
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair

2021 - 2022 Regular

Bill No: SB 710 **Hearing Date:** April 6, 2021
Author: Bradford
Version: March 25, 2021
Urgency: No **Fiscal:** Yes
Consultant: MK

Subject: *District attorneys: conflicts of interest*

HISTORY

Source: Prosecutors Alliance of California (Co-Sponsor)
San Francisco District Attorney's Office (Co-Sponsor)

Prior Legislation: None

Support: Asian Americans Advancing Justice – California; Asian Solidarity Collective; California for Safety and Justice; California Public Defenders Association; Communities United for Restorative Youth Justice; Dream Corps JUSTICE; Drug Policy Alliance; Ella Baker Center for Human Rights; Friends Committee on Legislation of California; Govern for California; Grassroots Law Project; Hope for All; Initiate Justice; Los Angeles Regional Reentry Partnership; Pillars of The Community; Showing Up for Racial Justice (SURJ) San Diego; Showing Up for Racial Justice North County; Smart Justice California; Team Justice San Diego; Think Dignity; Uncommon Law; We the People - San Diego; Young Women's Freedom Center

Opposition: California Coalition of School Safety Professionals; California District Attorneys Association; Los Angeles School Police Officers Association; Palos Verdes Police Officers Association; Riverside Sheriffs' Association; Santa Ana Police Officers Association

PURPOSE

The purpose of this bill is to require a district attorney or the Attorney General to recuse themselves from a decision relating to investigating, charging, or prosecuting a peace officer for alleged criminal conduct while on duty if that district attorney or Attorney General has a conflict of interest.

Existing law sets forth the requirements of a motion to disqualify a district attorney, city attorney, or city prosecutor. (Penal Code Section 1424)

Existing law provides that if a court finds that a prosecuting attorney deliberately or intentionally withheld relevant, material exculpatory evidence or information in violation of the law, the court may disqualify the prosecuting attorney. (Penal Code Section 14241.5)

Existing State Bar Rules prohibit a lawyer from representing a client when “the lawyer has...a legal business, financial, professional, or personal relationship with or to a party or witness in the same matter.” (State Bar Rules Prof. Conduct 1.7.)

This bill provides that a conflict of interest occurs when both of the following occurs:

- 1) A district attorney or the Attorney General investigating, charging, or prosecuting a peace officer for alleged criminal conduct while on duty received a monetary benefit from any of the following:
 - a. A member organization or association solely representing law enforcement that is involved in the investigation.
 - b. A member organization or association solely representing law enforcement that employed the officer who allegedly committed the crime at the time the alleged crime was committed.
 - c. A member organization or association solely representing law enforcement of which the officer is a member or was a member at the time of the alleged crime.
- 2) The member organization or association solely representing law enforcement makes representation in criminal investigations available to its employees or members under criminal investigation for alleged criminal conduct that occurred while on duty.

This bill defines “member organization or association” as a formal or legal organization representing individuals and includes unions.

This bill defines “monetary benefit” as any financial and includes a direct financial campaign contribution.

This bill defines “peace officer” has the same meaning as in Penal Code Section 830.

This bill provides that a district attorney or the Attorney General shall recuse themselves from a decision related to investigating, charging, or prosecuting a peace officer for alleged criminal conduct while on duty if the district attorney or the Attorney General has a conflict of interest.

This bill provides that except as otherwise provided, when a district attorney recuses themselves under this chapter, the Attorney General shall assume responsibility for investigating, charging, or prosecuting the peace officer.

This bill provides that if the Attorney General investigating, charging, or prosecuting the peace officer has a conflict of interest, the Attorney General shall recuse themselves and appoint a special prosecutor to investigate, charge, or prosecute the peace officer.

This bill makes a number of uncodified findings and declarations.

COMMENTS

1. Need for This Bill

According to the author:

Prosecutors serve a fundamental role in pursuing accountability for those who have broken the law, including peace officers. Yet California peace officers seriously harm or kill hundreds of people every year and only a handful have faced any criminal prosecutions over the past decade. As a result, many communities think that district attorneys are failing to investigate and prosecute police officers with the same objectivity as they do other members of the community alleged to have committed a crime.

This lack of trust in law enforcement and prosecutors is exacerbated when elected district attorneys accept a monetary benefit from a peace officer association that also pay for representation of their members who are under criminal investigation by these same prosecutors. This kind of financial exchange between the two sides in a legal case crosses an ethical line.

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2. Rules surrounding conflict of interest

Both the State Bar's Rules of Professional Conduct and California law address how attorneys should respond when faced with a conflict of interest, but sponsor believes that there are there are gaps in these provisions that create a loophole for the specific situation of an elected prosecutor receiving campaign contributions from the same entity (including a law enforcement association) that finances opposing counsel.

- a) State Bar Rules of Professional Conduct

The Rules of Professional provides that:

A lawyer shall not, without informed written consent* from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person,* or by the lawyer's own interests. (State Bar Rules Prof. Conduct 1.7(b).)

State Bar Rules of Professional Conduct 1.7 goes on to say that even when there is not a significant risk requiring the lawyer to comply with (b) they shall not represent a client without written disclosure of the relationship where:

[T]he lawyer has, or knows* that another lawyer in the lawyer's firm* has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; ... (State Bar Rules Prof. Conduct 1.7(c)(a))

This rule was crafted to avoid the conflict that arises when an attorney has a political or financial relationship with opposing counsel or their client, or a witness. The rule does not explicitly preclude a prosecutor from receiving financial support from an organization that is financing opposing counsel and it is unclear if the relationship between a campaign donor and a prosecutor would qualify under this Rule.

b) Penal Code

California Penal Code § 1424 also deals with recusal of a district attorneys' office due to a conflict of interest. However, the statute specifies that the conflict of interest must "render it unlikely that the *defendant* would receive a fair trial," while the problem addressed by SB 731 is whether a defendant may receive special (favorable) treatment.

Furthermore, this statute only provides a mechanism for disqualifying prosecutors *after* charges have been brought and does nothing to prevent undue influence in the investigation or the very decision of whether to file charges. Importantly, SB 710 would address the conflict of interest that could result in prosecutors neglecting to bring charges against peace officers altogether.

3. First Amendment protection of political speech

"The First Amendment guarantees the right to petition the government, which includes the right to participate in elections. These protections apply to individuals and businesses involved in paid and unpaid advocacy.

However, the government has the right to regulate speech as long as it passes a strict scrutiny test. That test was clarified in the landmark *U.S. Supreme Court Citizens United v. Federal Elections Commission* decision holding that such regulation must show that "the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." (https://www.jdsupra.com/legalnews/best-in-law-political-speech-62843/)

While political speech, including campaign contributions, is a fundamental right to which all entities, including law enforcement associations, are entitled, The Prosecutors Alliance of

California, the sponsor of this bill asserts that to the extent that it impacts speech, it is narrowly tailored: Specifically, it does not repeal the right of law enforcement associations to contribute to candidates for prosecutorial offices, nor the right of DA candidates to accept those contributions. The bill merely provides that in cases involving alleged criminal conduct by on-duty peace officers, the DA shall recuse themselves from the investigation and prosecution.

The sponsor further argues that maintaining public confidence in the integrity of prosecutors and their investigations of police wrongdoing is a compelling state interest. “When prosecutors accept campaign contributions from law enforcement associations, and then fail to hold accountable members of those associations for seemingly criminal acts, it corrodes public trust in an institution whose legitimacy hinges on the public’s faith in its fairness and impartiality.”

4. Argument in Support

In support the Ella Baker Center for Human Rights states:

Prosecutors play a fundamental role in pursuing accountability for all who have broken the law, including peace officers. Yet California peace officers have seriously harmed or killed hundreds of people and only a handful have faced criminal consequences. As a result, many communities believe that district attorneys are failing to investigate and prosecute police officers with the same objectivity as they do other members of the community. When a district attorney accepts a monetary benefit from an association that represents peace officers, the public’s confidence that the district attorney will fairly review allegations of an officer’s criminal conduct is critically undermined. When the same association also provides representation to the officer for the criminal investigation, the conflict of interest is even greater, crossing the threshold of what is ethically permissible for any attorney.

SB 710 is narrowly tailored to address this unique situation. The bill will require a district attorney to recuse themselves from the investigation or prosecution of an officer alleged to have committed a crime on-duty, only if the district attorney received a monetary benefit from an association that also provides representation to the officer for the criminal investigation. SB 710 addresses a gap in current law and ethical rules for attorneys: there is no way for a member of the public or a victim to raise this conflict of interest in court and no clear guidance for district attorneys regarding when financial entanglements with opposing counsel require recusal. SB 710 is carefully tailored to apply only to this unusual situation which occurs repeatedly, advancing the compelling governmental interest in equal and fair justice for all.

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