a light on the extent of prosecutorial misconduct occurring in New York State. As written, the proposed rules unnecessarily hide the Commission’s work. For example, Section 10400.7(e) states that “[u]pon completion of service, the commission’s findings and recommendations and the record of its proceedings shall be made available for public inspection at the principal office of the commission and at the office of the clerk of the appellate division in the department in which the record was filed.” The regulations later explain that the principal office of the Commission is located in Queens. There is no justification for the Commission’s recommendations only being made available at a physical location. The Commission’s website proudly states that it is “authorized to make its findings and recommendations public.”³ In 2024, a physical copy of the findings and recommendations in an office building does not constitute a public finding.

The Commission’s findings should be available online, in a searchable database, along with an annual report that details the Commission’s investigations, findings, and recommendations, along with detailed information regarding the types of misconduct the Commission found, i.e., discovery violations, missing *Brady* disclosures, personal impropriety, etc.⁴ The enabling legislation itself requires that the Commission must file an annual report and “at other times as the commission shall deem necessary,” and the Commission’s reports “may include legislative and administrative recommendations.” Judiciary Law 499-d. We strongly recommend that the Commission take every step possible to make its work open and accessible to the public. In addition to giving the public real access to the information, this resource can be used to educate prosecutors around the state about what constitutes misconduct and the Commission’s recommendations on how to address unethical conduct.

¹ See proposed Section 10400.1(n).

² NYSDA opposes the use of confidential letters of dismissal and advisement, as detailed in the group comments submitted to the Commission.

³ New York State Commission on Prosecutorial Conduct, “About,” available at <https://www.ny.gov/new-york-state-commission-prosecutorial-conduct>

⁴ If the Commission needs these types of violations to be delineated in the rules and procedures in order to subsequently report on them, they should be added to the proposed rules.

Finally, the Commission should make clear what modifications and reforms they are suggesting to District Attorney offices in response to the misconduct they are investigating. Did they suggest more hands-on supervision of younger trial attorneys? More ethics trainings? Implicit bias seminars? Diversity, equity and inclusion practices added to their hiring process? Without further explication of what they are finding and what they are suggesting manifested in a public, online format, the Commission will not meet its statutory intent or legislative purpose.⁵

We thank you for the opportunity to be heard on these proposed rules and procedures. If you have any questions regarding these comments, please do not hesitate to contact Susan Bryant, Executive Director, New York State Defenders Association, at sbryant@nysda.org.

⁵ Again, if the Commission needs these types of potential recommendations to be delineated in order to subsequently report on them, they should be added the proposed rules.