

# STATE OF NEW YORK

3934

2021-2022 Regular Sessions

## IN SENATE

February 1, 2021

Introduced by Sen. BAILEY -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary

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

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

1 Section 1. Section 499-a of the judiciary law, as amended by chapter  
2 23 of the laws of 2019, is amended to read as follows:

3 § 499-a. Establishment of commission. There is hereby created within  
4 the executive department a state commission of prosecutorial conduct.  
5 The commission shall have the authority to review and investigate the  
6 conduct of prosecutors upon the filing of a complaint with the commis-  
7 sion to [~~determine~~] examine whether [~~said~~] a prosecutor or prosecutors  
8 has committed conduct [~~as alleged departs from the applicable~~] in the  
9 course of his or her official duties or under color of state law poten-  
10 tially violative of statutes, the legal rights of private persons,  
11 whether statutory, constitutional or otherwise; case law[~~7~~]; or court  
12 rules, including, but not limited to the New York Rules of Professional  
13 Conduct, 22 NYCRR 1200, or any subset thereof or successor thereto,  
14 including but not limited to Rule 3.8 (Special Responsibilities of  
15 Prosecutors and Other Government Lawyers).

16 § 2. Section 499-b of the judiciary law, as amended by chapter 23 of  
17 the laws of 2019, is amended to read as follows:

18 § 499-b. Definitions. For the purposes of this article the following  
19 terms have the following meanings:

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

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

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

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

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

3 5. [~~"Presiding justices of the appellate division" shall mean, collec-~~  
4 ~~tively, the presiding justices of the appellate division of the supreme~~  
5 ~~court of each judicial department. The chief administrative judge shall,~~  
6 ~~by rule, establish an appropriate mechanism, not inconsistent with law,~~  
7 ~~for persons and entities interacting with the presiding justices of the~~  
8 ~~appellate division pursuant to this article to file papers and communi-~~  
9 ~~cate with such body.~~

10 6.] "Retired judge" shall mean a former judge or justice of the  
11 unified court system who was qualified as an attorney during such  
12 service and served as such a judge or justice for at least five years.

13 § 3. Subdivision 6 of section 499-c of the judiciary law, as amended  
14 by chapter 23 of the laws of 2019, is amended to read as follows:

15 6. For any action taken pursuant to subdivisions four through [nine]  
16 seven of section four hundred ninety-nine-f or subdivision two of  
17 section four hundred ninety-nine-e of this article, eight members of the  
18 commission shall constitute a quorum of the commission and the concur-  
19 rence of six members of the commission shall be necessary. Two members  
20 of a three member panel of the commission shall constitute a quorum of  
21 the panel and the concurrence of two members of the panel shall be  
22 necessary for any action taken.

23 § 4. Section 499-f of the judiciary law, as amended by chapter 23 of  
24 the laws of 2019, is amended to read as follows:

25 § 499-f. Complaint; investigation; hearing and disposition. 1. The  
26 commission shall receive, initiate, investigate and hear complaints with  
27 respect to the conduct[, qualifications, fitness to perform,] or  
28 performance of official duties of any prosecutor[, and may determine  
29 that a prosecutor be admonished, or censured]; and may make a recommen-  
30 dation to the governor that a prosecutor be removed from office for  
31 cause, for, including, but not limited to, misconduct in office, as  
32 evidenced by his or her departure from his or her obligations under  
33 appropriate statute, case law, and/or New York Rules of Professional  
34 Conduct, 22 NYCRR 1200, or any subset thereof or successor thereto,  
35 including but not limited to Rule 3.8 (Special Responsibilities of  
36 Prosecutors and Other Government Lawyers), persistent failure to perform  
37 his or her duties, conduct prejudicial to the administration of justice,  
38 or that a prosecutor be retired for mental or physical disability  
39 preventing the proper performance of his or her prosecutorial duties. A  
40 complaint shall be in writing and signed by the complainant and, if  
41 directed by the commission, shall be verified. Upon receipt of a  
42 complaint (a) the commission shall conduct an investigation of the  
43 complaint; or (b) the commission may dismiss the complaint if it deter-  
44 mines that the complaint on its face lacks merit. If the complaint is  
45 dismissed, the commission shall so notify the complainant. If the  
46 commission shall have notified the prosecutor of the complaint, the  
47 commission shall also notify the prosecutor of such dismissal. Pursuant  
48 to paragraph a of subdivision four of section ninety of this chapter,  
49 any person being an attorney and counselor-at-law who shall be convicted  
50 of a felony as defined in paragraph e of subdivision four of section  
51 ninety of this chapter, shall upon such conviction, cease to be any  
52 attorney and counselor-at-law, or to be competent to practice law as  
53 such.

54 2. The commission may, on its own motion, initiate an investigation of  
55 a prosecutor with respect to his or her [qualifications,] conduct[,  
56 fitness to perform] or the performance of his or her official duties.

1 Prior to initiating any such investigation, the commission shall file as  
2 part of its record a written complaint, signed by the administrator of  
3 the commission, which complaint shall serve as the basis for such inves-  
4 tigation.

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

21 4. If in the course of an investigation, the commission determines  
22 that a hearing is warranted it shall direct that a formal written  
23 complaint signed and verified by the administrator be drawn and served  
24 upon the prosecutor involved, either personally or by certified mail,  
25 return receipt requested. The prosecutor shall file a written answer to  
26 the complaint with the commission within twenty days of such service.  
27 If, upon receipt of the answer, or upon expiration of the time to  
28 answer, the commission shall direct that a hearing be held with respect  
29 to the complaint, the prosecutor involved shall be notified in writing  
30 of the date of the hearing either personally, at least twenty days prior  
31 thereto, or by certified mail, return receipt requested, at least twen-  
32 ty-two days prior thereto. Upon the written request of the prosecutor,  
33 the commission shall, at least five days prior to the hearing or any  
34 adjourned date thereof, make available to the prosecutor without cost  
35 copies of all documents which the commission intends to present at such  
36 hearing and any written statements made by witnesses who will be called  
37 to give testimony by the commission. The commission shall, in any case,  
38 make available to the prosecutor at least five days prior to the hearing  
39 or any adjourned date thereof any exculpatory evidentiary data and mate-  
40 rial relevant to the complaint. The failure of the commission to timely  
41 furnish any documents, statements and/or exculpatory evidentiary data  
42 and material provided for herein shall not affect the validity of any  
43 proceedings before the commission provided that such failure is not  
44 substantially prejudicial to the prosecutor. The complainant may be  
45 notified of the hearing and unless he or she shall be subpoenaed as a  
46 witness by the prosecutor, his or her presence thereat shall be within  
47 the discretion of the commission. The hearing shall not be public unless  
48 the prosecutor involved shall so demand in writing. At the hearing the  
49 commission may take the testimony of witnesses and receive evidentiary  
50 data and material relevant to the complaint. The prosecutor shall have  
51 the right to be represented by counsel during any and all stages of the  
52 hearing and shall have the right to call and cross-examine witnesses and  
53 present evidentiary data and material relevant to the complaint. A tran-  
54 script of the proceedings and of the testimony of witnesses at the hear-  
55 ing 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]~~ rely upon the agreed statement of facts in forming the commission's findings of fact.

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]~~ recommendations and the record of the proceedings upon which ~~[its determination is]~~ such findings and recommendations are based, to the ~~[presiding justices of the]~~ attorney grievance committee of the appellate division ~~[who]~~ in the department where the prosecutor was admitted to practice, which 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]~~ commission's findings and ~~[conclusions]~~ recommendations 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 appellate division in the department in which the ~~[alleged misconduct occurred]~~ record was filed. If the commission's findings and recommendations include any recommendation that any prosecutor should be removed or retired, the commission shall simultaneously transmit its findings, recommendations, and record of its proceedings to the governor. Records of a prosecuting agency provided by the agency to the commission pursuant to this article shall not be subject to disclosure by the commission under article six of the public officers law. ~~[The prosecutor involved may either accept the determination of the commission or make written request to the presiding justices of the appellate division, within thirty days after receipt of such determination, for a review thereof by the presiding justices of the appellate division. 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 presiding justices of the appellate division, 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 presiding justices of the appellate division, the presiding justices of the appellate division 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, the presiding justices of the appellate division 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 presiding justices of the]~~ The attorney grievance committee of the appellate division that receives the commission's report may accept or reject the ~~[determined]~~ recommended 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 presiding justices of the appellate division recommend removal or retirement, they 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 presiding justices of the appellate division 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 presiding justices of the appellate division 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 presiding justices of the appellate division 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 presiding justices of the appellate division 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]~~ and eight of this section, within the powers of: (a) a person having administrative jurisdiction over the prosecutor involved in the complaint; or (b) ~~[an]~~ the attorney grievance committee of the appellate division ~~[of the supreme court]~~ in the department where the prosecutor was admitted to practice; 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)]~~ (d) 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.]~~ 10. 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.]~~

§ 5. Section 499-i of the judiciary law, as amended by chapter 23 of the laws of 2019, is amended to read as follows:

§ 499-i. Resignation not to divest commission ~~[or presiding justices of]~~ and the appellate division of jurisdiction. The jurisdiction of the ~~[presiding justices of the]~~ appellate division 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 ~~[presiding justices of the appellate division]~~ governor, or in any case in which the commission's recommendation that a prosecutor should be removed from office shall be transmitted to the ~~[presiding justices of the appellate division]~~ governor 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.

§ 6. Section 499-j of the judiciary law, as amended by chapter 23 of the laws of 2019, is amended to read as follows:

§ 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.]~~

§ 7. Legislative intent. It is hereby declared to be the intent of the legislature that, if any clause, sentence, paragraph, subdivision, section or part of article 15-A of the judiciary law shall be adjudged by any court of competent jurisdiction to be invalid, that such article would have been enacted even if such invalid provisions has not been included therein.

§ 8. Severability. If any clause, sentence, paragraph, subdivision, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section or part thereof directly involved in the controversy in which such judgment shall have been rendered. It is hereby declared to be the intent of the legislature that this act would have been enacted even if such invalid provisions had not been included herein.

§ 9. This act shall take effect immediately.