

Date: October 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 of California (State Bar) dated June 1, 2020, three current elected district attorneys (Contra Costa, San Francisco, San Joaquin) and one former district attorney (San Francisco, now a candidate for district attorney in Los Angeles) (the "DAs") requested that the State Bar enact a new rule of professional conduct—or issue an ethics opinion—prohibiting an elected prosecutor, or a candidate seeking election, from soliciting or receiving political or financial support from law enforcement unions.

The proposal is based on the premise that law enforcement unions play an important role in prosecutorial elections, both by making endorsements and donating funds. The DAs note that prosecutors are in a unique position of having to work closely with law enforcement officers while also having to evaluate whether those officers have committed crimes. They further note that when prosecutors initiate an investigation or prosecution of a law enforcement officer, the union often pays the officer's legal fees. The DAs maintain that receiving an endorsement and campaign contributions from an entity that finances opposing counsel creates, at a minimum, the appearance of a conflict of interest, if not an actual conflict, for elected prosecutors.

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."

This memorandum identifies several potential issues that the Committee considered and analyzed as part of its review of the State Bar's request.

## DISCUSSION

### I. The Committee's Work

The Committee prepared an initial research memorandum discussing some of the central issues raised by the DAs' proposal. See Exhibit \_\_\_\_\_. The Committee also circulated a detailed list of questions to supporters and opponents of the proposal, seeking both factual support for their respective claims and help in analyzing the central issues of law and policy. Exhibit \_\_\_\_\_. The Committee received public comment concerning the proposal at a regularly scheduled Committee meeting on July 25 and conducted a noticed public hearing devoted exclusively to the proposal on August 11. In connection with the two hearings, the Committee received \_\_\_\_\_ separate written submissions and heard testimony from \_\_\_\_\_ witnesses, including \_\_\_\_\_ representatives of institutions and organizations and \_\_\_\_\_ members of the general public.

Members of the public almost uniformly favored the DAs' proposal. Lawyer's organizations representing public defenders, African-American, Asian, Latino, or LGBTQ lawyers also favored it. Law enforcement unions and the California District Attorneys Association were opposed. We discuss the substance of the comments and testimony, pro and con, in the next section.

At the August 11 hearing, District Attorney Chesa Boudin (San Francisco), one of the sponsoring DAs and signatory to the June 1, 2020 letter, clarified the scope of the DAs' proposal. Mr. Boudin stated that the proposed ban on personal solicitation and acceptance of support from law enforcement unions would apply to both the elected prosecutors (or candidates for office) and the groups "controlled by" them, e.g., their financial committees. Mr. Boudin also stated that the ban would apply to requests for or acceptance of "direct" political or financial support from unions, which the Committee interprets as financial contributions or in-kind donations made to or in concert with the campaign. In contrast, Mr. Boudin clarified that a union's or union PAC's independent expenditures and campaign activities would not be regulated by the proposed rule.

At the hearing, the ACLU of California presented an alternative proposal. Under the ACLU's proposal, candidates for district attorney would be barred from personally soliciting contributions from any "entity," including, but not limited to, law enforcement unions. Under this proposal, a candidate would be free to personally solicit and accept contributions from any individual, and the candidate's committee would be free to solicit contributions or other direct political support from any individual or entity.

One further development has occurred since the August 11 hearing. On September 30, the Governor signed into law AB 1506. That statute provides that henceforward a state prosecutor (the Attorney General unless otherwise specified) shall investigate all incidents of an officer-involved shooting resulting in the death of an unarmed civilian, prepare a written report, and prosecute any resulting criminal action against the officer.

## II. Understanding the Problem

Concern with prosecutorial conflicts of interest in investigating and prosecuting unlawful conduct by law enforcement officials has come to the fore in recent years, particularly in connection with events in Ferguson, Missouri in 2015, and events following the killing of George Floyd this past spring.<sup>1</sup> It is part of a much larger set of concerns about unfairness and systemic racism in the criminal justice system and law enforcement that collectively demand focused attention and reform.

Traditionally, the argument that prosecutors too often fail to act in a disinterested manner when investigating or prosecuting police misconduct has focused on their relationship with law enforcement agencies.<sup>2</sup> Prosecutors have close, day-to-day working relationships with law enforcement personnel and organizations. In addition, prosecutors may feel that they are on the “same team” as other law enforcement personnel, aligned against lawbreakers. And, as happens in most workplaces, prosecutors and law enforcement personnel may also become friends. These institutional and personal relationships frequently serve the public interest, but when it comes time to investigate allegations of law enforcement misconduct, they may impair the prosecutor’s ability or willingness to undertake a disinterested and vigorous investigation of law enforcement colleagues. Such relationships may also create the appearance of a conflict, even where none exists. Legislative measures like AB 1506, which take some investigations of alleged police misconduct by local law enforcement out of the hands of local prosecutors, address this type of conflict.

The second argument—that campaign contributions by law enforcement unions lead to failures to conduct disinterested investigations of police misconduct—is both more recent and less well documented, but, as outlined by supporters of the DAs proposal, it has intuitive force. Most state and local prosecutors are elected. Police unions have financial and political resources that can be and sometimes are used to support or oppose the candidates for that office. In addition, police unions have a large stake in how their members are treated in investigations of their alleged misconduct. Given these facts, it is reasonable to believe that concern about the political consequences of their actions may cause prosecutors to fail to act disinterestedly in investigating or charging incidents of alleged misconduct by union members. These facts may also create an appearance of conflict.

It is difficult to determine how pervasive or serious these conflict problems are, as information is in short supply. Prosecutors enjoy broad discretion in conducting investigations and making

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<sup>1</sup> Bruce A. Green and Rebecca Roiphe, Rethinking Prosecutors’ Conflicts of Interest, 58 B.C. L. Rev. 463, 473-77; Kate Levine, *Who Shouldn’t Prosecute the Police*, 101 Iowa L. Rev. 1447, 1464-77; Amari L. Hammonds, Katherine Kaiser May, Rachel R. Suhr, and Cameron Vanderwalt, *At Arm’s Length: Improving Criminal Investigations of Police Shootings* 12-13 (Stanford Criminal Justice Center 2016).

<sup>2</sup> Green and Roiphe, *supra* n. \_\_\_, 53 B.C. L. Rev. at 473-76; Levine, *supra* n. \_\_\_, 101 Iowa L. Rev. at 1465-72.

charging decisions, much of that process is shielded by confidentiality rules, and there is little systematic reporting. Despite our repeated requests, no proponent or opponent of the DAs' proposal has offered us any data on whether these conflict concerns are pervasive, and we have not found any empirical examination of these problems.

Our own judgment is that the conflict concerns stemming from the district attorneys' close working relationships with law enforcement might be pervasive and substantial.<sup>3</sup> The enactment of AB 1506 seems to support that view. The fact that the statute is limited in scope to fatal shootings of unarmed civilians means that investigation of less serious offenses remains vulnerable to conflicts due to ties between local prosecutors and local law enforcement.

The evidence presented at the hearing concerning conflicts due to union political support was oral and anecdotal, concerning one or two incidents of large political donations allegedly made while high profile investigations were pending or law enforcement unions' reported independent expenditures of several million dollars in the current Los Angeles district attorney's race. Supporters of the measure did not describe those anecdotal cases in any detail, however, and, as noted, neither side of the debate has provided any data on how often DA races are seriously contested, how much law enforcement unions contribute to DA candidates, how much money and in-kind support those unions deploy independently of DAs' campaigns, or how much of the total pool of contributions and independent expenditures they represent.<sup>4</sup>

Our own review of the statutes concerning campaign contributions to candidates for district attorney suggests that direct union contributions in such races may be relatively low. Until very recently, state law imposed no limits on contributions to county-wide offices like district attorneys. But it expressly allowed local governments to enact such ordinances, and many counties have done so. In many big counties, those direct contribution limits are in the range of

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<sup>3</sup> That is also the view expressed in the authorities cited in n. \_\_\_\_.

<sup>4</sup> Our preliminary research found anecdotal evidence pertaining to a district attorney whose acceptance of campaign money from police unions drew criticism. The Alameda County District Attorney Nancy O'Malley was criticized during her 2018 re-election campaign after she accepted a \$10,000 donation from the Fremont Police Association while her office was investigating two separate fatal police shootings within that department. See Angela Ruggiero, *Alameda County DA Promises Not to Accept Police Union Money, Advocacy Group Says*, THE MERCURY NEWS, July 9, 2020, updated July 10, 2020, at <https://www.mercurynews.com/2020/07/09/da-promises-not-to-accept-police-union-money-advocacy-group-says/>. O'Malley's office subsequently cleared the officers in both shootings of any wrongdoing. *Id.* In addition to the \$10,000 from Fremont, O'Malley also accepted at least \$30,000 from other police unions, including the Oakland Police Officers Association, the Deputy Sherriff's Association of Alameda County PAC, and Emeryville Police Union. *Id.* According to O'Malley, money from law enforcement makes up less than 5% of her total campaign donations. *Id.* In her 2020 reelection bid, O'Malley has indicated she has not and will not accept campaign money from police unions. *Id.*

\$300-500 per election.<sup>5</sup> Recent amendments to California state campaign finance laws, passed as AB 571 and scheduled to take effect in January 2021, will establish state law limits on political contributions to candidates running for local or county office unless the locality has itself enacted such limitations. In those counties that 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 \$4,700) while leaving existing local regulations in place. Localities will remain permitted to modify existing limits and to establish new ones that may be higher or lower than the default backup limits that will apply in counties that have not adopted any contribution limits.

These figures suggest that to the extent that union political activity has the potential to influence prosecutorial decision making in police misconduct cases—particularly in urbanized counties—that influence is more likely due to unions’ independent expenditures and political support than to their campaign contributions, for the simple reason that unions and individuals are permitted to devote vastly more financial and in-kind resources to independent activity than they are permitted to donate to campaigns. The current Los Angeles district attorney race appears to illustrate that phenomenon—the independent expenditures made by law enforcement unions, along with other individuals and groups, are significantly greater than the amounts of their permitted contributions under state law.<sup>6</sup>

However unclear the evidence of actual conflict stemming from union political influence, the testimony received at the hearing on the issue of apparent conflict was uniform. Without exception, every member of the public who testified agreed that that law enforcement unions’ political activity gives them too much power over local prosecutors, contributes to a systemic failure to address the problem of police misconduct in minority communities and damages public confidence in the criminal justice system, both in those communities and in the wider society. Given the evident persistence of systemic racism in the criminal justice system, the broad discretion afforded prosecutors, and the opacity of decisions to investigate or charge, we find that position understandable and, in many respects, persuasive.

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<sup>5</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 per person per election); Orange County Codified Ordinance 1-6-5 (a) (\$2000); San Bernardino Campaign Reform Ordinance 12.4305 (adopting limits 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. For a full listing, see the Fair Political Practices Commission website at <http://www.fppc.ca.gov/learn/campaign-rules/local-campaign-ordinances.html>

<sup>6</sup> Maloy Moore, Ryan Menezes and James Queally, “Here are the Mega-donors and Police Unions Pouring Millions into the L.A. County District Attorney Race,” Los Angeles Times, October 1, 2020. In the Los Angeles race, union expenditures appear to have been matched or exceeded by independent expenditures from advocates of criminal justice reform who support more vigorous investigation and prosecution of police misconduct. *Id.*

### III. How Existing Law Addresses the Problem

Before considering whether a new rule or opinion would be appropriate or adequate to address this problem, we first examine whether the current rules and statutes governing conflicts of interests and disqualification are sufficient to address the DAs' primary concerns.

#### A. Actual or Potential Conflicts under California Rules of Professional Conduct 1.7 and 1.10, Consent, Imputation and Enforcement

##### 1. Analyzing Conflicts of Interest with Current Clients Under Rule 1.7

Under the California Rules of Professional Conduct,<sup>7</sup> conflicts of interest with current clients are analyzed under rule 1.7. Rule 1.7 applies to all lawyers, including prosecutors [See rule 1.11(d)(1)].

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 his or her duties will be "materially limited" as a result of the prosecutor's other responsibilities to or relationships with another client, a former client or third person, or by the prosecutor's own interests, 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 as to whether receiving financial or political support from a law enforcement union would influence the district attorney's prosecutorial discretion. However, under the current conflicts rules, any potential conflicts involving the above fact pattern would likely be analyzed on a case by case basis. The critical question in analyzing the conflict is the likelihood that the financial or political support the elected prosecutor received from the law enforcement union would materially interfere with the prosecutor's professional judgment. See Rule 1.7, Comment [4].

If this potential conflict were to be analyzed under rule 1.7, some of the issues raised would be: (1) to what extent the amount of the campaign contribution, or the passage of time from when a contribution was made, would be a factor in analyzing the conflict of interest; (2) whether a *de minimis* contribution, such as a \$5 contribution, would be considered material interference with the prosecutor's professional judgment. If not, what amount would be "material" under the rule?; (3) how "political support" should be analyzed in determining whether a conflict exists. For example, is it more than just an endorsement by the law enforcement union?; (4) whether the elected prosecutor's close working relationship with police officers and law enforcement should be a factor in analyzing the potential conflict; and, (5) to what extent the scope of the rule would encompass all acts by an elected prosecutor in considering, recommending, or carrying out an appropriate course of action related to investigating, charging and prosecuting a police misconduct case?

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<sup>7</sup> Unless otherwise indicated, all rule references are to the California Rules of Professional Conduct.

Because conflicts under rule 1.7(b) are analyzed on a case by case basis, one cannot conclude that in all instances in which an elected prosecutor received political or financial support from law enforcement unions, there would be a conflict of interest preventing the prosecutor from investigating, charging or prosecuting the matter. Depending on the specific facts, there may, or may not, be a conflict of interest under the rule 1.7(b) analysis.

2. Difficulty with Consenting to a Conflict of Interest or Providing Written Disclosure to the “Client”

Assuming the above scenario results in a conflict of interest under rule 1.7(b), the representation would be prohibited unless the “affected client” provides informed written consent to the representation. Even when a significant risk requiring a prosecutor to comply with paragraph (b) is not present, under rule 1.7(c), an elected prosecutor that has “legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter,” must disclose that relationship in writing to the client in order to move forward with the representation. Although it is unclear if a law enforcement union with whom an elected prosecutor had a financial relationship would be considered a “party” or “witness” under 1.7(c).

Both scenarios raise the questions of whether and how the consent and disclosure requirements of rule 1.7(b) and (c) can be met when a conflict involves an elected prosecutor.

The preliminary question involves identifying who is the “client” of an elected district attorney for the purposes of the rules. Rule 1.13 provides that when the client is an organization, the entity itself is the client, “acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement.” While this rule applies to governmental organizations, Comment [6] to rule 1.13 notes that “[i]t is beyond the scope of this rule to define precisely the identity of the client and the lawyer’s obligations when representing a governmental agency.” Comment [6] further notes that “[d]uties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations.” A similar approach is taken by the State Bar’s Office of Chief Trial Counsel under State Bar Rule of Procedure 2201 which address the appointment and authority of State Bar Special Deputy Trial Counsel.<sup>8</sup>

While not directly on point, rule 3.7, which requires a client’s informed written consent for a lawyer to act as an advocate in a trial in which the lawyer is likely to be a witness, states “[i]f the lawyer represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the lawyer is employed.” Rule 3.7(a)(3). Cal. State Bar Ethic’s Opn. 2001-156, also concludes, based on existing California case law, that the entity itself is the client of a governmental attorney. However, in the context

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<sup>8</sup> State Bar Rule of Procedure 2201 can be found here:  
<https://www.statebarcourt.ca.gov/Portals/2/documents/Rules/Rules-of-Procedure-State-Bar.pdf>

of analyzing a conflict of interest under the above circumstances, it is difficult to foresee how the elected district attorney would be the appropriate person for purposes of disclosure or consent to any potential conflicts involving their own conduct. It is unknown if most district attorney offices have an appropriate “designee” or independent attorney to analyze these types of conflicts. [As noted above, and in the attached exhibits, we asked for information from the proponents of this rule and public commenters for information as to how conflicts of interest are typically handled within district attorney offices or a particular district attorney’s office, and received no information.]

If it is the constituents or the people that should more appropriately be considered the “client,” how would such consent or disclosure be effectuated? Even if an informed electorate, knowing who has donated and supported each district attorney candidate created some transparently around this issue, it is a leap to conclude that the “people” would have “consented” to a conflict of interest involving a district attorney investigating or prosecuting a specific police misconduct case, for example, simply because the majority of the people elected that district attorney knowing (or perhaps unaware) that the district attorney was supported by law enforcement unions.

Thus, when there is a threshold finding of a conflict under either rule 1.7(b) or (c), if there is no practical way for a district attorney to obtain consent under rule 1.7(c), or to disclose a conflict under rule 1.7(b), then the district attorney is unable to meet the requirement of rule 1.7. Under the above circumstances, mandatory withdrawal would likely be required by rule 1.16(a)(2), which 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. It is unclear how a “withdrawal” would be handled under the current rules in the context of a district attorney’s office.

### 3. Analyzing Imputation of Conflicts of Interest Under Rule 1.10

Assuming the elected prosecutor has a material limitation conflict under rule 1.7 based on the prosecutor’s financial, business, professional or personal relationship with a law enforcement union, that conflict may be imputed to other prosecutors in the office under rule 1.10.<sup>9</sup> Again, such an analysis is fact-specific and 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). Standards for imputation and screening to avoid imputation are also governed by statutes and case law, including Pen. Code § 1424. See rule 1.10, Comment [6].

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<sup>9</sup> 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.”



Penal Code section 1424, which will be discussed in more detail below, establishes procedural and substantive requirements for a motion to disqualify a district attorney in cases involving conflicts of interest. However, one question raised is whether the disqualification of a prosecutor or the vicarious disqualification of prosecutors is governed exclusively by Penal Code Section 1424.

Vicarious disqualification of an entire district attorney's office requires a heightened and "especially persuasive" showing that conflict is so grave that it will make a fair trial unlikely.<sup>10</sup> 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.<sup>11</sup> Conflicts may arise where the conflict creates a "divided loyalty" or "structural incentive" that interferes with the district attorney's office 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). Whether the prosecutor's receipt of financial or political support from a law enforcement union creates divided loyalties or structural incentives between the district attorney's office and the union or its members would need to be analyzed on a case by case basis. This issue depends on how likely the conflict is to influence the conduct of other deputy district attorneys assigned to the case. See *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

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<sup>10</sup> *People v. Hamilton* (1988) 46 Cal.3d 123, 139, *disagreed with on another ground in People v. Eubanks*, (1996) 14 Cal.4th 580, 590; see also *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); *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.'").

<sup>11</sup> 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 entire office warranted because conflict of interest was so grave that it was unlikely the auditor-controller would get a fair trial)

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.]”).<sup>12</sup>

Courts have generally taken a more flexible approach to vicarious disqualification in the public sector context. For instance, 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 (addressing vicarious disqualification in civil cases).

Whether a timely ethical wall would be sufficient to avoid imputation 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 *Kirk v. First American Title Ins. Co* (2010) 183 Cal.App.4th 776, 807-808. However, ethical walls have been approved to avoid the imputation of conflicts to other deputy district attorneys.<sup>13</sup>

#### 4. Enforcement of Violations of Conflicts Rules

The California Rules of Professional Conduct are disciplinary in nature and “are intended to regulate professional conduct of lawyers through discipline.” Rule 1.0(a), Comment [1.]. Any violation of rule 1.7 or 1.10, or any potential future ethics rule, would need to be investigated

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<sup>12</sup> 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 deputy district attorney who was the son on 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 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).

<sup>13</sup> See, e.g., *Melcher v. Superior Court* (2017) 10 Cal.App.5th 160 (denial of motion to recuse district attorney’s office based on fact that one of the alleged victims of assault was married to 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 district attorney established ethical wall between office that employed 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 conflicted district attorney from discussing the case with the press and with others in the office).

and charges brought by the State Bar’s Office of Chief Trial Counsel and addressed by the State Bar Court of California. Although California courts often look to California’s rules for guidance in deciding disqualification motions, they are not determinative as the remedy of lawyer disqualification is reserved as a judicial function.<sup>14</sup>

**B. Actual or potential conflicts under Penal Code Section 1424—Case Law and the California Attorney General’s position**

**1. Analyzing Conflicts and Disqualification under Penal Code section 1424**

Penal Code section 1424 establishes procedural and substantive requirements for a motion to disqualify a district attorney in cases involving conflicts of interest. *People v. Eubanks*, 14 Cal.4th 580, 591 (1996). The statute was enacted in 1980 as a legislative response to an earlier Supreme Court case, *People v. Superior Court (Greer)*, 19 Cal.3d 255 (1977), and other criminal cases that previously stressed the importance of the “appearance of impropriety” and other “apparent” conflicts as bases for prosecutorial disqualification, and to address concerns over an increase in the number of prosecutorial recusals under the “appearance of conflict” standard set forth in *Greer*. [See *Eubanks, supra*, 14 Cal.4th at 591; *People v. Petrisca*, 138 Cal.App.4th 189 (2006).]

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 §1424(a)(1). A conflict 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*, 34 Cal.3d 141 (1983)).

The primary concern surrounding section 1424 is “the likelihood that the defendant will not receive a fair trial[.]” *Id.* The concern raised in the District Attorneys’ letter, 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.

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<sup>14</sup> A trial court’s authority to disqualify an attorney derives from its inherent power to “control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in ever matter pertaining thereto.” (*People ex rel. Dept. of Corps. v. Spee-Dee Oil Change Sys., Inc.* (Cal. 1999) 20 Cal.4th 1135, 1145.) As a result, the court has discretion to decide whether disqualification or some lesser sanction would be an appropriate remedy. “In other words, even when counsel has been shown to have committed an ethical rule infraction the court retains discretion to decline to order disqualification and, in many cases, courts have done just that.” (*UMG Recordings, Inc. v. MySpace, Inc.* (C.D. Cal 2007) 526 F.Supp.2d 1046, 1063.)

2. California Attorney General Addresses Potential Conflict At Issue

In a February 28, 2018 letter to the Sacramento District Attorney's Office, the Attorney General's office concluded that "campaign endorsements and contributions from an individual or an organization" do not present a conflict that "bars the District Attorney from impartially deciding whether to prosecute a case in which that individual is a potential defendant," under the relevant case law and Penal Code section 1424. (See letter attached as Exhibit \_\_\_\_).

The Attorney General's letter goes on to state that: "the mere fact of campaign endorsements and financial contributions to a campaign does not create a conflict of interest for a district attorney. Case law makes clear that a conflict of interest stems from the district attorney's perspective, not the public's perception, and is rooted in the ability of a district attorney to wield discretion in a way to ensure that the defendant will receive a fair trial. The factual hypotheticals posed in your letter do not suggest that the District Attorney could not be fair to defendants who had either individually, or as part of an organization, endorsed or contributed financially to the District Attorney's re-election campaign."

3. No Appearance of Impropriety Conflicts under the Applicable Law

The Attorney General's letter also addresses whether the Sacramento District Attorney should avoid the "appearance of a conflict" in the above situation. Specifically, the Attorney General states, "Your final question is, even if there was no legal conflict disabling the district attorney, would the Attorney General's Office conduct a review of an officer-involved shooting simply to avoid an appearance of conflict? Sound policy counsels otherwise. The primary duty for enforcement of law in a particular county rests with the local district attorney, who is elected by the citizens of that county. Significant good cause is called for to warrant departure from the standard of Penal Code section 1424." "Additionally, the Attorney General's unavoidable constraints of personnel, funds, and other resources require that the Penal Code section 1424 standard be taken seriously." (Exhibit \_\_, Page. 3)

The Attorney General's position highlights the fact that Penal Code section 1424 was enacted to specifically reject "appearance of conflicts" standards for disqualification. Instead, relying on actual conflicts under the rule to justify disqualification and with the primary focus on the defendant receiving a fair trial. Also, unlike the code of judicial conduct, the rules regulating lawyer conduct do not prohibit appearances of a conflict.

Also, as noted above, the recent enactment of revisions Government Code section 12525.3 (AB 1506) addresses many concerns related to the appearance of conflicts between local law enforcement and district attorney offices.

4. Was Penal Code Section 1424 Intended to Regulate All Disqualifications Involving Conflicts of Interest with District Attorneys?

Another important issue to consider is whether the legislative intent behind Penal Code section 1424 was to regulate all disqualifications of district attorneys in cases involving conflicts of interest. Notably, the statute appears to have been enacted to protect a defendant's right to receive a fair trial. 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.

On its face, 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. However, whether the statute's intent to bar such regulation can be implied based on other features of the statute, its legislative history, or its judicial construction deserves further analysis and research. This inquiry may also warrant an analysis of the implications for the justice system that an expansion of the conflicts of interest and disqualification rules may pose based on concerns about the "unavoidable constraints of personnel, funds, and other resources," identified by the Attorney General. Although, such an analysis should be balanced by the state's significant interest in protecting the integrity of the prosecutorial function, the fair administration of justice, and restoring public trust in law enforcement.

#### **IV. Analyzing the Proposals**

##### **A. The DA's Proposal**

The DA's proposal bars candidates in prosecutorial elections or their committees from seeking or accepting direct political support from law enforcement unions. Because the rule requires candidates and committees to refuse direct law enforcement union contributions, it also operates as a de facto restriction on those union's right to make a contribution under state law. It does not seek to regulate independent activities of unions, whether in the form of expenditures or other forms of political activity—what might be called indirect support.

**Effectiveness:** How well the proposal addresses the actual and apparent conflicts stemming from political activities of law enforcement unions depends, among other things, on the extent to which those conflicts are the result of direct political support, such as donations, rather than independent activities, and how effectively law enforcement unions could substitute indirect support for direct support if direct support were barred. If direct support is relatively unimportant in proportion to indirect support, or if police unions can easily switch from providing direct to indirect support, then the proposed rule may have little impact on either actual or apparent conflicts.

**First Amendment:** Prohibitions or restrictions on political speech are generally subject to strict scrutiny, which requires a narrowly tailored means of prohibition/restriction that protects or advances a compelling State interest. *Williams-Yulee v. Florida Bar*, 575 U.S. 433 (2015). At

the August 11 hearing, Mr. Boudin argued that, under the principles, if not the strict holding, of the *Williams-Yulee* decision, the DAs proposal met constitutional muster because it was narrowly tailored to advance a compelling public interest in maintaining public confidence in the integrity of prosecutors and their investigations of police wrongdoing.

The opponents of the DAs' proposal argued that the proposal is unconstitutional because it infringes on both the rights of candidates for office and of unions (who have First Amendment rights under *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010)). They argued that the restrictions were not justified by a compelling state interest because such conflicts are rare and DAs can and do address conflicts when they arise. They also argued that because the restrictions involved affect only direct support from law enforcement unions, they discriminate against particular speech and speakers based on the content of their political views.

In *Williams-Yulee*, the Supreme Court addressed the constitutionality of the Florida Bar's ban on personal solicitation of campaign funds by candidates for judgeships. In upholding the ban, the Court concluded that the restriction imposed pursuant to Florida's Code of Judicial Conduct was narrowly tailored for the purpose of preserving public confidence in the integrity of its judiciary, which, the Court noted, was a "State interest of the highest order." [CITE] The Court further held that the rule was sufficiently narrowly tailored to withstand strict scrutiny because though the law "prevented judges from personally soliciting funds, they were still allowed to discuss any topic publicly and could have their campaign committees solicit funds for them." [CITE] The Court expressly rejected comparisons 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." (575 U.S. at 437.)

The majority opinion by Chief Justice Roberts rests on the conclusion that judicial campaign speech is different than campaign speech for other types of public office. "[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." As a result, "States may regulate judicial elections differently than they regulate political elections, because the role of judges differs from the role of politicians." [CITE] As the Court explained:

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.)

[CITE].

There are several differences between the DAs proposal and that upheld in *Williams-Yulee*. First, in *Williams-Yulee*, the ban applied to personal solicitation of all potential donors; here, the

DA” proposal applies only to law enforcement unions, in circumstances which suggest that the reason for the restriction is tied to their political views. Second, the effect on candidate speech is broader since both the candidate and the candidate’s committee are forbidden from soliciting funds *or accepting* funds. Third, unlike the ban in *Williams-Yulee*, the proposed rule restricts the rights of donors and does so selectively. In effect, it would constitute a targeted repeal of the right of law enforcement unions to make contributions to candidates for prosecutorial offices.<sup>15</sup> These differences mean that the proposal poses a significantly greater threat to freedom of speech than the rule in *Williams-Yulee*.

As for the State’s interest, courts may not find that the state interest in ensuring the appearance of neutrality for prosecutors is as strong as its interest in ensuring the appearance of “perfect and complete independence” for judges. In *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980), the Court recognized that in the case of potential threats to judicial neutrality, Due Process sometimes requires that “justice must satisfy the appearance of justice,” 446 U.S. at 243 (citations omitted), but held that standard did not apply “to those acting in a prosecutorial or plaintiff-like capacity.” The Court continued:

Our legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement process, and similar considerations have been found applicable to administrative prosecutors as well. Prosecutors need not be entirely ‘neutral and detached.’ In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law. The constitutional interests in accurate finding of facts and application of law, and in preserving a fair and open process for decision, are not to the same degree implicated if it is the prosecutor, and not the judge, who is offered an incentive for securing civil penalties.

446 U.S. at 248-49. The Court observed, however, that a prosecutor’s direct pecuniary interest in the outcome of a case that has an impact on the prosecutor’s decision whether or not to enforce a particular statute may have constitutional ramifications. *Id.* at 249-50.

*Marshall* is not a First Amendment or a campaign contribution case, and it is not informed by current concerns about systemic failures to prosecute police misconduct. Even so, the Court’s reasoning points to the possibility that a reviewing court may find that apparent neutrality and detachment is a less obvious or urgent value for prosecutors than for judges and may therefore conclude that the state interest implicated by the DAs proposal is weaker than that recognized

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<sup>15</sup> At the August 11 hearing, DA Boudin described the opponents’ First Amendment argument as a “red-herring” because, among other things, the proposed restrictions apply only to the individual candidates and their committees, without impacting the free speech rights of the unions. However, we note that by banning the candidates and candidate-controlled groups from “accepting” campaign contributions, the proposed rule change, in effect, restricts the unions’ right to free speech via campaign contributions.

in *Williams-Yulee*.<sup>16</sup> Given the greater threat to Free Speech posed by the DA's proposal and the weaker state interests supporting it, there is a risk that a court may find the proposed ban unconstitutional.

**Conflict with Other Laws, Regulatory Competence, and Separation of Powers:** The premise of the DAs proposal is that elected prosecutors are lawyers, and that therefore it is appropriate to regulate threats to their neutrality by way of a professional rule promulgated by the judicial branch. That argument has real force. But it is also true that elected prosecutors are different from other lawyers. They have no clearly identified client, their obligation is to seek justice, and the law governing their conduct (which is largely constitutional and statutory) grants them broad discretion in doing so. That discretion includes freedom to decline to enforce the law, and to take account of the views of the community, as expressed through the political process, in deciding which laws to enforce. Any effort by the judicial branch to regulate that discretion may therefore raise substantial separation of powers issues.

Elected prosecutors are also politicians—at both the state and local level—and the conduct of their campaigns for office is regulated under both state and local law. The DAs proposal clearly would change the law governing how such campaigns are conducted and who may contribute to them. Existing state campaign law allows “any state or local agency” to impose “additional requirements on any person if the requirements do not prevent the person from complying with this title.” Government Code § 81303. Cases interpreting this provision have allowed local governments to ban contributions otherwise permitted by state law because doing so would not require or encourage a non-complying act. *Major v. Silna*, 134 Cal. App.4th 1485, 1502 (2005) (outright local ban on non-cash contributions permitted by state law not barred by Political Reform Act). It is not clear whether the Supreme Court would be viewed as a “state or local agency” within the meaning of this provision—the reported cases all deal with local agencies seeking to regulate elections occurring under their jurisdiction. Even if a campaign regulation promulgated by the Court were technically within the statute, however, the Court might well be wary of adopting a rule that would change the dynamics of both local and statewide elections for all public prosecutors, unless it had a very clear understanding of what those changes would be.

It is difficult to evaluate the DAs proposal in terms of these concerns because no proponent or opponent of the proposal discussed these concerns or offered any relevant data. On the one hand, the proposal does not attempt to directly regulate prosecutorial discretion or to set standards for disqualification, both of which would raise strong separation of powers concerns. To the extent it has any effect on the exercise of prosecutorial discretion, that effect is indirect and uncertain since it depends on how much impact restricting access to direct support from law enforcement unions will have when their independent support remains fully available. The

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<sup>16</sup> The same conclusion would seem to follow from the history of the prosecutorial disqualification statute in California, where, after the Supreme Court adopted an appearance of impropriety standard for disqualification, the legislature intervened and set that standard aside.



effect on the dynamics of prosecutorial elections of a ban on seeking or accepting direct law enforcement union support is similarly uncertain because the relative importance of direct and independent union support or their role in ensuring competitive and fair elections is not known.

## **B. The ACLU of California Proposal**

The ACLU's proposal differs from the DAs proposal in three significant ways. First, it bars only personal solicitations by candidates for elected office; it does not bar solicitation by a candidate's campaign committees. Second, it does not single out solicitation of law enforcement unions; instead, it applies to solicitation from any "entity." Thus candidates remain free to personally solicit any individual. Third, the proposal permits candidate committees to freely solicit and accept contributions from anyone, including any entity or individual. The ACLU did not explain the rationale for these changes and did not offer any analysis of the legality or effects of its proposal. We apply the framework set out above to evaluate it.

**Effectiveness:** The ACLU proposal targets only a candidate's personal solicitation of contributions from entities. This is a much less effective way of addressing concerns with law enforcement influence over investigation and prosecution of police misconduct because campaigns remain free to solicit and accept direct support, and unions remain free to provide independent support. The only interest that the proposal appears to advance is an interest in avoiding personal asks for direct support, but unlike the similar restriction in *Williams-Yulee*, which extended to all candidate asks, the proposal draws a distinction between entities and individuals. It is not obvious what interest is served in drawing that distinction, particularly in a world where all direct contributions by entities and individuals alike are limited in amount by statute. As with the DA's proposal, it is unclear what impact, if any, the proposed rule would have on either actual or apparent conflicts.

**Constitutionality:** Because the proposed restriction on personal asks does not single out law enforcement unions or prevent candidate committees from soliciting or accepting contributions from anyone, on its face, it does not infringe on speech interests as much as the DAs proposal does. Before accepting that view of the proposal, however, it would be important to understand the rationale and effect of barring personal asks from entities but not from individuals. The contribution data for the pending Los Angeles County DA election raises some serious concerns about whether this restriction is viewpoint neutral since the major independent expenditures in support of the "law and order" candidate are almost all from law enforcement unions, while the major independent expenditures by individuals are all from individuals.<sup>17</sup>

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<sup>17</sup> Moore, Menezes and Queally, *supra* n \_\_\_\_ (showing approximately \$4.2 million in independent expenditures from unions in support of the "law and order" candidate; approximately \$5 million in independent expenditures by individuals in support of the "reform" candidate.)

Assuming that it is viewpoint neutral, the ACLU proposal appears to impose speech restrictions very similar to those at issue in *Williams-Yulee*, though the rationale for those restrictions is less clear than in that case. Whether such restrictions would survive strict scrutiny will then depend on whether the state's interest in preserving the apparent neutrality of prosecutors through a partial ban on personal asks is as compelling strong as the interest in apparent judicial neutrality promoted by the complete ban on personal asks in *Williams-Yulee*. For reasons discussed in Section IV(a) that seems relatively unlikely, and for that reason, the ACLU proposal also runs a risk of being held unconstitutional<sup>18</sup>.

**Conflict with Other Laws, Regulatory Competence, and Separation of Powers:** Because the ACLU proposal is limited only to personal requests for contribution by the candidate from entity donors and does not impact the campaign's ability to seek or accept direct support from anyone, the risk of regulatory conflict or of interference with prosecutorial discretion or with the fairness and competitiveness of prosecutorial elections is much lower than with the DAs proposal.

## **V. Other ways the State Bar could contribute to addressing the problem**

Besides considering the DAs and ACLUs proposed rule, the State Bar could consider other options for addressing this problem. As a preliminary matter, the State Bar should consider whether attorney discipline is the best way to address the issue of prosecutorial influence from campaign contributions. And if so, how would any potential misconduct be managed and reported when many of the acts of the district attorney in investigating and considering charges, including some grand jury proceedings, take place outside of the public eye or courtroom. As discussed above, the State Bar should also consider whether any proposed new rule or ethics opinion would be in conflict with existing law.

### **A. Revisions to Existing Rules of Professional Conduct**

#### **1. Revisions to Rule 1.7 or Comments to Rule 1.7 dealing with prosecutors**

The State Bar could consider additional language to rule 1.7 or comments to the rule 1.7 to more explicitly address these types of prosecutorial conflicts.

It could also consider a Comment to Rule 1.7, stating that:

“[ ] Standards for prosecutorial disqualification are also the subject of statutes and case law. (See, Pen. Code, § 1424; *[determine which cases to include in a short string*

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<sup>18</sup> If the State Bar were to consider either the DAs proposal or the ACULs proposed, we would recommend its Office of General Counsel conduct a more detailed analysis of the constitutional concerns raised above.

*cite*].) In certain instances, statutes may require a state prosecutor to conduct an investigation in place of the local prosecutor's office. (See, Gov. Code, § 12525.3.)"

2. Revisions to Comments to Rule 1.10 dealing with imputation in prosecutor's office

Similarly, the State Bar could consider revising comments to the rule 1.10, to more explicitly address imputation in a prosecutor's office, or expand upon standards for disqualification as set forth in Comment [6], to include revisions to Gov. Code, § 12525.3.

3. New Rule Related to Prosecutorial Conflicts of Interest

The State Bar could consider studying and drafting an entirely new rule addressing conflicts of interest for prosecutors and the unique problems associated with addressing conflicts for district attorneys. For example, in the same way that rule 3.8 addresses "special responsibilities of prosecutors," a new rule, 3.8.1, could address conflicts of interest generally for prosecutors and how and when prosecutors can and should "terminate" a representation, or particular rules for investigating and prosecuting police misconduct cases.

**B. Ethics opinion**

The State Bar could consider asking COPRAC to draft an ethic's opinion discussing conflicts under rule 1.7(b) and how the suggested fact pattern may give rise to a conflict of interest, which may require disqualification or withdrawal. However, as discussed above in the section addressing conflicts, because conflicts are analyzed on a case by case basis, and opinions have no controlling weight, it is unclear whether an opinion would be useful in addressing this problem.

**C. Develop Standards for Prosecutorial Conduct**

The State Bar could consider creating a task force to look into developing standards (generally, or for specifically for investigating and prosecuting police misconduct) for prosecutors. There are national standards that exist that were developed by the American Bar Association "ABA" and the National District Attorneys Association ("NDAA"). However, both are offered for guidance and are not disciplinary in nature. The State Bar should consider whether developing standards for prosecutorial conduct would be helpful in addressing this problem, and if so, should standards be aspirational or drafted as rules subject to discipline.

**D. Other Potential Solutions?**

For continued discussion.

## **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."

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. We hope that our analysis and discussion will be useful in achieving those goals, and welcome any questions and feedback on our process.