DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK

PRESIDENT
SANDRA DOORLEY
MONROE COUNTY

June 14, 2021

The Honorable Andrew M. Cuomo
Governor of New York State
NYS State Capitol Building
Albany, NY 12224

Dear Governor Cuomo,

Without fear or favor-- Those four words have long described the essence of a prosecutor's task and the compass that must be followed in pursuing equal justice for everyone. To ever consider either fear of consequence for investigating and prosecuting the powerful, or to curry favor with the influential and wealthy would surely pervert our notion of equal justice under the law and destroy all confidence in our already fraught criminal justice system.

It is for that reason that I write to you. As the current President of the District Attorneys Association of New York, I am compelled to urge you in the strongest terms to exercise a veto of S3934/A1634 -- legislation that would again establish a Commission on Prosecutorial Conduct. For reasons great and small; policy based and purely practical; apparent and more subtle, as well as those fact based, as well as legal, it is the considered opinion of the State's career prosecutors that the current iteration of the bill will not only fail to achieve its stated goals, but will prove to delay and hinder the potential discipline of any deserving prosecutor. Accordingly, we in DAASNY implore you to take the difficult action of issuing a veto of this third attempt of a flawed statutory scheme.

To be clear, we share your oft-stated belief that New York's prosecutors should not only be our nation's most professional, but they should practice our critical profession while being held to the highest ethical standards demanded by the constitution. As officials elected by our public, we expect no less of ourselves, and demand it from those who serve as our assistants. Because of that, we have long supported proposals advanced by the Justice Task Force to expedite and strengthen the attorney grievance process, while ensuring greater transparency and predictability in the attorney disciplinary system. Moreover, we have long recommended that the current Grievance Committees be augmented with members who have long and varied experience in the practice of criminal law to provide for the most thorough and professional investigation of any matter, regardless of how complicated or nuanced.

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As a measure of our frustration with the current state of the existing grievance system, DAASNY has previously urged for expeditious action by committees entrusted with the responsibility to examine the professional conduct of a District Attorney. That the grievance system needs to be changed is not in dispute. How that change should be implemented remains subject to continuing, healthy debate. What is apparent to our members, and we believe is clear to anyone upon examination of the current proposal, is that it will fail in its mission of holding prosecutors to the highest ethical standards, while simultaneously triggering many unintended results that will damage our criminal justice system and further erode the public's confidence in it, as well as in our ability to govern. To risk the advent of additional wounds to our joint reputations and the public's perception at a time when we are all faced with such dramatic increases in violent crime is more than unwise. Rather, we must seek to foster confidence in us, while finding solutions to this spreading plague of gun violence.

As you are well aware, this legislation has a long and unhappy history. Over the last six years, version after version has been proffered, time and again, only to be abandoned when critical flaws and oversights are pointed out. Passed, amended, and "tweaked" on multiple occasions, the concept of creating a separate oversight body to investigate and discipline only local state prosecutors remains an enduring objective of the Legislature. However, to date, every version has been afflicted with crippling risks which far outweigh any possible reward, and flagrantly violates the State's Constitution. Indeed, the current proposal exists only because its predecessor did not survive a single round of judicial scrutiny, owing to its facially unconstitutional impediments.

S3934/A1634 represents the Legislature's third attempt to craft a commission targeting only county District Attorneys and their assistants for conduct which is already within the purview of the existing Appellate Division Grievance Committees. The Legislature's prior efforts, as noted by your approval letters and the Attorney General's Memorandum, were fraught with constitutional pitfalls. This third version is an attempt to address the constitutional infirmities, yet in our opinion succeeds only in further diluting any potential benefit this commission could hope to achieve. This commission will not assist the Grievance Committees, the existing lawful entity empowered to recommend discipline to the Appellate Division, and rather it will impede their work. The Legislature should devote its efforts to strengthening the current grievance process and not creating any superfluous obstacle to the process.

Our initial review of the latest edition -- crafted to address flaws identified by the reviewing court, still presents clear "separation of powers" problems that diminish its chance of surviving challenge, as well as "equal protection" issues resulting from the bill's election to only target District Attorneys and their assistants, while sparing the Attorney General and her assistants, as well as County Attorneys doing identical work on cases arising from the same geographic jurisdiction, often sharing subject matter jurisdiction over the same cases and defendants or respondents. Therefore, the survival of the entire statutory scheme remains in doubt, but the delay in taking meaningful steps to improve our system is not. The current iteration is what remains after the initial level of judicial scrutiny and is simply a ramshackle attempt to mend serious flaws that have proven to be fatal.

But apart from these grave, legal impediments, more paramount in our opposition are the obvious policy dangers that this entire endeavor presents.

It is fundamental that District Attorneys are constitutional officers, statutorily charged with the responsibility and corresponding authority to investigate and prosecute crimes that occur in the counties in which they were elected. Every District Attorney is invested with the ultimate discretion to determine when to prosecute; who shall be prosecuted and for what crimes -- and just as significantly -- when, whom and for what not to prosecute. Although we have advised the legislative sponsors, they choose to ignore the reality that creating such a Commission necessarily will intrude into the decision making process that must be exercised only by an elected District Attorney on a daily basis. Knowing that choosing to open an investigation into a powerful or public figure with the knowledge that it may trigger a complaint that can color decisions that must be made without fear or favor -- not through a prism colored by considerations resulting from this ill-conceived legislation.

Just as insidious, but less obvious, will be the situation when a District Attorney refuses an entreaty to either investigate or prosecute a particular target, based on the District Attorney's conclusion that criminality has not occurred or that there exists insufficient factual predicate to subject any individuals to the burdens associated with potential prosecution. Experience teaches that disappointing those who crave prosecutorial action often results in deep bitterness and misbegotten claims of corruption, or political allegiance or influence. The fortitude necessary to make a principled decision not to commence such a prosecution will surely face compromise in the face of the real potential that such a decision will soon be followed by a complaint. Additionally, considerations regarding whether a particular office can simultaneously, thoroughly and professionally conduct a prosecution while defending against a complaint will become a routine election and occurrence. And of course, practical concerns about the financial burdens of retaining representation to answer such complaints will surely chill a prosecutor's exercise of his or her discretion without fear or favor. Events such as these will not be infrequent. Should such a thing happen once, that will be too often. Sadly, the weaponizing of the grievance process will be a common result. Confidence in our criminal justice system and those who must handle the well-defined roles will not be enhanced. Instead, it will be at best, diminished, or worse still, damaged or destroyed all together.

And what must be recognized is that this version of the statutory scheme has no authority to discipline anyone, yet it has enormous authority to investigate -- through the issuance of subpoenas and the compulsion of testimony -- and to recommend discipline by referring a matter to the same Grievance Committees and Appellate Divisions that are now constitutionally authorized to determine if discipline is warranted.

Rather than ensure the swift investigation of ethical violations resulting in public discipline for an offender, the Commission's initial investigation, followed by a referral and second, then a constitutionally required investigation by the existing grievance structure, will only delay the discipline of those who offend. Ironically, the few, historic cases of unethical behavior cited by proponents of this scheme would fall outside the reach of this Commission. In those matters, the individual prosecutors were terminated from service due to their actions, but because the current legislation provides for jurisdiction over current "prosecutors," many of the cases for which the Commission was designed to address would be outside the scope of its authority and would resultantly escape its attention. These obvious contradictions and shortcomings only highlight the counterproductive and misguided nature of this entire enterprise.

It is because of these many crippling defects we urge your veto. But we do not recommend inaction. It is our strong belief that the entire practice of law and the criminal justice system in particular, would benefit from a redesign of our current Grievance Committees, employing more criminal practitioners and armed with more robust and uniform rules to more efficiently investigate claims of unethical behavior and more transparently report its work to an eager public, thereby engendering greater confidence without squandering additional, precious taxpayer funds to create an entire bureaucracy that is so poorly designed that it can never achieve its stated mission.

For your convenience, I have attached the Report of the Justice Task Force on Attorney Discipline, as well as the New York State Commission on Statewide Attorney Discipline as models of what would more successfully achieve the stated goals of this ill-conceived legislation.

As the Reports show, cases of prosecutorial misconduct are rare. But, we share your view that one case is too many and can never be tolerated. DAASNY stands ready to partner with you in finding solutions to problems that afflict our criminal justice system, including the best methods of preventing and punishing ethical offenses by all those who labor in that system. That will be the surest path to a justice system in which every New Yorker can be confident.

Sandra Doorley
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District Attorneys Association of the State of New York