

1651

2011-2012 Regular Sessions

I N S E N A T E

January 11, 2011

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:

1 Section 1. Legislative findings. The legislature hereby finds that
2 district attorneys and other public prosecutors, as public officers
3 charged with overseeing that justice is done, owe a duty of fair dealing
4 to those accused and candor to the courts. This act seeks to ensure that
5 New York state's district attorneys and other public prosecutors comply
6 with these fundamental duties by establishing a minimum code of conduct
7 to guide their behavior in the performance of their official responsi-
8 bilities.
9 The legislature also recognizes that the state and its citizens are
10 served not only when the guilty are convicted but when criminal trials
11 are fair and that our system of the administration of justice suffers
12 when any accused is treated unfairly. This act seeks to guarantee that
13 district attorneys and other public prosecutors make timely disclosure
14 to the defense of all evidence required to be disclosed pursuant to the
15 laws and the constitution of the state of New York and the constitution
16 of the United States.
17 The legislature further finds that collaboration between district
18 attorneys and the press as to information affecting the fairness of a
19 criminal proceeding is not only subject to regulation, but is highly
20 censurable and worthy of penalties therefor. This act seeks to achieve a
21 fair balance between a district attorney's or other public prosecutor's
22 right of free speech and society's interest in protecting the integrity
23 of the criminal proceedings and thereby guaranteeing a fair and impar-
24 tial trial. It is the intent of this legislature to insure that informa-
25 tion and statements made by district attorneys and other public prosecu-

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

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tors 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.

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

3 2. EVERY DISTRICT ATTORNEY AND OTHER PUBLIC PROSECUTOR SHALL MAKE
4 TIMELY DISCLOSURE TO THE DEFENSE OF ALL EVIDENCE OF INFORMATION KNOWN TO
5 THE PROSECUTOR THAT TENDS TO NEGATE THE GUILT OF THE ACCUSED OR MITI-
6 GATES THE OFFENSE AND EXERCISE REASONABLE CARE TO PREVENT INVESTIGATORS,
7 LAW ENFORCEMENT PERSONNEL, EMPLOYEES OR OTHER PERSONS ASSISTING OR ASSO-
8 CIATED WITH THE DISTRICT ATTORNEY OR OTHER PUBLIC PROSECUTOR IN A CRIMI-
9 NAL PROCEEDING FROM MAKING AN EXTRAJUDICIAL STATEMENT PROHIBITED IN
10 SUBDIVISION ONE OF THIS SECTION.

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

13 A. THIS SPECIAL DUTY EXISTS BECAUSE:

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

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

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

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

25 B. TO COMPLY WITH SUCH DUTY OF PROSECUTORIAL CARE:

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

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

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

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

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

49 7. THE PROVISIONS OF THIS SECTION SHALL APPLY TO ALL DISTRICT ATTOR-
50 NEYS AND PUBLIC PROSECUTORS INCLUDING THOSE IN COUNTIES WHOLLY CONTAINED
51 WITHIN A CITY.

52 S 3. This act shall take effect on the first of January next succeed-
53 ing the date on which it shall have become a law.