S T A T E O F N E W Y O R K

120

2009-2010 Regular Sessions

I N S E N A T E

(PREFILED)

January 7, 2009

Introduced by Sen. SAMPSON -- read twice and ordered printed, and when printed to be committed to the Committee on Local Government

AN ACT to amend the county law, in relation to establishing guidelines of professional conduct for activities by district attorneys

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Legislative findings. The legislature hereby finds that district attorneys and other public prosecutors, as public officers charged with overseeing that justice is done, owe a duty of fair dealing to those accused and candor to the courts. This act seeks to ensure that New York state's district attorneys and other public prosecutors comply with these fundamental duties by establishing a minimum code of conduct to guide their behavior in the performance of their official responsibilities.

The legislature also recognizes that the state and its citizens are served not only when the guilty are convicted but when criminal trials are fair and that our system of the administration of justice suffers when any accused is treated unfairly. This act seeks to guarantee that district attorneys and other public prosecutors make timely disclosure to the defense of all evidence required to be disclosed pursuant to the laws and the constitution of the state of New York and the constitution of the United States.

The legislature further finds that collaboration between district attorneys and the press as to information affecting the fairness of a criminal proceeding is not only subject to regulation, but is highly censurable and worthy of penalties therefor. This act seeks to achieve a fair balance between a district attorney's or other public prosecutor's right of free speech and society's interest in protecting the integrity of the criminal proceedings and thereby guaranteeing a fair and impartial trial. It is the intent of this legislature to insure that informa-

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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tion and statements made by district attorneys and other public prosecutors is not to solicit coverage for their cause by employing the news media solely with a view toward gaining some benefit or influencing public opinions rather than fulfilling the prosecutor's obligation to seek justice. The purpose of this act is to insure, to the extent practicable, the fair and orderly judicial administration in the conduct of criminal proceedings.

S 2. The county law is amended by adding a new section 708 to read as follows:

S 708. GUIDELINES OF PROFESSIONAL CONDUCT FOR ACTIVITIES BY DISTRICT ATTORNEYS AND OTHER PUBLIC PROSECUTORS. 1. A. NO DISTRICT ATTORNEY OR OTHER PUBLIC PROSECUTOR SHALL MAKE AN EXTRAJUDICIAL STATEMENT WITH RESPECT TO A CRIMINAL PROCEEDING THAT A REASONABLE PERSON WOULD EXPECT TO BE DISSEMINATED BY MEANS OF PUBLIC COMMUNICATION IF SUCH DISTRICT ATTORNEY OR OTHER PUBLIC PROSECUTOR KNOWS OR REASONABLY SHOULD HAVE KNOWN THAT SUCH STATEMENT WILL HAVE A SUBSTANTIAL LIKELIHOOD OF MATERIALLY PREJUDICING A CRIMINAL PROCEEDING OR THAT SUCH STATEMENT PRESENTS AN IMMINENT AND SUBSTANTIAL HARM TO THE FAIRNESS OF THE CRIMINAL PROSECUTION OR INTERFERES WITH A FAIR TRIAL OR SUCH STATEMENT WILL HARM THE REPUTATION OF THE ACCUSED IN THE EVENT THAT THE ACCUSED IS SUBSEQUENTLY NOT FOUND GUILTY.

B. AN EXTRAJUDICIAL STATEMENT ORDINARILY IS LIKELY TO PREJUDICE MATERIALLY A CRIMINAL PROCEEDING WHEN THE STATEMENT RELATES TO:

(I) THE CHARACTER, CREDIBILITY, REPUTATION OR CRIMINAL RECORD OF A SUSPECT OR WITNESS IN A CRIMINAL INVESTIGATION.

(II) THE IDENTITY OF A WITNESS OR THE EXPECTED TESTIMONY OF A WITNESS IN A CRIMINAL PROCEEDING.

(III) THE POSSIBILITY OF A PLEA OF GUILTY TO THE OFFENSE OR THE EXISTENCE OR CONTENTS OF ANY CONFESSION, ADMISSION, OR STATEMENT GIVEN BY A DEFENDANT OR SUSPECT, OR THAT PERSON'S REFUSAL OR FAILURE TO MAKE A STATEMENT.

(IV) THE PERFORMANCE OR RESULTS OF ANY EXAMINATION OR TEST, OR THE REFUSAL OR FAILURE OF A PERSON TO SUBMIT TO AN EXAMINATION OR TEST, OR THE IDENTITY OR NATURE OF PHYSICAL EVIDENCE EXPECTED TO BE PRESENTED.

(V) ANY OPINION AS TO THE GUILT OR INNOCENCE OF A DEFENDANT.

(VI) INFORMATION THE DISTRICT ATTORNEY OR OTHER PUBLIC PROSECUTOR KNOWS OR REASONABLY SHOULD HAVE KNOWN IS LIKELY TO BE INADMISSIBLE AS EVIDENCE IN A TRIAL AND WOULD IF DISCLOSED CREATE A SUBSTANTIAL RISK OF PREJUDICING AN IMPARTIAL TRIAL.

C. AN EXTRAJUDICIAL STATEMENT IS NOT LIKELY TO PREJUDICE MATERIALLY A CRIMINAL PROCEEDING WHEN MADE WITHOUT ELABORATION AND CONCERNS THE FOLLOWING:

(I) THE INFORMATION CONTAINED IN A PUBLIC RECORD.

(II) THAT AN INVESTIGATION OF THE MATTER IS IN PROGRESS.

(III) THE SCHEDULING OR RESULT OF ANY STEP IN THE PROCEEDING.

(IV) A REQUEST FOR ASSISTANCE IN OBTAINING EVIDENCE AND INFORMATION NECESSARY TO THE PROCEEDING.

(V) A WARNING OF DANGER CONCERNING THE BEHAVIOR OF A PERSON INVOLVED WHEN THERE IS A REASON TO BELIEVE THAT THERE EXISTS THE LIKELIHOOD OF SUBSTANTIAL HARM TO AN INDIVIDUAL OR TO THE PUBLIC INTEREST.

(VI) THE IDENTITY, AGE, RESIDENCE, OCCUPATION AND FAMILY STATUS OF THE ACCUSED.

(VII) IF THE ACCUSED HAS NOT BEEN APPREHENDED, INFORMATION NECESSARY TO AID IN APPREHENSION OF THAT PERSON.

(VIII) THE FACT, TIME AND PLACE OF ARREST, RESISTANCE, PURSUIT, USE OF WEAPONS, AND A DESCRIPTION OF PHYSICAL EVIDENCE SEIZED, OTHER THAN AS CONTAINED ONLY IN A CONFESSION, ADMISSION OR STATEMENT.

(IX) THE IDENTITY OF INVESTIGATING AND ARRESTING OFFICERS OR AGENCIES AND THE LENGTH OF THE INVESTIGATION.

2. EVERY DISTRICT ATTORNEY AND OTHER PUBLIC PROSECUTOR SHALL MAKE TIMELY DISCLOSURE TO THE DEFENSE OF ALL EVIDENCE OF INFORMATION KNOWN TO THE PROSECUTOR THAT TENDS TO NEGATE THE GUILT OF THE ACCUSED OR MITIGATES THE OFFENSE AND EXERCISE REASONABLE CARE TO PREVENT INVESTIGATORS, LAW ENFORCEMENT PERSONNEL, EMPLOYEES OR OTHER PERSONS ASSISTING OR ASSOCIATED WITH THE DISTRICT ATTORNEY OR OTHER PUBLIC PROSECUTOR IN A CRIMINAL PROCEEDING FROM MAKING AN EXTRAJUDICIAL STATEMENT PROHIBITED IN SUBDIVISION ONE OF THIS SECTION.

3. IT IS THE RESPONSIBILITY OF EVERY DISTRICT ATTORNEY AND OTHER PUBLIC PROSECUTOR TO SEEK JUSTICE, NOT MERELY TO CONVICT.

A. THIS SPECIAL DUTY EXISTS BECAUSE:

(I) THE PROSECUTOR REPRESENTS THE SOVEREIGN AND THEREFORE SHOULD USE RESTRAINT IN THE DISCRETIONARY EXERCISE OF GOVERNMENTAL POWERS.

(II) THE PROSECUTOR IS MORE THAN AN ADVOCATE BUT ALSO MAKES DECISIONS NORMALLY MADE BY AN INDIVIDUAL CLIENT AND THOSE AFFECTING THE PUBLIC INTEREST SHOULD BE FAIR TO ALL.

(III) OUR SYSTEM OF CRIMINAL JUSTICE GRANTS THE ACCUSED THE BENEFIT OF ALL REASONABLE DOUBT.

(IV) THE PROSECUTOR HAS A DUTY TO MAKE TIMELY DISCLOSURE TO THE DEFENSE OF AVAILABLE EVIDENCE, KNOWN TO HIM OR HER, THAT TENDS TO NEGATE THE GUILT OF THE ACCUSED, MITIGATE THE DEGREE OF THE OFFENSE OR REDUCE THE PUNISHMENT.

B. TO COMPLY WITH SUCH DUTY OF PROSECUTORIAL CARE:

(I) THE PROSECUTOR SHOULD NOT INTENTIONALLY AVOID PURSUIT OF EVIDENCE MERELY BECAUSE OF THE BELIEF THAT IT WILL DAMAGE THE PROSECUTION'S CASE OR AID THE ACCUSED.

(II) NO PROSECUTOR SHALL FABRICATE EVIDENCE OR INTENTIONALLY MISLEAD AN ACCUSED OR ANY POTENTIAL WITNESS TO A CRIMINAL PROCEEDING.

4. THE TEMPORARY STATE COMMISSION OF INVESTIGATION ESTABLISHED PURSUANT TO CHAPTER NINE HUNDRED EIGHTY-NINE OF THE LAWS OF NINETEEN HUNDRED FIFTY-EIGHT SHALL HAVE THE DUTY AND POWER TO CONDUCT INVESTIGATIONS IN CONNECTION WITH ANY VIOLATION OF THE GUIDELINES OF PROFESSIONAL CONDUCT FOR ACTIVITIES BY DISTRICT ATTORNEYS AND OTHER PUBLIC PROSECUTORS PURSUANT TO THE PROVISIONS OF THIS SECTION.

5. A DISTRICT ATTORNEY OR OTHER PUBLIC PROSECUTOR WHO VIOLATES ANY PROVISION OF THIS SECTION IS GUILTY OF MISCONDUCT, AND IN ADDITION TO ANY OTHER PUNISHMENT WHICH MAY BE PRESCRIBED THEREFOR, HE OR SHE FORFEITS TO THE PARTY INJURED TREBLE DAMAGES, TO BE RECOVERED IN A CIVIL ACTION.

6. A DISTRICT ATTORNEY OR OTHER PUBLIC PROSECUTOR SHALL RESIGN HIS OR HER OFFICE WHEN HE OR SHE BECOMES A CANDIDATE FOR ANOTHER OFFICE EITHER IN A PARTY PRIMARY OR IN A GENERAL ELECTION, EXCEPT THAT HE OR SHE MAY CONTINUE TO HOLD HIS OR HER POSITION AS DISTRICT ATTORNEY OR OTHER PUBLIC PROSECUTOR WHILE BEING A CANDIDATE FOR ELECTION TO OR SERVING AS DELEGATE IN A STATE CONSTITUTIONAL CONVENTION, IF HE OR SHE IS OTHERWISE PERMITTED BY LAW TO DO SO.

7. THE PROVISIONS OF THIS SECTION SHALL APPLY TO ALL DISTRICT ATTORNEYS AND PUBLIC PROSECUTORS INCLUDING THOSE IN COUNTIES WHOLLY CONTAINED WITHIN A CITY.

S 3. This act shall take effect on the first of January next succeeding the date on which it shall have become a law.