

Date of Hearing: June 29, 2021
Counsel: Cheryl Anderson

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

SB 710 (Bradford) – As Amended May 20, 2021

SUMMARY: Requires an elected 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 received a monetary benefit creating a conflict of interest, as specified. Specifically, **this bill:**

- 1) Provides that a conflict of interest exists 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, at any point between the time they filed to run for office until the conclusion of their term in that office: a member organization or association solely representing law enforcement: (i) that is involved in the investigation, (ii) that employed the officer at the time the alleged crime was committed, or, (iii) of which the officer is or was a member at the time of the alleged crime; and,
 - b) The member organization or association makes criminal representation available to its employees or members under 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 benefit and includes a direct financial campaign contribution.
- 4) Defines “peace officer” as specified in current law.
- 5) Requires a district attorney or the Attorney General to 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) States that when a district attorney recuses themselves because a monetary benefit has created a conflict, the Attorney General shall assume responsibility for investigating, charging, or prosecuting the peace officer, unless the Attorney General has a conflict of interest.
- 7) Provides that if the Attorney General investigating, charging, or prosecuting the peace officer has a conflict of interest, the Attorney General must recuse themselves and appoint a special prosecutor to investigate, charge, or prosecute the peace officer.

- 8) Makes findings and declarations, including that prosecutors and police have a unique relationship. Prosecutors rely on police as their primary witnesses and they work hand-in-hand on a daily basis, often developing close relationships. As a result, there is a widespread perception that prosecutors are subject to undue influence when investigating peace officers accused of crimes alleged to have occurred on duty. When prosecutors accept financial support from associations solely representing peace officers, the public's confidence that they will objectively review allegations of criminal conduct by the officers represented by that association is further undermined.

EXISTING LAW:

- 1) Sets forth the requirements of a motion to disqualify a district attorney, city attorney, or city prosecutor. (Pen. Code, § 1424.)
- 2) Provides that a motion to disqualify may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial. (Pen. Code, § 1424, subd. (a)(1).)
- 3) Provides that if a court finds a prosecuting attorney deliberately or intentionally withheld relevant, material exculpatory evidence or information in violation of the law, and the violation occurred in bad faith, the court may disqualify the prosecuting attorney. (Pen. Code, § 1424.5, subds. (a) & (b)(1).)
- 4) States that a motion to disqualify may be directed at the entire prosecutor's office if there is sufficient evidence that other employees of the prosecuting attorney's office knowingly and in bad faith participated in or sanctioned the intentional withholding of the relevant, material exculpatory evidence or information and that withholding is part of a pattern and practice of violations. (Pen. Code, § 1424.5, subd. (b)(2).)
- 5) Prohibits 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." (Rules Prof. Conduct, rule 1.7.)

FISCAL EFFECT: Unknown.

COMMENTS:

- 1) **Author's Statement:** According to the author, "SB 710 is a straightforward measure that would address the conflict of interest between prosecutors and law enforcement officers who have committed misconduct. This bill will require prosecutors who have received a monetary benefit from an association that solely represents law enforcement to recuse themselves from the investigation, charging, and prosecution of an officer who is a member of that association. Communities throughout our state are rightfully critical of the relationship between district attorneys and law enforcement associations. This is a clear ethical issue, and our criminal justice system will benefit greatly by addressing this conflict of interest."
- 2) **California Rules of Professional Conduct – Conflict of Interest:** "The California Rules of Professional Conduct are intended to regulate professional conduct of attorneys licensed by

the State Bar through discipline.” (< <http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct> > [as of June 16, 2021].)

Under Rule 1.7(b), a lawyer may not, without informed written consent from each affected client, and as further specified, 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.

Even when a significant risk requiring a lawyer to comply with Rule 1.7(b) is not present, where the 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, a lawyer may not represent a client without written disclosure of the relationship to the client, and as further specified. (Cal. Rules Prof. Conduct, rule 1.7(c).)

“The primary purpose of this prophylactic rule is to prevent situations in which an attorney might compromise [their] representation of the client in order to advance the attorney’s own financial or personal interests” (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal. 4th 525, 546 [applying former Rule 3-310].)

This rule does not explicitly preclude a prosecutor from receiving financial support from an organization or association that is financing opposing counsel, and it is unclear if the reach of this rule includes a relationship between a campaign donor and a prosecutor.

- 3) **Statutory Disqualification (Recusal) of Prosecutor on the Ground of Conflict of Interest:** Penal Code section 1424 governs disqualification of a prosecutor: a disqualification motion “may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial.” (Pen. Code, § 1424, subd. (a)(1).) The motion may be directed at an individual prosecutor or the entire prosecutor’s office. (See *People v. Hernández* (1991) 235 Cal.App.3d 674, 680.)

The test for disqualification has two parts. First, the moving party must show a conflict, such that the “circumstances of a case evidence a reasonable possibility that the DA’s office may not exercise its discretionary function in an evenhanded manner.” (*People v. Conner* (1983) 34 Cal.3d 141, 148; accord, *People v. Cannedy* (2009) 176 Cal.App.4th 1474, 1479–1480.) Second, to warrant disqualification the conflict must be “so grave as to render it unlikely that defendant will receive fair treatment during all portions of the criminal proceedings.” (*People v. Eubanks* (1996) 14 Cal.4th 580, 592.) The “threshold necessary for recusing an entire office is higher than that for an individual prosecutor.” (*Cannedy, supra*, 176 Cal.App.4th at p. 1481.) “The showing of conflict of interest necessary to justify so drastic a remedy must be especially persuasive. [Citation.]” (*Id.* at p. 1482.)

Importantly, Penal Code section 1424 addresses prosecutorial conflicts that implicate a defendant’s right to a fair trial. This bill is aimed at preventing a defendant from possibly receiving more favorable treatment because of a prosecutorial conflict of interest.

Further, the remedy in Penal Code section 1464 – disqualification (recusal) of the prosecution – isn’t available until charges have been filed. This bill seeks to address a conflict of interest which might result in the prosecution not filing charges against peace

officers in the first place.

This bill contemplates disqualifying the entire office. Does a monetary contribution to the elected district attorney or Attorney General – the head of the office – rise to that level? (*Younger v. Superior Court* (1978) 77 Cal.App.3d 892 [(decided before enactment of Pen. Code, § 1464) conflict wall could not be effectively created with third-ranking administrative prosecutor in the office].)

- 4) **First Amendment and Free Political Speech Considerations:** “Political contribution involves an exercise of fundamental freedom protected by the First Amendment to the United States Constitution and article I, section 2 of the California Constitution.” (*Woodland Hills Residents Assn v. City Council of L.A.* (1980) 26 Cal.3d 938, 946 (*Woodland Hills*).) “Governmental restraint on political activity must be strictly scrutinized and justified only by compelling state interest.” (*Ibid.*)

In *Woodland Hills*, the California Supreme Court considered whether disqualifying 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 associational freedoms. (*Woodland Hills, supra*, 26 Cal.App.3d at p. 946.) The Court noted that while disqualifying contribution recipients from voting would not prohibit contributions, it would nonetheless curtail contributors’ constitutional rights. (*Id.* at pp. 946-947.) “Representative government would be thwarted by depriving certain classes of voters (i.e., developers, builders, engineers, and attorneys who are related in some fashion to developers) of the constitutional right to participate in the electoral process.” (*Id.* at p. 947.) According to the Court:

Public policy strongly encourages the giving and receiving of campaign contributions. Such contributions do not automatically create an appearance of unfairness. Adequate protection against corruption and bias is afforded through the Political Reform Act and criminal sanctions.

(*Ibid.*) The Court noted the Political Reform Act provided for disclosure of campaign contributions by recipients of contributions rather than disqualification. (*Id.* at p. 945.)

The campaign contributions at issue in this bill may be more akin to those in the judicial system, as addressed by the *United States Supreme Court in Williams-Yulee v. Florida Bar* (2015) 575 U.S. 433. There, the High Court addressed a local bar rule banning judicial candidates from soliciting campaign contributions. In concluding that the First Amendment permitted this restriction on speech, the Court reasoned:

Judges are not politicians, even when they come to the bench by way of the ballot. And a State’s decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office. A State may assure its people that judges will apply the law without fear or favor—and without having personally asked anyone for money.

(*Id.* at pp. 437-438.) The Court held that states have a compelling interest in preserving public confidence in their judiciaries. When a state adopts a narrowly-tailored restriction like

the one at issue, those principles do not conflict. (*Id.* at p. 436.)

Proponents of this bill contend that to the extent it implicates political speech, it is narrowly tailored to address a compelling state interest. They contend it is narrowly tailored in that it would not prohibit law enforcement associations from contributing to district attorneys' or Attorney Generals' campaigns. Nor would it prohibit district attorneys or Attorney Generals from accepting such contributions. Instead, the bill would require a district attorney or Attorney General to recuse themselves from the investigation or prosecution of an officer alleged to have committed a crime while on duty if they received a monetary benefit from an association also providing the officer with representation. Proponents contend that maintaining public confidence in the integrity of prosecutors and their investigations of alleged criminal conduct by on-duty officers is a compelling state interest.

- 5) **Argument in Support:** According to the *Prosecutors Alliance of California*, the sponsor of this bill, "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 represent 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 the unique situation of law enforcement associations contributing to prosecutors' campaigns and then also providing direct representation to an individual suspected of committing a crime. SB 710 does not repeal the right of these associations to make these contributions, nor the right of district attorney candidates to accept those contributions. Rather, the bill will require a district attorney to simply 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.

"This bill advances a compelling state interest in maintaining public confidence in the integrity of prosecutors and their investigations of police wrongdoing. The all-too-common act of prosecutors accepting campaign contributions from law enforcement associations, and then failing to hold accountable members of those associations for seemingly criminal acts, corrodes public trust in an institution whose legitimacy hinges on the public's faith in its fairness and impartiality and undermines the integrity of state power more broadly."

- 6) **Argument in Opposition:** According to the *Santa Ana Police Officers Association*, "This bill is a blatant attempt to infringe upon the first amendment rights of peace officer organizations to participate in the political process. Cops alone are singled out here for creating a conflict of interest with these prosecutors.

"Teachers can contribute to the DA and AG and have no restrictions on prosecutions of the educators. Same for doctors, corporate polluters and wildfire-causing utility companies. No

limits on DA or AG authority to prosecute such organizations.

“Curiously, SB 710 allows criminal defense attorneys and anti-police organizations to contribute to the DA or AG without any concern about a similar conflict of interest.

“Does this bill really claim that these sworn officers of the court are improperly influenced by a small contribution made by a cop group? Should lawmakers be prohibited from accepting campaign contributions from organizations that have business before the legislature?”

REGISTERED SUPPORT / OPPOSITION:

Support

Prosecutors Alliance California (Sponsor)
 Asian Americans Advancing Justice - California
 Asian Solidarity Collective
 California Attorneys for Criminal Justice
 California Changelawyers
 California for Safety and Justice
 California Public Defenders Association (CPDA)
 Californians United for a Responsible Budget
 Change Begins With Me Indivisible Group
 Communities United for Restorative Youth Justice (CURYJ)
 Community Advocates for Just and Moral Governance
 Contra Costa County District Attorney's Office
 Del Cerro for Black Lives Matter
 Democratic Club of Vista
 Drug Policy Alliance
 Ella Baker Center for Human Rights
 Friends Committee on Legislation of California
 Govern for California
 Grassroots Law Project
 Hillcrest Indivisible
 Hope for All: Helping Others Prosper Economically
 Initiate Justice
 Legal Services for Prisoners with Children
 Los Angeles County District Attorney's Office
 Los Angeles Regional Reentry Partnership (LARRP)
 Mission Impact Philanthropy
 Nextgen California
 Partnership for the Advancement of New Americans
 Pillars of the Community
 Racial Justice Coalition of San Diego
 Riseup
 San Diego Progressive Democratic Club
 Sd-qt poc Colectivo
 Showing Up for Racial Justice (SURJ) San Diego
 Showing Up for Racial Justice North County San Diego

Smart Justice California
Social Workers for Equity & Leadership
Team Justice
The Dream Corps
Think Dignity
Uncommon Law
Uprise Theatre
We the People - San Diego
Young Women's Freedom Center

Oppose

California Coalition of School Safety Professionals
California District Attorneys Association
California School Employees Association
Los Angeles School Police Officers Association
Palos Verdes Police Officers Association
Peace Officers Research Association of California (PORAC)
Riverside Sheriffs' Association
Santa Ana Police Officers Association

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