

Date: November 30, 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

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) who has since been elected as 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 summarizes the Committee's analysis 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 issues raised by the DAs' proposal. See Exhibit _____. The Committee circulated a detailed list of questions to supporters and opponents of the proposal, seeking factual, legal, and policy support for their respective claims. Exhibit _____. The Committee received public comment on the DAs' proposal at regularly scheduled Committee meetings on July 25, 2020, and September 11, 2020, and conducted a noticed public hearing devoted exclusively to the proposal on August 11, 2020. In connection with those meetings and hearing, 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 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. Mr. Boudin clarified that a union's or union PAC's independent expenditures and campaign activities would not be subject to the proposed rule.

At the hearing, the ACLU of California (representing the Northern California, Southern California, and San Diego-Imperial chapters) 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.

Two legislative developments have occurred since the August 11 hearing. First, on September 30, the Governor signed into law Government Code section 12525.3 (AB 1506). That statute provides that 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 and may prosecute any resulting criminal action against the officer. Second, on October 22, Assemblyman Rob Bonta announced plans to introduce legislation that would prohibit elected prosecutors from investigating police misconduct if they have accepted campaign

contributions from police unions that represent the accused officer.¹ The legislative proposal would have the Attorney General investigate the alleged misconduct in these instances. The bill is sponsored by the Prosecutors Alliance of California, whose executive committee includes the four DAs who submitted the proposed rule of professional conduct to the State Bar.

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.² It is part of a much larger set of concerns about unfairness and systemic racism in the criminal justice system and law enforcement that have recently generated public protests, political debate, and legislative attention.

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.³ 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. 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. Such relationships may also create the appearance of a conflict, even where none exists. Legislative measures like AB 1506, which take some investigations of potential misconduct by local law enforcement out of the hands of local prosecutors, can be seen as seeking to address this type of conflict through a rule of automatic recusal.

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. Most state and local prosecutors are elected. Police unions have financial and political resources that are sometimes used to support or oppose candidates for that office. In addition, police unions have a large stake in how their members are treated in investigations of

¹ Megan Cassidy, “Bill would remove D.A.’s from police misconduct probes if they accept police union money,” San Francisco Chronicle, October 22, 2020, at <https://www.sfchronicle.com/crime/article/New-bill-would-remove-DAs-from-police-misconduct-15667589.php>.

² 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).

³ Green and Roiphe, *supra* n. ___, 53 B.C. L. Rev. at 473-76; Levine, *supra* n. ___, 101 Iowa L. Rev. at 1465-72.

their alleged misconduct. Given these facts, it is reasonable to believe that concern about the political consequences of their actions may sometimes 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 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 preliminary sense is that conflicts stemming from the district attorneys' close working relationships with law enforcement may well interfere with the investigation and prosecution of some law enforcement misconduct. The enactment of AB 1506 indicates that the legislature also recognizes that concern, at least in cases of potentially grave misconduct.

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 expenditures of several million dollars in the current Los Angeles district attorney's race. Supporters of the proposal did not describe those anecdotal cases in any detail. 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.⁴

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

⁴ 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 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/>. That DA's office subsequently cleared the officers in both shootings of any wrongdoing. *Id.* In addition to the \$10,000 from the Fremont Police Association, the DA also accepted at least \$30,000 from other police unions, including the Oakland Police Officers Association, the Deputy Sheriff's Association of Alameda County PAC, and the Emeryville Police Union. *Id.* According to that DA, money from law enforcement makes up less than 5% of her total campaign donations. *Id.* In her 2020 reelection bid, that DA has indicated she has not and will not accept campaign money from police unions. *Id.*

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 \$300-500 per election.⁵ 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, 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 2020 Los Angeles district attorney race appears to illustrate that phenomenon—in that race, individual law enforcement unions and concerned individuals made independent expenditures that were hundreds of times greater than the amount that they were permitted to contribute directly to the candidate's campaign under the relevant local law.⁶

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

⁵*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>

⁶ 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.*

public confidence in the criminal justice system, both in those communities and in the wider society.

III. How Existing Law Addresses the Problem

We first examine whether the current rules and statutes governing conflicts of interests and disqualification are sufficient to address the DAs' primary concerns. As discussed below, our examination reveals shortcomings in the existing rules and statutes in addressing the type of conflicts at issue in the DAs' proposal.

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

1. Analyzing Conflicts of Interest Under Rule 1.7

Under the California Rules of Professional Conduct, conflicts of interest with current clients are analyzed under rule 1.7.⁷ Rule 1.7 applies to all lawyers, including prosecutors [See rule 1.11(d)(1)].

Under rule 1.7(b), absent informed written consent from each affected client, an elected prosecutor could not handle a matter if there was a "significant risk" the prosecutor's ability to carry out his or her duties would 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 supports 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 a relationship with local law enforcement or concern with political support would influence the district attorney's prosecutorial discretion. Nor is it determined by appearances—the Model Rules of Professional Conduct, on which Rule 1.7 is based, have rejected the appearance of impropriety as a standard for discipline.⁸ Instead, the critical question in analyzing the conflict is the likelihood that the relationship or financial or political support (or the threat of its withdrawal) 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) the amount of the campaign contribution, or the passage of time from when a contribution was made; (2) whether a *de minimis* contribution (e.g., \$5) would materially interfere with the prosecutor's professional judgment; (3) how "political support," including endorsements,

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

⁸ Similarly, California courts have consistently held that an appearance of impropriety is not, by itself, an independent basis for attorney disqualification under California law. See, e.g., *Oaks Management Corp. v. Superior Court* (2006) 145 Cal.App.4th 453, 471; *Addam v. Superior Court* (2004) 116 Cal.App.4th 368, 371-372; *DCH Health Services Corp. v. Waite* (2002) 95 Cal.App.4th 829, 833. But see, *Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197, 1212.

independent political expenditures, and voter turnout operations should be analyzed in determining whether a conflict exists; (4) the extent of the elected prosecutor's working relationship with police officers and law enforcement; and, (5) to what extent 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.

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. But it is certainly possible that in some circumstances, such a conflict could arise.

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

Assuming that a particular campaign contribution or endorsement resulted in a conflict under rule 1.7(b), the representation would be prohibited unless the "affected client" provides informed written consent. Even when a significant risk requiring a prosecutor to comply with paragraph (b) is not present, under rule 1.7(c), an elected prosecutor who 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." 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." Such an approach is taken by the State Bar's Office of Chief Trial Counsel under State Bar Rule of Procedure 2201, which addresses the appointment and authority of State Bar Special Deputy Trial Counsel.⁹

⁹ 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>

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 Formal Opn. 2001-156 also concludes, based on existing California case law, that the entity itself is the client of a governmental attorney. In the case of conflicts of interest for line attorneys, such as those stemming from working or personal relationships with a person under investigation, it would make sense to allow the elected DA or his or her designee to evaluate and give consent to those potential conflicts. Where the conflict stems from the elected DA's personal political interests, however, it is difficult to see how the elected district attorney would be the appropriate person for purposes of disclosure or consent to any potential conflict. It may be that most district attorney offices have an appropriate "designee" or independent attorney to analyze these types of conflicts; we asked both proponents and opponents of the rule for information as to how conflicts of interest are typically handled within district attorney offices, but received no information. In the alternative, our prior opinions indicate, without analysis, that in the event of a conflict involving the District Attorney personally, the appropriate person to give consent or receive disclosures is the Attorney General. Cal. State Bar Formal Opn. 1983-84, n. 3 (citing Government Code section 12550.)

If, rather than the District Attorney's office itself, the constituents or the People that are the "client," how would such consent or disclosure be effectuated? It seems difficult to conclude that the "People" "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.

When a potential or actual conflict exists under either rule 1.7(b) or (c), if there is no practical way for a district attorney to obtain informed written consent to a conflict under rule 1.7(b), or to provide written disclosure under rule 1.7(c), then the district attorney cannot satisfy rule 1.7. Under that circumstance, mandatory withdrawal would likely be required by rule 1.16(a)(2), which provides 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 rules when more than one lawyer in the DA's office may be seen as having benefited from the financial or political support of a law enforcement union.

3. 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. Rule 1.10 provides in pertinent part: "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.” This imputation standard turns on a fact-specific analysis 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). It could be that under this standard a prosecutor’s conflict based on a relationship with an officer under investigation would not be imputed to other members of the office, but that the elected DA’s conflict based on concerns about alienating an important election funder might give rise to a stronger case for imputation. Any analysis of this issue would also have to consider the potential relevance of standards for prosecutorial disqualification set by statutes and case law, including Penal Code section 1424. See rule 1.10, Comment [6].

4. Disciplinary 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 and charges brought by the State Bar’s Office of Chief Trial Counsel and addressed by the State Bar Court of California.

B. Judicial Disqualification for Actual or Potential conflicts under Penal Code Section 1424—Case Law and the California Attorney General’s position

1. The Standard for Disqualification under Penal Code section 1424

Although California courts often look to California’s ethics rules for guidance in deciding disqualification motions, they are not determinative as the remedy of lawyer disqualification is reserved as a judicial function.¹⁰ In the case of prosecutorial conflicts, moreover, judicial standards for disqualification have been largely displaced by standards set by the legislature.

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 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

¹⁰ 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.)

increase in the number of prosecutorial recusals under the “appearance of conflict” standard 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.” 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.” *Eubanks*, 14 Cal.4th at 592.

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 unwarranted favorable treatment or whether a prosecution may not proceed because of such treatment. The injury from such a conflict is not to the defendant, but to the victim or the public interest. Because of its focus on the fair trial rights of the defendant, section 1424 does not directly address such a conflict. Moreover, a defendant or target of an investigation who is receiving unwarranted favorable treatment is not likely to move to disqualify those providing such treatment. Even if the statute extended to defendant-favoring conflicts - it is not clear who would have standing to seek disqualification or how such a claim could be made at the investigative stage of a proceeding.

2. Attorney General Letter Concludes Campaign Contributions or Endorsements Not a Basis for Disqualification Under Section 1424

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.”

The Attorney General’s letter also considers whether under section 1424 the “appearance of a conflict” is a basis for a prosecutor to decline to review or investigate potential law enforcement misconduct. Consistent with the legislative history described above, it concludes: “Sound policy counsels otherwise. The primary duty for enforcement of the 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 letter predates the current movement and public support for criminal justice reform since the death of George Floyd. We do not know whether the Attorney General currently holds the same view on the conflict issues.

3. Imputation of Conflicts under Section 1424

Under Section 1424, 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.¹¹ 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, 201.¹² Conflicts may arise where there is 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. This issue, which must be analyzed on a case-by-case basis, 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 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.]”).¹³

¹¹ *People v. Hernandez* (1991) 235 Cal.App.3d 674, 680, opinion modified, (October 24, 1991) (motions to disqualify 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.’”).

¹² *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 because it was both victim and possible malfeasant; disqualification of entire office warranted because conflict was so grave that it was unlikely the defendant would get a fair trial)

¹³ *See, e.g., People v. Vasquez* (2006) 39 Cal.4th 47 (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 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 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);

More generally, courts have taken a more flexible approach to vicarious disqualification in the “public sector,” meaning the legal departments of public agencies. As the California Supreme Court noted, 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).

In the context of a motion to disqualify, whether a timely ethical wall could 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 factors regarding the efficacy of an ethical wall. See *Kirk v. First American Title Ins. Co* (2010) 183 Cal.App.4th 776, 807-808. Ethical walls have been approved to avoid the imputation of conflicts to other deputy district attorneys.¹⁴

C. Government Code Section 12525.3 (AB 1506)

As noted above, newly enacted Government Code section 12525.3 (AB 1506) provides that 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 and may prosecute any resulting criminal action against the officer. In that important but narrow class of police misconduct cases, the statute can be seen as resolving all issues of actual, potential, or apparent conflict for local prosecutors, including those stemming from relationships with local law enforcement, or union political activity, in favor of a rule of automatic disqualification. Moreover, the disqualification rule does not depend on the existence of a pending proceeding or on a motion by a defendant or victim. Earlier versions of the proposed legislation would have imposed a broader rule of disqualification extending to all officer-involved use of force cases resulting in the death of a civilian.

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

¹⁴ See, e.g., *Melcher v. Superior Court* (2017) 10 Cal.App.5th 160 (denial of motion to recuse DA’s office based on fact that one of the alleged assault victims 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 DA’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).

D. Summary of Existing Law

Under existing law, professional discipline is potentially available for prosecutorial conflicts of interest that actually or potentially impair the investigation and prosecution of misconduct by law enforcement personnel. Such conflicts could include both those stemming from relationships with the person under investigation, or that person's employer or union, and those stemming from political contributions by those affiliated with that person. In important respects, however, the disciplinary rules do not fit easily with such conflicts, and difficult questions remain about who should be able to consent to such conflicts and when they should be imputed to other lawyers in the office under rule 1.10.

Existing statutory law governing judicial disqualification of prosecutors provides no remedy for conflicts in matters that do not result in a filing. Moreover, because disqualification under Penal Code section 1424 is limited to conflicts that threaten the defendant's right to a fair trial, it does not appear to reach defendant-favoring conflicts stemming from relationships with law enforcement or from political contributions. Even if the law did reach such conflicts, existing imputation standards could make it difficult to impute such conflicts from an elected district attorney to the office as a whole.

Recent legislation provides for automatic disqualification of local prosecutors in cases involving officer-involved shootings of unarmed civilians. The legislature expressly considered and rejected proposals for disqualification in a broader range of cases.

Both existing disciplinary rules and legislative standards for judicial disqualification reject the appearance of impropriety as a basis for discipline or disqualification. In other respects, though, there may be significant tension between the potential application of disciplinary standards under rule 1.7 and the law of prosecutorial disqualification. Any effort by the State Bar to interpret existing law or to propose modifications of existing disciplinary rules will have to take into account that in regulating prosecutorial disqualification, the legislature has taken the leading role. A central question will be whether the standards set by the legislature should be viewed as limited to the disqualification context or instead should control the application of existing disciplinary standards or the content of new standards. Even if those standards are not viewed as controlling, the primacy of the legislature in setting criminal justice policy may counsel modesty in departing from those standards.

IV. Analyzing the Proposals

A. The DAs' Proposal

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

Effectiveness: Because existing law does not regulate the appearance of a conflict, and because the application of existing law to actual or potential prosecutorial conflicts is uncertain, the proposal can be viewed as reducing the potential for both apparent and actual conflicts stemming from political activities of law enforcement unions. As noted, the proponents of the rule did not document their claims concerning the frequency or severity of such conflicts. Moreover, the effectiveness of the proposed rule would depend, 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.

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). The proponents of the proposed rule did not submit any written analysis of its constitutionality. At the August 11 hearing, Mr. Boudin argued that 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.

Opponents of the proposal argued that it is unconstitutional because it infringes on both the rights of candidates for office and of unions (which 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 address them when they arise. They also argued that because the restrictions target police unions, they discriminate against particular speech and speakers based on the content of political views.

In *Williams-Yulee*, the Supreme Court addressed the constitutionality of the Florida Bar's ban on personal solicitation of campaign funds by judicial candidates. In upholding the ban, the Court concluded that the restriction imposed pursuant to Florida's Code of Judicial Conduct was narrowly tailored to preserve public confidence in the integrity of its judiciary, which, the Court noted, was a "State interest of the highest order." (575 U.S. at 446 (citation omitted).) The rule was sufficiently narrowly tailored to withstand strict scrutiny because though the law prevented judges and judicial candidates from personally soliciting funds, they were still allowed to discuss any topic publicly and could have their campaign committees solicit funds for them. (*Id.* at 444-445.) The Court 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." (*Id.* 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[.]" (575 U.S. at

434.) 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.” (*Id.* at 446.) 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).)

Id. at 446-47.

There are several differences between the DAs’ proposal and the rule upheld in *Williams-Yulee*. First, in *Williams-Yulee*, the ban applied to personal solicitation of all potential donors; here, the DAs’ proposal applies only to law enforcement unions, in circumstances that suggest that the proposed restriction is tied to their political views. Second, the effect on candidate speech is broader since both the candidate and the candidate’s committee could not solicit or accept funds. Third, unlike the ban in *Williams-Yulee*, the proposed rule restricts the rights of donors and does so selectively. It would be a targeted repeal of the right of law enforcement unions to contribute to candidates for prosecutorial offices.¹⁵ These differences mean that the proposal poses a significantly greater threat to freedom of speech than the rule in *Williams-Yulee*.

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,” *id.* 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

¹⁵ 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 proposal would, in effect, restrict the unions’ right to free speech via campaign contributions.

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 campaign contribution case, and it does not consider where an elected prosecutor sits on the spectrum between a judge and an ordinary politician. Nor is it informed by current concerns about systemic failures to prosecute police misconduct. Even so, the Court's reasoning suggests that a reviewing court may find that apparent neutrality is a less obvious or urgent value for elected prosecutors than for elected judges and may therefore conclude that the state interest implicated by the DAs' proposal is weaker than that recognized in *Williams-Yulee*.¹⁶ The risk of such a finding may be higher in California, given that the appearance of impropriety has been rejected as a basis for both discipline and disqualification. We are not constitutional law experts, but given the narrow majority that supported the result in *Williams-Yulee*, the greater threat to Free Speech posed by the DAs' proposal, and the weaker state interests supporting it, we think there are substantial grounds for concern that a court would 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 other than "the People," 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, particularly since the legislature has already taken a substantial regulatory role in this area.

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. Moreover, the exercise of prosecutorial discretion in police misconduct cases may sometimes involve a balancing of interests, and how that balance is struck can involve issues of policy that are properly subject both to debate in the community and to electoral input. Indeed, in recent years, such issues have been raised in many DA elections, both in California and nationwide. It is also possible for

¹⁶ 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.

candidates to campaign on the basis of their immunity to potential conflicts of interest by publicizing their refusal to accept law enforcement contributions.

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. Silva*, 134 Cal. App.4th 1485, 1502 (2005) (outright local ban on non-cash contributions permitted by state law not barred by Political Reform Act). We do not know whether the Supreme Court may be deemed 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 own jurisdiction. Even if a campaign regulation promulgated by the Court were found to be within the statute, however, the Court might be wary of adopting a rule that would change the dynamics of both local and statewide elections for all public prosecutors, particularly since the legislature has recently enacted changes to the law governing contributions in local prosecutorial elections which are just about to take effect.

B. The ACLU of California's 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 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's proposal targets only a candidate's personal solicitation of contributions from entities. This is a 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 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 where all direct contributions by entities and individuals alike are limited in amount by statute. As with the DAs' 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.¹⁷

Assuming that it is viewpoint neutral, the ACLU's 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 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's proposal also runs a risk of being held unconstitutional.¹⁸

Conflict with Other Laws, Regulatory Competence, and Separation of Powers: Because the ACLU's proposal is limited only to personal requests for contribution by the candidate, 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. Options for Board Consideration

A. Proceeding With the DAs' or ACLU's Proposal

One option is to proceed with either the DAs' proposal or the ACLU's variant. If the Board is inclined to pursue this course, we would recommend that before taking steps toward enacting a rule, the Board or its designees conduct a more extensive investigation into: (1) the severity of the conflict problem; (2) the probable impact of the proposed rule both in addressing that problem and on election dynamics; and (3) the constitutionality of the proposal under the First Amendment. The current presentations by proponents of the proposed rule simply do not provide an adequate basis to assess these concerns. In addition, the State Bar should consult with those in other branches of government to ascertain their views.

¹⁷ Moore, Menezes and Queally, *supra* n. 6 (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.)

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

If the Board decides not to proceed with these proposals at this time, there are other options that the Board can consider.

B. Clarifying Existing Law

The State Bar could consider asking COPRAC to draft an ethics opinion discussing prosecutorial conflicts under rule 1.7(b), including those that may result from campaign contributions or other political support. This opinion could consider various factual situations and opine on whether they give rise to a conflict, how and whether consent to the conflict can be obtained, and whether such conflicts would be imputed to other lawyers in the office under Rule 1.10. This opinion could also clarify the largely unexplored relationship between the rules that govern prosecutors for disciplinary purposes and the standards for disqualification under the Penal Code and the Government Code. Such an opinion would not be binding, but it could provide guidance to prosecutors throughout the state, although its application may be limited due to the gaps in existing rules discussed in Section III(A), *supra*.

The State Bar could also consider additional language to rule 1.7 or comments to the rule 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 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.)”

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 in Comment [6], to include revisions to Gov. Code, § 12525.3. These changes, while providing useful clarification, would not change the text of the Rules and hence would not change the bases for discipline under those Rules.

C. Monitor Existing and Proposed Legislation

The wisdom of proceeding immediately with either Option A or Option B may depend importantly on the impact of recent legislation and the potential for new legislation. As noted above, the legislature has just enacted important changes to both the law governing contributions to prosecutorial candidates and to the law of disqualification in use of force cases. Given the close connection between these legislative changes and the proper resolution of the issues raised by Options A and B, the State Bar could reasonably defer action on both Options to assess the impact of those changes.

Assemblyman Bonta’s recently announced intention to introduce legislation dealing directly with this subject may also counsel in favor of deferring a decision on Options A and B. Although Assemblyman Bonta’s bill has not yet been introduced, the Assemblyman’s press

release¹⁹ states the proposed “legislation...will require elected prosecutors to recuse themselves from the investigation and prosecution of law enforcement misconduct if they accept financial contributions from law enforcement unions.” The legislature’s adoption of such a rule would effectively eliminate the concerns with contribution-based conflicts of interest that underlie the DAs’ proposal since it would result in automatic disqualification in every case of actual, potential, or apparent conflict stemming from law enforcement union contributions. Moreover, violations of such a rule might well be enforceable in the disciplinary process.²⁰ If, however, the legislature were to reject such a rule, that rejection could also have an important bearing on whether it would make sense to proceed with Option A.

With respect to Option B, the enactment of Assemblyman Bonta’s proposed bill could have a significant effect both on the content of the relevant law and upon the need for and content of further clarification, whether through comments to the Rules of Professional Conduct or a new COPRAC opinion. There is precedent for keying conforming rule changes and related clarifications of the law to the content of new legislation. COPRAC recently undertook a similar assessment with Assembly Bill 1987, which was enacted in September 2018 and dealt with retention of, and access to, post-conviction discovery materials in cases involving a serious or violent felony resulting in a sentence of 15 years or more. Following enactment of the legislation, COPRAC proposed amendments to rules 1.16 and 3.8, which were approved by the Supreme Court on April 23, 2020 (made effective June 1, 2020). In addition, COPRAC is currently in the process of developing an ethics opinion on attorney file retention duties that incorporates the legislative requirements.

¹⁹ October 22, 2020 press released captioned: “Bonta Announces First-in-the-Nation Legislation to Cure Conflict of Interest for Elected Prosecutors Investigating Police Misconduct.” (See: <https://a18.asmdc.org/press-releases/20201022-bonta-announces-first-nation-legislation-cure-conflict-interest-elected> .)

²⁰ All attorneys have a statutory duty to support the laws of California and violation of that duty may be a cause for discipline. Business and Professions Code §6068(a) provides that it is a duty of an attorney: “To support the Constitution and laws of the United States and of this state.” Business and Professions Code §6077 provides, in part, that a lawyer’s willful violation of the duties of an attorney constitutes a cause “for disbarment or suspension.” (See also, *In the Matter of Lilley* (Rev. Dept. 1991) 1 Cal. State Bar Ct. Rptr 476, 487 [observing that: “the Supreme Court interprets section 6068(a) as a conduit by which attorneys may be charged and disciplined for violations of other specific laws which are not otherwise made disciplinable under the State Bar Act.”]. But see, *In the Matter of Harney* (Rev. Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 279 [The State Bar Court Review Department stated that: “We have recognized that section 6068(a) is not always the proper vehicle for charging a violation of the State Bar Act.” The Review Department also stated: “Nor are we obligated to find that a violation of every statute constitutes grounds for professional discipline.”].) In addition, if the statute is codified in the State Bar Act rather than as a Government Code section or a Penal Code section then a prosecutor’s noncompliance with the statutory mandatory recusal standard might also be subject to discipline as a violation of rule 1.16 (Declining or Terminating Representation). Rule 1.16, in part, provides that a lawyer “shall withdraw” from a representation if “the lawyer knows or reasonably should know that the representation will result in a violation of . . . the State Bar Act.” (Rule 1.16(a)(2).)

D. Develop Standards for Prosecutorial Conduct

The State Bar could consider creating a task force to look into developing standards (generally, or specifically for investigating and prosecuting police misconduct) for prosecutors. There are national standards developed by the American Bar Association (“ABA Criminal Justice Standards for the Prosecution Function”) and the National District Attorneys Association (“NDAA National Prosecution Standards”). 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, whether such standards should be aspirational or drafted as rules enforceable through discipline. The membership of any such task force should include representatives of the profession, of all relevant branches of government, and of the general public.

CONCLUSION

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 we welcome any questions and feedback on our process.