

## New York State Commission on Prosecutorial Conduct

### Operating Rules and Procedures

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#### Section 10400.1 Definitions

For the purpose of this Part, the following terms have the following meanings:

- (a) *Administrator* shall mean an individual appointed by the commission pursuant to section 499-c, subdivision 7 of the Judiciary Law.
- (b) *Administrator's complaint* shall mean a complaint signed by the administrator at the direction of the commission.
- (c) *Answer* shall mean a written response to a formal written complaint.
- (d) *Clerk of the Commission* shall mean an individual appointed by the commission pursuant to section 10400.12 of this Part.
- (e) *Complainant* shall mean a person or entity that submits a complaint to the commission.
- (f) *Complaint* shall mean a written communication signed and, if directed by the commission, verified by the complainant, making an allegation about a prosecutor's conduct pursuant to sections 499-a and 499-f of the Judiciary Law, or an administrator's complaint.
- (g) *Commission* shall mean the New York State Commission on Prosecutorial Conduct.
- (h) *Dismissal* shall mean a decision at any stage not to proceed further with a complaint and/or formal complaint.
- (i) *Electronic copy* shall mean a digital version of a document or piece of information accessible via electronic devices, including computers, tablets, and smartphones.

- (j) *Formal written complaint* shall mean a detailed, written allegation of prosecutorial misconduct, signed and verified by the administrator, submitted to initiate a hearing concerning the prosecutor's conduct.
- (k) *Hearing* shall mean a proceeding under section 499-f, subdivision 4 of the Judiciary Law wherein the commission may take the testimony of witnesses and receive evidentiary data and material relevant to the complaint. The respondent prosecutor shall have the right to call and cross-examine witnesses and present evidence and material relevant to the complaint.
- (l) *Initial review and inquiry* shall mean the first stage of the commission's process, in which the commission staff may engage in preliminary analysis and fact-finding to aid the commission in determining whether to authorize an investigation.
- (m) *Investigation* shall mean an examination of a specific complaint and/or the prosecutor's conduct, including the collection and analysis of relevant evidence, testimony under oath or affirmation, and documentation, conducted by the commission or its staff. An investigation shall only be initiated at the direction of the commission.
- (n) *Prosecutor* shall mean a district attorney or any assistant district attorney of any county of the State in an action to exact any criminal penalty, fine, sanction or forfeiture.
- (o) *Referee* shall mean an individual appointed by the commission pursuant to section 499-e, subdivision 2 of the Judiciary Law.
- (p) *Respondent* shall mean the individual against whom a formal written complaint has been filed with the commission.
- (q) *Virtual or virtually* shall be used to refer to commission proceedings conducted with two-way videoconferencing that permits all parties to simultaneously hear and observe other participants.

### **Section 10400.2 Processing of Complaints**

- (a) The commission shall receive complaints against any prosecutor with respect to the prosecutor's conduct or the performance of the prosecutor's official duties.
- (b) A complaint shall be in writing, signed by the complainant, and , if directed by the commission, verified by the complainant.
- (c) The commission staff may engage in an initial review and inquiry of the complaint and shall provide a recommendation to the commission about the disposition of a complaint.
- (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.

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

### **Section 10400.3 Investigation Procedures**

- (a) An investigation shall only be authorized by the commission.
- (b) Notice of Investigation. Upon receipt of a complaint or after an initial review and inquiry, the commission may initiate an investigation into the prosecutor's conduct. The prosecutor shall be notified in writing of the commencement of the investigation and provided with a copy of the complaint.
- (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.
- (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. Either party may request that the commission seek a court order to access materials that are prohibited by statute from disclosure. 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.
- (e) Criminal Investigations. The prosecuting agency may inform the commission by affirmation, with specificity and particularity in writing to the administrator, of its position that the commission's investigations will substantially interfere with the agency's own criminal investigation.
- (f) 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. Failure to appear may be deemed an admission unless the prosecutor provides good cause for failing to appear. Electronic copies of the transcripts shall be made available to the prosecutor without cost.

- (g) Recording and Transcribing. All interviews pursuant to a subpoena shall be recorded and transcribed.
- (h) 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.
- (i) Disposition. Based on the report, the commission may dismiss the complaint, direct further investigation, request a written response from the prosecutor, direct the filing of a formal written complaint, or take any other action authorized by law.

#### **Section 10400.4 Formal Complaint Procedures**

- (a) Applicable Law. If the commission determines that a hearing is warranted it shall direct that a formal written complaint signed and verified by the administrator be filed. Section 499-f, subdivision 4 of the Judiciary Law provides the procedures to be followed for a hearing.
- (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.
- (c) Answer. The respondent prosecutor shall file a written answer to the formal written complaint with the commission within 20 days of such service or seek an extension for good cause within 20 days of 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.
- (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 motion for summary determination is filed, the commission shall provide reasonable opportunity for the submission of briefs and oral argument.
- (e) Agreed statement of facts. Subject to the approval of the commission, the administrator and the respondent prosecutor may agree on a statement of facts and may stipulate in writing that the hearing shall be waived. In such a case, the commission shall rely upon the agreed statement of facts in forming the commission's findings of facts.

(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.

(g) Motions.

(1) The commission shall decide the following motions:

- i) a motion for summary determination;
- ii) a motion to dismiss a formal written complaint or any portion thereof;
- iii) a motion to confirm or disaffirm the findings of the referee;
- iv) a motion made prior to the appointment of the referee, except that the commission may refer such motion to the referee when such referral is not inconsistent with the other provisions of this section; and
- v) a motion to alter an action taken or order issued by the commission.

(2) The referee designated by the commission shall decide all other motions.

(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.

(4) 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. After 10 days of being notified, the parties may seek to file a motion to disqualify a referee for good cause.

(5) The respondent prosecutor may file a motion for reconsideration of a commission determination. 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.

(6) Moving parties shall obtain a motion schedule from the clerk of the commission for all motions to be decided by the commission.

(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.

(i) Discovery.

(1) 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. Exculpatory evidentiary data and material relevant to the complaint includes impeachment material. The failure of the commission to timely furnish any documents, statements and/or exculpatory evidentiary data and material provided for herein shall not affect the validity of any proceedings before the commission provided that such failure is not substantially prejudicial to the respondent prosecutor. If the referee determines that the failure was substantially prejudicial to the respondent prosecutor, the referee may adjourn the hearing and take any other action deemed necessary to cure the substantial prejudice.

(2) Upon the written request of the administrator, the respondent prosecutor shall, at least five days prior to the hearing or any adjourned date thereof, make available to the administrator without cost electronic copies of all documents that prosecutor intends to present at such hearing, a list of the witnesses the respondent prosecutor intends to call to give testimony and any written statements of witnesses who will be called to give testimony by respondent prosecutor, with the exception of prior statements of the respondent prosecutor.

(3) Either party may seek an adjournment if additional time is needed to review discovery. The request for adjournment must be made seven days prior to the hearing.

(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.

(k) Rules of Evidence. The rules of evidence applicable in New York courts shall be followed.

- (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.
- (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.
- (n) Recording and Transcription. A recording of the proceedings and of the testimony of witnesses at the hearing shall be taken and transcribed. The recording and transcription shall be kept with the records of the commission. An electronic copy of the transcript will be made available, without cost, to the respondent prosecutor.
- (o) The hearing shall not be public unless the respondent prosecutor involved shall so demand in writing.
- (p) The parties shall be afforded an opportunity to submit post-hearing briefs on issues of fact and law, including proposed findings, within 30 days after their receipt of the transcript of the hearing to the referee. For good cause, the referee may grant a reasonable extension. The referee shall set dates for service and filing of briefs and proposed findings that shall be served electronically.
- (q) The referee shall submit a report to the commission with proposed findings of fact and conclusions of law. No recommendation shall be made with respect to a sanction to be imposed by the commission. The referee shall submit such report no later than 30 days after receipt of post-hearing briefs and proposed findings from the parties or no later than 30 days after failure of the respondent prosecutor or the administrator to file such briefing. The clerk of the commission may grant reasonable extensions of time for the referee's report. The parties shall receive an electronic copy of the referee's report.
- (r) The commission shall consider the referee's report or agreed statement of facts and shall provide reasonable opportunity for the submission of briefs and oral argument with respect to such report or agreed statement of facts and with respect to possible sanctions. The commission may require that the oral argument be conducted virtually. The administrator and respondent prosecutor shall each serve and file an electronic copy of their brief to the commission via email or by such other means as the commission may direct.

#### **Section 10400.5 Final Disposition**

- (a) After the hearing, the commission may take appropriate action, ranging from dismissal of the complaint to recommending any measures available to the New York State Attorney Grievance Committees.
- (b) The commission shall transmit its findings of fact and recommendations and the record of the proceedings upon which such findings and recommendations are based, to the attorney grievance committee of the appellate division in the department where the

prosecutor was admitted to practice, which shall cause a copy thereof to be served either personally or by certified mail, return receipt requested, on the prosecutor involved.

- (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, at the office of the clerk of the appellate division in the department in which the record was filed, and online through the commission's website.
- (d) If the commission's findings and recommendations include any recommendation that a district attorney should be removed or retired, the commission shall simultaneously transmit its findings, recommendations, and record of its proceedings to the governor. If the commission's findings and recommendations include any recommendation that an assistant district attorney should be removed or retired, the commission shall simultaneously transmit its findings, recommendations, and record of its proceedings to the district attorney under whom such assistant district attorney serves.
- (e) Records of a prosecuting agency provided by the agency to the commission pursuant to the Judiciary Law shall not be subject to disclosure by the commission under article 6 of the Public Officers Law.
- (f) Dismissal. 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.
- (g) If during the course of or after an investigation or hearing, the commission determines that the complaint or any allegation thereof warrants action, other than in accordance with sections 499-f, subdivisions 7-8 of the Judiciary Law, the commission shall refer such complaint or the appropriate allegations thereof and any evidence or material related thereto to such person, agency or court for such action as may be deemed proper or necessary.
- (h) The commission shall notify the complainant of its disposition of the complaint.

#### **Section 10400.6 Confidentiality of Records**

The confidentiality of the commission's records shall be governed by section 499-g of the Judiciary Law. Disciplining staff for breaches of confidentiality shall be governed by procedures set forth in section 499-h of the Judiciary Law.

#### **Section 10400.7 Amending Rules**

The rules of the commission may be amended with the concurrence of at least six members.



### **Section 10400.8 Quorum, Voting**

Eight members of the commission shall constitute a quorum of the commission and the concurrence of six members of the commission shall be necessary. Two members of a three-member panel of the commission, as defined in section 499-e of the Judiciary Law, shall constitute a quorum of the panel and the concurrence of two members of the panel shall be necessary for any action taken.

### **Section 10400.9 Commission's Principal Office**

The commission's principal office shall be its New York City office.

### **Section 10400.10 Designation of Clerk of the Commission**

The commission shall designate a clerk of the commission who shall be a member of the bar of the State of New York. The clerk shall not participate in the investigation or in an adversarial capacity in any matter before the commission. The clerk shall assist the commission in all matters concerning its consideration of formal charges. The clerk shall serve as the commission's liaison to referees appointed pursuant to section 499-e of the Judiciary Law; shall correspond on behalf of the commission with attorneys with matters before the commission, including the administrator; shall schedule oral matters before the commission; shall assist the commission in the preparation of determinations and orders and shall transmit the record of matters to the appropriate entity pursuant to sections 499-f, subdivisions 7-8 of the Judiciary Law. The clerk shall advise complainants of the commission's disposition of the complaints pursuant to section 499-f, subdivision 10 of the Judiciary Law. The clerk shall perform such additional duties as may be assigned by the commission. The clerk shall serve at the pleasure of the commission and the terms and conditions of employment shall be established by the commission.