STATE OF NEW YORK

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2017-2018 Regular Sessions

IN SENATE

January 13, 2017

Introduced by Sens. DeFRANCISCO, BAILEY, COMRIE, HAMILTON, PARKER, RIVERA -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- reported favorably from said committee and committed to the Committee on Finance -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- recommitted to the Committee on Judiciary in accordance with Senate Rule 6, sec. 8 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

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

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The judiciary law is amended by adding a new article 15-A to read as follows:

ARTICLE 15-A

STATE COMMISSION ON PROSECUTORIAL CONDUCT

Section 499-a. Establishment of commission.
499-b. Definitions.
499-c. State commission on prosecutorial conduct; organization.
499-d. Functions; powers and duties.
499-e. Panels; referees.
499-f. Complaint; investigation; hearing and disposition.
499-g. Confidentiality of records.
499-h. Breach of confidentiality of commission information.
499-i. Resignation not to divest commission or court of appeals of jurisdiction.
499-j. Effect.

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

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§ 499-a. Establishment of commission. A state commission of prosecutorial conduct is hereby established. The commission shall have the authority to review the conduct of prosecutors upon the filing of a complaint with the commission to determine whether said conduct as alleged departs from the applicable statutes, case law, New York Rules of Professional Conduct, 22 NYCRR 1200, including but not limited to Rule 3.8 (Special Responsibilities of Prosecutors and Other Government Lawyers).

§ 499-b. Definitions. For the purposes of this article the following terms have the following meanings:

1. "Commission" means the state commission on prosecutorial conduct.

2. "Prosecutor" means a district attorney or any assistant district attorney of any county of the state in an action to exact any criminal penalty, fine, sanction or forfeiture.

3. "Hearing" means a proceeding under subdivision four of section four hundred ninety-nine-f of this article.

4. "Member of the bar" means a person admitted to the practice of law in this state for at least five years.

§ 499-c. State commission on prosecutorial conduct; organization. 1. The commission shall consist of eleven members, of whom two shall be appointed by the governor, two by the temporary president of the senate, one by the minority leader of the senate, two by the speaker of the assembly, one by the minority leader of the assembly and three by the chief judge of the court of appeals. 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.

2. Membership on the commission by a prosecutor shall not constitute the holding of a public office and no prosecutor shall be required to take and file an oath of office before serving on the commission. The members of the commission shall elect one of their number to serve as chairman during his or her term of office or for a period of two years, whichever is shorter.

3. The persons first appointed by the governor shall have respectively three and four year terms as he or she shall designate. The persons first appointed by the chief judge of the court of appeals shall have respectively two, three and four year terms as he or she shall designate. The persons first appointed by the temporary president of the senate shall have respectively three and four year terms as he or she shall designate. The person first appointed by the minority leader of the senate shall have a two year term. The persons first appointed by the speaker of the assembly shall have respectively three and four year terms as he or she shall designate. The person first appointed by the minority leader of the assembly shall have a three year term. Each member of the commission shall be appointed thereafter for a term of four years. Commission membership of a judge or justice appointed by the governor or the chief judge shall terminate if such member ceases to hold the judicial position which qualified him or her for such appointment. Membership shall also terminate if a member attains a position which would have rendered him or her ineligible for appointment at the

time of his or her appointment. A vacancy shall be filled by the appointing officer for the remainder of the term.

4. If a member of the commission who is a prosecutor is the subject of a complaint or investigation with respect to his or her qualifications, conduct, fitness to perform or performance of his or her official duties, he or she shall be disqualified from participating in any and all proceedings with respect thereto. If a member of the commission is employed in the same organization as the subject of a complaint or investigation with respect to his or her qualifications, conduct, fitness to perform, or performance of his or her official duties, he or she shall be disqualified from participating in any and all proceedings with respect thereto.

5. Each member of the commission shall serve without salary or other compensation, but shall be entitled to receive actual and necessary expenses incurred in the discharge of his or her duties.

6. For any action taken pursuant to subdivisions four through nine of section four hundred ninety-nine-f or subdivision two of section four hundred ninety-nine-e of this article, eight members of the commission shall constitute a quorum of the commission and the concurrence of six members of the commission shall be necessary. Two members of a three member panel of the commission shall constitute a quorum of the panel and the concurrence of two members of the panel shall be necessary for any action taken.

7. The commission shall appoint and at pleasure may remove an administrator who shall be a member of the bar who is not a prosecutor or retired prosecutor. The administrator of the commission may appoint such deputies, assistants, counsel, investigators and other officers and employees as he or she may deem necessary, prescribe their powers and duties, fix their compensation and provide for reimbursement of their expenses within the amounts appropriated therefor.

§ 499-d. Functions; powers and duties. The commission shall have the following functions, powers and duties:

1. To conduct hearings and investigations, administer oaths or affirmations, subpoena witnesses, compel their attendance, examine them under oath or affirmation and require the production of any books, records, documents or other evidence that it may deem relevant or material to an investigation; and the commission may designate any of its members or any member of its staff to exercise any such powers, provided, however, that except as is otherwise provided in section four hundred ninety-nine-e of this article, only a member of the commission or the administrator shall exercise the power to subpoena witnesses or require the production of books, records, documents or other evidence. The prosecuting agency may inform the commission of its position that the commission's investigations will substantially interfere with the agency's own investigation or prosecution. If the prosecuting agency, by affirmation with specificity and particularity, informs the commission of its basis for that position, the commission shall only exercise its powers in a way that will not interfere with an agency's active investigation or prosecution.

2. To confer immunity when the commission deems it necessary and proper in accordance with section 50.20 of the criminal procedure law; provided, however, that at least forty-eight hours prior written notice of the commission's intention to confer such immunity is given the attorney general and the appropriate district attorney.

3. To request and receive from any court, department, division, board, bureau, commission, or other agency of the state or political subdivi-

sion thereof or any public authority such assistance, information and data as will enable it properly to carry out its functions, powers and duties.

4. To report annually, on or before the first day of March in each year and at such other times as the commission shall deem necessary, to the governor, the legislature and the chief judge of the court of appeals, with respect to proceedings which have been finally determined by the commission. Such reports may include legislative and administrative recommendations. The contents of the annual report and any other report shall conform to the provisions of this article relating to confidentiality.

5. To adopt, promulgate, amend and rescind rules and procedures, not otherwise inconsistent with law, necessary to carry out the provisions and purposes of this article. All such rules and procedures shall be filed in the offices of the chief administrator of the courts and the secretary of state.

6. To do all other things necessary and convenient to carry out its functions, powers and duties expressly set forth in this article.

§ 499-e. Panels; referees. 1. The commission may delegate any of its functions, powers and duties to a panel of three of its members, one of whom shall be a member of the bar, except that no panel shall confer immunity in accordance with section 50.20 of the criminal procedure law. No panel shall be authorized to take any action pursuant to subdivisions four through nine of section four hundred ninety-nine-f of this article or subdivision two of this section.

2. The commission may designate a member of the bar who is not a prosecutor or a member of the commission or its staff as a referee to hear and report to the commission in accordance with the provisions of section four hundred ninety-nine-f of this article. Such referee shall be empowered to conduct hearings, administer oaths or affirmations, subpoena witnesses, compel their attendance, examine them under oath or affirmation and require the production of any books, records, documents or other evidence that the referee may deem relevant or material to the subject of the hearing.

§ 499-f. Complaint; investigation; hearing and disposition. 1. The commission shall receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform, or performance of official duties of any prosecutor, and may determine that a prosecutor be admonished, or censured; and make a recommendation to the governor that a prosecutor be removed from office for cause, for, including, but not limited to, misconduct in office, as evidenced by his or her departure from his or her obligations under appropriate statute, case law, and/or New York Rules of Professional Conduct, 22 NYCRR 1200, including but not limited to Rule 3.8 (Special Responsibilities of Prosecutors and Other Government Lawyers), persistent failure to perform his or her duties, habitual intemperance and conduct, in and outside of his or her office, prejudicial to the administration of justice, or that a prosecutor be retired for mental or physical disability preventing the proper performance of his or her prosecutorial duties. A complaint shall be in writing and signed by the complainant and, if directed by the commission, shall be verified. Upon receipt of a complaint (a) the commission shall conduct an investigation of the complaint; or (b) the commission may dismiss the complaint if it determines that the complaint on its face lacks merit. If the complaint is dismissed, the commission shall so notify the complainant. If the commission shall have notified the prosecutor of the complaint, the commission shall also notify the

prosecutor of such dismissal. Pursuant to paragraph a of subdivision four of section ninety of this chapter, any person being an attorney and counselor-at-law who shall be convicted of a felony as defined in paragraph e of subdivision four of section ninety of this chapter, shall upon such conviction, cease to be any attorney and counselor-at-law, or to be competent to practice law as such.

2. The commission may, on its own motion, initiate an investigation of a prosecutor with respect to his or her qualifications, conduct, fitness to perform or the performance of his or her official duties. Prior to initiating any such investigation, the commission shall file as part of its record a written complaint, signed by the administrator of the commission, which complaint shall serve as the basis for such investigation.

3. In the course of an investigation, the commission may require the appearance of the prosecutor involved before it, in which event the prosecutor shall be notified in writing of his or her required appearance, either personally, at least three days prior to such appearance, or by certified mail, return receipt requested, at least five days prior to such appearance. In either case a copy of the complaint shall be served upon the prosecutor at the time of such notification. The prosecutor shall have the right to be represented by counsel during any and all stages of the investigation in which his or her appearance is required and to present evidentiary data and material relevant to the complaint. A transcript shall be made and kept with respect to all proceedings at which testimony or statements under oath of any party or witness shall be taken, and the transcript of the prosecutor's testimony shall be made available to the prosecutor without cost. Such transcript shall be confidential except as otherwise permitted by section four hundred ninety-nine-g of this article.

4. If in the course of an investigation, the commission determines that a hearing is warranted it shall direct that a formal written complaint signed and verified by the administrator be drawn and served upon the prosecutor involved, either personally or by certified mail, return receipt requested. The prosecutor shall file a written answer to the complaint with the commission within twenty days of such service. If, upon receipt of the answer, or upon expiration of the time to answer, the commission shall direct that a hearing be held with respect to the complaint, the prosecutor involved shall be notified in writing of the date of the hearing either personally, at least twenty days prior thereto, or by certified mail, return receipt requested, at least twenty-two days prior thereto. Upon the written request of the prosecutor, the commission shall, at least five days prior to the hearing or any adjourned date thereof, make available to the prosecutor without cost copies of all documents which the commission intends to present at such hearing and any written statements made by witnesses who will be called to give testimony by the commission. The commission shall, in any case, make available to the prosecutor at least five days prior to the hearing or any adjourned date thereof any exculpatory evidentiary data and material relevant to the complaint. The failure of the commission to timely furnish any documents, statements and/or exculpatory evidentiary data and material provided for herein shall not affect the validity of any proceedings before the commission provided that such failure is not substantially prejudicial to the prosecutor. The complainant may be notified of the hearing and unless he or she shall be subpoenaed as a witness by the prosecutor, his or her presence thereat shall be within the discretion of the commission. The hearing shall not be public unless

the prosecutor involved shall so demand in writing. At the hearing the commission may take the testimony of witnesses and receive evidentiary data and material relevant to the complaint. The prosecutor shall have the right to be represented by counsel during any and all stages of the hearing and shall have the right to call and cross-examine witnesses and present evidentiary data and material relevant to the complaint. A transcript of the proceedings and of the testimony of witnesses at the hearing shall be taken and kept with the records of the commission.

5. Subject to the approval of the commission, the administrator and the prosecutor may agree on a statement of facts and may stipulate in writing that the hearing shall be waived. In such a case, the commission shall make its determination upon the pleadings and the agreed statement of facts.

6. If, after a formal written complaint has been served pursuant to subdivision four of this section, or during the course of or after a hearing, the commission determines that no further action is necessary, the complaint shall be dismissed and the complainant and the prosecutor shall be so notified in writing.

7. After a hearing, the commission may determine that a prosecutor be admonished or censured, or may recommend to the governor that a prosecutor be removed from office for cause. The commission shall transmit its written determination, together with its findings of fact and conclusions of law and the record of the proceedings upon which its determination is based, to the chief judge of the court of appeals who shall cause a copy thereof to be served either personally or by certified mail, return receipt requested, on the prosecutor involved. Upon completion of service, the determination of the commission, its findings and conclusions and the record of its proceedings shall be made public and shall be made available for public inspection at the principal office of the commission and at the office of the clerk of the court of appeals. The prosecutor involved may either accept the determination of the commission or make written request to the chief judge, within thirty days after receipt of such determination, for a review thereof by the court of appeals. If the commission has determined that a prosecutor be admonished or censured, and if the prosecutor accepts such determination or fails to request a review thereof by the court of appeals, the commission shall thereupon admonish or censure him or her in accordance with its findings. If the commission has recommended that a prosecutor be removed or retired and the prosecutor accepts such determination or fails to request a review thereof by the court of appeals, the court of appeals shall thereupon transmit the commission's findings to the governor who will independently determine whether the prosecutor should be removed or retired.

8. If the prosecutor requests a review of the determination of the commission, in its review of a determination of the commission pursuant to the second undesignated paragraph of subdivision b of section three of article six of the state constitution, the court of appeals shall review the commission's findings of fact and conclusions of law on the record of the proceedings upon which the commission's determination was based. After such review, the court may accept or reject the determined sanction; impose a different sanction including admonition or censure, recommend removal or retirement for the reasons set forth in subdivision one of this section; or impose no sanction. However, if the court of appeals recommends removal or retirement, it shall, together with the commission, transmit the entire record to the governor who will independently determine whether a prosecutor should be removed or retired.

9. (a) The court of appeals may suspend a prosecutor from exercising the powers of his or her office while there is pending a determination by the commission for his or her removal or retirement, or while he or she is charged in this state with a felony by an indictment or an information filed pursuant to section six of article one of the constitution. The suspension shall terminate upon conviction of a felony resulting in such prosecutor's disbarment pursuant to paragraph a of subdivision four of section ninety of this chapter. If such conviction becomes final, he or she shall be removed from office. The suspension shall be terminated upon reversal of the conviction and dismissal of the accusatory instrument.

(b) Upon the recommendation of the commission or on its own motion, the court may suspend a prosecutor from office when he or she is charged with a crime punishable as a felony under the laws of this state, or any other crime which involves moral turpitude. The suspension shall terminate upon conviction of a felony resulting in such prosecutor's disbarment pursuant to paragraph a of subdivision four of section ninety of this chapter. The suspension shall continue upon conviction of any other crime which involves moral turpitude and, if such conviction becomes final, he or she shall be removed from office. The suspension shall be terminated upon reversal of the conviction and dismissal of the accusatory instrument.

(c) A prosecutor who is suspended from office by the court shall receive his or her salary during such period of suspension, unless the court directs otherwise. If the court has so directed and such suspension is thereafter terminated, the court may direct that he or she shall be paid his or her salary for such period of suspension.

(d) Nothing in this subdivision shall prevent the commission from determining that a prosecutor be admonished or censured or prevent the commission from recommending removal or retirement pursuant to subdivision seven of this section.

10. If during the course of or after an investigation or hearing, the commission determines that the complaint or any allegation thereof warrants action, other than in accordance with the provisions of subdivisions seven through nine of this section, within the powers of: (a) a person having administrative jurisdiction over the prosecutor involved in the complaint; or (b) an appellate division of the supreme court; or (c) a presiding justice of an appellate division of the supreme court; or (d) the chief judge of the court of appeals; or (e) the governor pursuant to subdivision (b) of section thirteen of article thirteen of the constitution; or (f) an applicable district attorney's office or other prosecuting agency, the commission shall refer such complaint or the appropriate allegations thereof and any evidence or material related thereto to such person, agency or court for such action as may be deemed proper or necessary.

11. The commission shall notify the complainant of its disposition of the complaint.

12. In the event of removal from office of any prosecutor, pursuant to subdivision seven or eight or paragraph (a) or (b) of subdivision nine of this section, a vacancy shall exist pursuant to article three of the public officers law.

§ 499-g. Confidentiality of records. Except as hereinafter provided, all complaints, correspondence, commission proceedings and transcripts thereof, other papers and data and records of the commission shall be confidential and shall not be made available to any person except pursuant to section four hundred ninety-nine-f of this article. The commis-

sion and its designated staff personnel shall have access to confidential material in the performance of their powers and duties. If the prosecutor who is the subject of a complaint so requests in writing, copies of the complaint, the transcripts of hearings by the commission thereon, if any, and the dispositive action of the commission with respect to the complaint, such copies with any reference to the identity of any person who did not participate at any such hearing suitably deleted therefrom, except the subject prosecutor or complainant, shall be made available for inspection and copying to the public, or to any person, agency or body designated by such prosecutor.

§ 499-h. Breach of confidentiality of commission information. 1. Any staff member, employee or agent of the state commission on prosecutorial conduct who violates any of the provisions of section four hundred ninety-nine-g of this article shall be subject to a reprimand, a fine, suspension or removal by the commission.

2. Within ten days after the commission has acquired knowledge that a staff member, employee or agent of the commission has or may have breached the provisions of section four hundred ninety-nine-g of this article, written charges against such staff member, employee or agent shall be prepared and signed by the chairman of the commission and filed with the commission. Within five days after receipt of charges, the commission shall determine, by a vote of the majority of all the members of the commission, whether probable cause for such charges exists. If such determination is affirmative, within five days thereafter a written statement specifying the charges in detail and outlining his or her rights under this section shall be forwarded to the accused staff member, employee or agent by certified mail. The commission may suspend the staff member, employee or agent, with or without pay, pending the final determination of the charges. Within ten days after receipt of the statement of charges, the staff member, employee or agent shall notify the commission in writing whether he or she desires a hearing on the charges. The failure of the staff member, employee or agent to notify the commission of his or her desire to have a hearing within such period of time shall be deemed a waiver of the right to a hearing. If the hearing has been waived, the commission shall proceed, within ten days after such waiver, by a vote of a majority of all the members of such commission, to determine the charges and fix the penalty or punishment, if any, to be imposed as hereinafter provided.

3. Upon receipt of a request for a hearing, the commission shall schedule a hearing, to be held at the commission offices, within twenty days after receipt of the request therefor, and shall immediately notify in writing the staff member, employee or agent of the time and place thereof.

4. The commission shall have the power to establish necessary rules and procedures for the conduct of hearings under this section. Such rules shall not require compliance with technical rules of evidence. All such hearings shall be held before a hearing panel composed of three members of the commission selected by the commission. Each hearing shall be conducted by the chairman of the panel who shall be selected by the panel. The staff member, employee or agent shall have a reasonable opportunity to defend himself and to testify on his or her own behalf. He or she shall also have the right to be represented by counsel, to subpoena witnesses and to cross-examine witnesses. All testimony taken shall be under oath which the chairman of the panel is hereby authorized to administer. A record of the proceedings shall be made and a copy of

the transcript of the hearing shall, upon written request, be furnished without charge to the staff member, employee or agent involved.

5. Within five days after the conclusion of a hearing, the panel shall forward a report of the hearing, including its findings and recommendations, including its recommendations as to penalty or punishment, if one is warranted, to the commission and to the accused staff member, employee or agent. Within ten days after receipt of such report the commission shall determine whether it shall implement the recommendations of the panel. If the commission shall determine to implement such recommendations, which shall include the penalty or punishment, if any, of a reprimand, a fine, suspension for a fixed time without pay or dismissal, it shall do so within five days after such determination. If the charges against the staff member, employee or agent are dismissed, he or she shall be restored to his or her position with full pay for any period of suspension without pay and the charges shall be expunged from his or her record.

6. The accused staff member, employee or agent may seek review of the recommendation by the commission by way of a special proceeding pursuant to article seventy-eight of the civil practice law and rules.

§ 499-i. Resignation not to divest commission or court of appeals of jurisdiction. The jurisdiction of the court of appeals and the commission pursuant to this article shall continue notwithstanding that a prosecutor resigns from office after a recommendation by the commission that the prosecutor be removed from office has been transmitted to the chief judge of the court of appeals, or in any case in which the commission's recommendation that a prosecutor should be removed from office shall be transmitted to the chief judge of the court of appeals within one hundred twenty days after receipt by the chief administrator of the courts of the resignation of such prosecutor. Any determination by the governor that a prosecutor who has resigned should be removed from office shall render such prosecutor ineligible to hold any other prosecutorial office.

§ 499-j. Effect. 1. The powers, duties, and functions of the state commission on prosecutorial conduct shall not supersede the powers and duties of the governor as outlined in section thirteen of article thirteen of the New York state constitution.

2. Removal or retirement of a prosecutor pursuant to this article shall be considered a removal from office pursuant to section thirty of the public officers law.

§ 2. If any part or provision of this act is adjudged by a court of competent jurisdiction to be unconstitutional or otherwise invalid, such judgment shall not affect or impair any other part or provision of this act, but shall be confined in its operation to such part or provision.

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