

Date: July 20, 2020

To: Committee on Professional Responsibility and Conduct (COPRAC)

From: Working Group re District Attorney Letter Request

Subject: Issues Related to District Attorneys Request for New Rule of Professional Conduct or Ethics Opinion related to Campaign Contributions and Prosecutorial Conflicts

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## **INTRODUCTION:**

By letter to the State Bar dated June 1, 2020, three current elected district attorneys (Contra Costa, San Francisco, and San Joaquin) and one former district attorney (San Francisco, now a candidate in Los Angeles) (the “DAs”) requested that the State Bar enact a new Rule of Professional Conduct—or issue an ethics opinion – that would prohibit an elected prosecutor, or a candidate for that office, from seeking or accepting political or financial support from law enforcement public employee unions.

The letter’s premise is that law enforcement unions play an important role in prosecutorial elections, both by making endorsements and donating funds. At the same time, elected prosecutors work closely with law enforcement officers but must also sometimes evaluate whether those officers have committed crimes. Further, when prosecutors initiate an investigation or prosecution of a law enforcement officer, the union often pays the officer’s legal fees. DAs maintain that this creates an actual conflict—or at least the appearance of one—that should be addressed by a proposed rule or ethics opinion prohibiting such political or financial support.

By return letter dated July 2, 2020, the State Bar identified several concerns with the proposal, including constitutional concerns related to First Amendment and equal protection issues, as well as potential conflicts with other state laws. The State Bar also expressed similar concerns with solutions that, rather than barring contributions, would declare that a prosecutor had a per se conflict of interest in investigating an officer when the officer or the officer’s union had contributed to or supported the prosecutor’s campaign. At the same time, the State Bar acknowledged that the policy issue was “deserving of thoughtful attention and analysis,” and referred the matter to the Committee on Professional Responsibility and Conduct (“Committee” or “COPRAC”) “for a more in depth comprehensive analysis.” The expedited schedule for consideration of the issues involves a public hearing on August 11, 2020. Further work is expected to take place later this summer and in early fall, leading to a report being submitted to the Board of Trustees.

This memorandum identifies several potential issues that the Committee may need to consider in reviewing this request.

## DISCUSSION:

### I. Constitutional Concerns

A Rule of Professional Conduct is subject to the same constitutional analysis as is a statute or regulation. (*See Berry v. Schmitt* (6th Cir. 2012) 688 F.3d 290, 302-303 [Kentucky Rule of Professional Conduct prohibiting attorneys from making false or reckless statements about the integrity of a judge, adjudicatory officer, or public legal officer, unconstitutional as applied to attorney's speech].)

#### A. First Amendment Issues

1. Does the proposal limit free speech in the form of a campaign contribution in violation of the First Amendment?
  - a. Does the proposed change restrict protected speech? (*See Citizens United v. Federal Election Comm'n* (2010) 558 U.S. 310 [political spending is protected speech, and the government may not restrict independent expenditures for political communications by corporations or unions; striking down the provisions of campaign-finance law barring independent expenditures for electioneering communications, but leaving the ban on direct contributions to candidates in place].)
  - b. What is the standard of justification for a restraint of the type proposed?
    - i. Does this restriction call for a showing of a compelling state interest for the proposed change required under strict scrutiny? (*See Williams-Yulee v. Florida Bar* (2015) 575 U.S. 433 [in upholding Florida State Bar rule banning personal solicitation of campaign funds by judicial candidates, concluding that Florida's interest in preserving public confidence in the integrity of its judiciary was sufficiently compelling to survive strict scrutiny].)
    - ii. Or is the standard more similar to restrictions on campaign contributions, which is that the regulation must be "closely drawn" to match a "sufficiently important interest." *Buckley v. Valeo* (1976) 424 U. S. 1, 25 (per curiam).
  - c. In *Williams-Yulee*, the majority found that the State may conclude that judges, charged with exercising strict neutrality and independence, cannot supplicate campaign donors without diminishing public confidence in judicial integrity, and that because public perception of judicial integrity served a "state interest of the highest order," the First Amendment permitted the restrictions on speech. (556 U.S. at p. 889.)

- d. The majority in *Williams-Yulee* also rejected the comparison of the State Bar’s rule to campaign finance restrictions in political elections: “Judges are not politicians, even when they come to the bench by way of the ballot. And a State’s decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office.” (556 U.S. at p. 437.) *See also id.* at pp. 446-47 [“a State’s interest in preserving public confidence in the integrity of its judiciary extends beyond its interest in preventing the appearance of corruption in legislative and executive elections . . . . States may regulate judicial elections differently than they regulate political elections, because the role of judges differs from the role of politicians. Politicians are expected to be appropriately responsive to the preferences of their supporters . . . . The same is not true of judges. In deciding cases, a judge is not to follow the preferences of his supporters, or provide any special consideration to his campaign donors. A judge instead must observe the utmost fairness, striving to be perfectly and completely independent, with nothing to influence or control him but God and his conscience.”] (internal marks and citations omitted.)
  - e. Does the reasoning of *Williams-Yulee* and the Court’s analysis regarding judges apply to district attorneys? (See New York State Bar Ass’n, Comm. On Prof’l Ethics, Opn. 683 (1996) [“In light of their duty to seek justice, individual prosecutors have a responsibility . . . to exercise their discretion in a disinterested, nonpartisan fashion . . . .”].)
  - f. Is the proposed change to the CRPC narrowly tailored to advance the state’s interest through the least restrictive means? (See *United States v. Playboy Entertainment Group, Inc.* (2000) 529 U.S. 803.) When determining whether a law satisfies the narrow-tailoring test, courts look for a fit between the government’s ends and the means chosen to accomplish those ends that is reasonable, “that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.” [*Bd. of Trustees v. Fox* (1989) 492 U.S. 469, 480 (quotation marks omitted).]
2. Is there a potential for constitutional challenge on the grounds that the proposed change to the CRPC constitutes viewpoint-based or content-based regulation of speech in violation of the First Amendment? (See, e.g., *Police Department of Chicago v. Mosley* (1972) 408 U.S. 92, 95; *R.A.V. v. City of Saint Paul* (1992) 505 U.S. 377, 382.)
  3. Does this proposal raise the potential for a vagueness challenge? (See, e.g., *Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030 [U.S. Supreme Court reversed Nevada Supreme Court’s attorney discipline of a prosecutor who made extrajudicial statements concerning a criminal proceeding, reasoning that the Nevada Supreme Court’s disciplinary rule was unconstitutionally vague].)

## **B. Equal Protection Issues**

1. Does the proposed rule change raise a possible equal protection clause concern by imposing a prohibition on political contributions to district attorney candidates by law enforcement unions when a comparable prohibition is not imposed on other similarly situated groups/individuals? [*See, e.g., Protect My Check, Inc. v. Dilger* (E.D. Ky. 2016) 176 F.Supp.3d 685 (Kentucky's ban on direct contributions to political candidates from corporations, but not LLCs and unions, likely violated Equal Protection Clause; political speech is a fundamental right to which corporations are entitled).]
2. A law will be sustained in the face of an equal protection challenge if it can be said to advance a legitimate government interest. This is true even if the law seems unwise or works to the disadvantage of a particular group or if the rationale for it seems tenuous.

## **II. Conflict with State Law**

The State Bar has preliminarily identified two potential ways in which a ban on soliciting or accepting law enforcement union contributions or a conflict of interest rule disqualifying prosecutors who have accepted them from conducting police investigations might conflict with state law.

### **A. Assembly Bill 571 (“AB 571”)**

#### **1. Statutory Background**

Recent amendments to California state campaign finance laws, scheduled to take effect in January 2021, will establish state law limits on political contributions to candidates running for a local or county office, unless the locality has itself enacted such limitations. *See* AB 571. The relevant provisions are amendments to the Political Reform Act of 1974, and are largely contained in the Government Code. A professional rule barring a contribution that, while capped, would still be permissible under the provisions of the Government Code (or a qualifying local enactment) might be inconsistent with, or even barred by such provisions.

Before AB 571, state law imposed no limits on contributions to countywide offices such as district attorneys. But it expressly allowed local governments to enact such ordinances, and many counties have done so.<sup>1</sup> *E.g.*, Los Angeles County Code of Ordinances 2190.040 (\$300 per person per elections); San Diego County Code of Regulatory Ordinances Section 32.923 (\$500

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<sup>1</sup> For a full listing, see the Fair Political Practices Commission website at <http://www.fppc.ca.gov/learn/campaign-rules/local-campaign-ordinances.html>.

per person per election); Orange County Codified Ordinance 1-6-5 (a) (\$2000); San Bernardino Campaign Reform Ordinance 12.4305 (adopting limits established under state law for state senate and assembly races, now \$4700); Santa Clara Ordinance NS 19.40 (\$500 per person per election); San Francisco Campaign and Governmental Conduct Code Section 1.114 (a) (\$500). A notable outlier is Alameda County, which currently sets its limit at \$40,000. Alameda County Ordinance No. 2010-67, Section 1.07.030.

A significant number of counties (though among the larger ones, only Riverside) have no campaign contribution limits. The effect of AB 571 will be to cap contributions in those counties at the level set for State Senate and Assembly races (currently \$4700), while leaving the limits that already exist in other localities in place. Localities remain permitted to modify existing limits, and to establish new ones that differ from those set by state law—that is, they may be higher or lower than the default backup limits that will apply in counties which have not adopted any contribution limits.

2. Would a rule barring specific contributions to a District Attorney conflict with ABA 571 or any local government ordinances that have imposed similar restrictions?

Whether a rule barring specific contributions to a District Attorney would conflict with this scheme appears to turn in the first instance on Government Code Section 81013:

Nothing in this Title prevents the Legislature or any other state or local agency from imposing additional requirements on any person if the requirements do not prevent the person from complying with this title. If any act of the Legislature conflicts with the provisions of this title, this Title shall prevail.

The case law interpreting this section is sparse and not directly on point. But the general view expressed is that rules that are more restrictive than those in the statute are permitted, so long as they do not interfere with compliance, which appears to mean so long as they do not require or encourage a non-complying act. *Major v. Silna* (2005) 134 Cal.App.4th 1485, 1502 (local outright ban on non-cash contributions permitted by state law not barred by PRA); *Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1229 (provision barred if “it interferes with compliance”); see also the unreported decision in *Scheuplein v. City of West Covin* (Ct. of App. 2009) 2009 WL 3087343, \*18 (applying mandatory fee award provision under Anti-Slapp statute when PRA would not award attorney’s fees, does not impose any additional requirements that would prevent person subject to the PRA from complying with it). This preliminary analysis suggests that a ban on contributions permitted, but not required, by the PRA would not conflict with the PRA because the PRA does not require the soliciting or making of a particular contribution. Accordingly, a person who made no contribution would not be prevented from complying with the Act.

3. Is the setting of local campaign contribution limits by the State Bar and the State Supreme Court consistent with the division of authority contemplated by the Act?

An initial question would be whether the Supreme Court and the State Bar would be a “state or local agency” within the meaning of Government Code Section 81013. Very preliminary review of this question discloses that the question of whether the Supreme Court and the State Bar are “state agencies” may not be an easy question to answer. Again, more research is required. But it bears noting that the focus of the existing cases is on local jurisdictions that clearly qualify as agencies. It is also relevant that the focus of both the existing and new local campaign contribution regulation is on local control of campaign limits by the jurisdictions whose citizens, institutions, and elected officials are directly involved. The current statutory structure clearly contemplates that, if local governments choose to adopt local ordinances that balance the risks of constraining free expression and risking corruption in accord with perceived local needs and values, that choice should be honored. A statewide rule promulgated by the Supreme Court and the State Bar would appear to be in some tension with this set of legislative choices.

#### **B. Penal Code Section 1424**

The second potential site of conflict with state law is Penal Code section 1424, providing for the disqualification of prosecutors when a conflict exists that “would render it unlikely that the defendant would receive a fair trial.” Case law interpreting the statute holds that disqualification requires that the defendant show “*an actual likelihood of unfair treatment*, not a subjective perception of impropriety.” *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 719 (emphasis in original). In addition, the statute does not provide for disqualification in situations where the prosecutor’s conflict would benefit the defendant, whether at trial or in an investigation.

Clearly, section 1424 does not expressly forbid conflict rules that seek to protect against conflicts that unjustly benefit actual or prospective defendants. Nor does it expressly forbid conflict rules based on the appearance of impropriety. Hence the question would be whether an intent to bar regulation of defendant favoring conflicts, or the appearance of them, can be implied based on other features of the statute, its legislative history, or its judicial construction. This question deserves further research.

The real lesson of section 1424 may be that if the route chosen is new disqualification rules, rather than a restriction on contributions, such rules can only be effectively accomplished by legislation. Recall that disqualification is a matter for the courts, not the disciplinary process. Then add in the difficulties, in terms of doctrines like standing, of a doctrine that allows disqualification based upon a demonstrated risk of favoring a defendant. Then add to that the complication of prosecuting such a motion at the investigative stage of a potential criminal prosecution. Taken together, these factors and others might suggest that any rule that provided

for disqualification should be made in a forum with broader expertise that is accessible to a broader group of interested constituencies.

See more discussion of Penal Code section 1424 below.

### **III. Analysis of Rules of Professional Conduct and other Relevant California Statutes**

The substance of the DA's request is for a rule or opinion precluding elected prosecutors, or prosecutors seeking election, from seeking or accepting political or financial support from law enforcement unions. The primary concern for making this request is to "reduce the possibility of political influence from law enforcement unions over prosecutorial decision making."

In order to analyze this request, we must examine the current rules or statutes that govern conflicts of interests and disqualification to determine if any are adequate to address the relevant issues, and if not, consider whether a new rule or opinion adequately address this problem.

#### **A. Rule 1.7 [Conflicts of Interest: Current Clients]**

The current conflict of interest rules apply to all lawyers, including prosecutors. Rule 1.11(d)(1). Unlike the Code of Judicial Conduct, however, the rules regulating lawyer conduct do not prohibit appearances of a conflict.

Rule 1.7, states, in relevant part:

(b) A lawyer shall not, without informed written consent\* from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person,\* or by the lawyer's own interests.

(c) Even when a significant risk requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written\* disclosure of the relationship to the client and compliance with paragraph (d) where:

(1) the lawyer has, or knows\* that another lawyer in the lawyer's firm\* has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or

1. What is the appropriate conflict analysis for a prosecutor accepting political or financial support under rule 1.7?

Under rule 1.7(b), absent informed written consent, an elected prosecutor would be prohibited from prosecuting a matter if there is a significant risk the prosecutor's ability to carry out its duties will be materially limited as a result of the prosecutor's other interests or relationships, which could include receiving financial or political support from an organization that is supporting the defense of an accused police officer. This is an objective standard and is not measured by an elected prosecutor's subjective belief whether receiving financial or political support from a law enforcement union would influence his/her/their prosecutorial discretion. The critical question in analyzing the conflict is the likelihood that the financial or political support the elected prosecutor received from an organization supporting the defendant would materially interfere with the prosecutor's professional judgment. *See* rule 1.7, Comment [4]. Relevant circumstances may include the amount of financial and political support the elected prosecutor received and the financial and political support the accused officer is receiving from that organization in the case at issue; in addition to, perhaps, the passage of time.

Under rule 1.7(c), even when a significant risk requiring a prosecutor to comply with paragraph (b) is not present, an elected prosecutor that has a "legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter," must disclose said relationship in writing to the client in order to move forward with the representation.

- a. Does the scope of rule 1.7 encompass all acts by an elected prosecutor in considering, recommending, or carrying out an appropriate course of action related to investigating, charging and prosecuting an accused police officer?
- b. Should the amount of the campaign contribution, or the passage of time from when a contribution was made, be a factor in analyzing the conflict of interest? For example, what if a District Attorney received a \$5 contribution? Would a *de minimis* contribution warrant a per se conflict? If not, what dollar amount would warrant a per se conflict and how would it be determined?
- c. How would "political support" be analyzed for the purpose of determining if a conflict exists? Is it more than just an endorsement by the police union?
- d. Does an elected prosecutor's current or former financial relationship with a police union who is funding a party in the same matter require a disclosure under 1.7(c)? Is the police union a "party" under the rule?

- e. How are conflicts of interest typically handled inside a DA's office? Who typically evaluates potential conflicts? Individual attorneys? Committee? The DA? Are ABA or national standards followed or is each office different?
2. Can the consent and disclosure requirements of rule 1.7 be met when a conflict involves a prosecutor?
    - a. Assuming there is a threshold determination that the elected prosecutor has a conflict under 1.7(b) or 1.7(c), is it possible for the elected prosecutor to obtain informed written consent or properly disclose such a conflict? If so, to whom would that request or disclosure be made?
    - b. Who is the client of an elected District Attorney? Is it the constituents/people or the entity itself acting on behalf of the people?
      - i. *See*, State Bar Formal Opn. No. 2001-156, in which COPRAC considers a city attorney's representation and opines that "[w]hether a conflict of interest arises under [former] rule 3-310(C) of the California Rules of Professional Conduct ordinarily depends on a determination of the city attorney's client," and describes CA case law discussing who is a governmental entity's client.
      - ii. *See also*, rule 3.7 that, in part, requires a client's informed written consent for an advocate in a trial to also act as a witness and includes the concept that "[i]f the lawyer represents the People or a governmental entity, the consent shall be obtained from the head of the office . . . by which the lawyer is employed." Is this analogous? Who would provide such consent if DA is head of the office?
    - c. If it is the constituents/people that are considered the client, how would such consent be obtained? Should the people address this issue during an election by ballot with an informed electorate knowing who has donated, and in what amount, to each candidate, as opposed to through a Rule of Professional Conduct?
    - d. If there is no practical way for an elected District Attorney to obtain consent, or disclose a conflict under rule 1.7, and a conflict existed under the relevant facts, or a per se conflict standard was established, would mandatory withdrawal be required by Rule of Professional Conduct 1.16(a)(2)? (Rule 1.16(a)(2) provides, in pertinent part, that a lawyer shall withdraw if the lawyer knows or reasonably should know that the representation will result in a violation of the rules.)

3. What disciplinary standard would apply?
  - a. The rules are disciplinary in nature, as opposed to aspirational. [The rules “are intended to regulate professional conduct of lawyers through discipline.” Rule 1.0(a).]
  - b. What is the current disciplinary standard for violating rule 1.7? If a new rule or rule revision was to be considered, what would be the disciplinary standard?
  - c. Is attorney discipline the best way to address the issue of prosecutorial influence from campaign contributions? How would any potential misconduct be managed and reported when many of the acts of the DA in investigating and considering charges, including some grand jury proceedings, take place outside of the public eye or courtroom?

**B. Rule 1.10 [Imputation of Conflicts of Interest: General Rule]**

Rule 1.10(a)(1) states that: “While lawyers are associated in a firm,\* none of them shall knowingly\* represent a client when any one of them practicing alone would be prohibited from doing so by rules 1.7 or 1.9, unless (1) the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm . . . .”

1. Assuming the prosecutor has a conflict under rule 1.7(b), based on the prosecutor’s financial, business, professional or personal relationship with a law enforcement union, is that conflict imputed to other prosecutors in the office?
  - a. It depends on whether the conflict presents a significant risk of materially limiting the representation of the public by the other prosecutors in the office. Rule 1.10(a)(1).
  - b. Standards for imputation and screening to avoid imputation are also governed by statutes and case law, including Penal Code section 1424. See rule 1.10, Comment [6].
  - c. Is vicarious disqualification of prosecutors governed exclusively by Penal Code section 1424?
  - d. Vicarious disqualification of an entire district attorney’s office requires a heightened and “especially persuasive” showing that the conflict is so grave that it will make a fair trial unlikely. See, e.g., *People v. Hamilton* (1988) 46 Cal.3d 123, 139, *disagreed with on another ground in People v. Eubanks*, (1996) 14 Cal.4th 580, 590; *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 373

(“If a defendant seeks to recuse an entire office, the record must demonstrate ‘that the conduct of any deputy district attorney assigned to the case, or of the office as a whole, would likely be influenced by the personal interest of the district attorney or an employee.’ [Citation.]” (*Id.* at p. 373.); *People v. Hernandez* (1991) 235 Cal.App.3d 674, 680, opinion modified, (October 24, 1991) (motions to disqualify the entire staff are disfavored absent a substantial reason related to the proper administration of justice).)

- e. Recusing an entire prosecutorial office “is a disfavored remedy that should not be applied unless justified by a substantial reason related to the proper administration of justice.” *Millsap v. Superior Court* (1999) 70 Cal.App.4th 196, 201; *People v. Cannedy* (2009) 176 Cal.App.4th 1474, 1482 (Recusal of an entire prosecutorial office is a “disfavored,” “drastic” remedy and “there must be ‘no other alternative available.’”).
- f. Courts have indicated that there is a more flexible approach to vicarious disqualification in the public sector context.
  - i. The California Supreme Court has noted that vicarious disqualification in the public sector imposes different burdens on the affected public entities, lawyers and clients, including the additional expense to the government of retaining private counsel, the delay and possible loss of specialized experience resulting from substitution, which is borne by the public, and the difficulty public law offices would otherwise have hiring competent lawyers. *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 851-852.
- g. Does a prosecutor’s conflict based on a political endorsement and significant financial support received from a law enforcement union warrant disqualification of an entire district attorney’s office?
  - i. Is the conflict likely to influence the conduct of other deputy district attorneys assigned to the case? See *People v. Vasquez* (2006) 39 Cal.4th 47 (although not reversible error, entire district attorney’s office should have been disqualified because one of defendant’s parents worked for office); Compare *People v. Petrisca* (2006) 138 Cal.App.4th 189 (disqualification of a deputy district attorney who was the son of the murder victim did not require disqualification of the entire office absence a showing that defendant would receive unfair treatment); *People v. Hernandez, supra*, 235 Cal.App.3d at p. 680 (when the defendant in an assault case was himself assaulted by the victim, the victim became the defendant in a subsequent case, and both were prosecuted by the same office consisting of 900 deputies, there was not sufficient evidence that information obtained from the defendant in the

second case had affected the entire office); *Millsap, supra*, 70 Cal.App.4th 196 (defendant's solicitation of murder of deputy district attorneys disqualified targeted deputy district attorneys from handling the case, but did not warrant recusing the entire office).

- ii. Is there another substantial reason relating to the fair administration of justice? *See, e.g., People v. Jenan* (2006) 140 Cal.App.4th 782, 793 (affirming recusal of entire district attorney's office based on the "likelihood of unfairness" to the defendants if other prosecutors of a relatively small district attorney's office "were to argue to a jury the credibility of two colleagues who witnessed the charged crimes."); *Lewis v. Sup.Ct. (People)* (1997) 53 Cal.App.4th 1277, 1285-1286 (the district attorney's office had a conflict of interest because it was both victim and possible malfeasant; disqualification of the entire office warranted because the conflict of interest was so grave that it was unlikely the auditor-controller would get a fair trial).
- iii. Does the conflict create a "divided loyalty" or "structural incentive" that interferes with the district attorney's office's duty to prosecute the case fairly and exercise its discretion impartially? *See People v. Dekraai* (2016) 5 Cal.App.5th 1110, 1145-1148 (institutional interests and structural incentives between district attorney's office and sheriff's department relating to district attorney's office involvement in a custodial confidential information program prevented prosecutors from discharging their constitutional and statutory duties to fairly present case against defendant and warranted recusal of entire district attorney's office).

2. Would a timely ethical wall be sufficient to avoid imputation?

- a. It depends on a number of factors, including the nature and extent of the conflict, the size of the District Attorney's office, the position and duties of the conflicted prosecutor and other general factors regarding the efficacy of an ethical wall (see, e.g., *Kirk v. First American Title Ins. Co* (2010) 183 Cal.App.4th 776, 807-808).
- b. Ethical walls have been approved to avoid imputation of conflicts to other deputy district attorneys. *See, e.g., Melcher v. Superior Court* (2017) 10 Cal.App.5th 160 (denial of motion to recuse the district attorney's office based on fact that one of the alleged victims of assault was married to the district attorney where effective ethical wall was implemented); *People v. Gamache* (2010) 48 Cal.4th 347, 365-366, (denial of motion to recuse upheld in part because the district attorney established an ethical wall between office that employed the crime victim and office that would prosecute the crime); *Compare People v. Choi* (2000) 80 Cal.App.4th 476, 481-483 (recusal of district attorney's

office upheld where evidence showed ethical wall failed to prevent the conflicted district attorney from discussing the case with the press and with others in the office).

- c. Whether the public office may avoid vicarious disqualification in civil cases by using screening procedures to isolate a conflicted senior supervising attorney has not been decided by the California Supreme Court. *City & County of San Francisco v. Cobra Solutions, Inc., supra*, 38 Cal.4th at 850, fn. 2.
  - i. The California Supreme Court noted that trial courts addressing this issue consider:
    - (1) the actual duties of the supervising attorney in regard to the attorneys to be ethically screened, and the supervisor's responsibility for setting policies that might bear on the subordinate attorneys' handling of the litigation;
    - (2) whether public awareness of the case, the conflicted supervisor's role in the litigation, or another circumstance, is likely to cast doubt on the integrity of the office's continued participation in the matter. *Id.*
- d. The public law office may not avoid vicarious disqualification in civil cases by using screening procedures to isolate the conflicted head attorney from matters involving his or her former clients. *City & County of San Francisco v. Cobra Solutions, Inc., supra*, 38 Cal.4th at 852-854.

### **C. Business and Professions Code Section 6131**

#### **1. Statutory Background**

Section 6131 "is aimed at the formerly widespread practice of part-time prosecutors who carried on private law practices in addition to their public service." *Chadwick v. Superior Court* (1980) 106 Cal.App.3d 108, 119-120.

#### **2. Substance of Section 6131**

Section 6131(a) prohibits the private law partners of district attorneys or other public prosecutors from assisting in any way in the defense of a criminal defendant where the prosecution is being carried out by the district attorney or public prosecutor who is the partner. *People v. Rhodes* (1974) 12 Cal.3d 180, 183 n.3. This subdivision does not address the issues implicated by the district attorney request under consideration.

Section 6131(b) provides that a prosecutor who, having prosecuted (or "aided or promoted") any court action or proceeding as a district attorney or public prosecutor may not thereafter

take part in the defense of that action or proceeding or obtain valuable consideration from or on behalf of any defendant in that matter. *Price v. State Bar of Cal.* (1982) 30 Cal.3d 537, 541. The subdivision essentially addresses attorney side-switching.

### 3. Policy and Analysis of Section 6131

Although section 6131 is an example of a specific conflict of interest disciplinary standard applicable only to the prosecutorial function, as a legal ethics concept, section 6131 appears distinguishable from the proposal because section 6131 is consistent with well-settled conflict of interest standards generally applicable to all lawyers under the rules and case law – namely: (i) direct adversity conflicts that can arise when a lawyer attempts to represent both sides of a litigated matter (compare *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [recognizing a limited exception where the conflict was only a potential conflict and both sides of the case gave informed consent]); and (ii) classic side-switching conflicts where substantial relationship and possession of confidential information is presumed for any lawyer who jumps from one side of a case to the opposing side. (See State Bar Formal Op. No. 1998-152 where COPRAC opines that the California courts repeatedly have disqualified lawyers in civil cases from representing a new client against the opposing party formerly represented by the lawyers in the same case when the opposing party actually communicated confidential information about the case in the prior consultation.) No similar well-settled basis or case law has been presented to the State Bar in the letter conveying the proposal.

In addition, the policy behind section 6131, as well as the specific language and scope of its two subdivisions, does not appear to be relevant to the concerns of examining how to address the possibility that a district attorney's prosecutorial decisions might be influenced by campaign funding.

### **D. Penal Code Section 1424**

#### 1. Statutory Background.

Section 1424 was enacted in 1980. *People v. Eubanks* (1996) 14 Cal.4th 580, 590. The statute was a legislative response to an earlier Supreme Court case, *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, and other criminal cases that previously stressed the importance of the "appearance of impropriety" and other "apparent" conflicts as bases for prosecutorial disqualification. *Id.* at p. 591. The statute is a legislative response to an increase in the number of prosecutorial recusals under the "appearance of conflict" standard set forth in *Greer*. *People v. Petrisca* (2006) 138 Cal.App.4th 189.

#### 2. Standard for Recusal under Section 1424.

Section 1424 "established both procedural and substantive requirements for a motion to disqualify the district attorney." *Eubanks*, 14 Cal.4th at p. 591. Substantively, the statute

provides the following standard: “The motion may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial.” *Id.*; Penal Code section 1424(a)(1). However the conflict is characterized, it warrants recusal “only if so grave as to render it unlikely that defendant will receive fair treatment during all portions of the criminal proceedings.” *Id.* at 592 (citing *People v. Conner* (1983) 34 Cal.3d 141. The concern surrounding section 1424 is “the likelihood that the defendant will not receive a fair trial[.]” *Id.*

### 3. Summary

Section 1424 addresses whether a defendant would receive a fair trial. The District Attorneys’ concern, in contrast, is whether a defendant may receive special treatment or whether a prosecution may not proceed in the first instance because of such special treatment. A defendant or target of an investigation who is receiving special treatment is not likely to move to disqualify those providing such treatment.

### 4. Legislative Amendment

The statute is fairly interpreted to mean that a defendant would have standing to seek prosecutorial recusal. That is because a motion under section 1424 “may not be granted unless” there is a conflict that “would render it unlikely that *the defendant* would receive a fair trial.” Section 1424 would have to be amended to allow other “interested” parties to challenge prosecutorial decisions. Otherwise, practically-speaking, section 1424 may be irrelevant here because a defendant receiving special treatment is not likely to challenge the prosecutor providing such treatment. Legislative amendment to section 1424 might receive resistance. Among other reasons, the statute itself was a reaction to an increase in the number of prosecutorial recusals. An amendment with the effect of broadening the ability to seek recusals would arguably run contrary to the statute’s legislative intent.

Is an amendment to Penal Code section 1424 required before any changes could be made to the California Rules of Professional Conduct to address prosecutor’s conflicts of interest and vicarious disqualification?

## **E. Other Rules, Statutes or Standards**

### 1. ABA Judicial Standards for the Prosecution Function

- a. Standard 3.17(f) states that a “prosecutor should not permit the prosecutor’s professional judgment or obligations to be affected by the prosecutor’s personal, political, financial, professional, business, property, or other interests or relationships.” This is similar in substance to portions of rule 1.7(b) & (c).

- b. Role of ABA Standards in governing conflicts of interest. According to the ABA, these standards are meant to provide “guidance for the professional conduct and performance of prosecutors.” “They are aspirational or describe ‘best practices,’ and are not intended to serve as the basis for the imposition of professional discipline, to create substantive or procedural rights for accused or convicted persons, to create a standard of care for civil liability, or to serve as a predicate for a motion to suppress evidence or dismiss a charge.” [See Standard 3-1.1(b)].
2. National District Attorneys Association (“NDAA”) National Prosecution Standards
    - a. NDAA Standard 1-3.3(c), which provides: “The prosecutor should excuse himself or herself from the investigation and prosecution of any person who is represented by a lawyer related to the prosecutor as a parent, child, sibling, spouse, or domestic partner, or who has a significant financial relationship with the prosecutor.”
    - b. NDAA Standard 1-3.3(d), which provides: “The prosecutor should excuse himself or herself from any investigation, prosecution, or other matter where personal interests of the prosecutor would cause a fair-minded, objective observer to conclude that the prosecutor’s neutrality, judgment, or ability to administer the law in an objective manner may be compromised.”
    - c. NDAA standards are “intended to be an aspirational guide to professional conduct in the performance of the prosecutorial function.”
  3. Others?

#### **IV. Additional Issues to Consider**

The Committee has identified numerous potential issues that it might consider in reviewing this request. Are there additional issues, rules, statutes, or standards that merit analysis and consideration?

#### **V. Proposed Questions for Public Commenters**

After our meeting on July 24, 2020, the Committee expects to post and to circulate to potential commenters this memorandum, accompanied by a list of specific questions that commenters are invited to address. A list of potential questions follows. We expect to refine and add to this list at the meeting.

1. What is the problem exactly and what is its extent?
  - a. How big are the contributions that police unions are making to local district attorney races, both in terms of absolute amounts and what percentage of total contributions they represent? Is there any data on that question? Are their particular local jurisdictions where the problem appears to be especially severe?
  - b. Does the importance of union contributions differ by jurisdiction within the state? In many counties, it appears, union contributions would be limited to relatively modest levels—\$300 to \$500 per election. Do restrictions such as those in effect in those counties eliminate the risk or appearance of impropriety?
  - c. In counties which currently have no contribution limits, AB 571 will, starting in January, impose state law limitations on contributions to county and municipal elections. Will those provisions reduce or eliminate the problem?
  - d. Are you aware of incidents involving actual favoritism shown to law enforcement personnel based on campaign contributions?
2. Given the nature of the problem, would an outright ban on campaign contributions by law enforcement unions be consistent with the United States and California constitutions? In particular:
  - a. Political contributions are a form of protected political speech. What standard of justification must be met for a speech restriction of this kind and why would it be met here? Can you point us to what you think is the Federal and state case law that speaks most directly to the validity of such a restraint?
  - b. The proposed rule does not bar all contributions, but only those from a single type of donor, public employee unions. Does this raise any additional issues, under either Free Speech or Equal Protection principles?
  - c. What is the relevance, if any, to the Constitutional analysis that a restriction might be imposed by the Supreme Court, rather than by the legislature?
  - d. Can you point to any cases where similar restrictions have been enacted and upheld in this or other jurisdictions?
3. Would the proposed restrictions be consistent with other California statutes regulating local government campaign contributions, such as the Political Reform Act of 1974 and the recent amendments thereto in AB 571 and with section 81013

- of the Government Code? Is the Supreme Court a state agency who is empowered to enact further contribution restrictions on local government elections under section 81013? More generally, those statutes appear to establish a principle that where local communities have established campaign contribution limits, those limits, and not statewide limits, should control. Given the legislative preference for localism, does the Supreme Court have the power to displace campaign contribution limits set at the county level, and what is the source of that power?
4. To the extent that the problem is one of conflict of interest, why are existing conflict of interest rules, including Rules of Professional Conduct 1.7 and 1.10 and Penal Code section 1424 inadequate to address the problem? Would an ethics opinion construing existing law be adequate to address the problem? If existing law is inadequate to address the problem, are there ways of addressing the conflict problem through changes to the Rules of Professional Conduct or statutory disqualification standards that would not involve restrictions on political speech? To the extent that the problem would call for standards different from those in Penal Code section 1424, should those changes be made by legislation, rather than by a rule?
  5. Would a Rule of Professional Conduct, or an ethics opinion, be an efficacious authority for seeking the non-disciplinary remedy of lawyer disqualification when that remedy is reserved as a judicial function and involves the exercise of judicial discretion on a case-by-case basis?

## **CONCLUSION:**

The DA's proposal summarizes the essence of their request by saying: "Whether the State Bar takes action in the form of a new rule of professional conduct or an ethics opinion-the goal is the same: to protect the integrity of the prosecutorial function, the fair administration of justice, and restore public trust in law enforcement."

In a recent open letter to the legal community, Alan Steinbrecher, Chair, State Bar Board of Trustees and Donna S. Hershkowitz, Interim Executive Director, stated:

The legal profession bears a special responsibility to guarantee the equal treatment of all persons and to ensure remedies for those subjected to unfair, unequal, and unjust treatment. Many in the legal community have worked for years to reduce bias, support access to justice, and foster diversity and inclusion, but there is much more to do. Each instance of injustice is one too many.

While the DAs proposal has been assigned to COPRAC for analysis as the State Bar's legal ethics experts, we also view it as an opportunity for COPRAC to contribute to the State Bar's effort to discharge the profession's responsibility for guaranteeing fairness, equality and justice.



June 1, 2020

Alan Steinbrecher  
Chair, Board of Trustees  
State Bar of California  
180 Howard St.  
San Francisco, CA 94105

Donna Hershkowitz  
Interim Executive Director  
State Bar of California  
180 Howard St.  
San Francisco, CA 94105

RE: Ethics rule change request to reduce conflicts of interest for prosecutors.

Dear Chair Alan Steinbrecher and Interim Executive Director Donna Hershkowitz:

We are a coalition of current and former elected prosecutors representing millions of Californians in diverse counties across our golden state. In the wake of the recent killings of George Floyd, Ahmaud Arbery, Breonna Taylor, and countless others in California and beyond, we strongly urge the State Bar to implement a new rule of professional responsibility to reduce the possibility of political influence from law enforcement unions over prosecutorial decision making.

Across California there are dozens of law enforcement unions representing rank-and-file police officers, sheriff's deputies and correctional officers. These unions play a major role in local, state and even national politics. They are well-funded, and purport to represent the interests and positions of law enforcement in elections and on issues before the voters and the legislature. Their political endorsements are provided only to candidates whom they believe share their particular vision of public safety and whom they believe will advance their interests. When the unions grant an endorsement, they often also provide financial support to their endorsed candidate.

Prosecutors are in a unique position of having to work closely with law enforcement officers and evaluate whether some of those same officers have committed crimes. When prosecutors initiate an investigation or prosecution of an officer, law enforcement unions often finance their members' legal representation.

Receiving an endorsement and campaign contributions from an entity that finances opposing counsel creates, at a minimum, the appearance of a conflict of interest for elected prosecutors. District Attorneys will undoubtedly review use of force incidents involving their members. When they do, the financial and political support of these unions should not be allowed to influence that decision making.

The State Bar's Rules of Professional Conduct generally prohibit a lawyer from representing a client when, "the lawyer has ... a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter" ("Rule 1.7, Conflict of Interest," 2018). Further, the California Court of Appeal found in *People v. Vasquez* (2006) 39 Cal.4th 47, 45 Cal.Rptr.3d 372, 137 P.3d 199, "[A] 'conflict,' for purposes of California Penal Code § 1424, 'exists whenever the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner. Thus, there is no need to determine whether a conflict is "actual" or only gives an "appearance" of conflict.'" Similarly, the American Bar Association's rules governing conflicts of interest reference a slew of responsibilities related to financial or political interests for prosecutors. Specifically, "a prosecutor who has a significant personal, *political*, *financial*, professional, business, property, or other relationship with another lawyer should not participate in the prosecution of a person who is represented by the other lawyer" [emphasis added] ("Standard 3-1.7 Conflicts of Interest," 2017).

These rules and decisions were ostensibly crafted for the purpose of avoiding a conflict, or the appearance of a conflict, that exists when an attorney, or prosecutor, has a political or financial relationship with opposing counsel. These rules therefore suggest an elected prosecutor should either avoid soliciting financial contributions and support from an attorney representing an accused officer, or to recuse their office from a prosecution where the prosecutor has received financial or political support therefrom. These rules, however, do not preclude the attorney or prosecutor from soliciting or receiving financial support from an individual or organization that is financing opposing counsel. It is illogical that the rules prohibit prosecutors from soliciting and benefiting from financial and political support from an accused officer's advocate in court, while enabling the prosecutor to benefit financially and politically from the accused's advocate in public.

In order to cure this conflict, or the appearance of a conflict, the rules must therefore explicitly preclude elected prosecutors—or prosecutors seeking election—from seeking or accepting political or financial support from law enforcement unions. Such a rule change will not only help to avoid conflicts and ensure independence on the part of elected prosecutors, it will also enhance trust in our criminal justice system at a time when it is sorely needed.

Whether the State Bar takes action in the form of a new rule of professional conduct or an ethics opinion-the goal is the same: to protect the integrity of the prosecutorial function, the fair administration of justice, and restore public trust in law enforcement. Given the urgent national situation, we request an expedited review of this request. We appreciate your time and consideration on this incredibly time sensitive and important matter.

Diana Becton  
Contra Costa County District Attorney

Chesa Boudin  
San Francisco District Attorney

George Gascón  
Former San Francisco District Attorney

Tori Verber Salazar  
San Joaquin County District Attorney

CC: Alan Steinbrecher, Chair  
Sean M. SeLegue, Vice-Chair  
Mark Broughton, Trustee  
Hailyn Chen, Trustee  
José Cisneros, Trustee  
Juan De La Cruz, Trustee  
Sonia T. Delen, Trustee  
Ruben Duran, Trustee  
Chris Iglesias, Trustee  
Renée LaBran, Trustee  
Debbie Y. Manning, Trustee  
Joshua Perttula, Trustee  
Brandon N. Stallings, Trustee





# The State Bar of California

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SENT VIA EMAIL

July 2, 2020

Hon. Diana Becton  
Contra Costa County District Attorney

Hon. Chesa Boudin  
San Francisco District Attorney

Hon. George Gascón  
Former San Francisco District Attorney

Hon. Tori Verber Salazar  
San Joaquin County District Attorney

RE: Proposal for Ethics Rule Change Regarding Elected Prosecutors

Dear District Attorneys Becton, Boudin, Gascón, and Salazar:

This letter is in response to your June 1, 2020, letter requesting that the State Bar adopt a Rule of Professional Conduct or issue an ethics opinion prohibiting elected prosecutors, or those seeking election to a prosecutorial post, from seeking or accepting political or financial support from law enforcement unions. To determine the appropriate next steps regarding this important matter, the State Bar has conducted a preliminary analysis of the issues you raised and the solution you proposed. Consideration of your proposal requires analysis of existing statutory and decisional law, including constitutional limitations. We want to advise you of the results of our preliminary analysis and the procedure the State Bar has established for further consideration of your proposal.

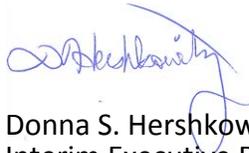
Our initial review identified some significant constitutional concerns with the solution you proposed, including possible First Amendment and equal protection issues. We also note that a statute enacted last year, which will take effect on January 1, 2021, addresses the issue of political contributions to those running for county and local office, including candidates for district attorney. Assembly Bill 571 (“AB 571”) will impose state-wide limits on political contributions made by individuals or entities to candidates running for county and local office if local limitations do not otherwise exist. (See Assembly Bill 571 (2019-2020 Reg. Sess.) § 1(g).) Applied to the question of law enforcement union contributions to candidates for district attorney, AB 571 thus limits—but does not prohibit—contributions that such unions can make. Adopting a Rule of Professional Conduct that precludes elected prosecutors, or those seeking such office, from accepting any contribution from a law enforcement union could be said to conflict with AB 571, which permits such contributions, limiting only their amount.

In addition, limitations on political contributions have been the subject of significant constitutional challenges in recent years. In consideration of such issues, one alternative could involve addressing whether a district attorney's office has a conflict of interest in any case where the office is investigating any crime committed by, or misconduct of, a law enforcement officer, if the district attorney has taken a financial contribution from the officer, a police union that represents that officer, or the agency that employs or employed the officer. Our preliminary research identified potential issues with this approach as well. For instance, such a rule could be said to conflict with the statutory or decisional law that currently governs this area. As a result, pursuing a statutory change or litigating the matter through judicial decision is an alternative to your proposal to the State Bar for consideration.

In addition to the legal issues identified above, the policy issue you raise is without doubt deserving of thoughtful attention and analysis. The Chair and Vice-Chair of the State Bar Board of Trustees, therefore, have referred the matter to the State Bar's Committee on Professional Responsibility and Conduct (Committee) for a more in depth, comprehensive analysis. I want to give you an overview of the process the Committee will follow.

The Committee will have a preliminary briefing on this matter during its July 24 meeting. In addition, the Committee intends to hold a special session in August devoted solely to receiving input on this proposal so that there will be sufficient opportunity for public comment and thorough discussion on this important issue. We invite you and others interested in this issue matter to address the issues identified in this letter—and any other point related to the proposal—at the Committee's special meeting in August. For more information about the meeting, please feel free to contact Lauren McCurdy at [lauren.mccurdy@calbar.ca.gov](mailto:lauren.mccurdy@calbar.ca.gov). We look forward to engaging with you further as the Committee's work progresses.

Sincerely,



Donna S. Hershkowitz  
Interim Executive Director

cc: State Bar Board of Trustees  
Steven M. Bundy, Chair, Committee on Professional Responsibility and Conduct  
Dena M. Roche, Vice-Chair, Committee on Professional Responsibility and Conduct