
THIRD READING

Bill No: SB 710
Author: Bradford (D), et al.
Amended: 5/20/21
Vote: 21

SENATE PUBLIC SAFETY COMMITTEE: 4-1, 4/6/21
AYES: Bradford, Kamlager, Skinner, Wiener
NOES: Ochoa Bogh

SENATE APPROPRIATIONS COMMITTEE: 5-2, 5/20/21
AYES: Portantino, Bradford, Kamlager, Laird, Wieckowski
NOES: Bates, Jones

SUBJECT: District attorneys: conflicts of interest

SOURCE: Prosecutors Alliance of California
San Francisco District Attorney's Office

DIGEST: This bill requires 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.

ANALYSIS:

Existing law:

- 1) Sets forth the requirements of a motion to disqualify a district attorney, city attorney, or city prosecutor. (Penal Code Section 1424)
- 2) 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 1424l.5)

- 3) Provides that the 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:

- 1) Provides that a conflict of interest occurs when both of the following occurs:
 - a) 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 organizations or associations at any point between the time the district attorney or the Attorney General filed to run for the office until the conclusion of their term in that office:
 - i) A member organization or association solely representing law enforcement that is involved in the investigation.
 - ii) 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.
 - iii) 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.
 - b) 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.
- 2) Defines “member organization or association” as a formal or legal organization representing individuals and includes unions.
- 3) Defines “monetary benefit” as any financial and includes a direct financial campaign contribution.
- 4) Defines “peace officer” has the same meaning as in Penal Code Section 830.
- 5) 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.

- 6) 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.
- 7) 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.
- 8) Makes a number of uncodified findings and declarations.

Background

1) *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 with\out 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 Section 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.

2) *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. This 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.”

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: No

According to the Senate Appropriations Committee:

- Unknown costs, potentially ranging from the tens of thousands of dollars to the low millions of dollars annually, to the Department of Justice (DOJ) for a special prosecutor to investigate, charge, or prosecute any peace officer when the Attorney General has a conflict of interest as proposed by this measure. Actual costs would depend on a number of unknown factors, including how many law enforcement member organization and associations that represent law enforcement employees or members in criminal investigations related to on-duty conduct provided a monetary benefit to the Attorney General, the number of peace officers within those entities who are being investigated for on-duty criminal conduct in any given year, if and how many investigations lead to the filing of criminal charges and prosecutions, and the complexity of each criminal case. (General Fund)
- Unknown, potentially-significant workload cost pressures to DOJ to take over the investigation, charging, and prosecution of peace officers, as specified, when a district attorney has a conflict of interest as proposed by this measure minus the workload related to the investigation of peace officer-involved shootings that result in the death of an unarmed civilian, as DOJ is required to conduct those investigations already. Factors that would determine the actual workload that DOJ attorneys would assume are similar to the factors related to when the Attorney General has a conflict of interest but with respect to the 58 county district attorneys. (General Fund)

SUPPORT: (Verified 5/20/21)

Prosecutors Alliance of California (co-source)
San Francisco District Attorney's Office (co-source)
Asian Americans Advancing Justice - California
Asian Solidarity Collective
California Attorneys for Criminal Justice
California for Safety and Justice
California Public Defenders Association
Communities United for Restorative Youth Justice
Community Advocates for Just and Moral Governance
Drug Policy Alliance
Ella Baker Center for Human Rights
Friends Committee on Legislation of California
Govern for California
Grassroots Law Project
Hope for All: Helping Others Prosper Economically
Initiate Justice
Los Angeles County District Attorney's Office
Los Angeles Regional Reentry Partnership
Pillars of The Community
Showing Up for Racial Justice North County
Showing Up for Racial Justice San Diego
Smart Justice California
Team Justice San Diego
The Dream Corps
Think Dignity
Uncommon Law
We the People - San Diego
Young Women's Freedom Center

OPPOSITION: (Verified 5/20/21)

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

ARGUMENTS 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.

ARGUMENTS IN OPPOSITION: The California District Attorneys Association opposes this bill stating:

This bill is both unnecessary and, we believe, creates insurmountable constitutional challenges. As the California Supreme Court stated in *Woodland Hills Residents Association, Inc. v. City Council of Los Angeles* (1980) 26 Cal.3d 938, 946: "Political contributions involve an exercise of fundamental freedom protected by the First Amendment to the United States Constitution and Article 1, Section 2 of the California Constitution."

In *Woodland Hills*, the court rejected the notion that elected city council members must be recused from voting on a development issue because developers had donated to the council members' campaigns. In rejecting this claim, the Court went on to state: "To disqualify a city council member from

acting on a development proposal because the developer had made a campaign contribution to that member would threaten constitutionally protected political speech and association freedoms.”

We believe this bill creates dangerous, arbitrary and inconsistent distinctions respecting political campaign contributions and we respectfully urge a NO vote.

Prepared by: Mary Kennedy / PUB. S. /
5/25/21 10:40:43

****** END ******