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November 14, 2024

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Michael A. Simons
Chair, New York State Commission on Prosecutorial Conduct

RE: Comments on Amended Proposed Rules

Dear Mr. Simons:

The District Attorneys Association of the State of New York (DAASNY) appreciates the opportunity to once again comment on the proposed operating rules and procedures (the “Rules”) for the Commission. Although some of our initial recommendations were addressed in the latest version of the Rules, we continue to have concerns about the Commission’s operations that could impact not only the careers of individual prosecutors, but also the integrity of the criminal justice system. Elements of the proposed Rules are still unfair, vague, and inconsistent with due process, and I fear that, as a result, the Commission will discourage young attorneys from pursuing careers as prosecutors. Furthermore, as written, some of the proposed Rules continue to have the potential to damage the administration of justice and to erode New Yorkers’ confidence in the criminal justice system. Part of that latter concern is the possibility that criminal defendants will take advantage of the Commission to disrupt legitimate investigations and prosecutions.

Due Process Concerns

Notice of Allegations. The latest draft of the proposed Rules continues to lack sufficient requirements regarding the specificity of a complaint. As set forth in proposed Rule 10400.1(f), an initial complaint need only “[make] an allegation about a prosecutor’s conduct,” with no requirement for any specificity in that allegation. An administrator’s complaint, filed when the Commission initiates a complaint, does not even, by definition, require that minimal level of specificity. *See* Proposed Rules 10400.1(b) and 10400.2(e). Even a “formal written complaint,” which must be signed and verified by the Commission’s administrator, although requiring that it be “detailed,” Proposed Rule 10400.1(j), does not have any requirement concerning the level of detail that it contains.

Due process demands that litigants be given sufficient notice of the nature of the allegations against them, notice that is essential to the preparation of an adequate defense. Respondent prosecutors are entitled to no less than any

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other litigant. DAASNY continues to recommend that the Rules be amended to require that all Commission complaints be required to provide sufficient notice of the misconduct being alleged against a respondent prosecutor. That notice includes both detailed factual allegations and specificity regarding the provisions of the law that the respondent prosecutor purportedly violated. Certainly, in the case of administrator's complaints filed at the behest of the Commission, or the case of formal written complaints filed by the administrator when proceedings have progressed beyond the investigation stage, it is not too much to ask that the complaint specifically set forth the rule of law or procedure, or case, or other standard that the respondent prosecutor is alleged to have transgressed.

Time Limitations. In the previous public comment period, DAASNY raised several concerns about time limitations applicable to various Commission proceedings. The Commission's amended proposed Rules address most of those concerns, but one remains: The 20-day time limitation for a respondent prosecutor to answer a complaint.

As we noted in our earlier submission, 20 days is too short a period to answer a complaint. Occasions will arise where a prosecutor is on leave for longer than that 20-day period, and, therefore, does not get notice of the complaint in time to answer it. The amended proposed Rules do allow for a motion to enlarge the time to answer. That is a positive change, to be sure, but that change does not fully cure the defect, because that motion must also be filed within 20 days of service of the complaint. A prosecutor who could not answer the complaint within 20 days would also be unable within 20 days to make a motion to enlarge the time to answer. The proposed Rules must be amended again, to either lengthen the time to answer a complaint, or to provide that the Commission must retrospectively consider a late-filed motion to enlarge the time to answer.

Burden of Proof. In our previous submission, DAASNY recommended that the burden of proof in Commission hearings should be clear and convincing evidence, rather than merely a preponderance of the evidence. The Commission rejected that recommendation, but we ask that the Commission reconsider. Commission proceedings raise the potential for adverse effects on the careers of respondent prosecutors. In addition, there is a real threat that the Commission's procedures will be abused by criminal defendants or their lawyers to disrupt legitimate criminal prosecutions by complaining to the Commission about the prosecutors handling their cases. A higher burden of proof is essential to the fair administration of the Commission's authority. The livelihoods of New York State's prosecutors and the integrity of legitimate criminal prosecutions should not be placed in jeopardy under a mere preponderance of the evidence standard.

Verification and Sworn Testimony. The latest version of the proposed Rules requires that a complaint, other than one submitted by the Commission's administrator, need not be verified, unless directed by the Commission. Proposed

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Rules 10400.1(f) and 10400.2(b). In our submission concerning the previous version of the Rules, we requested that verification be a requirement for all complaints. The Commission did not amend the proposed Rules in that respect, but, instead, softened verification requirements that were present in the previous version of the Rules. Furthermore, in our previous submission, we requested that the Rules be amended to require a complainant to testify under oath. The Commission did not adopt that requirement, but, instead, in its response to Comment 59, determined that complainants need not have personal knowledge or relevant information about their complaints. We ask that the Commission reconsider those determinations.

As noted above, Commission proceedings have the potential to be abused by criminal defendants, but, also, by those who have motives to harass prosecutors. Without a verification requirement for complaints, and without a requirement of sworn testimony from complainants, the potential for that abuse will skyrocket. Indeed, anyone who, for example, sees something that they do not like in the press concerning a prosecutor, or anyone who has a personal vendetta against a prosecutor, will be permitted to file a complaint before the Commission, with no factual or legal basis for that complaint, and without any requirement that the person back up that allegation with any type of sworn evidence. Although, presumably, many of those complaints will be frivolous and easily disposed of, those respondent prosecutors will be required to defend against those complaints, potentially disrupting their work, and potentially resulting in a financial burden on them. Requiring that complaints be verified and requiring that complainants testify under oath will go a long way toward short-circuiting those potential abuses on the Commission's proceedings. We request that such requirements be added to the proposed Rules.

Notification of Dismissal. The current version of the proposed Rules and procedures does not provide any mechanism to notify a respondent prosecutor of the dismissal of a complaint, other than by service of the Commission's determination following a hearing. If a complaint is dismissed before a hearing is ordered, nothing in the proposed Rules requires any notification of the respondent prosecutor at all. Indeed, the latest version of the proposed Rules removed former section 10400.3, which at least required notification to the respondent prosecutor of the dismissal of a complaint when the prosecutor had previously been notified of its filing. As written now, the Rules would permit dismissal of pre-hearing complaints, without the respondent prosecutor ever being notified. In the case of disciplinary proceedings before an Appellate Division grievance committee, the committee is required to notify the respondent attorney when it dismisses a complaint. *See* Rules for Attorney Disciplinary Matters 1240.7(d)(2)(i). Surely, the process of the Commission in this respect should be no less stringent than that required of the grievance committees. The Rules should be amended to require notification of a respondent prosecutor of any disposition of a complaint, including dismissal, before or after a hearing is ordered. Without that notification requirement, respondent prosecutors who prevail in Commission proceedings may never know that outcome and may never obtain the closure that dismissal of complaints against them would carry.

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Access to Records. In its submission regarding the previous version of the Rules, DAASNY recommended that the Rules be amended to require the Commission to obtain a court order authorizing disclosure of any materials respondent prosecutors need to mount a defense, but that they are legally precluded from obtaining. The Rules were amended to provide that “[e]ither party may request that the commission seek a court order to access materials that are prohibited by statute from disclosure.” Proposed Rules 10400.3(d). That change in the Rules was certainly positive, but it fails to remedy those instances where relevant materials cannot be obtained by court order, such as materials subject to a protective order; wiretap information; cases where the records are sealed pursuant to several Criminal Procedure Law statutes; and, most importantly, grand jury materials. *See Matter of Suffolk County District Attorney*, 58 N.Y.2d 536 (1983) (disclosure of grand jury minutes denied in civil forfeiture case; no compelling and particularized need for disclosure shown). Indeed, grand jury testimony will often provide justification for a respondent prosecutor’s actions in handling a case but, due to the inherent secrecy of grand jury proceedings, may be legally unavailable to the respondent prosecutor when the time comes to defend against what may be, as noted, baseless, unverified, and unsworn allegations of misconduct. Furthermore, the Rules, as now written, do not account for situations where a prosecution agency may have a legitimate reason to prevent disclosure of information, such as in situations involving ongoing, sensitive investigations.

There must be built into the Rules some mechanism to enhance a respondent prosecutor’s ability to defend against Commission proceedings when essential records are unavailable. In our submission regarding the previous version of the Rules, we suggested that a respondent prosecutor be permitted to respond to the allegations of a complaint with a statement that essential records are unavailable or with the ability to assert a Fifth Amendment privilege, and we argued for a rule requiring the Commission to draw an inference favorable to the respondent prosecutor when essential records are unavailable. The Commission rejected those suggested amendments to the Rules, but we ask that the Commission reconsider.

Interference with Criminal Investigations

DAASNY remains concerned that Commission proceedings will disrupt criminal investigations, resulting in injustice to those who are accused of crime, to those who are victims of crime, and, ultimately, to all New Yorkers. In our previous submission, we recommended that Commission proceedings be deferred until completion of any related criminal investigation, and that all relevant prosecution agencies be notified of any Commission action. The Commission chose not to adopt those recommendations, but we ask that the Commission reconsider. Our recommendations are reasonable and will not disrupt any ultimate Commission determination but will help ensure that legitimate are not compromised.

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I ask that the Commission's proposed Rules be further amended to address the above concerns. As written, the Commission's procedures are unfair to prosecutors, victims, and witnesses; will deny due process to respondent prosecutors; and will ultimately interfere with the administration of justice in New York State.

Sincerely,



Michael E. McMahon
Richmond County District Attorney
DAASNY President