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Ms. Susan Friedman
Administrator of the New York State Commission
on Prosecutorial Conduct
Regulations@cpc.ny.gov

RE: Comments on New York State Prosecutorial Conduct Commission's Proposed Regulations

Dear Ms. Friedman,

Please accept this letter as my commentary on the recently posted proposed rules and procedures ("RAPs") for the newly formed New York State Commission on Prosecutorial Conduct ("CPC"). As the District Attorney of Nassau County, who oversees over 200 dedicated prosecutors, I oppose several of the proposed rules and procedures, some of which will likely cause confusion and uncertainty due to their ambiguity. Others are impractical, unfair, or inconsistent with due process. In many cases, where the RAPs should be very specific, they are vague and general, and where the rules are outlined with specificity, they set random and illogical guidelines that cannot be fairly imposed. Moreover, some of the proposed RAPs seem to be at odds with the underlying statute that created the Commission (Jud. L. § 499-a).

Of serious concern is the damaging effect that many of these proposed rules and procedures will have on the prosecutorial profession in New York. The rules are likely to discourage some of the most promising young attorneys from pursuing careers as prosecutors because many of the rules are one-sided, unjust, and otherwise flawed. As for those who are already prosecutors—and who were already subject to effective oversight in the form of the Attorney Grievance Committee—the proposed rules and procedures will likely lead to an eventual exodus from district attorneys' offices across the state, as these RAPs, in their current form, will give criminal defendants and others with axes to grind the unfettered ability to engage in persistent harassment against

prosecutors and interference with legitimate investigations and prosecutions. Indeed, as the RAPs are currently written, there is nothing that would prevent or discourage a disgruntled individual from lodging an endless array of frivolous—but highly damaging—complaints against a prosecutor who has done nothing but honor his or her commitment to seek justice and uphold the State and Federal constitutions. Simply put, these RAPs will have a detrimental effect on the administration of justice, as prosecutors may feel compelled to leave the profession to protect their own reputational, professional, and financial interests. And ultimately it will not be just the district attorneys' offices that suffer for it, but also the citizens of our communities at large, the courts, and even the defendants.

As described below, the RAPs are marred by the following major problems: (1) they violate the prosecutor's right to due process by allowing CPC to punish him or her without providing adequate notice of the charges against the prosecutor or a meaningful opportunity to respond to those charges; (2) they enable a criminal defendant or anyone else to harass prosecutors and disrupt their cases, possibly resulting in the unwarranted dismissal of criminal charges or reversal of convictions; (3) they violate the New York Constitution by infringing on the exclusive jurisdiction of the Appellate Division over attorney disciplinary matters; (4) they lack any sort of mechanism to permit a targeted prosecutor to meaningfully avail himself or herself of counsel, ; and (5) they inflate the powers of CPC beyond those authorized by the enabling statutes.

My comments are organized by topic and the sections of the RAPs to which they pertain:

Unlimited Complaints Against Prosecutors

Sections 10400.1(e), 10400.2(a)-(b), 10400.2(e), 10400.3(a)

Section 10400.2(a): The commission shall receive complaints against any prosecutor with respect to the prosecutor's qualifications, conduct, fitness to perform, or the performance of the prosecutor's official duties.

- This provision is flawed for multiple reasons. First, the potential subject matter for such complaints exceeds the CPC's statutory authority found in Judiciary Law § 499-a which limits the complaints to "conduct in the course of his or her official duties or under color of state law". *See also* Judiciary Law 499-f(1) ("The commission shall receive, initiate, investigate and hear complaints with respect to the conduct or performance of official duties of any prosecutor[.]"). The proposed rule sweeps in the

prosecutor's background, education, and even his or her medical and family history or protected First-Amendment activities. According to the broad language of this subsection, the complaint need not relate to the prosecutor's job or the rules of professional conduct. Second, the RAPs provide no minimum showing that must be met by a complainant before CPC will investigate the complaint. In other words, the RAPs appear to authorize CPC to receive a complaint about, and investigate, virtually anything concerning a prosecutor, regardless of the proof, or lack thereof, supporting the complaint. Third, CPC itself may initiate a complaint for any reason (Section 10400.2[e]). The RAPs provide no guidance as to when such a self-initiated investigation might occur. Fourth, if the complaint does concern a criminal prosecution, nothing in the RAPs precludes CPC from investigating—and interfering with—a pending matter. Accordingly, this provision must be eliminated or, at least, significantly revised. These concerns are further discussed below.

- It appears that CPC is attempting to expand its powers beyond the already considerable ones authorized in the enabling legislation. Judiciary Law § 499-a provides, in relevant part, that CPC "shall have the authority to review and investigate the conduct of prosecutors upon the filing of a complaint . . . to examine whether a prosecutor . . . *has committed conduct in the course of his or her official duties or under color of state law* . . . ." *See also* Judiciary Law 499-f(1) ("The commission shall receive, initiate, investigate and hear complaints with respect to the conduct or performance of *official duties of any prosecutor*[.]"). Thus, the Judiciary Law states that CPC's jurisdiction is limited to the review and investigation of alleged misconduct in the exercise of the prosecutor's *official duties.*[1] There is an internal contradiction in the RAPs insofar as Section 10400.1(e) defines "Complaint" not as an allegation about a prosecutor's "qualifications, conduct, [or] fitness to perform" (Section 10400.2[a]), but instead as "an allegation about a

[1] It should be noted, however, that Judiciary Law 499-f(1) authorizes CPC to "make a recommendation to the governor that a prosecutor be removed from office for cause, for, including, but not limited to . . . persistent failure to perform his or her duties, conduct prejudicial to the administration of justice, or that a prosecutor be retired for mental or physical disability preventing the proper performance of his or her prosecutorial duties." Even there, however, any such recommendation must be tied to the targeted prosecutor's ability to perform their job, not an unrestricted look into every area of a prosecutor's life and background.

prosecutor's conduct pursuant to Sections 499-a and 499-f of the Judiciary Law, or an administrator's complaint." The absence from the Judiciary Law of any provision allowing CPC to receive complaints about a prosecutor's qualifications, general conduct, or fitness to perform demonstrates that such complaints are beyond the scope of the agency's jurisdiction.

- To the extent CPC's powers are modeled on those to the State Commission on Judicial Conduct ("CJC") under Judiciary Law § 44 and 22 NYCRR §§ 7000.2 and 7000.9, it is worth noting that the CJC's mandate is broader than the CPC's, and, accordingly, the CJC would necessarily require more extensive authority. The CJC is empowered by the Judiciary Law to investigate, among other things, a judge's "conduct, qualifications, [and] fitness to perform" (Judiciary Law § 44[1]), whereas the CPC, as noted, is authorized by the Judiciary Law only "to review and investigate the conduct of prosecutors" as it relates to their "conduct in the course of his or her official duties or under color of state law" (Judiciary Law § 499-a). Moreover, the CJC may admonish or censure a judge (subject to the acceptance of its recommendation by the Chief Judge) or recommend the removal of the judge (*see* Judiciary Law § 44[7]), whereas the CPC may only make recommendations to the New York State Attorney Grievance Committees (*see* Section 10400.7[a]). With a narrower mandate, the CPC should have lesser investigatory power than the CJC.

- This provision would violate a prosecutor's right to due process. It grants CPC the authority to investigate all aspects of a prosecutor's life, not just alleged violations of the professional rules of conduct. Further, it provides no notice to the prosecutor, nor is there any guidance elsewhere in the RAPs, as to what unofficial conduct, fitness, or qualifications, or lack thereof, may serve as ground for recommended removal from office. For instance, nothing in the RAPs would prevent CPC from investigating, and recommending the removal of, a prosecutor for expressing "incorrect" political views, suffering from depression, or living outside the county in which he or she works. Worse still, because the RAPs permit CPC to issue what is effectively a public censure, *see* Section 10400.7, this section would effectively permit CPC to publicly air a prosecutor's

personal life. Prosecutors would have no way of knowing what behavior, outside a violation of the rules of professional conduct, might trouble CPC. The RAPs should be revised, therefore, to limit the complaints that CPC may receive (and initiate) exclusively to those concerning the prosecutor's alleged violations of the professional rules of conduct in the course of his or her official duties, as provided in the enabling statute.

- Because this subsection of the RAPs would allow CPC to investigate a complaint about a pending criminal matter, it violates Judiciary Law 499-d(1), which provides that CPC "shall only exercise its powers in a way that will not interfere with an agency's active investigation or prosecution." To avoid such interference, the subsection should provide that CPC will receive complaints *only* about criminal matters that are not pending. In the definitions section (Section 10400.1), "pending" should be defined as any criminal matter in which the direct appeal has not been concluded or where there is any additional ongoing litigation, such as a post-judgment vacatur motion or a federal petition for a writ of habeas corpus.

- Penalties should be imposed for false and meritless complaints to discourage the harassment of prosecutors and the interference in their duties. At the very least, the RAPs should provide that all complaints must be supported by sworn allegations of fact and that any false statement by the complainant may result in his or her prosecution for perjury.

Section 10400.2(b): A complaint shall be in writing, signed by the complainant, and verified.

- This subsection must be revised to protect the prosecutor's right to due process by providing that *all* complaints must be served upon the prosecutor *and* his or her office, and that any complaint that is not properly served *must* be dismissed immediately, without any further action by CPC. A complaint served only upon the prosecutor and not their current (or former) office will, for the reasons stated below, delay both the prosecutor's ability to respond and the investigation into the alleged complaint.

Section 10400.2(e): If a complaint is initiated by the commission, the commission shall file as part of its records an administrator's complaint.

- There is no provision here for notifying the prosecutor of a CPC-initiated complaint. To satisfy the targeted prosecutor's right to due process, CPC should immediately notify him or her when initiating a complaint.

Section 10400.3(a): If the commission dismisses a complaint, the commission shall so notify the complainant. If the commission notified the prosecutor of the complaint prior to its dismissal, the commission shall also notify the prosecutor of the determination to dismiss the complaint.

- To satisfy the prosecutor's right to due process, CPC must notify him or her of both the filing of a complaint *and* its dismissal.

Letters of Dismissal and Advisement

Sections 10400.1(n), 10400.2(d)(2), 10400.3(b), 10400.4(a), 10400.7(c)

Section 10400.1(n): Letter of dismissal and advisement shall mean 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 "letter of dismissal and advisement" are themselves "potentially problematic" for at least three reasons.
    - First, the letters can later be used against prosecutors (*see below*), but in many cases it appears that this "advisement" will be delivered without prior notice of the allegedly problematic conduct and without an opportunity for the prosecutor to be heard, in violation of the right to due process. "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." *Hallock v. Grievance Committee for Tenth Judicial District*, 37 N.Y.3d 436, 442 (2021) (quoting *In re Ruffalo,* 390 U.S. 544, 550–51 [1968]). The RAPs state that CPC may receive a complaint, without any notice to the prosecutor, and then dismiss it, again without any notice, if CPC "determines that the complaint

lacks merit" (Subsection 10400.2[d][2]). Notwithstanding the dismissal of the meritless complaint, CPC "may issue the prosecutor a confidential letter of dismissal and advisement" (Section 10400.3[b]). Thus, CPC may find fault with a prosecutor solely on the basis of a meritless complaint of which the prosecutor has had no notice or opportunity to be heard.

- Second, the violation of a prosecutor's right to due process is compounded whenever a subsequent complaint is filed against the prosecutor. Section 10400.4(a) provides that a letter of dismissal and advisement "may be used in a subsequent proceeding" against the prosecutor. Specifically, the prosecutor "may be questioned" about the letter (Section 10400.4[a][2]), and the prior finding of "potentially problematic conduct" mentioned in the letter may now be deemed to constitute actual prosecutorial misconduct; in that case, the prior alleged misconduct may be used against the prosecutor by CPC "in determining the sanction to be recommended" for the current alleged misconduct (*id.*) without the prosecutor having any opportunity to rebut the conclusions of the CPC. In other words, a prosecutor against whom a complaint is filed may have to defend himself not only against the allegation of misconduct stated in the complaint, but also against past findings of "potentially problematic conduct" that were issued without any due process or real opportunity to defend against the allegations. Moreover, CPC may deem those past findings to be aggravating circumstances that warrant a more serious sanction for any current misconduct, again, without having afforded the prosecutor any due process. In addition, the RAPs provide that CPC's "findings and recommendation and the record of its proceedings," which would include the previously confidential "advisement," must be publicized (Section 10400.7[c]). For these reasons, the CPC's use of letters of dismissal and advisement is very likely unconstitutional.

- Third, a "letter of dismissal and advisement" is unconstitutional because it is a form of sanction in itself. Such a letter regarding a prosecutor's past "potentially problematic conduct" may form the basis for a more serious recommended sanction. Accordingly, it infringes on "[t]he Appellate Division['s] . . . exclusive jurisdiction over attorney discipline, including the ability to issue 'public

censures' of attorneys who violate the disciplinary rules." *Soares v. State*, 68 Misc. 3d 249, 289 (Sup. Ct. Albany Cnty. 2020).

Other Due Process Concerns

Sections 10400.2(c)-(d), 10400.5(d)-(g), 10400.6(b)-(d), (f)-(j), (l)

Section 10400.2(c): The commission staff may engage in an initial review and inquiry of the complaint and provide a recommendation to the commission about the disposition of a complaint.

- To protect the prosecutor's right to due process, any "recommendation to the commission" by CPC staff should be served upon the prosecutor, who should be given a reasonable opportunity to respond to the recommendation.

Section 10400.2(d): Upon receipt of a recommendation from commission staff, the commission shall (1) authorize an investigation of the complaint; or (2) dismiss the complaint if it determines that the complaint lacks merit.

- To avoid harassment and undue interference with a prosecutor's official duties, as well as to protect his or her right to due process, a deadline should be imposed on CPC's determination whether to authorize an investigation or to dismiss a complaint, and prompt notice of that determination should be given to the prosecutor. Hence, the subsection should be reworded as follows: "Within 30 days of the receipt of a recommendation from staff and the prosecutor's response to that recommendation, the commission shall either: (1) authorize an investigation; or (2) dismiss the complaint if it determines that the complaint lacks merit. In either event, the commission shall promptly notify the prosecutor of its determination."

Section 10400.5(d): Evidence Collection. The administrator or a member of the commission may subpoena witnesses, compel their attendance, and require the production of any books, records, documents, or other evidence that may be deemed relevant or material to the investigation and/or the complaint. The commission may authorize any member of its staff to administer oaths or affirmations and examine witnesses under oath. A witness required to appear before the commission shall have the right to be represented by counsel who may be present with the witness and advise the witness, but may not otherwise participate in the proceedings.

- As noted above, this subsection violates the due process rights of prosecutors because it places no limits on the evidence that CPC can collect. According to this provision, CPC theoretically could subpoena a prosecutor's medical or financial records or private emails and text messages without providing any explanation as to the relevance of such records or any opportunity for the prosecutor to challenge the subpoena, other than a potentially costly and time-consuming motion to quash. A clause must be inserted limiting the collection of evidence by CPC to that which is relevant to an alleged violation of a professional rule of conduct in a past prosecution, e.g., case files, court records, interviews of the complainant and other witnesses with relevant knowledge.

- This subsection does not address the complications that will inevitably arise whenever a complainant, an accused prosecutor (current or former), an administrator, or a commission member seeks to review confidential District Attorney records and to gather and present evidence on the basis thereof. Such documents could include grand jury records, material subject to a protective order, medical and psychiatric records of victims, witnesses and defendants, records that identify sexual assault victims and minor victims and witnesses, autopsy reports, 911 calls, police officer disciplinary records, crime scene photos, and other such confidential and sensitive records that are typically found in case files. Many of those records are precluded from release by statute, such as grand jury records (C.P.L. § 190.25[4][a]), 911 calls (County L. § 308[4]), and records that would identify the victim of a sexual crime (Civil Rights L. § 50-b[1]). Nor does the subsection address whether confidential information (for instance dates of birth, social security numbers, and financial information) must be redacted from records sought as evidence in a proceeding, or the process for making redactions. The RAPs should address these records specifically and provide that a prosecutor is not obligated to produce records that are subject to statutory protections.

- The subsection does not consider the lengthy delay that will result whenever a complainant, an accused prosecutor (current or former), an administrator, or a commission member seeks confidential records or records that require redactions, particularly in cases with extensive and voluminous case files. A request for confidential records may generate time-consuming litigation, whereas a demand for even routine records may result in a months-long redaction review. Further, a district attorney's

office may not be able to process in an expeditious manner a request for records.

Section 10400.5(e): Appearance of the Prosecutor. The commission may require the appearance of the prosecutor involved before it, in which event the prosecutor shall be notified in writing of the required appearance, either personally, at least 10 days prior to such appearance, or by certified mail, return receipt requested, at least 14 days prior to such appearance. A copy of the complaint shall be served upon the prosecutor at the time of such notification. 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. Electronic copies of the transcripts shall be made available to the prosecutor without cost.

- At the outset, as discussed further below, all of the time limits in the RAPs lack a provision to extend or modify deadlines to accommodate the reality of life. A pre-planned vacation that happens to overlap with the notice could result in a prosecutor not knowing that his or her time is running until it is nearly too late. Similarly, an unanticipated illness or injury may preclude a prosecutor from complying with the deadline through no fault of his or her own. The RAPs must take into account that prosecutors are people, not machines, and unavoidable delays are a natural part of life.

- Because the RAPs provide for only 10 days of notice, it is unrealistic to suppose that any prosecutor in New York would be able to appear before CPC without substantial interference in his or her official duties. This subdivision should be amended to give prosecutors a much lengthier notice period and provide that CPC and the prosecutor who is summoned must agree on a mutually acceptable date for the prosecutor's appearance.

- This section does not provide sufficient time to prepare for such an appearance. To prepare, the prosecutor would, by necessity, need to review not only the underlying case file or files but also any other documentation or information which may be relevant to their response to the CPC, including but not limited to e-mails, memoranda, training materials, motions, hearing and trial transcripts, and appellate records. These records, depending upon the age and complexity of the investigation and prosecution, the extent of motion or appellate practice, and the occurrence of any hearings or trials, can be extensive and

voluminous and may not be readily obtainable. In addition, where a complaint relates to an individual who has filed multiple complaints or has been prosecuted on more than one occasion, other case files and related information may be relevant to the prosecutor's response.

- The necessary information may not be immediately available to a prosecutor because (1) the prosecutor is no longer with the relevant District Attorney's Office; (2) the file and other relevant information has been archived; (3) some or all of the relevant information has been sealed by the operation of law pursuant to C.P.L. article 160 and the Clean Slate Act; or (4) the records are otherwise immediately unavailable. All of these variables will affect the prosecutor's ability to prepare.

Section 10400.5(f): Recording and Transcribing. All interviews pursuant to a subpoena shall be recorded and transcribed.

- The words "pursuant to a subpoena" should be removed from this subsection. *All* interviews should be recorded and transcribed.

Section 10400.5(g): Report. Upon completion of the investigation, the administrator or administrator's designee shall prepare a report detailing its findings, conclusions, and any recommendations for further action.

- The report of CPC's investigation cannot be delayed indefinitely, as this provision would allow. Instead, the RAPs should require that the report be completed within a reasonable time after the initiation of the investigation, and it must be served on the prosecutor within days of its completion.

Section 10400.6(b): Notice. A formal written complaint signed and verified by the administrator will be drawn and served upon the respondent prosecutor involved, either personally or by certified mail, return receipt requested.

- The notice should be served upon the respondent prosecutor *and* the office in which he or she worked at the time of the alleged misconduct. District attorneys' offices have an interest in defending their current and former employees and may have special knowledge pertaining to the alleged misconduct. For example, the offices may have access to prior judicial findings, such as the results of any motion practice or appeals during which the allegations may have been raised; they may have

previously investigated and addressed said conduct; and they may possess the relevant records, which a former (or even current) employee might not have access to.

Section 10400.6(c): Answer. The respondent prosecutor shall file a written answer to the formal written complaint with the commission within 20 days of such service. The answer shall contain a response which corresponds to each allegation and sets forth that the allegation 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. The respondent prosecutor's answer may also contain defenses, may assert that the alleged conduct in the formal complaint is not improper or unethical, and provide any additional information relevant to the alleged conduct. Failure to answer the formal written complaint or address specific factual allegations shall be deemed an admission of its allegations.

- The 20-day deadline for answering a complaint is unreasonably short for the reasons stated above regarding Section 10400.5(e). This is especially true when the "[f]ailure to answer the formal written complaint or address specific factual allegations shall be deemed an admission of its allegations." Although in Grievance Committee proceedings regarding general attorney misconduct, the Grievance Committee may require a written response from an attorney (22 NYCRR § 1240.7[b][2]), that provision does not obligate a response by a specific time period, let alone such a narrow deadline. Moreover, the CPC is bound to receive, serve upon prosecutors, and investigate many more false or baseless complaints than the Grievance Committee processes. There is no disincentive in the RAPs or the enabling legislation to discourage those seeking to interfere with the administration of justice—including charged or convicted criminal defendants—from filing false or baseless complaints. Accordingly, given the high volume of litigation that can be expected and the busy schedules of prosecutors, it is practically inevitable that some complaints will go unanswered inadvertently and then "be deemed" admitted in accordance with this subsection. No prosecutor should lose his or her livelihood by default. A much longer deadline, coupled with a provision for extensions of time to answer, would be more appropriate. In addition, the sentence deeming a non-answer to be an admission should be removed.

- The 20-day deadline for answering a complaint is also unreasonable because the prosecutor's response may be dependent upon the receipt of

records from a district attorney's office, including confidential records and records subject to redaction. As noted above in the comments related to Section 10400.5(d), a request for such records may generate litigation or be subject to a lengthy delay.

Section 10400.6(d): Summary determination. The respondent prosecutor may move before the commission for a summary determination upon all or any part of the issues being adjudicated, if the pleadings, and any supplementary materials, show that there is no genuine issue as to any material fact and that the respondent prosecutor is entitled to such decision as a matter of law. A motion for summary determination may be served in the same manner as a formal written complaint. If a summary determination is granted, the commission shall provide reasonable opportunity for the submission of briefs and oral argument with respect to possible sanctions.

- This subsection is similar to the provisions regarding the double-edged "letter of dismissal and advisement" insofar as it contemplates, in its final sentence, the granting of a prosecutor's motion for "summary determination" *and* the subsequent recommendation of sanctions against the prosecutor, despite his or her prevailing motion. A successful motion for summary judgment should result in dismissal of the complaint with no further adverse action against the prosecutor.

Section 10400.6(f): Subpoenas. The commission or referee designated by the commission is empowered to issue subpoenas for a commission hearing pursuant to a formal written complaint. If the administrator or the respondent prosecutor who is the subject of a formal written complaint wishes to subpoena a witness or books, records, documents, or other evidence, a request must be made to the referee with notice to the opposing side, affording a reasonable opportunity to be heard. The referee shall grant reasonable requests for subpoenas.

- The subpoena power of CPC is far too broad. It should be limited to evidence directly pertaining to a specific allegation of attorney misconduct related to a closed criminal case. Before a subpoena is issued, CPC should be required to make a showing that the subpoena it seeks will not violate such limitations. Moreover, the prosecutor and his or her office must be given a neutral forum, such as the Supreme Court in the county where the prosecutor's office is located, in which to bring a motion to quash any subpoena served by CPC. As it is currently drafted, nothing in this subsection would prevent CPC from subpoenaing the prosecutor's

medical or financial records, internet history, political affiliations or contributions, or other such materials.

Section 10400.6(g)(3): In deciding a motion, the commission members shall not have the aid or advice of the administrator or commission staff who has been engaged in any stage of the investigation.

- The words "or referee" should be inserted between "staff" and "who."

Section 10400.6(g)(4): Motions to dismiss a formal written complaint must be made within 30 days of service of the formal written complaint upon the respondent prosecutor.

- There can be no time limit on the right to seek the dismissal of a false or baseless complaint.

Section 10400.6(g)(5): Within 10 days of the parties being notified of the designation of the referee, commission counsel or the respondent prosecutor may file a motion to disqualify a referee based on a conflict of interest or bias. The opposing party must respond to the motion within 10 days of service of the motion.

- The 10-day time limit on motions to disqualify should be removed. A referee's bias or conflict of interest may not come to light until after the 10-day time limit. There should be no time limit on such motions. Like all of the other time periods in the RAPs, there should also be a provision for reasonable extensions of the deadline.

Section 10400.6(g)(6): The respondent prosecutor may file a motion for reconsideration of a commission determination within 30 days of service of the determination upon the respondent prosecutor. The respondent prosecutor must demonstrate that (i) the new evidence could not have been discovered with due diligence at the time of the hearing and (ii) would have resulted in a different outcome. The commission reserves the authority to hold a hearing to evaluate the newly discovered evidence.

- The 30-day time limit on motions for reconsideration should be removed. New evidence may come to light more than 30 days after a determination by CPC. A motion for reconsideration of a court's order on the basis of new evidence has no time limit in the CPLR (*see* CPLR § 2221[e]), and the same consideration should apply here. In the alternative, any time limit should begin to run from the discovery of the new evidence.

Section 10400.6(h): Hearing. If, upon receipt of the answer, or upon expiration of the time to answer, the commission shall direct that a hearing be held with respect to the complaint, the respondent prosecutor involved shall be notified in writing of the date of the hearing either personally, at least 20 days prior thereto, or by certified mail, return receipt requested, at least 22 days prior thereto. The respondent prosecutor has the right to be present for the hearing. If the respondent prosecutor fails to appear, the hearing shall continue in their absence. Hearings shall be held at a commission office or such other place as the parties and referee may agree, or the clerk of the commission shall direct. The commission may require that any hearing be conducted virtually and may issue public protocols for determining when and how such a virtual hearing should be conducted. The referee shall set a hearing date, regulate the course of the hearing, make appropriate rulings, set the time and place for adjourned or continued hearings, and shall have such authority as specified by the commission pursuant to section 499-e, subdivision 2 of the Judiciary Law.

- The 20-day notice provision is inadequate, especially for upstate prosecutors required to travel to Manhattan for their hearings. For this reason and the reasons set forth above regarding Sections 10400.6(c) and 10400.5(e), lengthier notice of hearings should be provided. To protect the prosecutor's right to due process, all hearings should be live and in person, unless the prosecutor requests or agrees to a virtual hearing. CPC should be required to hold a hearing whenever one is requested by a respondent prosecutor. Moreover, members of the public, including other prosecutors, must be allowed to attend the hearing if the respondent prosecutor requests a public hearing. The hearing must be transcribed, and, if the prosecutor requests a public hearing, minutes of the hearing must be made available to the public. And, again, provisions for reasonable extensions should be in the RAPs.

Section 10400.6(i): Discovery. Upon written request of the respondent prosecutor, the administrator shall, at least 10 days prior to the hearing or any adjourned date thereof, make available to the respondent prosecutor without cost electronic copies of all documents which the administrator intends to present at such hearing, a list of the witnesses administrator intends to call to give testimony and any written statements made by witnesses who will be called to give testimony. The administrator shall, in any case, make available to the respondent prosecutor at least 10 days prior to the hearing or any adjourned date thereof any exculpatory evidentiary data and material relevant to the complaint, whether or not written or recorded, and whether such evidentiary data and material is directly relevant to the charges or is impeachment material.

- Just as the Legislature has provided that all criminal defendants are entitled to automatic discovery of all relevant information pertaining to the charges against them, so respondent prosecutors in "quasi-criminal" proceedings (*Hallock*, 37 N.Y.3d at 442) should be furnished automatically with all relevant information pertaining to the complaints against them, especially any exculpatory or impeaching evidence, regardless of whether the CPC intends to present the information or call the witness at the hearing. The failure by CPC to furnish a prosecutor with complete automatic discovery within a certain time period should result in the dismissal of the complaint against the prosecutor. Accordingly, this subsection should be modeled on C.P.L. § 245.20.

Section 10400.6(j): Burden of Proof. The administrator or administrator's designee has the burden of proving, by a preponderance of the evidence, the facts justifying a finding of misconduct.

- Given that the respondent prosecutor's reputation and livelihood is at stake in a CPC proceeding, the burden of proof should be clear and convincing evidence, not a mere preponderance of the evidence. While the burden of proof in a Grievance Committee proceeding also is a preponderance of the evidence, a Grievance Committee proceeding is inherently fairer than a CPC proceeding and with stronger confidentiality provisions. Therefore, a higher burden of proof should apply to CPC proceedings.

Section 10400.6(l): Complainant. The complainant may be notified of the hearing and unless they are subpoenaed as a witness by the prosecutor, their presence thereat shall be within the discretion of the commission.

- The complainant should be required to appear and testify in person at any CPC hearing, except for good cause shown. Just as the criminal defendant has the right to confront his or her accuser, so the respondent prosecutor should have the right to confront the person attacking his or her reputation and livelihood.

The Right to Counsel

Sections 10400.5(c), 10400.6(m)

Section 10400.5(c): Party Participation. The prosecutor shall have the right to be represented by counsel during any and all stages of the investigation. The prosecutor or

their counsel may present evidentiary data and material relevant to the complaint, through submission of such data and material, by making an oral statement, or both.

- The right to counsel is meaningless if prosecutors—many of whom are recent law school graduates with large student loan debts and relatively low salaries—cannot afford to hire lawyers to defend themselves in CPC investigations. Indeed, because there is no disincentive to filing frivolous, harassing complaints against a prosecutor, bad actors may well use continuous complaints as a method of bleeding a targeted prosecutor of funds. A provision should be added to the RAPs providing that the State will pay all attorneys' fees incurred by any prosecutor against whom a complaint has been filed.

Section 10400.6 (m): Right to Counsel. The respondent prosecutor shall have the right to be represented by counsel during any and all stages of the hearing and shall have the right to call and cross-examine witnesses and present evidentiary data and material relevant to the complaint.

- As noted above, the right to counsel is illusory if a prosecutor cannot afford to hire an attorney.

The Appellate Division's Exclusive Jurisdiction Over Attorney Discipline

Section 10400.7(c): Upon 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.

- As previously mentioned, the proposed publication of CPC's "findings and recommendations and the record of its proceedings"[2] is unconstitutional because this would infringe on "[t]he Appellate Division['s] . . . exclusive jurisdiction over attorney discipline, including the ability to issue 'public censures' of attorneys who violate the disciplinary rules." *Soares*, 68 Misc. 3d at 289.

- It is worth noting that the CJC statute shields from public view allegations of judicial misconduct to a greater extent than the CPC and the proposed RAPs shield allegations of prosecutorial misconduct. Judiciary Law § 44(7)

[2] The record would, of course, include any previously confidential "letter of dismissal and advisement."

states that upon the completion of service of the CJC, "the determination of the commission, its findings and conclusions and the record of its proceedings shall be made public and shall be made available for public inspection." Under the provision, a "determination" is a decision that a "judge be admonished, censured, removed or retired." In contrast, as for prosecutors, the CPC statute and the proposed RAPs provide that, "[u]pon completion of service" of the CPC, its "findings and recommendations and the record of its proceedings shall be made public and shall be made available for public inspection"—without reference to a "determination" that punishment is warranted. Thus, it appears the CJC requires disclosure of only those determinations that lead to a judge's punishment, whereas the CJC allows for disclosure of all findings and conclusions (and the record thereof) relating to prosecutors, even if the findings do not lead to punishment.

- Furthermore, NYCRR § 7001.3 states that the "comments, suggestions and recommendations" that the CJC issues in "a letter of dismissal and caution" to a judge are "confidential." There is no similar provision in the proposed CPC rules and procedures relating to prosecutors. It is unclear why there is inconsistent and disparate treatment of judges and prosecutors.

In closing, notwithstanding my concerns and criticisms relating to CPC's proposed rules and procedures, I appreciate the opportunity to weigh in on this significant change in the landscape of how prosecutors will be scrutinized. My staff and I have taken painstaking efforts to analyze the proposed guidelines. I can only hope that my recommendations will be considered, given the serious repercussions that the application of these rules and procedures will have for prosecutors across the state and which will leave a lasting impact on the entire profession. Thank you for your consideration.

Sincerely,

Anne T. Donnelly

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