DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK

PRESIDENT
FRANK A. SEDITA, III
ERIE COUNTY

June 4, 2015

Hon. John J. Flanagan
Temporary President & Majority Leader
New York State Senate
Room 330 State Capitol Building
Albany, NY 12247

Re: Commission on Prosecutorial Misconduct

Dear Senator Flanagan:

The District Attorney's Association of the State of New York (DAASNY) is adamantly opposed to the proposed bill (S 24) to create a Commission on Prosecutorial Conduct (CPC). Some -- but not all -- of the reasons are as follows.

Setting the Standard for Ethical Prosecution Practice

"Prosecutorial misconduct" is a term widely and promiscuously used by law enforcement critics, the media and even some courts to describe every miscue by a prosecutor whether deliberate malfeasance, nonfeasance or a simple mistake, devoid of any negligence or bad faith. This was recognized in 2010 when the American Bar Association, in Resolution 100B, urged trial and appellate courts to differentiate between "error" and "misconduct."

Willful prosecutorial misconduct is an extremely rare occurrence, especially in the State of New York and especially over the last few years. This is so because the professional prosecutors in our state, upon our own accord, have taken steps to assure that we adhere to the highest ethical standards in the nation.

In 2009, DAASNY formed the Committee for the Fair and Ethical Administration of Justice (CFEAJ). Soon thereafter, CFEAJ, through its Best Practices Subcommittee, formulated protocols to prevent misidentifications and unreliable confessions, two of the leading sources of wrongful convictions. In 2011 we published a detailed ethical manual entitled *The Right Thing*. It has been continually updated and has been adopted by every District Attorney's Office in this state, and in many other states as well.

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The prosecution protocols and ethical guidelines created by New York prosecutors and adopted by every New York District Attorney's Office are considered state of the art. Our CFEAJ and its subcommittee on Best Practices has been publicly lauded by former Attorney General Eric Holder as a model for the nation and the United States Department of Justice has awarded grants to several other states to copy New York's model.

Notwithstanding these internal controls, external mechanisms also exist to hold prosecutors accountable for their conduct:

- Defendants can pursue claims of prosecutorial misconduct and prosecutorial error in the state courts by several methods, including a motion to set aside the verdict (see, CPL Article 330), a motion to vacate the judgment (see, CPL Article 440), appeals as a matter of right and appeals as a matter of the court's discretion. Additionally, defendants can, and often do, pursue these claims by filing writs of habeas corpus in the federal courts. It should be noted that most defendants who pursue these avenues, do so with the assistance of legal counsel, regardless of whether they can afford to pay for an attorney.

- Like all attorneys (except judges), District Attorneys are bound by the Rules of Professional Conduct and are subject to discipline by Grievance Committees, which conduct investigations on behalf of and report to the courts. District Attorneys can be publicly censured, suspended or disbarred should we engage in misconduct, and prosecutors have been so disciplined.

- Unlike any other attorney, the daily decisions of the District Attorney are very public and are subject to unrelenting scrutiny by the media.

- Unlike any other attorney, a District Attorney can be removed from handling any case at the discretion of the Governor.

- Unlike all other attorneys, a District Attorney is elected and thus is subject to removal from office by the public.

New York's 62 elected District Attorneys are amongst the most ethically conscientious, the most regulated and the most scrutinized in the country. Given this reality, it is well worth asking the following question: why should New York be the first and only state in this nation to create a CPC and single out District Attorneys for unequal treatment under the law?

One explanation appears to be based upon a false narrative, popular in some circles, about wrongful convictions; i.e. that District Attorneys routinely prosecute innocent people.

Seeking Just Convictions and Timely Exonerations with Equal Vigor

The New York State Bar Association's Task Force on Wrongful Convictions reported on 53 such cases during the period from 1964 through 2009. Putting these findings in context requires acknowledging that these 53 cases were culled from the universe of an estimated 1.3 million

convictions which occurred in New York over the same time period, thus accounting for .004 of one per cent (.004%) of all convictions.

Wrongful convictions are anathema to the fair and ethical administration of justice, and although they have occurred in the history of our jurisprudence, they are extraordinarily rare.

Much more commonplace have been the efforts of prosecutors to address past wrongful convictions and prevent their reoccurrence in the future. Regarding the former, several offices, most notably the Kings County (Brooklyn) District Attorney, have conviction integrity units to review claims of past wrongful convictions. Regarding the latter, nearly every office has designed rigorous procedures to assure wrongful convictions do not occur. For example, the Erie County (Buffalo) District Attorney's Office has implemented rigorous case screening procedures, resulting in the pre-trial exoneration of over 200 innocent persons whom the police had criminally charged. These citizens might have been wrongfully arrested and wrongfully accused, but they were not wrongfully prosecuted or wrongfully convicted, precisely ***because*** of the District Attorney.

To a District Attorney practicing in New York, the exoneration of the innocent is equally important as the conviction of the guilty. That is why we formed the CFEAJ and its Best Practices sub-committee. That is why we developed protocols that not only look back and examine claims of wrongful convictions, but also look forward to prevent wrongful convictions from occurring. That is why, most recently, we joined with the New York State Bar Association and the Innocence Project in advocating for legislation regarding eyewitness identification and video recorded statements; we did so because misidentifications and unreliable confessions are two of the principal reasons for wrongful convictions.

The Judicial Conduct Commission and the Grievance Committees

In reality, New York District Attorneys do ***not*** routinely engage in misconduct, let alone the kind that would justify an unprecedented and unnecessary regulatory commission. Similarly unavailing is the claim that a CPC is needed to regulate prosecutors for the same reason that a Judicial Conduct Commission (JCC) is needed to regulate judges.

The state JCC exists because judges are not subject to the same disciplinary regime as attorneys. As previously noted all attorneys, including prosecutors, must abide by the Rules of Professional Conduct and are subject to discipline by four state-wide Grievance Committees. Judges are subject to discipline by another entity known as the JCC. Should the proposed bill become law, District Attorneys would be the only attorneys in New York State, as well as in the United States of America, to be subject to investigation and discipline by two separate entities: the Grievance Committees and the CPC.

Based upon the foregoing, one is left with the inescapable conclusion that the CPC bill seeks to solve a problem (widespread and willful prosecutorial misconduct) which does not exist, while creating a redundant disciplinary authority, based upon an inapposite model.

Additional support for the conclusion that the CPC is a solution in search of a problem is the apparent lack of research to determine the alleged ineffectiveness of the current disciplinary system as administered by the state's four Grievance Committees. The efforts of these long

utilized committees and their success in monitoring the professional behavior of all attorneys, including prosecutors, has rarely been the subject of criticism or suggested modification. Indeed, the state's four Grievance Committees enjoy a stellar reputation for conducting fair investigations, efficiently dismissing bogus and retaliatory claims, and appropriately prosecuting legitimate cases of attorney misconduct.

Proponents of the CPC -- which would be an unnecessarily duplicative office at best -- dismiss the performance of the Grievance Committee system with anti-prosecution clichés. It is respectfully submitted that responsible governance minimally demands an actual examination of the facts to determine if there is any truth to these oft-repeated bromides.

Public Safety and the Fair Administration of Justice

An additional measure of the CPC proposal's lack of sufficient forethought is its vast array of unintended consequences, perhaps the most alarming of which will be the adverse impact upon public safety.

Public safety, as well the fair and efficient administration of justice, will suffer because the CPC loads the quiver of those accused of the most serious crimes, facing the longest sentences, cornered by the most compelling evidence of guilt, with slings and arrows to hurl at the public official, elected or appointed, who prosecutes such awful transgressions. The CPC will provide defendants an offensive "play book" through which to mount an attack upon the very public official sworn to prosecute such unspeakable deeds.

The CPC legislation permits nearly anyone -- including criminal defendants, relatives of criminal defendants, defense attorneys, dissatisfied victims, or anyone with an ax to grind or a theory to assay -- to file a complaint against a District Attorney, an Assistant District Attorney, or a police officer when working under the direction of a prosecutor.

The complainant is not limited to allegations of misconduct. Instead, he is permitted to base his complaint upon vague and frivolous grounds. Nor is the complainant subject to make his claims under penalty of perjury because there is no necessity of sworn allegations. The complainant, in short, can allege anything he wishes and do so with complete impunity.

Once the complaint is filed, the CPC has unprecedented powers, including the power to compel the District Attorney to testify against herself and the power to grant immunity to the complainant (which will often be the defendant in the criminal proceeding) no matter how serious or how heinous his alleged crime. Unlike a legal proceeding against a criminal defendant -- where the accuser is limited by the rules of evidence and bears the burden of proof beyond a reasonable doubt -- the proceeding against the District Attorney or police officer is not governed by evidentiary rules, nor does the accuser bear any burden of proof, let alone proof beyond a reasonable doubt.

CPC complaints can be filed and CPC hearings can be held contemporaneous to an ongoing criminal case because there is no exemption for pending criminal investigations or prosecutions. The CPC legislation fails to account for how important and sensitive investigative issues -- like privileged medical records, immunity, confidential informant identity, confidentiality as a result of a grand jury subpoena or grand jury testimony, wiretaps, the location of domestic violence victims, child protective service records etc. -- will be addressed in the context of a CPC proceeding. Such a failure will inevitably encourage defendants to file bogus complaints in an effort to conduct fishing expeditions and sabotage ongoing investigations.

The CPC will become a bonanza for criminal defendants looking to harass prosecutors and police officers, leverage more favorable plea bargains and defeat the criminal charges filed against them. With nothing to lose and everything to gain, anyone -- including murderers, rapists, domestic violence offenders, conspiracy theorists, and blog trolls -- can file an unsworn complaint, thus setting in motion a parallel proceeding in which a prosecutor or police officer must defend herself from any accusation imaginable.

Parallel CPC investigations and hearings will severely disrupt the efficient day-to-day operations of District Attorneys from smaller counties, who must regularly and personally appear in the courts of their county. Regardless of office size, threats by a defendant to file a complaint will create a chilling effect upon bringing otherwise just prosecutions and will lead District Attorneys to offer plea bargains we would never have considered. Ironically, those who believe a District Attorney failed to prosecute a tough but viable case or gave too favorable a plea bargain could also file a complaint and trigger a proceeding against the District Attorney.

Conclusion

In addition to its pernicious effect upon public safety and the fair and efficient administration of justice, the CPC singles out the duly elected chief law enforcement official in each of New York's 62 counties for disparate treatment, creates a chilling effect upon the lawful discharge of our duties and denies prosecutors, as well as police officers, legal protections afforded to all citizens, including those enjoyed by common criminals.

The disastrous consequences and non-necessity of a CPC, especially given the myriad of effective review and disciplinary mechanisms already in place, serve as further evidence to reinforce the impression that the CPC is principally designed to punish prosecutors for doing our job. Accordingly, the District Attorney's Association of the State of New York respectfully urges that the proposed CPC legislation not be enacted into law.

Very truly yours,

FRANK A. SEDITA, III
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President, DAASNY

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