

**COMMENTS ON LEGISLATION BY THE  
COMMITTEE ON PROFESSIONAL DISCIPLINE**

**A.1131-B  
S.24-B**

**M. of A. Perry  
Sen. DeFrancisco**

AN ACT to amend the judiciary law, in relation to establishing the commission on prosecutorial conduct.

This proposed legislation would create a new statewide prosecutorial conduct commission (the “Commission”) consisting of eleven members to be appointed by the Governor (two appointments), the temporary president and minority leader of the Senate (two and one appointments, respectively), the speaker and minority leader of the Assembly (two and one), and the Chief Judge of the Court of Appeals (three).<sup>1</sup>

The Committee on Professional Discipline (the “Committee”) of the New York City Bar Association has reviewed the bill and finds it flawed as currently drafted. In so finding, neither the Committee nor the Association is expressing an opinion at this time as to whether, if properly constituted and demonstrably justified, such a commission could be appropriate or beneficial. The Committee’s analysis is set forth below.

**ANALYSIS**

- 1. The bill would provide for investigation and discipline by the Commission of prosecutorial misconduct that parallels the function of the State’s attorney disciplinary agencies without specifically allocating functions between them or otherwise addressing this apparently overlapping jurisdiction.**

The disciplinary rules broadly apply to all New York attorneys, including lawyers working in governmental agencies and prosecutors. Thus, if the Commission were to be established pursuant to the enactment of the bill, the disciplinary agencies throughout the State would appear to have overlapping jurisdiction over prosecutors. This raises such questions as

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<sup>1</sup> The bill further provides: “Of the members appointed by the governor one shall be a public defender and one shall be a prosecutor. Of the members appointed by the chief judge one person shall be a justice of the appellate division of the supreme court and two shall be judges of courts other than the court of appeals or appellate division. Of the members appointed by the legislative leaders, there shall be an equal number of prosecutors and attorneys providing defense services; provided, however, that a temporary imbalance in the number of prosecutors and defense attorneys pending new appointments shall not prevent the commission from conducting business.” Section 499-c.

whether two parallel disciplinary investigations or actions could both proceed simultaneously or, conversely, whether a complaint of prosecutorial misconduct that is reported to one of the disciplinary agencies after formation of the Commission would then be referred to the Commission. The bill does not address these and other practical and logistical considerations, which would inevitably arise were it to become law and the Commission established.

The uncertainty surrounding the continuing role of the disciplinary agencies in disciplining prosecutors once the Commission is created and, if such a role continues to exist, the allocation of responsibilities between them and the Commission, is particularly untimely in light of a major statewide initiative that is underway to create uniformity in the attorney disciplinary system.<sup>2</sup> Notably, the Commission on Judicial Conduct—a disciplinary authority outside of the attorney disciplinary agencies—governs judicial conduct; but judges are subject to a separate set of conduct rules under the Judiciary Law, so concerns about overlapping jurisdiction and parallel disciplinary investigations do not exist in the way that they do in the context of the proposed prosecutorial misconduct commission. Is the legislature now proposing that prosecutors, like judges, be held to a different set of conduct rules? Or would the rules be superimposed over the regular attorney conduct rules? The bill as currently drafted provides no answers to these and other threshold questions and leaves both prosecutors and the public in the dark as to what standards the new commission would impose and how it would operate within the uniform statewide attorney disciplinary framework currently being established.

## **2. Functionally disabling constitutional objections under Articles IV, VI and XIII of the New York Constitution may prevent the legislature’s contemplated delegation of duties and powers to the Governor and the Court of Appeals.**

The bill provides at Section 499-f that the Commission may, after a hearing, determine that a prosecutor should be admonished or censured, or may recommend that the prosecutor be removed from office for cause. The bill further provides that the Commission’s determinations, together with findings of fact, conclusions of law, and the record, are then to be transmitted to the Chief Judge of the Court of Appeals, who shall, in turn, cause a copy of same to be served on the prosecutor involved. Following such service, the prosecutor would then have 30 days either to accept the determination or to make a written request to the Chief Judge of the Court of Appeals for review by the Court of Appeals, which may accept or reject the determined sanction, impose a different sanction (admonition or censure) or no sanction, or recommend removal or “retirement”<sup>3</sup> of the prosecutor. If the Court of Appeals recommends removal or retirement, it shall “transmit the entire record to the Governor[,] who will independently determine whether a prosecutor should be removed or retired.”

Article IV, § 3 of the New York Constitution lists the powers and duties of the Governor, which do not include any explicit (or implicit) duty to review and act upon the record described above. Likewise, Article VI, § 3 specifies the jurisdiction of the Court of Appeals, limiting it to

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<sup>2</sup> See Supreme Court, Appellate Division, All Departments, Rules for Attorney Disciplinary Matters (currently scheduled to be implemented on October 1, 2016). 22 NYCRR Part 1240, *available at* <http://www.nycourts.gov/rules/comments/index.shtml>.

<sup>3</sup> It is noted that neither “retire” or “retirement” are defined in the bill.

“the review of questions of law,” with certain exceptions that do not appear to include the review contemplated by the bill. Thus, the Legislature’s delegation of powers and duties to two other branches of government would raise legitimate separation-of-powers concerns. Further, Article XIII, § 13(b) confers a duty upon the Governor to remove District Attorneys from office under certain circumstances, and the bill’s interposition of the Commission between the Governor and a District Attorney subject to such removal may therefore conflict with the provisions of Article XIII, § 13(b) in certain applications.

Section 499-j(2) of the bill purports to save the remainder of the Act should any portion be declared unconstitutional, but it is unclear how the Commission would be effective in the absence of the functions assigned to the Court of Appeals and/or the Governor should the provisions mandating the participation of either or both of those branches of government be held to be in violation of the New York Constitution and therefore rendered inoperative.

## **CONCLUSION**

In sum, for the reasons set forth above, the Committee on Professional Discipline of the New York City Bar Association believes that the bill as currently drafted should not be enacted into law.

Committee on Professional Discipline  
Devika Kewalramani, Chair

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