



# **New York State Defenders Association, Inc.**

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## **MEMORANDUM**

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

**FROM:** Susan Bryant, Executive Director, and Maxwell Kampfner, Staff Attorney  
New York State Defenders Association

**DATE:** November 12, 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 revised operating rules and procedures of the Commission on Prosecutorial Conduct (“the Commission”) that would add a new Part 10400 to Title 9 NYCRR. We appreciate the opportunity to comment on the revised proposed rules and procedures as well as the Commission’s assessments of public comments.

NYSDA has long supported establishing a Prosecutorial Conduct Commission, submitting a memo in support of a bill to create one as early as 2014. On June 24th of this year, NYSDA submitted comments on the first draft of these proposed operating rules. We are grateful that the Commission revised the rules regarding reporting by agreeing to make findings and recommendations available online,<sup>1</sup> as well as eliminating letters of dismissal and advisement.<sup>2</sup> And while these revised operating rules and procedures are an important step to finally getting the Commission off the ground, we still have significant concerns about the lack of transparency and standards in the proposed regulations.

In the statute creating the Commission, the legislature granted the Commission authority to dismiss certain complaints without any investigation if “the complaint on its face lacks merit.”<sup>3</sup> While the statute rightly does not force the Commission to investigate each and every complaint, it is silent on how the Commission is to come to the determination of what lacks merit “on its face.” Yet even in these revised procedures, there is still no clarity on how the Commission will decide to dismiss a complaint unilaterally with no investigation.

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<sup>1</sup> See Comment 60, Assessment of Public Comments, available at: [https://www.ny.gov/sites/default/files/2024-10/assessment\\_of\\_public\\_comments.pdf](https://www.ny.gov/sites/default/files/2024-10/assessment_of_public_comments.pdf)

<sup>2</sup> Comment 4, *ibid*

<sup>3</sup> “Upon receipt of a complaint (a) the commission shall conduct an investigation of the complaint; or (b) the commission may dismiss the complaint if it determines that the complaint on its face lacks merit.” Judiciary Law § 499-f, available at <https://www.nysenate.gov/legislation/laws/JUD/499-F>

Judiciary Law 499-a tasks the Commission with the authority to review and investigate conduct “potentially violative of statutes, the legal rights of private persons, whether statutory, constitutional or otherwise; case law; or court rules . . . .” This covers a range of conduct, from discovery infractions to egregious and flagrant ethical violations. Many examples of witness tampering, or suborning perjury, might seem far-fetched or fanciful at first glance but turn out to be true.<sup>4</sup> It is rare for an initial complaint to carry with it any investigation of evidence of misconduct that has occurred in an opaque, closed-door system -- that fact is the foundational truth behind the creation of the Commission in the first place. But allowing the dismissal of complaints unilaterally for that very lack of evidence belies the entire point of the Commission. It is not simply the lack of a definitional standard, but an existential flaw that threatens to render the entire endeavor pointless.

What is even more troubling is that this is not an issue where the Commission is being reined in by an overly stringent statute. The statute is purposefully and correctly vague -- a complaint *may* only be dismissed if it lacks merit on its face, with the presumption that the Commission’s rules and procedures would follow with specificity on how that is to be assessed. But instead of heeding the statute’s intention and narrowly and specifically explaining how and when unilateral dismissal may be done, the proposed rules give no direction to the Commissioners whatsoever.

This lack of transparency extends to the Commission’s proposed regulations even after a dismissal has been made. As it stands, the proposed rules do not require the Commission to give a complainant information about why a complaint has been dismissed. (Since there are no governing standards for why a unilateral dismissal has been granted, this is perhaps unsurprising). And while Comment 6 to the assessment of public comments<sup>5</sup> says that a complainant may file a new complaint if they learn of new information after dismissal, without any indication of why the complaint was dismissed in the first place there is no way for a complainant to know what new information might change the Commission’s determination. As it stands, a unilateral dismissal with no explanation will deter even the most diligent complainant.

In addition to this lack of transparency and explication, there is a pronounced lack of standards throughout the proposed rules. There is a seemingly arbitrary calculation of which determinations have standards of proof and which are not. For example, 10400.4(d) details a standard for a

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<sup>4</sup> For examples, see Danielle Robinson’s 2020 article in the *Brooklyn Law Review*, “Prosecuting Misconduct: New York’s Creation of a Watchdog Commission,” available at: <https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=2249&context=blr> and George A. Weiss’s 2011 article in the *Drake Law Review*, “Prosecutorial Accountability after *Connick v. Thompson*,” available at: [https://drakelawreview.org/wp-content/uploads/2015/06/irvol60-1\\_weiss.pdf](https://drakelawreview.org/wp-content/uploads/2015/06/irvol60-1_weiss.pdf). More generally, see The Innocence Project’s “Prosecutorial Oversight: A National Dialogue in the Wake of *Connick v. Thompson*” (March 2016), available at: [https://www.innocenceproject.org/wp-content/uploads/2016/04/IP-Prosecutorial-Oversight-Report\\_09.pdf](https://www.innocenceproject.org/wp-content/uploads/2016/04/IP-Prosecutorial-Oversight-Report_09.pdf) and The National Registry of Exoneration’s 2020 report, “Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement,” available at: [https://www.law.umich.edu/special/exoneration/Documents/Government\\_Misconduct\\_and\\_Convicting\\_the\\_Innocent.pdf](https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf).

<sup>5</sup> “Comment 6: Several commentors requested that a complainant be permitted to file a motion for reconsideration if their complaint is dismissed. Response 6: The comment was reviewed by the commission and no amendment was determined to be necessary. If a complainant learns of new information after they are notified the complaint was dismissed, they may file a new complaint.” Assessment of Public Comments, available at: [https://www.ny.gov/sites/default/files/2024-10/assessment\\_of\\_public\\_comments.pdf](https://www.ny.gov/sites/default/files/2024-10/assessment_of_public_comments.pdf)

summary determination,<sup>6</sup> and 10400.5(f) details a standard for dismissal after a hearing.<sup>7</sup> However there are no standards for granting a motion to dismiss, a motion to confirm or disaffirm the findings of the referee, or a motion to “alter an action taken or order issued by the commission.”<sup>8</sup> There are also no procedures, rules, or criteria for determining how to proceed with an investigation after it is has been commenced.<sup>9</sup> These are not mere technicalities that can be relegated to guidance documents issued without any public comment -- these are the very teeth and point of the Commission. Why Commissioners dismiss complaints, or disaffirm the findings of a referee, are important determinations for these rules to explain in full. Instead, they are completely silent on them.

Finally, as letters from other advocacy organizations like It Could Happen to You! have detailed in more particularity, we continue to be concerned that the Commission has not provided a clear answer to the question of whether it will exercise jurisdiction over attorneys who are no longer employed as prosecutors but are alleged to have committed misconduct while they were prosecutors. The ramifications of a wrongful conviction, or a coerced plea, do not simply cease to exist when the prosecuting attorney happens to change jobs. Limiting complaints to only current prosecutors is a gross misunderstanding of the ways in which prosecutorial misconduct affects New Yorkers, as well as the legislative intent behind the creation of the Commission.

We thank you for the opportunity to be heard on these revised 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](mailto:sbryant@nysda.org).

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<sup>6</sup> “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.”

<sup>7</sup> “The commission may dismiss the complaint if it determines there is insufficient evidence to support the allegations, if the administrator or administrator’s designee has not carried its burden of proof, or for other justifiable reasons.”

<sup>8</sup> Section 10400.4(g)(1) lists these as motions the Commission “shall decide,” but gives no standard or proof or criteria for any of them. If the Commission plans to use a standard that currently exists in another legal context, such as for a civil motion to dismiss, the rules should make that clear.

<sup>9</sup> Section 10400.3(a) “Investigation Procedures” states that an investigation “shall only be authorized by the commission” and then goes on to explicate notice, participation, evidence and recording issues. However, it offers no information on what an investigation will actually look like, how it will proceed, or what the scope, techniques, or scale of the investigation will be. While some of this information may be appropriate for guidance documents, the rules and procedures should give the public a basic overview of the process so they have an opportunity to comment on it.