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OF CRIMINAL DEFENSE LAWYERS

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November 6, 2024

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

Re: Comments to the Revised Proposed Operating Rules and Procedures

Dear Chair Simons:

The New York State Association of Criminal Defense Lawyers (NYSACDL) raises the following concerns in response to the revised Operating Rules and Procedures (herein the "revised proposed rules") published on October 2, 2024, by the New York State Commission on Prosecutorial Conduct (CPC).

NYSACDL is a statewide organization of criminal defense attorneys, representing over 1,700 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.

1. CPC's Jurisdiction Should Extend to Former Prosecutors. The Revised Rules have not Clarified the Position of the CPC

During the initial commentary period, NYSACDL, among others, raised concerns that the proposed rules were ambiguous as to whether CPC's jurisdiction extends to former prosecutors. CPC declined to address this issue in the revised rules. Instead, CPC simply stated in Comment 3: "The comment was reviewed by the commission and no amendment was determined to be necessary." We reiterate our concerns that the proposed rules are ambiguous and ask CPC to clearly state that the definition of prosecutor includes former prosecutors.

Without such clarity, we are concerned that the CPC may not fulfill its full jurisdictional responsibilities under the enabling statute, Judiciary Law

Section 499. The Rules should make explicit that the CPC's mandate to consider complaints concerning any alleged misconduct by a prosecutor means conduct that occurred in the course of that attorney's employ as a prosecutor – whether or not he or she remains in that role at the time of the complaint. We believe that Section 499's use of the term "prosecutor" clearly includes former prosecutors. An example in support of our position is the statutory requirement that the CPC's administrator not be "a prosecutor," since one could not be the administrator and a current prosecutor at the same time.

In addition to being inconsistent with the broad meaning of "prosecutor" throughout Section 499, if CPC were to limit its jurisdiction to current prosecutors, it would completely undermine the law's clear purpose and remove from CPC's scrutiny many of the most egregious types of prosecutorial misconduct. As is now well documented, the misconduct of withholding *Brady* material has caused numerous wrongfully convicted defendants to spend years and even decades behind bars. In these cases, it is the ongoing concealment of exculpatory evidence that continued, prolonged, and exacerbated the initial misconduct — often well after the offending prosecutor has left office. Among many other cases, we note the CPL Art. 440 dismissals of convictions in *People v. Jabar Washington* (Kings County Indictment 2585/1996), on July 12, 2017, 21 years post-conviction, and *People v. Bell, Bolt and Johnson*, 71 Misc. 3d 646 (Queens Co. Supreme Court, 2021), following the defendants '22 years of incarceration. To send a message to miscreant prosecutors that they can insulate themselves from CPC scrutiny by prolonging the cover-up of the initial misconduct until they have moved on to other employment, may provide incentive to continue the concealment.

Our position is consistent with the legislative history of the statute creating the CPC, Section 499, which includes the publicly available video recordings of the joint legislative hearing, the Assembly and Senate debates, as well as the Assembly vote, which manifests a clear intent by the Legislature to include former prosecutors in CPC's jurisdiction. In fact, during the debate, numerous Legislators repeatedly expressed their support for the CPC, as it was expected to consider scores of misconduct in scores of decades-old New York cases that had never been addressed, including those involving former prosecutors.

For example, Assemblyman Charles Barron explicitly noted: "We had a Brooklyn DA... prior to Brooklyn D.A. Thompson, that Brooklyn DA, prior to him wrongfully convicted countless, countless people... This Commission will hold people like him accountable." (referring to the former D.A.) No Assemblyman objected to his comments.

Limiting the CPC's jurisdiction to current prosecutors would violate the enabling legislation, as well as the intent of the statute's drafters and the Legislature that enacted it. Furthermore, it would allow the grievance committees to continue their practice, for the most part, of failing to hold accountable even the worst offending prosecutors, the very concern that led to the CPC's creation in the first place. We therefore reiterate our request that the rules be amended to clearly state that CPC's jurisdiction includes former prosecutors.

2. CPC's Revised Rules Should Include Standards

During the initial commentary period, NYSACDL objected because the proposed rules did not contain any standards. We believe that the lack of standards could lead to arbitrary and inconsistent handling of complaints and recommendations for sanctions. CPC declined to address this issue. See Comment 45.

We request that the CPC reconsider and include clear and unambiguous standards in either the Operating Rules and Procedures or the guidance documents. We believe that this is especially critical in the initial review of complaints by members of the staff, for the imposition of sanctions, and for notice to complainants. The inclusion of standards will provide clear guidance to staff and serve to reduce or eliminate inconsistency and the potential for even the appearance of arbitrary decision making.

Specifically, we request that either the rules or guidance document include standards for the following sections: §10400.2, Processing of Complaints; §10400.3, Investigation Procedures; §10400.4, Formal Complaint Process; and §10400.5, Final Disposition.

Most importantly, we request that standards be promulgated as to the manner in which investigators commence and handle preliminary investigations, as this initial screening is a critical stage of the process and will determine which complaints are denied outright and which are further investigated.

3. Automatic Investigation of Judicial Findings of Misconduct

NYSACDL had raised the issue of whether there should be an automatic investigation into judicial findings of misconduct. The proposed rules did not address this issue. See Comment 35. We urge CPC to include such requirement in the proposed rules or in the guidance documents. In our experience, a judicial finding of misconduct is rarely issued unless a prosecutor has engaged in blatant, egregious, and documented misconduct. Further, the evidence of that misconduct is already a matter of record. Any such finding should mandate an automatic investigation by CPC to determine if disciplinary action is warranted.

4. Misconduct Includes Being Unfit to Hold Office or Otherwise Unqualified

In Comment 24, CPC stated that “two commentors requested that the commission not investigate complaints regarding a prosecutor’s “qualifications” and “fitness to perform.” In response, CPC stated that the request was reviewed and “accepted.”

We object to the CPC excluding from its review complaints that a prosecutor was unqualified or unfit to hold office. First, those terms are ambiguous and might include a variety of misconduct that should be considered by CPC. A prosecutor might be “unqualified” because he allowed his bar license to lapse and continued to appear in court, or because he engaged in dishonest or illegal conduct, rendering him unqualified and unfit to hold office. Both of these terms are too vague to provide guidance and create an unintended arbitrary

loophole. A prosecutor's fitness to perform could span a broad spectrum of conduct, ranging from those arising from personal issues to blatant misconduct in the performance of his responsibilities as a prosecutor. There is no basis in the statute to exclude such conduct from CPC's review.

We note that Rule 8.4(b) of the Rules of Professional Conduct expressly prohibits an attorney from "engag[ing] in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer. Comment 24 would seem to exempt such clear misconduct from CPC's authority to investigate.

We request that CPC either reverse its position refusing to investigate these types of complaints, or clarify its comment to provide more specificity as to what conduct it would exempt. As it stands, the comment appears to create an arbitrary exemption for conduct expressly prohibited by the Rules of Professional Conduct.

5. CPC's Jurisdiction is Not Limited to Specific Instances of Misconduct.

We object to CPC's position that it will only review specific instances of misconduct. See Comment 36. It is a short-sighted view that would curtail the goals of the enabling legislation, which included no such limitation. It also fails to recognize the policies in many prosecutors' offices that lead to and perpetuate repeated examples of misconduct.

For example, many egregious *Brady* violations which have recently come to light resulted from an office-wide practice that shielded such evidence from the trial prosecutor, or otherwise instilled a policy and mindset of not disclosing exculpatory evidence. This includes *Batson* issues in which prosecutors were instructed to routinely strike all black jurors in accordance with a circulated checklist. To exclude CPC's jurisdiction review whether a District Attorney or his supervising attorneys created and furthered an atmosphere or policies where such misconduct was encouraged, rewarded, or expected, is contrary to the intent of the Legislature.

We note that Comment 36 is inconsistent with the holding by the Court of Appeals in *People v. Steadman*, 82 N.Y.2d 1 (1993), where the defendant's conviction was reversed as a result of an office-wide practice that kept him from being advised of a cooperation agreement. The courts thus hold the DA's Offices accountable for office-wide practices that result in a deprivation of a defendant's constitutional rights, and the CPC should investigate such practices and likewise hold those responsible accountable.

Similarly, Rule 8.4 prohibits a "lawyer or law firm" from engaging in misconduct, reflecting an acknowledgement that misconduct may not be limited to individual instances and might reflect a pervasive pattern of dealing and office-wide policy.

Limiting CPC's jurisdiction to individual instances, when the misconduct might be the result of an office-wide practice or policy, and sanctioned by management, is inconsistent with the Rules of Professional Responsibility, as well as the Legislature's goal. It is also

unsupported by the enabling legislation. It will not address the underlying systemic problem found in a number of District Attorney Offices.

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

Sincerely,

A handwritten signature in black ink, appearing to be 'SE', with a long horizontal line extending to the right.

Steven Epstein
President