



The State Bar of California

OPEN SESSION AGENDA ITEM 705 JANUARY 2021

DATE: January 22, 2021

TO: Members, Board of Trustees

FROM: Andrew Tuft, Supervising Attorney, Office of Professional Competence

SUBJECT: District Attorney Campaign Contributions: Consideration of Amendment to the Rules of Professional Conduct, an Ethics Opinion, and Other Options

EXECUTIVE SUMMARY

On June 1, 2020, four district attorneys submitted a letter to the State Bar of California requesting the State Bar adopt a rule of professional conduct, or issue an ethics opinion, precluding “elected prosecutors—or prosecutors seeking election—from seeking or accepting political or financial support from law enforcement unions.” On July 2, 2020, the State Bar sent a reply stating that the issue deserved focused attention, an in-depth analysis, and also identified constitutional and other concerns with the proposal based upon a preliminary review of the request. As a result, the chair and vice-chair of the Board of Trustees referred the issue to the Committee on Professional Responsibility and Conduct for a more comprehensive analysis. This item attaches the committee’s analysis and presents four options for the Board’s consideration.

BACKGROUND

On June 1, 2020, four district attorneys¹ submitted a letter to the State Bar of California requesting the State Bar adopt a rule of professional conduct, or issue an ethics opinion, precluding “elected prosecutors—or prosecutors seeking election—from seeking or accepting

¹ As of June 1, 2020, the following three of the four signatories were current district attorneys (Diana Becton, Contra Costa County; Chesa Boudin, San Francisco County; and Tori Verber Salazar, San Joaquin County); the fourth signatory (George Gascon) was a former district attorney of San Francisco County and a candidate for district attorney in Los Angeles. On December 7, 2020, George Gascon was sworn-in as the district attorney of Los Angeles County.

political or financial support from law enforcement unions.” The district attorneys state that such a rule is necessary, in part, to “reduce the possibility of political influence from law enforcement unions over prosecutorial decision making.”

On July 2, 2020, Interim Executive Director Donna Hershkowitz sent a reply to the district attorneys informing them that the policy issue deserved focused attention and an in-depth analysis. The reply stated that the State Bar had conducted a preliminary analysis of their proposal that identified significant constitutional concerns with the proposed rule, including possible First Amendment and equal protection issues, as well as potential conflicts with other state laws. The letter also expressed concerns with an alternative solution that, rather than barring political or financial contributions entirely, would declare that a prosecutor has a per se conflict of interest in investigating an officer when the officer or the officer’s union has contributed to or supported the prosecutor’s campaign as statutory and decisional law currently governs the area of prosecutorial disqualification. Accordingly, the chair and vice-chair of the Board of Trustees referred this matter to the State Bar’s Committee on Professional Responsibility and Conduct (COPRAC) for a more in-depth, comprehensive analysis.

COPRAC met four times to discuss and consider the proposal. In addition, they held a public hearing on August 11, devoted exclusively to receiving public comment on this topic. At their meeting on December 4, COPRAC approved a final memorandum reflecting their analysis, including recommended options for the Board to consider. The memorandum is provided as Attachment A.

At the August 11 hearing, a speaker from the ACLU of California (representing the Northern California, Southern California, and San Diego-Imperial chapters) offered a modified version of the district attorneys’ proposal. Under the ACLU’s proposal, candidates for district attorney would be prohibited from personally soliciting contributions from any “entity,” including law enforcement unions. This proposal would allow a candidate to personally solicit and accept contributions from any individual, and the candidate’s campaign committee would be free to solicit contributions or other direct political support from any individual or entity. COPRAC’s memorandum analyzes both the ACLU and the district attorneys’ proposal.

To help inform their analysis, COPRAC drafted an initial research memorandum discussing issues raised by the proposal.² They circulated a detailed list of questions to supporters and opponents of the proposal, seeking factual, legal, and policy support for their respective claims.³ COPRAC received 52 separate written submissions and heard oral comment or testimony from 84 people, including representatives of institutions and organizations, as well as individuals speaking on their own behalf.

² This initial research memorandum is included as Appendix 1 to the memorandum.

³ This list of questions was part of the public notice for the August 11, 2020 public hearing. It is included as Appendix 2 to the memorandum.

COPRAC's analysis of the proposed rule of professional conduct is contained in the attached memorandum. This agenda item will focus on the four options COPRAC has recommended the Board to consider following their analysis.

DISCUSSION

COPRAC offers four options for the Board's consideration in their memorandum. The following is staff's observations with respect to each option.

Option 1: Proceeding with Either the District Attorneys' or ACLU's Proposed Rule of Professional Conduct

The Board could decide to proceed with the development of a rule of professional conduct patterned on either the district attorneys' proposal or the ACLU's. This option is the most responsive to the proponents' interest in framing this issue as one of legal ethics. However, based on COPRAC's analysis, such a rule may: (1) ultimately be found to be unconstitutional; and (2) function only as an attorney disciplinary standard, limiting its effect to only indirect recusal by a prosecutor.

COPRAC's assessment is that "there are substantial grounds for concern" that a court would find the proposed rule unconstitutional. As a result, if the Board determines to pursue this option, COPRAC recommends that a more extensive analysis be conducted into the constitutionality of the proposed rule under the First Amendment. The Office of General Counsel would be the entity within the State Bar to conduct that analysis. COPRAC's analysis concluded that the proposed rule would likely constitute a restriction on political speech which would be subject to strict scrutiny. That exacting standard will require the State Bar to establish the proposed rule of professional conduct is narrowly tailored to achieve a compelling state interest.

COPRAC found that the presentations to date by those in favor of the proposed rule do not provide an adequate basis to determine that the proposed rule would meet constitutional muster. Because a compelling state interest may be established by empirical evidence and no such evidence was presented to COPRAC, staff believes that a thorough constitutional analysis might require the State Bar to seek original academic research and surveys as a first step in determining whether to proceed with such a rule.⁴

⁴ See generally, *Florida Bar v. Went For It, Inc.* (1995) 515 U.S. 618 [115 S.Ct. 2371] (Florida attorney disciplinary rule prohibiting personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster did not violate the First and Fourteenth Amendments under commercial speech doctrine intermediate scrutiny where: (i) Florida asserted a substantial state interest both in protecting the privacy and tranquility of personal injury victims and their loved ones against invasive unsolicited contact by lawyers and in preventing the erosion of confidence in the profession that results from such repeated invasions; and (ii) this state interest was demonstrated by a Florida Bar study that contained "extensive statistical and anecdotal data suggesting that the Florida public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession"). Note that intermediate scrutiny of commercial speech is less rigorous than strict scrutiny of restrictions on political speech.

However, it is unclear whether a further study would reveal any data concerning the effect of campaign contributions on prosecutorial decision making, thus eliminating the viability of option 1 and bringing the Board back to the same decision point it is at now.

Option 2: Clarifying Ethics Opinion or Comments to the Rules of Professional Conduct

The Board could direct COPRAC to draft an ethics opinion analyzing prosecutorial conflicts of interest under Rule of Professional Conduct 1.7(b), including those that may result from campaign contributions or other political support. Such an opinion could also analyze the concept of imputation in a district attorney's office under rule 1.10 and the standards for disqualification under the penal code and the government code. Such an opinion may not be satisfactory to the rule proponents because the opinion may not conclude that withdrawal is necessary in every instance in which political or financial support is received by an elected district attorney from a police union. And such an opinion is, in any event, only advisory and not binding on the State Bar or the courts. However, an opinion could provide guidance to prosecutors throughout the state on these issues.

The Board could also choose to address prosecutorial disqualification and Government Code section 12525.3 in a Comment to rule 1.7 by stating, for example:

“[] Standards for prosecutorial disqualification are also the subject of statutes and case law. (See, Pen. Code, § 1424; *include cases 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 Board could consider revising the comments to rule 1.10 to more explicitly address imputation in a prosecutor's office or expand upon the standards for disqualification in Comment [6] to rule 1.10, to include citation to Government Code section 12525.3.

However, as with an ethics opinion, these changes would not accomplish the clear goal of the rule proponents of establishing a per se conflict of interest as a disciplinary standard but at most would be educational or advisory.

Option 3: Monitor Existing and Proposed Legislation

The Board could defer action on proceeding with either amending the Rules of Professional Conduct or the drafting of an ethics opinion until an assessment of recently enacted, or proposed, legislation is made. As noted in the COPRAC memorandum, the Legislature has recently enacted changes to both the law governing financial contributions to prosecutors seeking election and to the law governing disqualification of elected prosecutors in certain use of force cases. The impact of these changes may affect how amendments to the rules of professional conduct, or the drafting of an ethics opinion, are pursued.

In addition, as discussed in the memorandum, on October 22, 2020, Assemblymember Rob Bonta announced plans to introduce legislation dealing directly with this subject. Although, at the time of the writing of this agenda item, Assemblymember Bonta's bill has not been

introduced, the Assemblymember's press release⁵ 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 legislative proposal would have the Attorney General investigate the alleged misconduct in these instances. The violation of such a statute might well be enforceable in the disciplinary process.⁶ The proposed legislation is sponsored by the Prosecutors Alliance of California; whose executive committee includes the four district attorneys who submitted the proposed rule of professional conduct to the State Bar.

Depending on whether, and how, the Legislature enacts such a statute would provide an important determination on how to proceed with an amendment to the rules of professional conduct or an ethics opinion. There is precedent for conforming or implementing changes to the Rules of Professional Conduct as a complement to new legislation impacting the conduct of lawyers. COPRAC recently undertook a similar assessment regarding Penal Code section 1054.9, which was enacted in September 2018 and dealt with an attorney's 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.

Upon carefully considering each of the options presented by COPRAC, staff recommends pursuing this option. One main reason for preferring this option is that this strategy is the one that is most likely to avoid inconsistencies, or outright conflicts, between attorney conduct standards set by statute and those established in the Rules of Professional Conduct adopted by the Supreme Court on recommendation of the State Bar or in State Bar ethics opinions. For example, preliminary information is that the proposed legislation would permit prosecutors to seek or accept financial contributions from law enforcement unions, but would require the elected prosecutors to recuse themselves from investigating or prosecuting law enforcement

⁵ October 22, 2020 press release 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>.)

⁶ 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 section 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 section 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." 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).)

misconduct. In contrast, the proposed rule sought by the district attorneys would ban a prosecutor pursuing election from seeking or accepting political or financial contributions from law enforcements unions altogether. It might be imprudent for the State Bar to propose a rule to the Supreme Court for adoption that is materially different from a statutory standard on the same issue of attorney conduct. Accordingly, monitoring the proposed statutory amendments in the current legislative session will inform the consideration and drafting of a rule amendment or an ethics opinion.

It is important to note that this option is not a rejection of the development of a rule amendment or the drafting of an ethics opinion on this topic. Rather, it would be a decision to hold in abeyance how to proceed in order to see what action the Legislature takes in this area to better inform the substance of any rule amendment or an ethics opinion.

Option 4: Develop Standards for Prosecutorial Conduct

COPRAC found that there are aspirational 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).⁷ The Board could consider creating a task force to develop prosecutorial standards. Having such standards would offer the benefit of providing supplemental guidance concerning the ethical conduct of prosecutors. However, if adopted in the form recommended by the ABA or the NDAA, these standards would not function as lawyer disciplinary standards as they are aspirational and are “not intended to serve as the basis for professional discipline, to create substantive or procedural rights for accused or convicted persons, to create a standard of care for civil liability, or to serve as a predicate for a motion to suppress evidence or dismiss a charge.”⁸ Staff is not aware of any other jurisdiction that has adopted such guidelines as attorney disciplinary standards.

The adoption of aspirational standards would not accomplish the goals of the rule proponents as the current version of these standards do not address the topic of campaign contributions nor would they establish a per se conflict of interest resulting in discipline or disqualification. However, the Board would not be precluded from directing a task force to consider adding the topic of campaign contributions to the standards they are tasked with developing.

If the Board selects this option, COPRAC’s report contemplates the creation of a task force that includes attorneys whose practice area is relevant to the subject matter, including prosecutors, criminal defense attorneys, constitutional law experts, and legal ethicists, representation from the executive, legislative, and judicial branches, and nonattorney members of the public. A key threshold issue for either the Board in the first instance, or the task force as charged by the Board, to decide would be whether it is within the purview of the State Bar to develop guidelines that are not regulatory standards. California has in the past, as a policy matter,

⁷ Some states have incorporated these standards by reference in the Comments to their Rule of Professional Conduct 3.8. See, for example, Colorado Rule of Professional Conduct 3.8, Comment [1], and Delaware Rule of Professional Conduct 3.8, Comment [1].

⁸ Standard 3-1.1 of the ABA Criminal Justice Standards for the Prosecution Function.

avoided statements of aspirational principals that are not adopted as binding regulatory standards.

FISCAL/PERSONNEL IMPACT

One of the options recommends the formation of a task force. The fiscal and personnel impact of such a group may not be insignificant. These impacts will ultimately be determined by the size and composition of any task force and the scope and timeline for completion of its work. Should the Board approve the idea of establishing a task force consistent with the purposes outlined in the Recommendations section below, staff will return to the Board with a detailed cost proposal for the effort.

AMENDMENTS TO RULES OF THE STATE BAR

None

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: None

RECOMMENDATIONS

- 1. Should the Board decide to pursue consideration of a rule of professional conduct as proposed in the June 1, 2020, district attorneys' letter, it is recommended that the Board of Trustees approve the following resolution:**

RESOLVED, that the Board of Trustees directs the Committee on Professional Responsibility and Conduct to develop a rule of professional conduct prohibiting elected prosecutors—or prosecutors seeking election—from seeking or accepting political or financial support from law enforcement unions; and it is

FURTHER RESOLVED, that following development of the rule the Committee on Professional Responsibility and Conduct presents the proposed rule to the Board of Trustees together with an analysis of the compelling state interest addressed by the rule and how the rule is narrowly tailored to advance that state interest.

2. **Should the Board decide to pursue the development of a rule of professional conduct as proposed by the ACLU, it is recommended that the Board of Trustees approve the following resolution:**

RESOLVED, that the Board of Trustees directs the Committee on Professional Responsibility and Conduct to develop a rule of professional conduct prohibiting elected prosecutors—or prosecutors seeking election—from personally soliciting contributions from any entity; and it is

FURTHER RESOLVED, that following development of the rule the Committee on Professional Responsibility and Conduct presents the proposed rule to the Board of Trustees together with an analysis of the compelling state interest addressed by the rule and how the rule is narrowly tailored to advance that state interest.

3. **Should the Board decide to develop nonbinding guidance in the form of an ethics opinion addressing prosecutorial conflicts of interest under the Rules of Professional Conduct and related statutory provisions, or amendments to relevant Comments to the existing Rules of Professional Conduct concerning prosecutorial conflicts of interest, it is recommended that the Board of Trustees approve the following resolution:**

RESOLVED, that the Board of Trustees directs the Committee on Professional Responsibility and Conduct to develop an ethics opinion analyzing prosecutorial conflicts under the Rules of Professional Conduct and related statutory provisions, and/or draft amendments to relevant Comments to the existing Rules of Professional Conduct concerning prosecutorial conflicts of interest.

4. **Should the Board decide to monitor proposed legislation before taking any action, it is recommended that the Board of Trustees approve the following resolution:**

RESOLVED, that the Board of Trustees directs staff to monitor legislation introduced in the first year of the 2021–2022 legislative session concerning the recusal of prosecutors who receive campaign contributions; and it is

FURTHER RESOLVED, that following the consideration of the Legislature’s activity on this issue during the 2021–2022 legislative session, the Committee on Professional Responsibility and Conduct is assigned to determine whether revisions to the Rules of Professional Conduct, or the development of an ethics opinion, would be appropriate.

5. **Should the Board decide to develop guidelines for prosecutorial conduct similar to the standards developed by other associations, it is recommended that the Board of Trustees approve the following resolution:**

RESOLVED, that the Board of Trustees directs staff to form a task force to consider whether to develop prosecutorial standards that considers both the ABA Criminal

Justice Standards for the Prosecution Function and the National District Attorneys Association National Prosecution Standards; and it is

FURTHER RESOLVED, that if the task force decides to recommend the adoption of such standards that it prepare a recommended set of such standards for adoption and transmit them to the Board of Trustees; and it is

FURTHER RESOLVED, that staff is directed to prepare a proposed charter for the task force; and it is

FURTHER RESOLVED, that staff is directed to prepare a recommendation for the composition of the task force that includes (i) attorneys whose practice area is relevant to the subject matter, including prosecutors, criminal defense attorneys, constitutional law experts, and legal ethicists, (ii) representation from the executive, legislative, and judicial branches, and (iii) nonattorney members of the public.

ATTACHMENT(S) LIST

- A.** COPRAC Memorandum Analyzing Issues Related to Request for New Rule of Professional Conduct



The State Bar *of California*

COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

Date: December 4, 2020

To: Members, Board of Trustees

From: Committee on Professional Responsibility and Conduct (COPRAC)

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 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 by making endorsements and donating funds. The DAs note that prosecutors are in a unique position of working 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." It

referred the matter to the Committee on Professional Responsibility and Conduct (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 Appendix 1. 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. See Appendix 2. The committee received public comment on the DAs’ proposal at regularly scheduled Committee meetings on July 24, 2020, October 23, 2020, and December 4, 2020, and conducted a noticed public hearing devoted exclusively to the proposal on August 11, 2020. In connection with those meetings and the hearing, the committee received 52 separate written submissions¹ and heard testimony from 84 witnesses,² including representatives of institutions and organizations and members of the general public.

Members of the public almost uniformly favored the DAs’ proposal. Lawyers’ 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, for example, 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 American Civil Liberties Union (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,

¹ All written public comments received are provided as Appendix 4.

² The list of speakers who provided public comment is provided as Appendix 5.

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, 2020, 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, 2020, Assemblymember 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 representing the accused officer.³ 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

The 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.⁴ 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.⁵ 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

³ 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>.

⁴ 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).

⁵ Green and Roiphe, *supra* n. 2, 53 B.C. L. Rev. at 473-76; Levine, *supra* n. 2, 101 Iowa L. Rev. at 1465-72.

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 such as 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 law enforcement unions’ campaign contributions 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 their alleged misconduct. Given these facts, it is reasonable to believe that concerns 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 requests, no proponent or opponent of the DAs’ proposal has offered us any data on whether these conflict concerns are pervasive. We have not found any empirical examination of these problems.

Our own preliminary sense is that conflicts stemming from 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, highlighting one or two incidences of large political donations allegedly made while high-profile investigations were pending. Some speakers mentioned law enforcement unions’ reported expenditures of several million dollars in the then-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.

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 countywide offices such as 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

\$300–\$500 per election.⁶ 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 establish new ones that may be higher or lower than the default backup limits applied 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. The simple reason is that unions and individuals are permitted to devote vastly more financial and in-kind resources to independent activity than they can donate to campaigns. The 2020 Los Angeles district attorney race appears to illustrate this 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.⁷

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.

⁶ For example, 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>

⁷ 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 a more vigorous investigation and prosecution of police misconduct. *Id.*

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 1.7.⁸ 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.⁹ 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 (for example, \$5) would materially interfere with the prosecutor's professional judgment; (3) how "political support," including endorsements, independent political expenditures, and voter turnout operations should be analyzed in determining whether a conflict exists; (4) the extent of the elected prosecutor's

⁸ Unless otherwise indicated, all rule references are to the California Rules of Professional Conduct.

⁹ Similarly, California courts have consistently held that an appearance of impropriety is not 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.

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 a “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 rule 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.¹⁰

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

¹⁰ 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>

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 their 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, one prior opinion indicates, 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 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.

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.¹¹ 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

¹¹ 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 every 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 DAs’ 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 Appendix 3).

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.” (Appendix 3, 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 these 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.¹² 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, 201.¹³ 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.]”).¹⁴

¹² *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.’”).

¹³ 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).

¹⁴ 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); *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).

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.¹⁵

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.

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

¹⁵ 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).

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 does not provide a 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 the Legislature has taken the lead role in regulating prosecutorial disqualification. 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 on, among other things, 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.¹⁶ 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 same degree implicated if it is the prosecutor, and not the judge, who is offered an incentive for securing civil penalties.

¹⁶ At the August 11 hearing, District Attorney 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.

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*.¹⁷ 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 to both debate in the community and 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 candidates to campaign based on their immunity to potential conflicts of interest by publicizing their refusal to accept law enforcement contributions.

¹⁷ 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.

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 noncomplying act. *Major v. Silna*, 134 Cal. App.4th 1485, 1502 (2005) (outright local ban on noncash 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 committee. 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's 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 this proposal appears to advance is avoiding personal asks for direct support. However, 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 2020 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 were almost all from law enforcement unions, while the major independent expenditures for the “reform” candidate were all from individuals.¹⁸

Assuming that it is viewpoint neutral, the ACLU’s proposal appears to impose speech restrictions very similar to those at issue in *Williams-Yulee*. However, 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.¹⁹

Conflict with Other Laws, Regulatory Competence, and Separation of Powers: Because the ACLU’s proposal is limited only to personal requests for contributions 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.

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

¹⁸ 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.)

¹⁹ If the State Bar were to consider either the DAs’ or the ACLU’s proposal, we would recommend its Office of General Counsel conduct a more detailed analysis of the constitutional concerns raised above.

B. Clarifying Opinions or Comments

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 prosecutors 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. However, 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 adding a Comment to rule 1.7 addressing the adoption of AB 1506, by stating:

“[] 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 the comments to 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 Government Code section 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.

Assemblymember 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

Assemblymember Bonta's bill has not yet been introduced, his press release²⁰ 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.²¹ 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 Assemblymember Bonta's proposed bill could significantly affect both the content of the relevant law and 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 developing an ethics opinion on attorney file retention duties that incorporates the legislative requirements.

²⁰ October 22, 2020 press release 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>.)

²¹ 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 help address 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, all relevant branches of government, and the general public.

CONCLUSION

While analysis of the DAs’ proposal has been assigned to COPRAC 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.

APPENDICES

Appendix 1: COPRAC Initial Research Memorandum

Appendix 2: Notice of Public Hearing Memorandum

Appendix 3: Attorney General Opinion re Campaign Contributions

Appendix 4: All Written Comments Received

Appendix 5: List of Speakers Who Provided Oral Comment

Appendix 1: COPRAC Initial Research Memorandum

Date: July 20, 2020

To: Committee on Professional Responsibility and Conduct (COPRAC)

From: Working Group re District Attorney Letter Request

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

INTRODUCTION:

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

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

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

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

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DISCUSSION:

I. Constitutional Concerns

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

A. First Amendment Issues

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

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

B. Equal Protection Issues

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

II. Conflict with State Law

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

A. Assembly Bill 571 (“AB 571”)

1. Statutory Background

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

Before AB 571, state law imposed no limits on contributions to countywide offices such as district attorneys. But it expressly allowed local governments to enact such ordinances, and many counties have done so.¹ *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

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

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

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

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

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

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

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

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

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

B. Penal Code Section 1424

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

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

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

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

See more discussion of Penal Code section 1424 below.

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

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

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

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

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

Rule 1.7, states, in relevant part:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Business and Professions Code Section 6131

1. Statutory Background

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

2. Substance of Section 6131

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

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

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

3. Policy and Analysis of Section 6131

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

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

D. Penal Code Section 1424

1. Statutory Background.

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

2. Standard for Recusal under Section 1424.

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

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

3. Summary

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

4. Legislative Amendment

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

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

E. Other Rules, Statutes or Standards

1. ABA Judicial Standards for the Prosecution Function

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

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

IV. Additional Issues to Consider

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

V. Proposed Questions for Public Commenters

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

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

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

CONCLUSION:

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

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

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

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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.



The State Bar of California

Public Hearing on a Proposed Rule or Ethics Opinion Regarding Prohibitions on Elected Prosecutors from Seeking or Accepting Political or Financial Support from Law Enforcement Unions

On June 1, 2020, three current elected district attorneys (Contra Costa, San Francisco, and San Joaquin) and one former district attorney (San Francisco) submitted a letter to the State Bar requesting the promulgation of a new Rule of Professional Conduct – or issuance of an ethics opinion – that would prohibit an elected prosecutor, or a candidate for that office, from seeking or accepting political or financial support from law enforcement public employee unions.

On July 2, 2020, the State Bar's Interim Executive Director Donna Hershkowitz wrote a letter to the DA's identifying potential legal issues, including constitutional law issues, that would need to be reviewed to analyze the proposal. The July 2 letter also stated that Chair and Vice-Chair of the State Bar Board of Trustees had referred the DA's request to the State Bar's Committee on Professional Responsibility and Conduct (COPRAC) for an in-depth, comprehensive analysis.

As part of that effort, COPRAC is holding a public hearing via Zoom on Tuesday, August 11 at 10:00 a.m. to receive input regarding this proposal. Information about how to join the meeting is provided below.

COPRAC invites both written and oral public comment. COPRAC's own initial research and the public comment received at their July 24, 2020 meeting have identified a number of specific questions they would particularly welcome comment; however, commenters will not be limited to these questions and may provide comments on other issues:

The Nature and Extent of the Problem

1. Can you provide us with data or studies concerning the extent of elected prosecutors' failing to investigate or prosecute unlawful conduct by police officers? Is the problem uniform, or are there particular jurisdictions where it is more or less severe?
2. Can you provide us with data or studies addressing the following questions:
 - a. How large are direct contributions that law enforcement unions are making to local district attorney races, both in absolute amounts and the percentage of total contributions they represent? Are their particular local jurisdictions where the amount or percentage of union contributions appears to be especially high?
 - b. How much political support, other than direct contributions, are law enforcement unions providing in local district attorney races, whether in the form of donations to PACs, in kind donations, volunteers or otherwise? Are there other interest groups that also provide such support? Are there particular local jurisdictions where the amount or relative importance of political support from law enforcement unions appears to be especially high?
 - c. In many counties, it appears, direct union contributions would be limited to relatively modest levels - \$300 to \$500 per election. In counties where such restrictions are in effect, do they eliminate the risk or appearance of impropriety?
 - d. In counties which currently have no contribution limits, AB 571 will, starting in January, impose state law limitations on contributions to county and municipal elections. Will those provisions reduce or eliminate the problem?
 - e. Are there other restrictions on the financial or political support that law enforcement can provide to candidates for elected prosecutor?

Appendix 2: Notice of Public Hearing Memorandum

Relevance and Effectiveness of Existing Conflict of Interest Provisions

3. To the extent that the problem is one of conflict of interest, why are existing conflict of interest standards, including Rules of Professional Conduct 1.7 and 1.10, Penal Code section 1424, and related case law regarding ethical walls or screening, inadequate to address the problem?
4. If existing law is not effective to address the problem, how would an ethics opinion construing that law be helpful?
5. How are conflict of interest issues typically handled within a district attorney's office? Is there any mechanism for informed written consent to a conflict? Is there uniformity of approach across the state, or is each office different?

Constitutional Questions

6. What conduct is encompassed in "seeking or accepting financial or political support?" Is a restraint on speech framed in those terms unconstitutionally vague? If so, what changes would have to be made to avoid that problem?
7. Assuming a ban on "seeking or accepting political or financial support" constitutes a restraint on protected speech, what standard of justification must be met for speech restrictions of this kind and would it be met here? Is the standard of justification the same for financial support as it is for political support? Can you point us to what you think is the federal and state case law that speaks most directly to the validity or invalidity of such restraints?
8. The proposed rule singles out financial and political support from a single type of donor, public employee law enforcement unions. Does this raise any additional issues, under either First Amendment or Equal Protection principles? Again, citations to the authorities deemed most relevant would be very helpful.
9. Some constitutional analyses turn on whether there are other, less restrictive means of achieving the same goal. Are any less restrictive means available here?
10. Can you point to any cases where similar restrictions have been enacted in this or other jurisdictions? Were those restrictions challenged, and if so, were they upheld?

Relevance of Other State Law

11. Does the history, structure and operation of Penal Code Section 1424, including its express rejection of appearance of impropriety as a basis for disqualification, have any implications for the proposed rule or for its enactment by the Supreme Court rather than the legislature?
12. How does the proposed restriction compare with the ways in which California regulates elected judges' seeking or accepting contributions or support?
13. Are there other California laws which bar elected officials from seeking support from particular classes of donors and how do they bear on this situation, if at all?
14. Would the proposed restrictions be consistent with other California statutes regulating local government campaign contributions, such as the Political Reform Act of 1974 and the recent amendments thereto in AB 571 and with section 81013 of the Government Code? In particular, is the Supreme Court a state agency who is empowered to enact further contribution restrictions on local government elections under section 81013?

Members of the public who wish to provide public comment as well as those who wish to simply observe the proceeding may access the public hearing on August 11 at 10:00 a.m. as follows:

Public Hearing [Notice and Agenda](#)

Zoom Link: <https://calbar.zoom.us/j/98699303214>

Call-In Number: 669-900-9128

Webinar ID: 986-9930-3214

We have created a speaker registration form in order to estimate the number of speakers and allot time accordingly. If you plan on providing oral comment, please fill out this [form](#). This form will also allow you upload any written materials in support of your comment. If you are unavailable, or do not wish to speak, but would like to submit a written comment you may use this [form](#) to submit your comment.

Appendix 3: Attorney General Opinion re Campaign Contributions

XAVIER BECERRA
Attorney General

State of California
DEPARTMENT OF JUSTICE



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February 28, 2018

Assistant Chief Deputy District Attorney Michael Blazina
Sacramento District Attorney's Office
901 G Street
Sacramento, CA 95814

RE: Conflict of Interest Analysis – Campaign Contributions

Dear Mr. Blazina:

In your letter, dated February 5, 2018, you asked whether campaign endorsements and contributions from an individual or an organization present a conflict that bars the District Attorney from impartially deciding whether to prosecute a case in which that individual is a potential defendant. Your questions focused on an officer-involved-shooting case in which an officer being prosecuted was a member of a labor union that had endorsed and financially contributed to the district attorney's campaign. The short answer to these questions is that there is no conflict.

Under Penal Code section 1424, recusal of a district attorney's office requires proof of a conflict of interest that makes it unlikely that the defendant could receive a fair trial if the district attorney's office prosecutes the case. A conflict has been described as "a structural incentive for the prosecutor to elevate some other interest over the interest in impartial justice, should the two diverge." (*People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 754.) "[A] prosecutor's interest should coincide with the interest of the public in bringing a criminal to justice and should not be under the influence of third parties who have a particular axe to grind against the defendant." (*People v. Parmar* (2001) 86 Cal.App.4th 781, 797 (*Parmar*)).

Published cases in which a disabling conflict has been found are few and generally fall into the following three categories: an employee of the district attorney's office is a crime victim (see *People v. Conner* (1983) 34 Cal.3d 141, *Lewis v. Superior Court* (1997) 53 Cal.App.4th 1277; *People v. Jenan* (2006) 140 Cal.App.4th 782); the district attorney represented the defendant previously (*People v. Lepe* (1985) 164 Cal.App.3d 685); or the district attorney's

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Assistant Chief Deputy District Attorney Michael Blazina
Sacramento District Attorney's Office
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office received money for investigative costs from a victim (see *People v. Eubanks* (1996) 14 Cal.4th 580). As stated in *Parmar*, "...*Eubanks* and virtually every other disqualification case has been concerned with situations in which the prosecutor has either had a personal interest or been claimed to be under the influence of a private party with a personal interest in the prosecution of the particular defendant, usually by virtue of having been a victim." (*People v. Parmar*, *supra*, 86 Cal.App.4th at p. 795.)

In many instances, cases with conflicts of interest can be handled by a district attorney's office after an ethical wall has been established around the affected employee. (See *Stark v. Superior Court* (2011) 52 Cal.4th 368; *People v. Gamache* (2010) 48 Cal.4th 347; *People v. Hamilton* (1985) 41 Cal.3d 211; *People v. Sy* (2014) 223 Cal.App.4th 44; *Hambarian v. Superior Court* (2002) 27 Cal.4th 826; *People v. Lopez* (1984) 155 Cal.App.3d 813; and *Trujillo v. Superior Court* (1983) 148 Cal.App.3d 368.) That focus on fair adjudication of a case is borne out by the fact that failure to recuse a district attorney's office can be harmless on appeal when the district attorney's office "did not infringe upon defendants' state or federal rights to due process of law." (*People v. Vasquez* (2006) 39 Cal.4th 47, 66.) An ethical wall ensures that a defendant receives a fair trial.

The few published cases ordering recusal, as well as courts' acceptance of ethical walls in lieu of recusal, demonstrate that recusal is a disfavored remedy that appellate courts have cautioned should be exercised with "particular caution." (*People v. Lopez* (1984) 155 Cal.App.3d 813, 821-822.) The policy reasons for this position were set out in *Lopez*:

'when the entire prosecutorial office of the district attorney is recused and the Attorney General is required to undertake the prosecution or employ a special prosecutor, the district attorney is prevented from carrying out the statutory duties of his elected office and, perhaps even more significantly, the residents of the county are deprived of the services of their elected representative in the prosecution of crime in the county. The Attorney General is, of course, an elected state official, but unlike the district attorney, is not accountable at the ballot box exclusively to the electorate of the county. Manifestly, therefore, the entire prosecutorial office of the district attorney should not be recused in the absence of some substantial reason related to the proper administration of criminal justice.'

(*Id.*, at p. 822, quoting *Younger v. Superior Court* (1978) 86 Cal.App.3d 180.)

As to whether political contributions create a conflict of interest, it was claimed in another case that city council members should have been disqualified from voting on a subdivision map because developers had donated to the council members' campaigns. The Supreme Court stated, "Political contribution involves an exercise of fundamental freedom

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Assistant Chief Deputy District Attorney Michael Blazina
Sacramento District Attorney's Office
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protected by the First Amendment to the United States Constitution and article I, section 2 of the California Constitution.” (*Woodland Hills Residents Association, Inc. v. City Council of City of Los Angeles* (1980) 26 Cal.3d 938, 946.) “To disqualify a city council member from acting on a development proposal because the developer had made a campaign contribution to that member would threaten constitutionally protected political speech and associational freedoms.” (*Ibid.*) The Court further found that law governing disclosure of campaign contributions “provides for disclosure of campaign contributions by recipients of contributions rather than disqualification of recipients from acting in matters in which the contributor is interested.” (*Ibid.*)

While the act precludes an elected official from participating in a decision in which he has ‘a financial interest’ (Gov. Code, § 87100), it expressly excludes from definition of ‘financial interest’ the receipt of campaign contributions. (Gov. Code, §§ 87103, subd. (c), 82030, subd. (b). Thus, the Political Reform Act -- dealing comprehensively with problems of campaign contribution and conflict of interest -- does not prevent a city council member from acting upon a matter involving the contributor.

(*Id.*, at pp. 946-947; see also *Caperton v. A.T. Massey Coal, Co. Inc.* (2009) 129 S.Ct. 2252, 2263 [“exceptional case” where campaign contributions required recusal of a judge]. Disqualification rules applicable to adjudicators are even more stringent than those that govern the conduct of prosecutors. (*County of Santa Clara v. Superior Ct.* (2010) 50 Cal.4th 25, 56 FN 12.)

Accordingly, 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.

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.

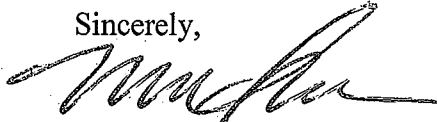
Additionally, the Attorney General’s unavoidable constraints of personnel, funds, and other resources require that the Penal Code section 1424 standard be taken seriously.

Appendix 3: Attorney General Opinion re Campaign Contributions

Assistant Chief Deputy District Attorney Michael Blazina
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Thank you for your letter. And, of course, you are always welcome to call me if you have questions or comments.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Farrell", written over the printed name.

MICHAEL P. FARRELL
Senior Assistant Attorney General

For XAVIER BECERRA
Attorney General

Appendix 4: All Written Comments Received

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Public Comment Form - DA Request

Commenting on behalf of an organization	No
Name	Brett Andriesen
City	Los Angeles
State	California
Email address	brett.andriesen@gmail.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>Police Department / Union contributions to DA candidates is a major conflict of interest.</p> <p>Jackie Lacey's inability to prosecute swiftly may or may not be due to the LAPPL. Because police unions are donating to campaigns, even the appearance of a conflict of interest challenges the integrity of our justice system. At what point can we as citizens investigate the relationship between the union and the DA? There's never an opportunity, but yet the LAPPL continues to buy off politicians, intimidate critics and cover up the crimes of its members.</p> <p>This band of bullies is stalling progress, feeding bad behavior, and killing lives.</p> <p>Unions are supposed to leverage the power of the oppressed to protect workers' rights, not leverage the violence of the state to protect people who should be prosecuted. The only way to stop this asinine behavior is to leave them out of the election so we can ensure our elected DA can do their job without bias.</p> <p>Thank you for supporting this proposal to enact this new rule of behavior.</p>

Appendix 4: All Written Comments Received

Public Comment Form - DA Request

Commenting on behalf of an organization	No
City	Los Angeles
State	California
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	The police force does not need greater funding nor political power in endorsing a Distirct Attorney. What we need is reform and abolition of the police department and distributing wealth to our local communities.



**Asian Pacific American
Women Lawyers Alliance
(APAWLA)**

President

Calimay Pham

President-Elect

Sandy Yu

Vice President (Membership)

Esther Ro

Vice President (Historian) Diane

M.L. Tan

Secretary

Tracy Nakaoka

Treasurer

Li Wang

Board of Governors

Beti Bergman
Aimee M. Contreras-Camua
Christine Gonong
Hon. Holly Fujie
Lisa Kang
Hon. Wesley Hsu
Kathy Khommarath
Lydia Liberio
Taryn Perez
Katrina Rayco
Hon. Jana Seng
Leana Taing
Eleanor Sun
Lynn Whitcher
Mia Frances Yamamoto
Joyce Yu

Mailing Address

P.O. Box 711016
Los Angeles, CA 90071

Appendix 4: All Written Comments Received

August 18, 2020

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

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

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

Dear Chair Alan Steinbrecher and Interim Executive Director Donna
Hershkowitz:

On behalf of the Asian Pacific American Women Lawyers Alliance, we write to you, in the wake of the recent killings of George Floyd, Ahmaud Arbery, Breonna Taylor, and countless others in California and beyond, to strongly urge the State Bar to implement a new rule of professional responsibility to reduce the possibility of political influence from law enforcement unions over prosecutorial decision making.

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

Recent tragedies have illustrated the importance of independent prosecutors to assess wrongdoing by police officers. Prosecutors work closely with law enforcement officers and are often tasked with evaluating whether some of those same officers have committed crimes. When prosecutors initiate an investigation or prosecution of an officer, police unions finance officers' representation. This creates the appearance of a conflict of interest. District Attorneys will undoubtedly review use of force incidents involving their members. When they do, the financial and political support of police unions should not be allowed to influence that decision-making.

The State Bar's Rules of Professional Conduct generally prohibit a lawyer from representing a client when, "the lawyer has . . . a legal business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter." (Rule 1.7 "Conflict of Interest" 2018).

Appendix 4: All Written Comments Received



Asian Pacific American Women Lawyers Alliance (APAWLA)

President

Calimay Pham

President-Elect

Sandy Yu

Vice President (Membership)

Esther Ro

Vice President (Historian) Diane

M.L. Tan

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Hon. Jana Seng
Leana Taing
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Joyce Yu

Mailing Address

P.O. Box 711016
Los Angeles, CA 90071

The American Bar Association's rules governing conflicts of interest reference a slew of responsibilities related to financial or political interests for prosecutors. Specifically, "a prosecutor who has a significant personal, *political* or *financial*, professional, business, property, or other relationship with another lawyer should not participate in the prosecution of a person who is represented by the other lawyer." [emphasis added] ("Standard 3-1.7 Conflicts of Interest, "2017)

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

In order to cure this conflict, or the appearance of a conflict, the rules must therefore explicitly preclude elected prosecutors – or prosecutors seeking election – from seeking or accepting political or financial support from law enforcement unions. Such a rule change will not only help to avoid conflicts and ensure independence on the part of elected prosecutors, it will also act to build trust from the public in our criminal justice system at a time when it is lacking due to the recent events around police violence.

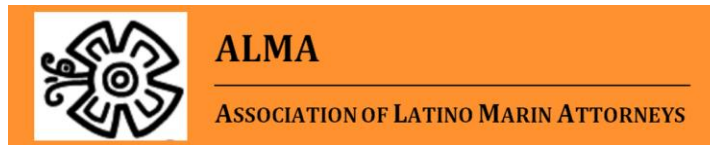
Whether the State Bar takes action in the form of a new rule of professional conduct or an ethics opinion, our goal is the same: to cure the conflict of interest inherent in allowing police unions to support prosecutors, and ensure independence of prosecutors in investigating and prosecuting police.

Thank you for your consideration of this matter.

Sincerely,

Calimay Pham
President
Asian Pacific American Women Lawyers Alliance

Appendix 4: All Written Comments Received



August 2, 2020

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

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

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

Dear Chair Alan Steinbrecher and Interim Executive Director Donna Hershkowitz:

On behalf of the Association of Latino Marin Attorneys, we write to you in the wake of the recent killings of George Floyd, Ahmaud Arbery, Breonna Taylor, and countless others in California and beyond to strongly urge the State Bar to implement a new rule of professional responsibility to reduce the possibility of political influence from law enforcement unions over prosecutorial decision making.

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

Recent tragedies have illustrated the importance of independent prosecutors to assess wrongdoing of police officers. Prosecutors work closely with law enforcement officers and are often tasked with evaluating whether some of those same officers have committed crimes. When a prosecutor initiates an investigation or prosecution of an officer, that officer's union often finances that officer's legal representation. This creates the appearance of a conflict of interest. District Attorneys will undoubtedly review use of force incidents involving their members. When they do, the financial and political support of police unions should not be allowed to influence that decision-making.

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August 2, 2020

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The State Bar's Rules of Professional Conduct generally prohibit a lawyer from representing a client when, "the lawyer has ... a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter" ("Rule 1.7, Conflict of Interest," 2018). The American Bar Association's rules governing conflicts of interest reference a slew of responsibilities related to financial or political interests for prosecutors. Specifically, "a prosecutor who has a significant personal, *political, financial*, professional, business, property, or other relationship with another lawyer should not participate in the prosecution of a person who is represented by the other lawyer" [emphasis added] ("Standard 3-1.7 Conflicts of Interest," 2017).

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

In order to cure this conflict, or the appearance of a conflict, the rules must therefore explicitly preclude elected prosecutors—or prosecutors seeking election—from seeking or accepting political or financial support from law enforcement unions or any entity that funds the legal defense of police officers charged with misconduct. Such a rule change will help to avoid conflicts and ensure independence on the part of elected prosecutors. It will also strengthen public trust in our criminal justice system at this crucial time in United States history.

Whether the State Bar takes action in the form of a new rule of professional conduct or an ethics opinion, our goal is the same: to cure the conflict of interest inherent in allowing police unions to support prosecutors and ensure the independence of prosecutors in investigating and prosecuting police.

We appreciate your consideration of this incredibly time sensitive and important matter.

Signed,

Anna Pletcher
President, Association of Latino Marin Attorneys
atletcher@gmail.com

cc: Sean M. SeLegue, Vice-Chair
Mark Broughton, Trustee

Appendix 4: All Written Comments Received

August 2, 2020

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Hailyn Chen, Trustee
José Cisneros, Trustee
Juan De La Cruz, Trustee
Sonia T. Delen, Trustee
Ruben Duran, Trustee
Chris Iglesias, Trustee
Renée LaBran, Trustee
Debbie Y. Manning, Trustee
Joshua Perttula, Trustee
Brandon N. Stallings, Trustee

Appendix 4: All Written Comments Received

Public Comment Form - DA Request

Commenting on behalf of an organization	No
Name	Charles H. Bell Jr
City	Sacramento
State	California
Email address	cbell@bmhlaw.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ATTACHMENTS You may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.	200806_Letter_to_State_Bar.pdf (1190k)

Appendix 4: All Written Comments Received

BELL, McANDREWS & HILTACHK, LLP

Attorneys and Counselors at Law

455 CAPITOL MALL, SUITE 600
SACRAMENTO, CA 95814

(916) 442-7757
FAX (916) 442-7759

August 6, 2020

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

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

Re: Proposed Rule to Prohibit Campaign Endorsements and Contributions

“If all mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind.”

- John Stuart Mill

On behalf of a substantial number of Elected District Attorneys across California, the following written comment is submitted in response to the State Bar’s hearing on whether Elected District Attorneys or candidates for District Attorney should be prohibited from seeking endorsements or financial contributions from law enforcement unions.

The undersigned is a member in good standing of the California State Bar, has practiced campaign, election and constitutional law exclusively since 1980. I have represented numerous clients in litigation involving campaign finance and redistricting matters before federal and state courts, including the California Supreme Court and the United States Supreme Court. In 2010, I served as Co-Chair of Fair Political Practices Commission Chair Dan Schnur’s Task Force on Campaign Finance Reform. I have served as a member of the American Bar Association’s Standing Committee on Election Law (2015-2018) and currently serve as the Chair of the Advisory Committee of the Standing Committee. My views reflect those of my clients and do not represent the views of the Standing Committee.

Appendix 4: All Written Comments Received

Letter to State Bar regarding Proposed Rule to Prohibit Campaign Endorsements and Contributions

August 6, 2020

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I. The Proposed Rule Is Unconstitutional

A. Campaign Endorsements and Contributions are Protected by the First Amendment.

On June 1, 2020, the proponents of this rule change sent a letter to the State Bar asking them to prohibit “elected prosecutors-or prosecutors seeking election” from accepting endorsements or contributions from police unions. They claim there is a conflict of interest or appearance one, as District Attorneys work daily with law enforcement officers. Per their statement, “[p]rosecutors are in a unique position of having to work closely with law enforcement officers and evaluate whether some of those same officers have committed crimes.”

The proposed rule is patently unconstitutional and prohibited by the First Amendment. As the California Supreme Court stated in *Woodland Hills Residents Association, Inc. v. City Council of City of Los Angeles* (1980) 26 Cal.3d 938, 946:

“Political contributions involve an exercise of fundamental freedom protected by the First Amendment to the United States Constitution and article I section 2 of the California Constitution.”

In *Woodland Hills*, the court rejected the notion that elected city council members must be recused from voting on a development issue because developers had donated to the council members’ campaigns. In rejecting this claim, the Court went on to state,

“To disqualify a city council member from acting on a development proposal because the developer had made a campaign contribution to that member would threaten constitutionally protected political speech and association freedoms.”

Furthermore, while individual counties may, by state law or local ordinance, put campaign limits on direct contributions to candidates, there is no authority to limit what proportion of a candidate’s total contributions may be obtained from any individual, group or association. Any reliance on *Caperton v. A.T. Massey Coal, Co. Inc.* (2009) 556 U.S. 868 is misplaced. In that case, a party to a case *pending* in front of an appellate judge, donated \$3 million to the judge’s election campaign, equating to 300% more than the judge’s campaign committee had raised. The Supreme Court found that, given the disproportionately large donation, the judge should have *recused* himself. Nothing about the decision establishes that judges-or prosecutors-can be *prohibited* from accepting donations.¹

¹ The State Bar’s Committee on Professional Responsibility and Conduct posed several questions related to amount and percentage of contributions received. There is no legal authority for the government to impose a “proportionality” standard to the amount of contributions allowed.

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B. The proposed rule is unconstitutional because it is content based

The proposed Rule of Professional Conduct prohibiting prosecutors from accepting political or financial support from police and “law enforcement” unions is not only violative of the First Amendment’s protection of freedom of speech through campaign expenditures, but constitutes an impermissible content-based restraint on speech as well.

The United States Supreme Court has long held that the First Amendment protects political and ideological speech, including campaign financing. *See West Virginia State Board of Education W. Va. State Bd. of Educ. v. Barnette* (1943) 319 U.S. 624, 642.; also, *NAACP v. Button* (1963) 371 U.S. 415, 428-429; *Citizens United v. FEC* (2010) 558 U.S. 310. As the Supreme Court stated in *Citizens United* at page 898:

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. *See Buckley v. Valeo* (1976) 424 U.S. 1, at 14-15, 96 S.Ct. 612 (“In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential”). The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment “‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.” *Eu v. San Francisco County Democratic Central Comm.* (1989) 489 U.S. 214, 223, 109 S.Ct. 1013, 103 L.Ed.2d 271 (quoting *Monitor Patriot Co. v. Roy* (1971) 401 U.S. 265, 272, 91 S.Ct. 621, 28 L.Ed.2d 35); see *Buckley, supra*, at 14, 96 S.Ct. 612 (“Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.”). For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are “subject to strict scrutiny,” which requires the Government to prove that the restriction “furthers a compelling interest and is narrowly tailored to achieve that interest.”

The proposed rule imposes restrictions on contributions and support from one particular group or presumed category of organizations based not on a legal conflict but on a disagreement with, and more pointedly, a disdain for, a particular philosophy. (See also Part III, *infra*, pp. 7-13.) The pretext for this proposed rule is to ensure and preserve the integrity of the legal profession and the role of the District Attorney in its oversight of police agencies. The real purpose of this proposed rule is to further an agenda designed to stifle and silence opposing viewpoints. This is antithetical to healthy political discourse.

The proposed rule is, by design, content based in its clear attempt to suppress the political speech of candidates supported by law enforcement unions. There can be little doubt that this effort is politically driven to silence and attempt to unseat District Attorneys who are supported by law enforcement.

Appendix 4: All Written Comments Received

Letter to State Bar regarding Proposed Rule to Prohibit Campaign Endorsements and Contributions

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II. Law enforcement endorsements and contributions do not create a conflict for a District Attorney.

The proponents claim that endorsements and contributions should be prohibited because there is a conflict or appearance of a conflict of interest since District Attorneys work daily with law enforcement officers. As they state, “Prosecutors are in a unique position of having to work closely with law enforcement officers and evaluate whether some of those same officers have committed crimes.”

The proponents fail to delineate what they mean by “law enforcement unions.” For instance, does this proposed rule ban *all* endorsements or contributions, irrespective of whether the union represents officers from the same jurisdiction as the individual Elected District Attorney? For instance, will this proposed rule prohibit:

- The Sacramento County or San Diego County District Attorney from seeking endorsements or contributions from the Los Angeles Police Protective League?
- The San Luis Obispo County District Attorney candidate from seeking the endorsement of the Hayward Police Officers Association (POA)? What if the Hayward POA gives endorsements but does not have a PAC to give financial contributions? Is the candidate still prohibited under this proposed rule?
- The candidate for Los Angeles County District Attorney from accepting endorsements from the Alameda Deputy Sheriffs Association?
- The Fresno County District Attorney from accepting contributions from the Riverside Police Officers Association?
- Elected District Attorneys or candidates for district attorney from receiving endorsements and/or contributions from law enforcement unions that represent officers from statewide agencies and have little or nothing to do with local prosecutions?²

² For instance, the California State Law Enforcement Association (CSLEA) represents DMV, Alcohol Beverage and Control, Fish and Wildlife, Fire Marshalls, DOJ criminalists, 911 dispatchers, and Bureau of Automotive Repair.

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Letter to State Bar regarding Proposed Rule to Prohibit Campaign Endorsements and Contributions

August 6, 2020

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These questions are particularly relevant since the proponents' claim of conflict arises because District Attorneys "work closely" with these officers and evaluate whether some of these officers have committed crimes. Yet, this argument fails for several reasons:

- District Attorneys are bound by their prosecutorial ethics in making charging decisions. Those decisions are based upon the facts and the law.
- District Attorneys have in fact charged police officers with crimes when the facts and law support the prosecution. Just a few examples of such crimes include³:
 - Murder
 - Los Angeles Police Officer Stephanie Lazarus convicted of murder of Sherri Rasmussen
 - San Diego Sheriff's Deputy Aaron Russell: pending murder charges for an officer-involved fatal shooting
 - Riverside Sheriff Deputy Oscar Rodriguez: pending murder charges for an officer-involved fatal shooting
 - Rape
 - Sacramento Police Officer Darrell Rosen convicted of rape committed on duty; sentenced to state prison.
 - West Sacramento Police Officer convicted of multiple counts of rape while on duty; sentenced to 205 years to life
 - Excessive Force
 - Elk Grove Police Officer currently pending felony charges for excessive force (*People v. Bryan Schmidt*)
 - Placer County: in 2018, three correctional deputies were prosecuted and convicted of excessive force
 - Los Angeles: LAPD Officer Frank Hernandez currently pending charges of felony assault under color of authority (Case No. BA487734)
 - Public Integrity
 - El Dorado Deputy Sheriffs Association President Donald Atkinson convicted of embezzling over \$400,000 from the DSA; Atkinson was sentenced to 5 years in prison
- Endorsements and contributions by law enforcement unions outside the District Attorney's jurisdiction have a First Amendment right to do so⁴
- Officer-involved use of force cases represent a tiny fraction of all cases reviewed by a District Attorney

³ These examples are just a fraction of crimes prosecuted by District Attorneys against police officers in California. If the State Bar wants more information on the number and types of cases involving police officers, I can provide that upon request.

⁴ For instance, in the 2018 Election, the Sacramento District Attorney received over 80% of her law enforcement contributions either from statewide unions or those from associations outside Sacramento County.

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To further demonstrate the absurdity of the claimed “conflict” as the reason to adopt the rule are the following questions:

- Should District Attorneys be prohibited from accepting endorsements or donations from Crime Victims associations? After all, by the very nature of their jobs, “work closely” with crime victims.
- Should District Attorneys be prohibited from accepting donations from criminal defense attorneys? After all, by the very nature of their jobs, “work closely” with defense attorneys.
- Should District Attorneys be prohibited from accepting endorsements or donations from Real Estate Associations? After all, District Attorneys often investigate and prosecute real estate cases.
- Should District Attorneys be prohibited from accepting endorsements or donations from Insurance Associations? After all, District Attorneys often investigate and prosecute insurance fraud cases.

There can be little doubt that one of the underlying reasons for this proposed rule is the baseless claim that District Attorneys cannot fairly review use of force cases. However, these cases represent a miniscule number of cases reviewed each year by a District Attorney. In mid-large counties, thousands of cases are reviewed each year by a District Attorney’s Office for charging decisions. The number of use of force cases is less than 1%. For instance:

- In 2019, the Sacramento District Attorney’s Office reviewed approximately 33,000 cases for charging decisions. Of these 33,000 cases, only *six* fatal use of force cases were submitted for review. This represents .018% of all cases.
- The Riverside District Attorney’s Office reviews approximately 122,000 cases per year. In 2018, 173 of these cases involved use of force or police misconduct. This represents .014% of all cases.
- The Los Angeles District Attorney’s Office reviews approximately 65,000-70,000 felony cases per year. Of these, approximately 95-115 cases involve use of force. This represents .017% of all cases.

Even with this overly broad attempt to restrict the First Amendment right to accept endorsements and contributions, there is no authority to outright *prohibit* such constitutionally protected actions. (See, *Woodland Hills Residents Association, Inc., supra.*) In fact, in 2018, several months prior to the June elections, California Attorney General Xavier Becerra found that “the mere fact of a campaign endorsement and financial contributions to a campaign does not create a conflict of interest for a district attorney.” In his analysis, the Attorney General went on to state, “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.” (Attorney General’s Letter attached.)

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Letter to State Bar regarding Proposed Rule to Prohibit Campaign Endorsements and Contributions

August 6, 2020

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Furthermore, there are adequate protections in place to ensure the fair administration of justice and addressing either actual or perceived conflicts of interest. This includes the State Bar's Rules of Professional Conduct, the American Bar Association's Standards for Criminal Justice, and Penal Code section 1424 authorizing recusal of the District Attorney.

Finally, it cannot be understated that the Attorney General has the Constitutional authority to review any case, including decisions regarding allegations of police misconduct. It is unclear if this proposed rule would apply to the Attorney General. Whether or not it applies, the inherent authority of the Attorney General authorizes him or her to step in where there is an actual or perceived conflict. Given the Constitutional rights implicated by this proposed rule, the current safeguards are adequate to ensure impartiality in decisions being made by district attorneys.

III. The proposed rule applies only to some, not all.

Glaringly omitted from the proposed rule is any prohibition on any other organization or group posing an equally compelling conflict from providing similar contributions, endorsements or independent expenditures. Yet even more alarming is the absence of any analysis into other such organizations and their contributions and expenditures. Logic dictates and fairness demands that *any* group or organization with such a perceived conflict significant enough to warrant a prescription on contributions, independent expenditures and endorsements would be faithfully vetted and critically examined. The conspicuous absence of any such analysis provides clarity into the true motivation behind this proposed solution.

Engaging in a holistic and comprehensive examination of potential conflicts makes it readily apparent that there are a number of organizations whose contributions to and endorsements of the campaigns of District Attorney candidates would rise to the same level of conflict as with police unions that warrant this drastic proposal.

This effort to suppress the First Amendment rights of candidates supported by law enforcement unions is evidenced by the fact that the proponents are supported by individuals and organizations that promote anti-law enforcement agendas. No such attempt to limit contributions from groups who support the proponents demonstrates the glaring hypocrisy of this proposal.

Moreover, a one-sided ban on the contributions on one side also runs up against two issues: (1) violation of equal protection of the laws under the First and Fourteenth Amendments, which is related to but somewhat different than the prohibition on content-based regulation of speech (*Buckley v Valeo*, *supra*, 424 U.S. at 48-49; *McConnell v FEC*, (2003) 540 U.S. 93, 227, and *Davis v. FEC* (2008) 554 US 724, 741-742) ["the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."]), and (2) ignores the constitutional prohibition against limitations on independent expenditures by the very organizations the proposed rule purports to prohibit. (*Citizens United*, *supra*; and *Long Beach Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir. 2010).)

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Examples of these agenda driven groups include:

- In the recent 2018 election cycle, Soros and his network of foundations and supporters poured nearly \$3 million into California candidates who support his platforms. These include races in San Diego, Sacramento, and Alameda counties.

Similarly, Shaun King's Real Justice PAC has poured large amounts of money into candidates who support his progressive agendas. This organization actively recruits and endorses progressive candidates to defeat sitting District Attorneys who do not share his agendas. (<https://realjusticepac.org/>) It is also well-known that Shaun King, who has a social media following of millions of people, has made false accusations against police officers. In fact, in 2018 he falsely accused a Texas Trooper of kidnapping and rape on his various social media platforms. His twitter post, including naming the trooper, was as follows:



Appendix 4: All Written Comments Received

Letter to State Bar regarding Proposed Rule to Prohibit Campaign Endorsements and Contributions

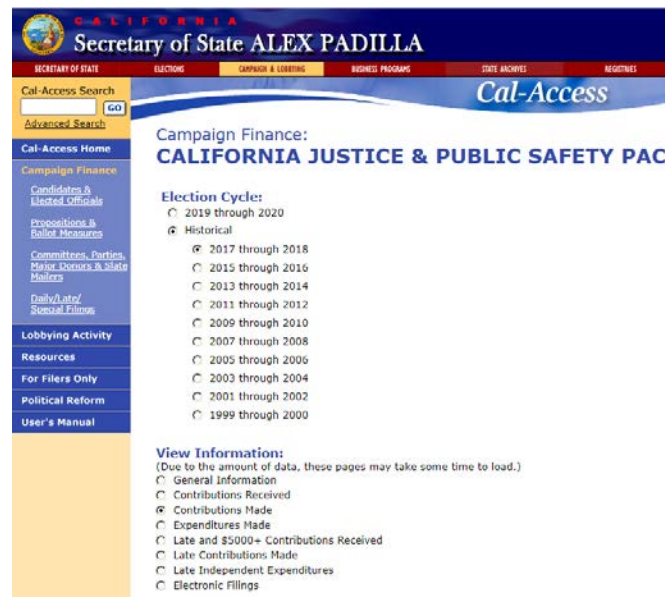
August 6, 2020

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These accusations were later proven false by bodycam videos and a confession by the woman who made the false allegation.

The candidates endorsed and supported by these groups often made campaign promises to “prosecute killer” cops,⁵ and often citing cases that had been found justified by the sitting District Attorney.⁶

A brief review of the Secretary of State’s campaign finance reports demonstrates the volume of money funneled into these races by Soros funded super PACs:



⁵ Examples of campaign mailers include:



⁶ Many District Attorney’s Offices post the police use of force reports online detailing the facts and legal analysis of each incident. Often, anti-law enforcement groups demand that police officers be prosecuted for murder. In these demands, these groups often make false claims about the true facts of these incidents.

Appendix 4: All Written Comments Received

Letter to State Bar regarding Proposed Rule to Prohibit Campaign Endorsements and Contributions

August 6, 2020

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Who did the committee give contributions to, and how much?					
DOWNLOAD THESE RESULTS: MICROSOFT EXCEL					
DATE	PAYEE	CONTEST	POSITION	PAYMENT TYPE	AMOUNT
05/29/2018	PRICE, PAMELA	DISTRICT ATTORNEY	SUPPORT	IND	\$218,215.44
05/22/2018	JONES-WRIGHT, GENEVIEVE	DISTRICT ATTORNEY	SUPPORT	IND	\$209,055.00
05/08/2018	JONES-WRIGHT, GENEVIEVE	DISTRICT ATTORNEY	SUPPORT	IND	\$198,750.00
05/11/2018	JONES-WRIGHT, GENEVIEVE	DISTRICT ATTORNEY	SUPPORT	IND	\$198,750.00
05/03/2018	JONES-WRIGHT, GENEVIEVE	DISTRICT ATTORNEY	SUPPORT	IND	\$194,884.00
05/22/2018	JONES-WRIGHT, GENEVIEVE	DISTRICT ATTORNEY	SUPPORT	IND	\$124,035.79
05/19/2018	PRICE, PAMELA	DISTRICT ATTORNEY	SUPPORT	IND	\$121,250.00
05/23/2018	STEPHAN, SUMMER	DISTRICT ATTORNEY	OPPOSE	IND	\$111,968.05
05/29/2018	JONES-WRIGHT, GENEVIEVE	DISTRICT ATTORNEY	SUPPORT	IND	\$111,781.00
05/29/2018	STEPHAN, SUMMER	DISTRICT ATTORNEY	OPPOSE	IND	\$111,781.00
05/29/2018	JONES-WRIGHT, GENEVIEVE	DISTRICT ATTORNEY	SUPPORT	IND	\$108,963.30
05/08/2018	PHILLIPS, NOAH	DISTRICT ATTORNEY	SUPPORT	NON-MONETARY	\$101,475.00
05/04/2018	JONES-WRIGHT, GENEVIEVE	DISTRICT ATTORNEY	SUPPORT	IND	\$101,377.12
05/03/2018	PHILLIPS, NOAH	DISTRICT ATTORNEY	SUPPORT	NON-MONETARY	\$77,648.48
05/14/2018	PRICE, PAMELA	DISTRICT ATTORNEY	SUPPORT	IND	\$75,676.22
05/21/2018	O'MALLEY, NANCY	DISTRICT ATTORNEY	OPPOSE	IND	\$73,424.11
05/01/2018	PRICE, PAMELA	DISTRICT ATTORNEY	SUPPORT	IND	\$66,196.84
05/07/2018	PRICE, PAMELA	DISTRICT ATTORNEY	SUPPORT	IND	\$65,163.69
05/30/2018	O'MALLEY, NANCY	DISTRICT ATTORNEY	OPPOSE	IND	\$64,931.95
05/29/2018	PRICE, PAMELA	DISTRICT ATTORNEY	SUPPORT	IND	\$64,035.53

<http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1402586&view=contributions&session=2017>

For instance, in San Diego county, Soros funneled \$2 million in his effort to unseat District Attorney Summer Stephan. The shocking amounts donated include the following: Outside of California, Soros has poured many more millions into “Soros-minded” candidates. This includes over \$1,000,000 to Philadelphia District Attorney Larry Krasner. Prior to being elected, Krasner was a criminal defense attorney with a reputation for having suing police officers 75 times. (<https://www.nytimes.com/2017/06/17/us/philadelphia-krasner-district-attorney-police.html>)

Several articles document the amount of money being funneled to these candidates, either directly or indirectly, as well as who is supporting them.

- <http://contracostaherald.com/05271801cch/>
- <https://www.politico.com/states/california/story/2019/11/07/california-da-race-a-major-test-for-criminal-justice-reform-movement-1226372>
- <https://apnews.com/0aa7d76876c24be7a8a9d4cab737342b/Big-money-Soros-contributions-change-prosecutor-campaigns>

Appendix 4: All Written Comments Received

Letter to State Bar regarding Proposed Rule to Prohibit Campaign Endorsements and Contributions
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Furthermore, a brief review of the Secretary of State's campaign finance reports demonstrates the volume of money funneled into these races by Shaun King's Real Justice PAC:

CALIFORNIA Secretary of State ALEX PADILLA					
SECRETARY OF STATE	ELECTIONS	CAMPAIGN & LOBBYING	BUSINESS PROGRAMS	STATE ARCHIVES	REGISTRARS
Cal-Access Search					
GO					
Advanced Search					
Cal-Access Home					
Campaign Finance					
Candidates & Elected Officials					
Propositions & Ballot Measures					
Committees, Parties, Major Donors & State Mailers					
Daily/late/ Special Filings					
Lobbying Activity					
Resources					
For Filers Only					
Political Reform					
User's Manual					
Campaign Finance: REAL JUSTICE PAC (FED PAC ID #C00632554)					
Election Cycle: <input checked="" type="radio"/> 2019 through 2020 <input type="radio"/> Historical					
View Information: (Due to the amount of data, these pages may take some time to load.)					
<input type="radio"/> General Information					
<input type="radio"/> Contributions Received					
<input checked="" type="radio"/> Contributions Made					
<input type="radio"/> Expenditures Made					
<input type="radio"/> Late and \$5000+ Contributions Received					
<input type="radio"/> Late Contributions Made					
<input type="radio"/> Late Independent Expenditures					
<input type="radio"/> Electronic Filings					
Who did the committee give contributions to, and how much?					
DOWNLOAD THESE RESULTS: MICROSOFT EXCEL					
DATE	PAYEE	CONTEST	POSITION	PAYMENT TYPE	AMOUNT
02/03/2020	RUN, GEORGE, RUN: GEORGE GASCON FOR LA DA 2020		SUPPORT	MONETARY	\$250,000.00
02/19/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$35,000.00
02/13/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$13,375.00
12/09/2019	GASCON, GEORGE	OTHER	SUPPORT	MONETARY	\$4,666.00
03/18/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$4,666.00
01/25/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$4,666.00
01/15/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$4,666.00
04/29/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$4,166.00
06/08/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$4,166.00
03/10/2019	SCHUBERT, ANN MARIE	OTHER	OPPOSE	IND	\$3,333.00
01/25/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$2,632.72
02/28/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$2,532.44
03/02/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$2,263.90
05/29/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$2,150.46
03/18/2019	SCHUBERT, ANN MARIE	OTHER	OPPOSE	IND	\$1,754.40
03/02/2019	SCHUBERT, ANN MARIE	OTHER	OPPOSE	IND	\$1,633.48
06/30/2019	SCHUBERT, ANN MARIE	OTHER	OPPOSE	IND	\$1,302.14
02/12/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$1,272.48
03/05/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$1,114.78
04/14/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$750.00
06/29/2020	GASCON, GEORGE	OTHER	SUPPORT	IND	\$600.00
03/18/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$577.32
04/14/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$560.40
06/30/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$511.29
02/28/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$491.87
06/30/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$231.04
06/30/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$209.14
03/31/2019	SCHUBERT, ANN MARIE	OTHER	OPPOSE	IND	\$144.72
03/31/2019	SCHUBERT, ANN MARIE	OTHER	OPPOSE	IND	\$142.69
03/19/2019	SCHUBERT, ANN MARIE	OTHER	OPPOSE	IND	\$74.84
02/28/2020	ROSSI, RACHEL	OTHER	SUPPORT	IND	\$58.33
02/28/2020	GASCON, GEORGE	OTHER	SUPPORT	IND	\$58.33
06/25/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$58.28
02/12/2020	ROSSI, RACHEL	OTHER	SUPPORT	IND	\$50.00
02/12/2020	GASCON, GEORGE	OTHER	SUPPORT	IND	\$50.00
02/28/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$32.34
03/03/2020	GASCON, GEORGE	OTHER	SUPPORT	IND	\$29.25
03/03/2020	ROSSI, RACHEL	OTHER	SUPPORT	IND	\$29.25
03/02/2019	SCHUBERT, ANN MARIE	OTHER	OPPOSE	IND	\$22.62
02/28/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$15.44
06/30/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$5.56

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<http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1404289&view=contributions>

To further demonstrate the viewpoint driven effort underway in this proposed rule is the fact that within just weeks of the proponents' June 1, 2020 letter, the Soros funded Justice Collaborative emailed Elected District Attorneys across California, demanding they "reject police union contributions and endorsements" and aggressively threatening: **"We will be publishing whether you respond "yes," "no," or "declined to answer" by Tuesday, July 7th."**

This email was followed a week later with a threat to publish non-compliance: "When [The Appeal](#) publishes the final list of responses, they will use the attached graphic."

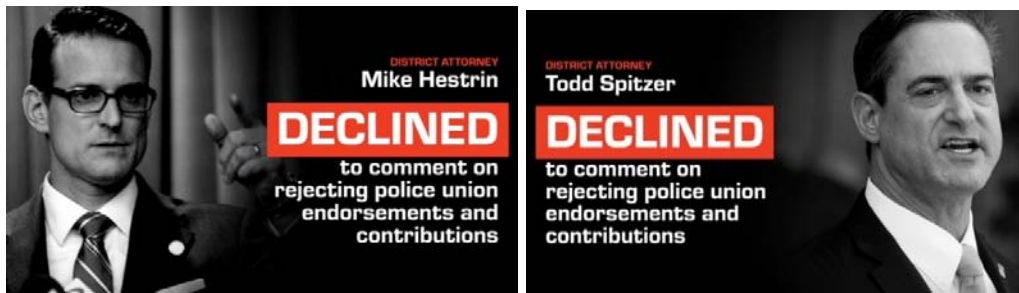


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Letter to State Bar regarding Proposed Rule to Prohibit Campaign Endorsements and Contributions

August 6, 2020

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Perhaps most ironic is the Justice Collaborative’s statement in their email, “Campaign endorsements and contributions send a message to constituents. They tell voters that a candidate aligns with the values and interests of the donor.”

The irony is that this very email demonstrates the core values of the First Amendment and the fundamental protection of political and ideological speech. As poignantly stated in *Citizens United*, “speech is the essential mechanism of democracy” ... and “For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence.”

Revealing all these viewpoint driven candidates begs the obvious question: Should these candidates and Elected District Attorneys be prohibited from accepting endorsements and contributions from these groups, or let alone any other group that “aligns with the values and interests” of the candidate? As divided the values may be among the candidates, the answer to the obvious question is clear: The First Amendment wins.

IV. Conclusion

It is as logically incongruous as it is intellectually disingenuous to assert that law enforcement contributions and endorsements to a District Attorney candidate create an intolerable conflict yet a contribution by an organization requiring a District Attorney candidate to decide to prosecute or not to prosecute a case in conformity with its stated beliefs and mission does not.

The proponents ignore the natural and logical extension of the purpose of the very rule they suggest. If this particular perceived conflict is so egregious as to warrant this proposed remedy, *all* contributions from any organization presenting a perceived conflict should also be prohibited. Moreover, the prohibition on contributions should be extended to *any* lawyer seeking to hold an elected office in order to preserve the integrity of the profession.

Fundamental to our democracy is the notion that the government cannot regulate speech based on its content or viewpoint. Content-based restrictions on speech are presumptively invalid and the United States Supreme Court and the California Supreme Court have held that campaign donations are protected political speech and that a donation in and of itself does not give rise to a conflict of interest. Likewise, California’s Attorney General reached the same conclusion in 2018.

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Letter to State Bar regarding Proposed Rule to Prohibit Campaign Endorsements and Contributions

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The proponents' proposed rule is unconstitutional, content driven and politically motivated to silence District Attorneys and candidates who are supported by law enforcement. It is a flawed attempt to stifle opposing viewpoints and chill political discourse. There is no conflict of interest that would authorize a *prohibition* on endorsements and contributions. This proposed rule violates the fundamental principles of democracy and should be wholly rejected.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Charles H. Bell, Jr.", written in a cursive style.

Charles H. Bell, Jr.

Appendix 4: All Written Comments Received

XAVIER BECERRA
Attorney General

State of California
DEPARTMENT OF JUSTICE



1300 I STREET, SUITE 125
P.O. BOX 944255
SACRAMENTO, CA 94244-2550

Public: (916) 445-9555
Telephone: (916) 210-7687
Facsimile: (916) 324-2960
E-Mail: Michael.Farrelle@doj.ca.gov

RECEIVED

MAR 05 2018

ANNE MARIE SCHUBERT
District Attorney

February 28, 2018

Assistant Chief Deputy District Attorney Michael Blazina
Sacramento District Attorney's Office
901 G Street
Sacramento, CA 95814

RE: Conflict of Interest Analysis – Campaign Contributions

Dear Mr. Blazina:

In your letter, dated February 5, 2018, you asked whether campaign endorsements and contributions from an individual or an organization present a conflict that bars the District Attorney from impartially deciding whether to prosecute a case in which that individual is a potential defendant. Your questions focused on an officer-involved-shooting case in which an officer being prosecuted was a member of a labor union that had endorsed and financially contributed to the district attorney's campaign. The short answer to these questions is that there is no conflict.

Under Penal Code section 1424, recusal of a district attorney's office requires proof of a conflict of interest that makes it unlikely that the defendant could receive a fair trial if the district attorney's office prosecutes the case. A conflict has been described as "a structural incentive for the prosecutor to elevate some other interest over the interest in impartial justice, should the two diverge." (*People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 754.) "[A] prosecutor's interest should coincide with the interest of the public in bringing a criminal to justice and should not be under the influence of third parties who have a particular axe to grind against the defendant." (*People v. Parmar* (2001) 86 Cal.App.4th 781, 797 (*Parmar*).)

Published cases in which a disabling conflict has been found are few and generally fall into the following three categories: an employee of the district attorney's office is a crime victim (see *People v. Conner* (1983) 34 Cal.3d 141, *Lewis v. Superior Court* (1997) 53 Cal.App.4th 1277; *People v. Jenan* (2006) 140 Cal.App.4th 782); the district attorney represented the defendant previously (*People v. Lepe* (1985) 164 Cal.App.3d 685); or the district attorney's

Appendix 4: All Written Comments Received

Assistant Chief Deputy District Attorney Michael Blazina
Sacramento District Attorney's Office
February 28, 2018
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office received money for investigative costs from a victim (see *People v. Eubanks* (1996) 14 Cal.4th 580). As stated in *Parmar*, "...*Eubanks* and virtually every other disqualification case has been concerned with situations in which the prosecutor has either had a personal interest or been claimed to be under the influence of a private party with a personal interest in the prosecution of the particular defendant, usually by virtue of having been a victim." (*People v. Parmar*, *supra*, 86 Cal.App.4th at p. 795.)

In many instances, cases with conflicts of interest can be handled by a district attorney's office after an ethical wall has been established around the affected employee. (See *Stark v. Superior Court* (2011) 52 Cal.4th 368; *People v. Gamache* (2010) 48 Cal.4th 347; *People v. Hamilton* (1985) 41 Cal.3d 211; *People v. Sy* (2014) 223 Cal.App.4th 44; *Hambarian v. Superior Court* (2002) 27 Cal.4th 826; *People v. Lopez* (1984) 155 Cal.App.3d 813; and *Trujillo v. Superior Court* (1983) 148 Cal.App.3d 368.) That focus on fair adjudication of a case is borne out by the fact that failure to recuse a district attorney's office can be harmless on appeal when the district attorney's office "did not infringe upon defendants' state or federal rights to due process of law." (*People v. Vasquez* (2006) 39 Cal.4th 47, 66.) An ethical wall ensures that a defendant receives a fair trial.

The few published cases ordering recusal, as well as courts' acceptance of ethical walls in lieu of recusal, demonstrate that recusal is a disfavored remedy that appellate courts have cautioned should be exercised with "particular caution." (*People v. Lopez* (1984) 155 Cal.App.3d 813, 821-822.) The policy reasons for this position were set out in *Lopez*:

'when the entire prosecutorial office of the district attorney is recused and the Attorney General is required to undertake the prosecution or employ a special prosecutor, the district attorney is prevented from carrying out the statutory duties of his elected office and, perhaps even more significantly, the residents of the county are deprived of the services of their elected representative in the prosecution of crime in the county. The Attorney General is, of course, an elected state official, but unlike the district attorney, is not accountable at the ballot box exclusively to the electorate of the county. Manifestly, therefore, the entire prosecutorial office of the district attorney should not be recused in the absence of some substantial reason related to the proper administration of criminal justice.'

(*Id.*, at p. 822, quoting *Younger v. Superior Court* (1978) 86 Cal.App.3d 180.)

As to whether political contributions create a conflict of interest, it was claimed in another case that city council members should have been disqualified from voting on a subdivision map because developers had donated to the council members' campaigns. The Supreme Court stated, "Political contribution involves an exercise of fundamental freedom

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Assistant Chief Deputy District Attorney Michael Blazina
Sacramento District Attorney's Office
February 28, 2018
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protected by the First Amendment to the United States Constitution and article I, section 2 of the California Constitution.” (*Woodland Hills Residents Association, Inc. v. City Council of City of Los Angeles* (1980) 26 Cal.3d 938, 946.) “To disqualify a city council member from acting on a development proposal because the developer had made a campaign contribution to that member would threaten constitutionally protected political speech and associational freedoms.” (*Ibid.*) The Court further found that law governing disclosure of campaign contributions “provides for disclosure of campaign contributions by recipients of contributions rather than disqualification of recipients from acting in matters in which the contributor is interested.” (*Ibid.*)

While the act precludes an elected official from participating in a decision in which he has ‘a financial interest’ (Gov. Code, § 87100), it expressly excludes from definition of ‘financial interest’ the receipt of campaign contributions. (Gov. Code, §§ 87103, subd. (c), 82030, subd. (b). Thus, the Political Reform Act -- dealing comprehensively with problems of campaign contribution and conflict of interest -- does not prevent a city council member from acting upon a matter involving the contributor.

(*Id.*, at pp. 946-947; see also *Caperton v. A.T. Massey Coal, Co. Inc.* (2009) 129 S.Ct. 2252, 2263 [“exceptional case” where campaign contributions required recusal of a judge]. Disqualification rules applicable to adjudicators are even more stringent than those that govern the conduct of prosecutors. (*County of Santa Clara v. Superior Ct.* (2010) 50 Cal.4th 25, 56 FN 12.)

Accordingly, 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.

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.

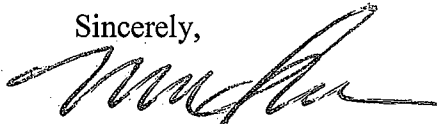
Additionally, the Attorney General’s unavoidable constraints of personnel, funds, and other resources require that the Penal Code section 1424 standard be taken seriously.

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Assistant Chief Deputy District Attorney Michael Blazina
Sacramento District Attorney's Office
February 28, 2018
Page 4

Thank you for your letter. And, of course, you are always welcome to call me if you have questions or comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. Farrell', written over the printed name.

MICHAEL P. FARRELL
Senior Assistant Attorney General

For XAVIER BECERRA
Attorney General

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Demetria L. Graves

Hon. Tara C. Doss

* DECEASED

August 10, 2020

Chair Alan Steinbrecher
Director Donna Hershkowitz
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Dear Chair Alan Steinbrecher and Interim Executive Director Donna Hershkowitz:

Black Women Lawyers Association of Los Angeles writes to urge the State Bar to adopt a new rule of professional responsibility to reduce the possibility that law-enforcement unions will exert, or will be perceived as exerting, political influence over prosecutorial decision making.

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

Prosecutors are in a unique position of having to work closely with law-enforcement officers and to evaluate whether some of those same officers have committed crimes. When a prosecutor initiates an investigation or prosecution of an officer, law-enforcement unions often finance their members' legal representation. Yet the same unions may have contributed to the prosecutor's campaign.

This is worse than unseemly: it corrodes public trust in an institution whose legitimacy hinges on the public's trust in its fairness and impartiality. Prosecutors, like judges, are charged with public duties that transcend those of ordinary advocates; and it is therefore of paramount importance that the public trusts prosecutors to carry out those duties fairly and impartially. A prosecutor is the "representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." (Berger v. United States (1935) 295 U.S. 78, 88.) "The prosecutor is an administrator of justice, an advocate, and an officer of the court"; she "must exercise sound discretion in the performance of his or her functions"; and her duty "is to seek justice, not merely to convict." (ABA Criminal Justice Standards: Prosecution

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Function, Standard 3-1.2, subds. (b) & (c).) Because a prosecutor exercises vast discretion when deciding whether to investigate, whether to charge, and how to charge, she “should have, as nearly as possible, a detached and impartial view of all groups in his community.” (Robert H. Jackson, “The Federal Prosecutor,” speech delivered at the Second Annual Conference of United States Attorneys, Great Hall, Department of Justice Building, Washington, D. C., April 1, 1940.1)

Receiving endorsements and campaign contributions from unions that finance opposing counsel creates, at a minimum, the appearance of a conflict of interest for elected prosecutors. District Attorneys undoubtedly will review use-of-force incidents involving union members. When they do, the financial and political support of those unions should not influence, or appear to influence, the District Attorneys’ decision making.

The State Bar’s Rules of Professional Conduct generally prohibit a lawyer from representing a client when, “the lawyer has ... a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter” (California Rules of Professional Conduct, rule 1.7, Conflict of Interest [2018]). Further, the California Court of Appeal has found that “a ‘conflict,’ for purposes of California Penal Code § 1424, ‘exists whenever the circumstances of a case evidence a reasonable possibility that the DA’s office may not exercise its discretionary function in an evenhanded manner.’” (People v. Vasquez (2006) 39 Cal.4th 47, 74, fn.2, 45 Cal.Rptr.3d 372, 137 P.3d 199 [italics omitted].) Thus, there is no need to determine whether a conflict is “actual” or only gives an “appearance” of conflict. Similarly, the American Bar Association’s conflicts-of-interest rules provide that “a prosecutor who has a significant personal, political, financial, professional, business, property, or other relationship with another lawyer should not participate in the prosecution of a person who is represented by the other lawyer.” (Am Bar Assn. Criminal Justice Standards for the Prosecution Function, Standard 3-1.7, subd. (h), Conflicts of Interest [2017].)

These rules and decisions ostensibly were crafted to avoid the conflict, or the appearance of a conflict, that arises when an attorney or prosecutor has a political or financial relationship with opposing counsel. They suggest that an elected prosecutor either should avoid soliciting financial contributions and support from an attorney representing an accused officer, or should recuse their office from a 1 Available at <https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf>. prosecution where the prosecutor has received financial or political support from such an attorney.

But these rules do not preclude the attorney or prosecutor from soliciting or receiving financial support from an individual or organization that is financing opposing counsel. It is illogical that the rules prohibit a prosecutor from soliciting and benefiting from financial and political support from an accused officer’s advocate when the prosecutor is carrying out his duties, but enable the prosecutor **when campaigning** to benefit financially and politically from an entity that funds the accused’s advocate.

To cure this conflict, or the appearance of conflict, and to maintain public confidence in the fairness and impartiality of prosecutors, ethical rules must explicitly preclude

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elected prosecutors, prosecutors seeking election, and their campaign committees from seeking or from accepting political or financial support from law-enforcement unions. Such a rule would not only help to avoid conflicts and ensure the independence of elected prosecutors, it also would enhance trust in our criminal-justice system at a time when trust is sorely needed. And the rule would survive First Amendment scrutiny, as it is narrowly tailored to further the state's compelling interest in maintaining public confidence in the integrity of prosecutors. (Cf. *Williams-Yulee v. Florida Bar* (2015) 575 U.S. 433 [upholding state ethical ban on personal campaign solicitations by judicial candidates]).

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

Sincerely,



President, Black Women Lawyers Association of Los Angeles, Inc.

Sincerely,



Rosezetta E. Upshaw
President – Black Women Lawyers Association of Los Angeles, Inc.

Appendix 4: All Written Comments Received

From: [Jordan Blakeman](#)
To: [Lee, Mimi](#)
Subject: Proposal to ban prosecutors from taking campaign money
Date: Tuesday, August 11, 2020 1:01:01 PM

Hi all,

The stronghold the police union has on our communities is unjust. We have way too many problem officers who are able to skirt the line as the form of kickbacks for heavy political donations made to candidates. Enough is enough.

We **MUST** quit allowing these mafioso-like organizations to inflict harm on the rest of us.

I am enthusiastically in support of the ban. Thank you.

Best,
Jordan Blakeman
4053 Marathon St., Apt. #11
Los Angeles, CA 90029

Appendix 4: All Written Comments Received

From: [Bobrow, Oscar](#)
To: [Lee, Mimi](#)
Subject: attached letters relevant to the state bar discussion
Date: Tuesday, August 11, 2020 11:17:07 AM
Attachments: [letter to AG Becerra.pdf](#)
[Response Letter to CPDA re Sean Monterrosa 7.27.20.pdf](#)

Please distribute to the participants of the discussion.
Thank you.

Oscar Bobrow
Chief Deputy Public Defender
Solano County
Vallejo Branch Office
355 Tuolumne Street, Vallejo CA 94590
Direct line: (707) 553 5009
OBobrow@solanocounty.com

This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. The contents of this email are privileged attorney-client and attorney work-product communications pursuant to Evidence Code section 952. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and return the original message to us at the above address via reply e-mail. Thank you.

XAVIER BECERRA
Attorney General

State of California
DEPARTMENT OF JUSTICE



1300 I Street
P.O. Box 944266
Sacramento, CA.94244-2550
Telephone: (916) 210-6071
Fax: (916) 327-7154
E-Mail Address: philip.ferrari@doj.ca.gov

July 27, 2020

Oscar Bobrow
CPDA President
California Public Defenders Association
10324 Placer Lane
Sacramento, CA, 95827

Dear Mr. Bobrow:

Thank you for your letter dated July 10, 2020, requesting that the Department of Justice investigate the officer involved shooting of Sean Monterrosa. We understand and appreciate the concerns expressed in your letter, and the Attorney General has made it a priority to respond to the concerns about law enforcement that are being expressed by our communities. The Department of Justice is committed to doing all that we can to ensure that California's law enforcement officers are aware of and utilize best practices with respect to use of force policies and practices. We are further committed to the principle that no one is above the law and that there must be true accountability when individual officers commit unlawful acts.

As you know, the role of the Attorney General's office in intervening in a local criminal investigation and prosecution is limited. California's 58 district attorneys are charged with investigating and prosecuting criminal cases as the elected public prosecutors for each of our counties. Absent a conflict of interest, abuse of discretion or other exceptional circumstances, the Department of Justice generally does not assume responsibility for investigations or prosecutions of officer involved shootings. We are mindful of the important policy discussions underway concerning the future handling of officer involved shootings, and we intend to be a part of crafting a solution. However, at this time the Department has neither the funding nor the staffing to routinely enable us to conduct independent investigations of officer involved shooting incidents throughout the State. Because our resources are limited, we must be selective in deploying them where necessary and appropriate.

As you may know, the Department of Justice recently made a decision to deploy some of those resources by committing to perform a deep, comprehensive review of the Vallejo Police Department's policies, operations and practices. In addition, we have also agreed to perform an independent investigation into allegations that evidence was destroyed that was relevant to the investigation of Mr. Monterrosa's death.

Appendix 4: All Written Comments Received

Oscar Bobrow

July 27, 2020

Page 2

With respect to the underlying investigation into the shooting, that investigation is already being conducted by local authorities. Your letter references Solano County District Attorney Krishna Abrams' announcement that she had recused herself from this matter. As we have informed the District Attorney's office, there is no legal basis for such an action. As you are aware, Penal Code section 1424(a) does not require recusal unless "the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." Two elements are required to justify this standard under section 1424. (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711.) First, a conflict only exists where "the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner." (*Hambarian v. Superior Court* (2002) 27 Cal.4th 826, 833.) Second, the conflict must be "so grave as to render it unlikely that [any] defendant will receive fair treatment during all portions of the criminal proceedings." (*Ibid.*) In other words, "there must be 'an actual likelihood of unfair treatment'" of any possible defendants. (*People v. Cannedy* (2009) 176 Cal.App.4th 1474, 1485 (emphasis added), citing *Haraguchi*, at p. 719.) In this case, there is no apparent basis for finding that either element has been met.

District Attorney Abrams has publicly stated that she is confident that her office can conduct a fair and thorough review of any officer involved shooting, and she has not identified a conflict of interest or any other extraordinary circumstance that would require our office to assume the responsibilities of the District Attorney's office. As such, we must respectfully decline the request to conduct an additional investigation of the matter.

Sincerely,



Philip Ferrari
Special Assistant to the Attorney General

For XAVIER BECERRA
Attorney General



Appendix 4: All Written Comments Received

CPDA

California Public Defenders Association
10324 Placer Lane
Sacramento, CA 95827
Phone (916) 362-1686
Fax (916) 362-3346
Email: cpda@cpda.org

A Statewide Association of Public Defenders and Criminal Defense Counsel

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Oscar Bobrow
Solano County

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Jennifer Friedman
Los Angeles County

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Laura Arnold
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San Francisco County

Aimee Vierra, 20
Riverside County

Brendon Woods, 20
Alameda County

July 10, 2020

Xavier Becerra

Attorney General of the State of California
1300 T Street
Sacramento, CA 95814

RE: The June 2, 2020 Shooting to Death of Unarmed Sean Monterrosa
by a Vallejo Police Officer from the back of a patrol car

Dear Attorney General Becerra:

I know you are aware Sean Monterrosa was shot and killed by a Vallejo police officer in Solano County on June 2, 2020, as he was walking in front of a Walgreens store. Please see the video link released by the Vallejo Police Department July 8, 2020: <https://vimeo.com/436510158>.

The Solano County District Attorney's office has refused to conduct the investigation in this matter due to what they perceive as a conflict of interest. Please see the recorded statement of the Solano DA here:

<https://youtu.be/QVdgk9MVZ6k>. Your office has also refused to investigate this matter. Considering both authorized investigative bodies in the State of California with jurisdiction over this event have declined to act, no investigation is currently being conducted by an investigative body with the authority to file charges, should such charges be warranted.

As President of The California Public Defender's Association, the largest association of criminal defense attorneys in the State of California, and as a board member that oversees the California Racial Identity Profiling Act I am writing to urge you to reverse your position and to investigate this shooting.

As the video released on Wednesday shows the officer who shot Mr. Monterrosa was seated in the back of an unmarked police vehicle at the time he fired the rifle that killed him. The audio on the video also establishes that the officer who fired asked the other officers in the car, *after he fired the fatal shot*, "what was it" that Mr. Monterrosa pointed at the officers before he was shot. The video further establishes that Mr. Monterrosa was unarmed when he was shot by the officer.

I know you are aware of the perception in this state and in this nation of the inequities in how people of color are treated by law enforcement, and the inequities in charging decisions made by prosecutors who file charges for violations of the law.



Appendix 4: All Written Comments Received

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Email: cpda@cpda.org

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Riverside County

Brendon Woods, 20
Alameda County

The decision of your office and the decision of the Solano County District Attorney not to investigate this matter has perpetuated these negative perceptions. The officer who shot Mr. Monterrosa has not only not been investigated or been charged with any crime, he hasn't even been placed on leave from his position in the Vallejo police department. As President of CPDA, as a member of the RIPA board and as a concerned member of the public on behalf of the Monterrosa family and the citizens of the city of Vallejo I urge you to immediately take over the investigation of this shooting and killing of Mr. Monterrosa. If your office is unable to conduct such investigation I urge you to ask the United States Attorney on behalf of the federal government to conduct a complete investigation of this shooting. Without a proper investigation it seems certain that any future attempt to restore some sense of justice and integrity into the criminal justice system will be irreparably lost.

Sincerely,

Oscar Bobrow
CPDA President

Appendix 4: All Written Comments Received

Public Comment Form - DA Request

Commenting on behalf of an organization	No
Name	Andrew Borin
City	Los Angeles
State	California
Email address	chunksmcg@gmail.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	Law enforcement unions should not be able to provide financial support to the campaigns of people seeking a position of power in an election. In the last several weeks the county of Los Angeles has had to pay out millions in settlement money because member of law enforcement unions have been connected with illegal organized crime. Therefore, we know members of these unions are corrupt and corruption should have no place in elections.

Appendix 4: All Written Comments Received

Public Comment Form - DA Request

Commenting on behalf of an organization	No
Name	Daniela Bustamante
City	Los Angeles
State	California
Email address	defaceme@gmail.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>It appears to me that there is a major ethical concern regarding district attorneys soliciting and accepting funds from law enforcement unions and I support a ban on this kind of activity. The very direct working relationship between a district attorney and law enforcement creates a major conflict of interest, as being directly beholden to law enforcement unions for funding can lead to bias and unfair support for law enforcement officials during trials and legal proceedings. The district attorney and the DA's office should maintain as close to an unbiased examination of evidence as possible in order to fairly try citizens, rather than aligning unquestioningly with law enforcement. Removing the financial relationship between these offices is key to helping maintain fair and just enforcement of the law in Los Angeles.</p>

Appendix 4: All Written Comments Received



CALIFORNIA
DISTRICT
ATTORNEYS
ASSOCIATION

2495 Natomas Park Drive, Suite 575
Sacramento, CA 95833
916.443.2017
www.cdaa.org

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Mark Zahner

August 5, 2020

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

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

Re: Proposed change to ethics rules for prosecutors

Dear Mr. Steinbrecher and Ms. Hershkowitz:

On behalf of the Board of Directors the California District Attorneys Association, we reach out to voice our strong opposition to the proposed amendment to the ethics rules prohibiting prosecutors from accepting political donations from police unions.

The proposed rule intentionally discriminates against law enforcement unions to the exclusion of any other criminal-justice-oriented organizations and violates their First Amendment rights. The result is the complete muting of the voice of law enforcement professionals thereby amplifying, by design, an often-times opposing political perspective and as such, is unconstitutional.

Campaign Endorsements and Contributions are Protected Speech

The proposed rule is patently unconstitutional, and the speech involved is protected by the First Amendment. As the California Supreme Court stated in *Woodland Hills Residents Association, Inc. v. City Council of City of Los Angeles* (1980) 26 Cal.3d 938, 946: "Political contributions involve an exercise of fundamental freedom protected by the First Amendment to the United States Constitution and article I section 2 of the California Constitution."

In *Woodland Hills*, the court rejected the notion that elected city council members must be recused from voting on a development issue because developers had donated to the council members' campaigns. In rejecting this claim, the Court went on to state: "To disqualify a city council member from

Appendix 4: All Written Comments Received

CDA Letter to State Bar
August 5, 2020
Page 2

acting on a development proposal because the developer had made a campaign contribution to that member would threaten constitutionally protected political speech and association freedoms.”

On June 1, 2020, the proponents of this rule change sent a letter to the State Bar asking them to prohibit “elected prosecutors” or “prosecutors seeking election” from accepting endorsements or contributions from police unions. They claim there is a conflict or appearance of a conflict since district attorneys work daily with law enforcement officers. As they state, “Prosecutors are in a unique position of having to work closely with law enforcement officers and evaluate whether some of those same officers have committed crimes.”

Stated simply, the proposal assumes that if a police union were to contribute to a district attorney’s campaign, the elected official would be so beholden to that law enforcement organization and fail to hold their members accountable for criminal malfeasance in violation of their oath, the ethics of the profession and the law. It is not without consequence that the proposed rule applies only to law enforcement unions. It does not include any other individual, political interest, criminal justice organization, advocacy group, or political action committee – all of which could be the subject of criminal inquiry – only police unions and their membership.

Evidently, the elected prosecutor is assumed vulnerable to such unethical decision-making only as it relates to members of law enforcement but impervious to such perceived conflicts involving any other donor to their campaign or re-election bids. Fortunately, the law does not subscribe to this logic nor is as dismissive of the free speech implications.

Silencing a Particular Political Position is Unconstitutional

The United States Supreme Court has long held that the First Amendment protects political and ideological speech, including campaign financing and any limitation is subject to strict scrutiny. (See *West Virginia State Board of Education W. Va. State Bd. of Educ. v. Barnette*, (1943) 319 U.S. 624, 642.; also, *NAACP v. Button* (1963) 371 U.S. 415, 428-429; *Citizens United v. FEC* (2010) 558 U.S. 310.) As the United States Supreme Court has stated:

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. See *Buckley, supra*, at 14-15, 96 S.Ct. 612 (“In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential”). The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment “‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.” *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S.Ct.

Appendix 4: All Written Comments Received

CDAA Letter to State Bar
August 5, 2020
Page 3

621, 28 L.Ed.2d 35 (1971)); see *Buckley, supra*, at 14, 96 S.Ct. 612 (“Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution”).

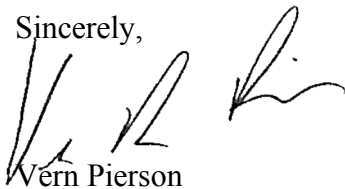
For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are “subject to strict scrutiny,” which requires the Government to prove that the restriction “furthers a compelling interest and is narrowly tailored to achieve that interest.”

(*Citizens United, supra*, at 339–340.)

To pass the high standard of strict scrutiny, the law must be narrowly tailored to achieve a compelling government interest. (*United States v. Playboy Entertainment Group, Inc.* (2000) 539 U.S. 803, 813.) The coalition presents the issue as though district attorneys across this state do not regularly recuse themselves from cases where there exist actual or perceived conflicts. They further fail to account for district attorneys who take personal responsibility for the refusal or acceptance of political contributions.

The proposed rule is overbroad, speculative, and fails to genuinely address the issue of a conflict.

Sincerely,

A handwritten signature in black ink, appearing to read 'Vern Pierson', with a stylized flourish at the end.

Vern Pierson

El Dorado County District Attorney
2020-21 CDAA President

Appendix 4: All Written Comments Received

Public Comment Form - DA Request

Commenting on behalf of an organization	Yes
Professional Affiliation	California Public Defender's Association
Name	Oscar Bobrow
City	Vallejo
State	California
Email address	obobrow@solanocounty.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	Please see attached
ATTACHMENTSYou may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.	<ul style="list-style-type: none">• Response_Letter_to_CPDA_re_Sean_Monter_rosa_7.27.20.pdf (520k)• letter_to_AG_Becerra.pdf (937k)



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Aimee Vierra, 20
Riverside County

Brendon Woods, 20
Alameda County

July 10, 2020

Xavier Becerra

Attorney General of the State of California
1300 T Street
Sacramento, CA 95814

RE: The June 2, 2020 Shooting to Death of Unarmed Sean Monterrosa
by a Vallejo Police Officer from the back of a patrol car

Dear Attorney General Becerra:

I know you are aware Sean Monterrosa was shot and killed by a Vallejo police officer in Solano County on June 2, 2020, as he was walking in front of a Walgreens store. Please see the video link released by the Vallejo Police Department July 8, 2020: <https://vimeo.com/436510158>.

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Sincerely,

Oscar Bobrow
CPDA President

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XAVIER BECERRA
Attorney General

State of California
DEPARTMENT OF JUSTICE



1300 I Street
P.O. Box 944266
Sacramento, CA.94244-2550
Telephone: (916) 210-6071
Fax: (916) 327-7154
E-Mail Address: philip.ferrari@doj.ca.gov

July 27, 2020

Oscar Bobrow
CPDA President
California Public Defenders Association
10324 Placer Lane
Sacramento, CA, 95827

Dear Mr. Bobrow:

Thank you for your letter dated July 10, 2020, requesting that the Department of Justice investigate the officer involved shooting of Sean Monterrosa. We understand and appreciate the concerns expressed in your letter, and the Attorney General has made it a priority to respond to the concerns about law enforcement that are being expressed by our communities. The Department of Justice is committed to doing all that we can to ensure that California's law enforcement officers are aware of and utilize best practices with respect to use of force policies and practices. We are further committed to the principle that no one is above the law and that there must be true accountability when individual officers commit unlawful acts.

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July 27, 2020

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District Attorney Abrams has publicly stated that she is confident that her office can conduct a fair and thorough review of any officer involved shooting, and she has not identified a conflict of interest or any other extraordinary circumstance that would require our office to assume the responsibilities of the District Attorney's office. As such, we must respectfully decline the request to conduct an additional investigation of the matter.

Sincerely,



Philip Ferrari
Special Assistant to the Attorney General

For XAVIER BECERRA
Attorney General

Appendix 4: All Written Comments Received

Public Comment Form - DA Request

Commenting on behalf of an organization	No
Name	CF
City	Los Angeles
State	California
Email address	cherilyn.farris@yahoo.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	Law enforcement unions should NOT be able to contribute to the campaign process. Allowing them to do so does not represent the wishes of the community and will skew any election to not represent the wishes of the general public.

Appendix 4: All Written Comments Received

From: [Marissa Chapman](#)
To: [Lee, Mimi](#)
Subject: Ban Police Union Funding DA Races
Date: Tuesday, August 11, 2020 12:34:22 PM

To whom it may concern:

My name is Marissa Chapman and I support the proposal to ban police union funding towards DA races. This is a clear conflict of interest and the law should reflect that.

Sincerely,

Marissa Chapman

Appendix 4: All Written Comments Received

2020 Executive Board
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Terry Wiley & Vincent L. Brown
Special Assistants
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Regina R. Maloof
Executive Director
rmaloof@charleshoustonbar.org

CHARLES HOUSTON BAR ASSOCIATION

"Empowering Our Future"



July 27, 2020

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

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

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

Dear Chair Alan Steinbrecher and Interim Executive Director Donna Hershkowitz:

On behalf of Charles Houston Bar Association, we write to you in the wake of the recent killings of George Floyd, Ahmaud Arbery, Breonna Taylor, and countless others in California and beyond to strongly urge the State Bar to implement a new rule of professional responsibility to reduce the possibility of political influence from law enforcement unions over prosecutorial decision making.

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

*Representing the Interests of African-American Attorneys throughout Northern California
An Affiliate of the National Bar Association
"Celebrating Over 50 Years of Excellence"*

Appendix 4: All Written Comments Received

Recent tragedies have illustrated the importance of independent prosecutors to assess wrongdoing of police officers. Prosecutors work closely with law enforcement officers and are often tasked with evaluating whether some of those same officers have committed crimes. When prosecutors initiate an investigation or prosecution of an officer, police unions often finance officers' representation. This creates the appearance of a conflict of interest. District Attorneys will undoubtedly review use of force incidents involving their members. When they do, the financial and political support of police unions should not be allowed to influence that decision making.

The State Bar's Rules of Professional Conduct generally prohibit a lawyer from representing a client when, "the lawyer has ... a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter" ("Rule 1.7, Conflict of Interest," 2018). The American Bar Association's rules governing conflicts of interest reference a slew of responsibilities related to financial or political interests for prosecutors. Specifically, "a prosecutor who has a significant personal, *political*, *financial*, professional, business, property, or other relationship with another lawyer should not participate in the prosecution of a person who is represented by the other lawyer" [emphasis added] ("Standard 3-1.7 Conflicts of Interest," 2017).

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

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

Whether the State Bar takes action in the form of a new rule of professional conduct or an ethics opinion, our goal is the same: to cure the conflict of interest inherent in allowing police unions to support prosecutors and ensure the independence of prosecutors in investigating and prosecuting police.

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Appendix 4: All Written Comments Received

We appreciate your consideration of this incredibly time sensitive and important matter.

Signed,



Nichelle N. Holmes
President,
Charles Houston Bar Association

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

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CHARLES HOUSTON BAR ASSOCIATION PO Box 1474 Oakland, CA 94604 (866)- 712-7974 www.charleshoustonbar.org

Appendix 4: All Written Comments Received

From: [Caitlin Charos](#)
To: [Lee, Mimi](#)
Subject: Written Statement of Support for Ethics Proposal
Date: Tuesday, August 11, 2020 11:29:58 AM

Dear Ms. Lee,

I am currently participating in the Zoom Webinar Public Comment meeting but must hop off to attend another meeting. My name is Caitlin Charos, and I am a Ph.D. candidate finishing my doctorate degree at Princeton University from afar, and I am a resident of Oakland, California.

I am writing in support of the ethics proposal to address the conflict of interest that arises when prosecutors accept law enforcement union money and support. Ms. Price, the civil rights lawyer who spoke during the public comment, put it best: Alameda County's history demonstrates that district attorneys are beholden to the interests of police unions and less likely to prosecute officers guilty of abusing their power when they receive police union contributions. This abuse disproportionately affects black and brown people of color, particularly in Oakland. Mistrust of the fairness of the legal system is high here in Oakland. Instituting the proposed ethics rule would go a long way toward restoring confidence in the legal system.

The lawyer who spoke against the proposal, Vern Peterson (I am unsure whether I spelled his name correctly), suggested that this new rule might be unconstitutional because it bars certain groups from "participating in the political process." But there are many rules that govern campaign financing across our country at the federal and state levels. His threat, that the proposal would be the center of a legal battle for years to come, seemed intended to discourage the CA Bar from doing what it has the right to do via its authority through the CA Supreme Court: implement regulations that protect the public, regulation and discipline attorneys, and advance the ethical practice of law.

Thank you for your time and for your thorough work on this issue,
Caitlin Charos

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Public Comment Form - DA Request

Commenting on behalf of an organization	No
Name	Christina
City	San Jose
State	California
Email address	christina.h.luu@gmail.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	This is common sense. Financial contributions have historically been linked to power. The powerful police unions should have no say in an election decided by the people other than a verbal recommendation. We live in a democratic republic. The power should be afforded to the people not the police unions.

Appendix 4: All Written Comments Received

Public Comment Form - DA Request

Commenting on behalf of an organization	Yes
Professional Affiliation	Citizen Creative LA
Name	Puno Puno
City	Los Angeles
State	California
Email address	punodostres@gmail.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>When will there NOT be a conflict of interest?</p> <p>While I have my own opinion, Jackie Lacey's inability to prosecute swiftly may or may not be due to the LAPPL. However, why leave it in gray area? At what point can we as citizens investigate the relationship between the union and the DA? There's never an opportunity, but yet the LAPPL continues to buy off politicians, intimidate critics and cover up the crimes of its members.</p> <p>This band of bullies is stalling progress, feeding bad behavior, and killing lives.</p> <p>Unions are supposed to leverage the power of the oppressed to protect workers' rights, not leverage the violence of the state to protect people who should be prosecuted.</p> <p>The only way to stop this nonsense is to leave them out of the election so we can ensure our elected DA can do their job without bias.</p> <p>#curetheconflict</p>

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August 10, 2020

Chair Alan Steinbrecher
Director Donna Hershkowitz
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Dear Chair Alan Steinbrecher and Interim Executive Director Donna Hershkowitz:

We, of the Contra Costa Defender Association, write to urge the State Bar to adopt a new rule of professional responsibility to reduce the possibility that law-enforcement unions will exert, or will be perceived as exerting, political influence over prosecutorial decision making.

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

Prosecutors are in a unique position of having to work closely with law-enforcement officers and to evaluate whether some of those same officers have committed crimes. When a prosecutor initiates an investigation or prosecution of an officer, law-enforcement unions often finance their members' legal representation. Yet the same unions may have contributed to the prosecutor's campaign.

This is worse than unseemly: it corrodes public trust in an institution whose legitimacy hinges on the public's trust in its fairness and impartiality. Prosecutors, like judges, are charged with public duties that transcend those of ordinary advocates; and it is therefore of paramount importance that the public trusts prosecutors to carry out those duties fairly and impartially. A prosecutor is the "representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." (*Berger v. United States* (1935) 295 U.S. 78, 88.) "The prosecutor is an administrator of justice, an advocate, and an officer of the court"; she "must exercise sound discretion in the performance of his or her functions"; and her duty "is to seek justice, not merely to convict." (ABA Criminal Justice Standards: Prosecution Function, Standard 3-1.2, subds. (b) & (c).) Because a prosecutor exercises vast discretion when deciding whether to investigate, whether to charge, and how to charge, she "should have, as nearly as possible, a detached and impartial view of all groups in his community." (Robert H. Jackson, "The Federal Prosecutor," speech delivered at the Second Annual Conference of United States Attorneys, Great Hall, Department of Justice Building, Washington, D. C., April 1, 1940.1)

Appendix 4: All Written Comments Received

Receiving endorsements and campaign contributions from unions that finance opposing counsel creates, at a minimum, the appearance of a conflict of interest for elected prosecutors. District Attorneys undoubtedly will review use-of-force incidents involving union members. When they do, the financial and political support of those unions should not influence, or appear to influence, the District Attorneys' decision making.

The State Bar's Rules of Professional Conduct generally prohibit a lawyer from representing a client when, "the lawyer has ... a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter" (California Rules of Professional Conduct, rule 1.7, Conflict of Interest [2018]). Further, the California Court of Appeal has found that "a 'conflict,' for purposes of California Penal Code § 1424, 'exists whenever the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner.'" (People v. Vasquez (2006) 39 Cal.4th 47, 74, fn.2, 45 Cal.Rptr.3d 372, 137 P.3d 199 [italics omitted].) Thus, there is no need to determine whether a conflict is "actual" or only gives an "appearance" of conflict. Similarly, the American Bar Association's conflicts-of-interest rules provide that "a prosecutor who has a significant personal, political, financial, professional, business, property, or other relationship with another lawyer should not participate in the prosecution of a person who is represented by the other lawyer." (Am Bar Assn. Criminal Justice Standards for the Prosecution Function, Standard 3-1.7, subd. (h), Conflicts of Interest [2017].)

These rules and decisions ostensibly were crafted to avoid the conflict, or the appearance of a conflict, that arises when an attorney or prosecutor has a political or financial relationship with opposing counsel. They suggest that an elected prosecutor either should avoid soliciting financial contributions and support from an attorney representing an accused officer, or should recuse their office from a 1 Available at <https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf>. prosecution where the prosecutor has received financial or political support from such an attorney.

But these rules do not preclude the attorney or prosecutor from soliciting or receiving financial support from an individual or organization that is financing opposing counsel. It is illogical that the rules prohibit a prosecutor from soliciting and benefiting from financial and political support from an accused officer's advocate when the prosecutor is carrying out his duties, but enable the prosecutor **when campaigning** to benefit financially and politically from an entity that funds the accused's advocate.

To cure this conflict, or the appearance of conflict, and to maintain public confidence in the fairness and impartiality of prosecutors, ethical rules must explicitly preclude elected prosecutors, prosecutors seeking election, and their campaign committees from seeking or from accepting political or financial support from law-enforcement unions. Such a rule would not only help to avoid conflicts and ensure the independence of elected prosecutors, it also would enhance trust in our criminal-justice system at a time when trust is sorely needed. And the rule would survive First Amendment scrutiny, as it is narrowly tailored to further the state's compelling interest in maintaining public confidence in the integrity of prosecutors. (Cf. Williams-Yulee v. Florida Bar (2015) 575 U.S. 433 [upholding state ethical ban on personal campaign solicitations by judicial candidates]).

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

Sincerely,

s/ ali saidi

Ali Saidi, President
Contra Costa Defender Association

Appendix 4: All Written Comments Received

Public Comment Form - DA Request

Commenting on behalf of an organization	No
Name	Emily Cox
City	Los Angeles
State	California
Email address	emlycx@gmail.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>When will there NOT be a conflict of interest?</p> <p>While I have my own opinion, Jackie Lacey's inability to prosecute swiftly may or may not be due to the LAPPL. However, why leave it in gray area? At what point can we as citizens investigate the relationship between the union and the DA? There's never an opportunity, but yet the LAPPL continues to buy off politicians, intimidate critics and cover up the crimes of its members.</p> <p>This band of bullies is stalling progress, feeding bad behavior, and killing lives.</p> <p>Unions are supposed to leverage the power of the oppressed to protect workers' rights, not leverage the violence of the state to protect people who should be prosecuted.</p> <p>The only way to stop this nonsense is to leave them out of the election so we can ensure our elected DA can do their job without bias.</p> <p>#curetheconflict</p>

Appendix 4: All Written Comments Received

Public Comment Form - DA Request

Commenting on behalf of an organization	No
Name	Liela Crosset
City	Los Angeles
State	California
Email address	liela.crosset@gmail.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>As a citizen of Los Angeles I feel like I see my public officials being held captive to police unions and police authority.</p> <p>The police department targets people who oppose any part of their massive budget, which we're seeing now while they go after Mike Bonin and Nuri Martinez for opposing 150 million dollars of their BILLIONS of dollars. Police unions make it impossible for money to be reallocated from the people who sweep homeless encampments to the people and organizations that try to keep people from falling into homelessness. We can never shift our time and resources away from police while police unions bully our elected officials.</p> <p>This union doesn't protect it's workers so much as it defends a group of government employees who are allowed to murder without consequence. Police unions are a danger to our community and keep the department from ever being held accountable or reevaluated.</p>



EARL B. GILLIAM BAR ASSOCIATION

P.O. Box 124527, San Diego, CA 92112 • (858) 792-6366
ebgba.org • ebgbassociation@gmail.com

August 5, 2020

Chair Alan Steinbrecher
Director Donna Hershkowitz
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Dear Chair Alan Steinbrecher and Interim Executive Director Donna Hershkowitz:

We, of the Earl B. Gilliam Bar Association, write to urge the State Bar to adopt a new rule of professional responsibility to reduce the possibility that law-enforcement unions will exert, or will be perceived as exerting, political influence over prosecutorial decision making.

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

Prosecutors are in a unique position of having to work closely with law-enforcement officers and to evaluate whether some of those same officers have committed crimes. When a prosecutor initiates an investigation or prosecution of an officer, law-enforcement unions often finance their members' legal representation. Yet the same unions may have contributed to the prosecutor's campaign.

This is worse than unseemly: it corrodes public trust in an institution whose legitimacy hinges on the public's trust in its fairness and impartiality. Prosecutors, like

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Chair Alan Steinbrecher
Director Donna Hershkowitz
August 5, 2020
Page 2

judges, are charged with public duties that transcend those of ordinary advocates; and it is therefore of paramount importance that the public trusts prosecutors to carry out those duties fairly and impartially. A prosecutor is the "representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." (Berger v. United States (1935) 295 U.S. 78, 88.) "The prosecutor is an administrator of justice, an advocate, and an officer of the court"; she "must exercise sound discretion in the performance of his or her functions"; and her duty "is to seek justice, not merely to convict." (ABA Criminal Justice Standards: Prosecution Function, Standard 3-1.2, subds. (b) & (c).) Because a prosecutor exercises vast discretion when deciding whether to investigate, whether to charge, and how to charge, she "should have, as nearly as possible, a detached and impartial view of all groups in his community." (Robert H. Jackson, "The Federal Prosecutor," speech delivered at the Second Annual Conference of United States Attorneys, Great Hall, Department of Justice Building, Washington, D. C., April 1, 1940.1)

Receiving endorsements and campaign contributions from unions that finance opposing counsel creates, at a minimum, the appearance of a conflict of interest for elected prosecutors. District Attorneys undoubtedly will review use-of-force incidents involving union members. When they do, the financial and political support of those unions should not influence, or appear to influence, the District Attorneys' decision making.

The State Bar's Rules of Professional Conduct generally prohibit a lawyer from representing a client when, "the lawyer has ... a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter" (California Rules of Professional Conduct, rule 1.7, Conflict of Interest [2018]). Further, the California Court of Appeal has found that "a 'conflict,' for purposes of California Penal Code § 1424, 'exists whenever the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner.'" (People v. Vasquez (2006) 39 Cal.4th 47, 74, fn.2, 45 Cal.Rptr.3d 372, 137 P.3d 199 [italics omitted].) Thus, there is no need to determine whether a conflict is "actual" or only gives an "appearance" of conflict. Similarly, the American Bar Association's conflicts-of-interest rules provide that "a prosecutor who has a significant personal, political, financial, professional, business, property, or other relationship with another lawyer should not participate in the prosecution of a person who

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Chair Alan Steinbrecher
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Page 3

is represented by the other lawyer." (Am Bar Assn. Criminal Justice Standards for the Prosecution Function, Standard 3-1.7, subd. (h), Conflicts of Interest [2017].)

These rules and decisions ostensibly were crafted to avoid the conflict, or the appearance of a conflict, that arises when an attorney or prosecutor has a political or financial relationship with opposing counsel. They suggest that an elected prosecutor either should avoid soliciting financial contributions and support from an attorney representing an accused officer, or should recuse their office from a 1 Available at <https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf>. prosecution where the prosecutor has received financial or political support from such an attorney.

But these rules do not preclude the attorney or prosecutor from soliciting or receiving financial support from an individual or organization that is financing opposing counsel. It is illogical that the rules prohibit a prosecutor from soliciting and benefiting from financial and political support from an accused officer's advocate when the prosecutor is carrying out his duties, but enable the prosecutor when campaigning to benefit financially and politically from an entity that funds the accused's advocate.

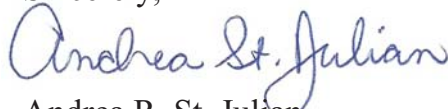
To cure this conflict, or the appearance of conflict, and to maintain public confidence in the fairness and impartiality of prosecutors, ethical rules must explicitly preclude elected prosecutors, prosecutors seeking election, and their campaign committees from seeking or from accepting political or financial support from law-enforcement unions. Such a rule would not only help to avoid conflicts and ensure the independence of elected prosecutors, it also would enhance trust in our criminal-justice system at a time when trust is sorely needed. And the rule would survive First Amendment scrutiny, as it is narrowly tailored to further the state's compelling interest in maintaining public confidence in the integrity of prosecutors. (Cf. *Williams-Yulee v. Florida Bar* (2015) 575 U.S. 433 [upholding state ethical ban on personal campaign solicitations by judicial candidates]).

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

Sincerely,



Andrea R. St. Julian
President, Earl B. Gilliam Bar Association

Appendix 4: All Written Comments Received



EAST BAY LA RAZA LAWYERS ASSOCIATION
1010 Grayson Street, Suite 2
Berkeley, CA 94710-2611
Ph: 510-525-4243
Fax: 510-665-4036
eblarazalawyers@gmail.com
www.eblrla.org

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August 10, 2020

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VIA EMAIL

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The State Bar of California
180 Howard Street
San Francisco, CA 94105

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Treasurer

Amelia Sandoval-Smith
Secretary

Re: New Rule of Professional Responsibility or Ethics Opinion for Prosecutors

Board Members

Elena Condes

Dear Chair Steinbrecher and Director Hershkowitz:

María D. Domínguez

On behalf of the East Bay La Raza Lawyers Association (EBLRLA), I write to urge the State Bar of California to adopt a new rule of professional responsibility to reduce the possibility that law-enforcement unions will exert, or will be perceived as exerting, political influence over prosecutorial decision making.

Steve Franco

Susana Gonzales

Monica Othón Espinosa

Founded in 1978, the EBLRLA is the county bar association of Latina/o and Latinx lawyers in Alameda and Contra Costa counties. As such, we are dedicated to expanding legal access and justice in our communities.

David Pereda

Elena Ramirez

Veronica Rios Reddick

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

April Smith

Prosecutors are in a unique position of having to work closely with law-enforcement officers and to evaluate whether some of those same officers have committed crimes. When a prosecutor initiates an investigation or prosecution of an officer, law-enforcement unions often finance their members' legal representation. Yet the same unions may have contributed to the prosecutor's campaign.

This is worse than unseemly: it corrodes public trust in an institution whose legitimacy hinges on the public's trust in its fairness and impartiality. Prosecutors, like judges, are charged with public duties that transcend those of ordinary advocates. It is therefore of

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East Bay La Raza Lawyers Association Letter
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paramount importance that the public trusts prosecutors to carry out those duties fairly and impartially.

A prosecutor is the “representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” (Berger v. United States (1935) 295 U.S. 78, 88.) “The prosecutor is an administrator of justice, an advocate, and an officer of the court”; she “must exercise sound discretion in the performance of his or her functions”; and her duty “is to seek justice, not merely to convict.” (ABA Criminal Justice Standards: Prosecution Function, Standard 3-1.2, subds. (b) & (c).)

Because a prosecutor exercises vast discretion when deciding whether to investigate, whether to charge, and how to charge, she “should have, as nearly as possible, a detached and impartial view of all groups in his community.” (Robert H. Jackson, “The Federal Prosecutor,” speech delivered at the Second Annual Conference of United States Attorneys, Great Hall, Department of Justice Building, Washington, D. C., April 1, 1940.1)

Receiving endorsements and campaign contributions from unions that finance opposing counsel creates, at a minimum, the appearance of a conflict of interest for elected prosecutors. District Attorneys undoubtedly will review use-of-force incidents involving union members. When they do, the financial and political support of those unions should not influence, or appear to influence, the District Attorneys’ decision making.

The State Bar’s Rules of Professional Conduct generally prohibit a lawyer from representing a client when, “the lawyer has ... a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter” (California Rules of Professional Conduct, rule 1.7, Conflict of Interest [2018]). Further, the California Court of Appeal has found that “a ‘conflict,’ for purposes of California Penal Code § 1424, ‘exists whenever the circumstances of a case evidence a reasonable possibility that the DA’s office may not exercise its discretionary function in an evenhanded manner.’” (People v. Vasquez (2006) 39 Cal.4th 47, 74, fn.2, 45 Cal.Rptr.3d 372, 137 P.3d 199 [italics omitted].) Thus, there is no need to determine whether a conflict is “actual” or only gives an “appearance” of conflict.

Similarly, the American Bar Association’s conflicts-of-interest rules provide that “a prosecutor who has a significant personal, political, financial, professional, business, property, or other relationship with another lawyer should not participate in the prosecution of a person who is represented by the other lawyer.” (Am Bar Assn. Criminal Justice Standards for the Prosecution Function, Standard 3-1.7, subd. (h), Conflicts of Interest [2017].)

These rules and decisions ostensibly were crafted to avoid the conflict, or the appearance of a conflict, that arises when an attorney or prosecutor has a political or financial relationship with opposing counsel. They suggest that an elected prosecutor either should avoid soliciting financial contributions and support from an attorney representing an accused officer, or should recuse their office from a prosecution where the prosecutor has received financial or political support from such an attorney.

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East Bay La Raza Lawyers Association Letter

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But these rules do not preclude the attorney or prosecutor from soliciting or receiving financial support from an individual or organization that is financing opposing counsel. It is illogical that the rules prohibit a prosecutor from soliciting and benefiting from financial and political support from an accused officer's advocate when the prosecutor is carrying out his duties, but enable the prosecutor *when campaigning* to benefit financially and politically from an entity that funds the accused's advocate.

To cure this conflict, or the appearance of conflict, and to maintain public confidence in the fairness and impartiality of prosecutors, ethical rules must explicitly preclude elected prosecutors, prosecutors seeking election, and their campaign committees from seeking or from accepting political or financial support from law-enforcement unions. Such a rule would not only help to avoid conflicts and ensure the independence of elected prosecutors, it also would enhance trust in our criminal-justice system at a time when trust is sorely needed. Moreover, the rule would survive First Amendment scrutiny, as it is narrowly tailored to further the state's compelling interest in maintaining public confidence in the integrity of prosecutors. (Cf. *Williams-Yulee v. Florida Bar* (2015) 575 U.S. 433 [upholding state ethical ban on personal campaign solicitations by judicial candidates]).

Whether the State Bar takes action in the form of a new rule of professional conduct or an ethics opinion, our goal is the same: to protect the integrity of the prosecutorial function, the fair administration of justice, and restore public trust in law enforcement. Given the urgent national situation, we request an expedited review of this request.

Thank you for your consideration of this time-sensitive and important matter.

Sincerely,

A handwritten signature in blue ink that reads "Ana Flores". The signature is written in a cursive, flowing style.

Ana I. Flores, Esq.
President

Appendix 4: All Written Comments Received

Public Comment Form - DA Request

Commenting on behalf of an organization	No
Name	Katie Edgerton
City	Los angeles
State	California
Email address	katie.edgerton@gmail.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>When will there NOT be a conflict of interest?</p> <p>While I have my own opinion, Jackie Lacey's inability to prosecute swiftly may or may not be due to the LAPPL. However, why leave it in gray area? At what point can we as citizens investigate the relationship between the union and the DA? There's never an opportunity, but yet the LAPPL continues to buy off politicians, intimidate critics and cover up the crimes of its members.</p> <p>This band of bullies is stalling progress, feeding bad behavior, and killing lives.</p> <p>Unions are supposed to leverage the power of the oppressed to protect workers' rights, not leverage the violence of the state to protect people who should be prosecuted.</p> <p>The only way to stop this nonsense is to leave them out of the election so we can ensure our elected DA can do their job without bias.</p>

Appendix 4: All Written Comments Received

From: [Marie Elliott](#)
To: [Lee, Mimi](#)
Subject: Written Submission - Cure the Conflict proposal
Date: Tuesday, August 11, 2020 11:32:06 AM

Hello,

My name is Marie Elliott, I'm a resident of San Francisco. I'm a concerned citizen. Thank you for giving the public a chance to comment on the proposal to Cure the Conflict between Police Unions and Prosecutors. I was unable to make my comment before I had to leave the meeting, so I am sending it in via email.

I support the ethics proposal to Cure the Conflict. I support Mr Boudin & Miss Price's comments from the call.

Law Enforcement Unions shouldn't be able to buy their way into having influence over Prosecutors.

1 - Prosecutors need to be independent, and if bodies they are supposed to be able to prosecute in use of force incidents have given them financial support or public endorsements, that independence is, at the very least, questionable, and at worst, deeply compromised. This financial connection calls objectivity into question. We desperately need officers to be held accountable, as evidenced by so many incidents of police brutality that are never prosecuted.

2 - Law Enforcement Unions exist to protect their members. Their members have sworn to protect the public. If a member of the public is harmed by a member of a Law Enforcement Union, we need prosecutors to be able to independently act. The instances of police brutality in this country are shocking, and they are too many. We rely on prosecutors as a line of defense and justice - so we should do all we can to ensure prosecutors are acting objectively and independently.

For these reasons, I support this ethics proposal.

Thank you for the time.

-Marie

--

Marie Elliott
melliott930@gmail.com

Appendix 4: All Written Comments Received

Public Comment Form - DA Request

Commenting on behalf of an organization	No
Name	riley gibson
City	calabasas
State	California
Email address	rileygibson09@gmail.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>When will there NOT be a conflict of interest?</p> <p>While I have my own opinion, Jackie Lacey's inability to prosecute swiftly may or may not be due to the LAPPL. However, why leave it in gray area? At what point can we as citizens investigate the relationship between the union and the DA? There's never an opportunity, but yet the LAPPL continues to buy off politicians, intimidate critics and cover up the crimes of its members.</p> <p>This band of bullies is stalling progress, feeding bad behavior, and killing lives.</p> <p>Unions are supposed to leverage the power of the oppressed to protect workers' rights, not leverage the violence of the state to protect people who should be prosecuted.</p> <p>The only way to stop this nonsense is to leave them out of the election so we can ensure our elected DA can do their job without bias.</p> <p>#curetheconflict</p>

Appendix 4: All Written Comments Received

From: [Kyle Helf](#)
To: [Lee, Mimi](#)
Subject: Ban Police Union Funding toward DA races
Date: Wednesday, August 12, 2020 4:23:21 PM

Hello I am Kyle Helf from Los Angeles.

I SUPPORT the proposal to BAN POLICE UNION FUNDING towards DA elections. It's an indisputable conflict of interest. Thank you.

Kyle Helf

Appendix 4: All Written Comments Received

Public Comment Form - DA Request

Commenting on behalf of an organization	No
Name	Samantha Honowitz
City	Los Angeles
State	California
Email address	sambempong@gmail.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>When will there NOT be a conflict of interest?</p> <p>While I have my own opinion, Jackie Lacey's inability to prosecute swiftly may or may not be due to the LAPPL. However, why leave it in gray area? At what point can we as citizens investigate the relationship between the union and the DA? There's never an opportunity, but yet the LAPPL continues to buy off politicians, intimidate critics and cover up the crimes of its members.</p> <p>This band of bullies is stalling progress, feeding bad behavior, and killing lives.</p> <p>Unions are supposed to leverage the power of the oppressed to protect workers' rights, not leverage the violence of the state to protect people who should be prosecuted.</p> <p>The only way to stop this nonsense is to leave them out of the election so we can ensure our elected DA can do their job without bias.</p>

Appendix 4: All Written Comments Received

Public Comment Form - DA Request

Commenting on behalf of an organization	No
Name	Zachary Jenkins
City	Los Angeles
State	California
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>When will there NOT be a conflict of interest?</p> <p>While I have my own opinion, Jackie Lacey's inability to prosecute swiftly may or may not be due to the LAPPL. However, why leave it in gray area? At what point can we as citizens investigate the relationship between the union and the DA? There's never an opportunity, but yet the LAPPL continues to buy off politicians, intimidate critics and cover up the crimes of its members.</p> <p>This band of bullies is stalling progress, feeding bad behavior, and killing lives.</p> <p>Unions are supposed to leverage the power of the oppressed to protect workers' rights, not leverage the violence of the state to protect people who should be prosecuted.</p> <p>The only way to stop this nonsense is to leave them out of the election so we can ensure our elected DA can do their job without bias.</p>

Appendix 4: All Written Comments Received

Public Comment Form - DA Request

Commenting on behalf of an organization	No
Name	Theo Kirkham-Lewitt
City	Los Angeles
State	California
Email address	theo.lewitt@yahoo.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>When will there NOT be a conflict of interest?</p> <p>While I have my own opinion, Jackie Lacey's inability to prosecute swiftly may or may not be due to the LAPPL. However, why leave it in gray area? At what point can we as citizens investigate the relationship between the union and the DA? There's never an opportunity, but yet the LAPPL continues to buy off politicians, intimidate critics and cover up the crimes of its members.</p> <p>This band of bullies is stalling progress, feeding bad behavior, and killing lives.</p> <p>Unions are supposed to leverage the power of the oppressed to protect workers' rights, not leverage the violence of the state to protect people who should be prosecuted.</p> <p>The only way to stop this nonsense is to leave them out of the election so we can ensure our elected DA can do their job without bias.</p> <p>#curetheconflict</p>

Appendix 4: All Written Comments Received

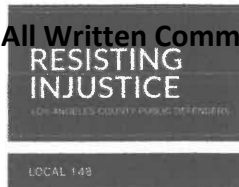
Public Comment Form - DA Request

Commenting on behalf of an organization	No
Name	John Kordosh
City	Los Angeles
State	California
Email address	jakordosh@gmail.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>District attorneys seeking political or financial support from police unions is a clear conflict of interest as it will incentivize their offices to look the other way when the police are accused of brutalities or law breaking.</p> <p>Police brutality and flouting the laws they are supposed to uphold has been issue for a long time, not just in California, but across the country. This rule of professional conduct is a step in the right direction.</p>

Appendix 4: All Written Comments Received

Public Comment Form - DA Request

Commenting on behalf of an organization	No
Name	Amanda L
City	Los Angeles
State	California
Email address	amandapaigeleal@gmail.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>Who are the DAs trying to protect when it comes down to it? Money has by and large been proven to be influential in the decision making that affects the PUBLIC. Unions are meant to protect labor rights, not leverage the violence of the state to protect people who should be prosecuted.</p> <p>It is not wild to ask for fairness, it is not wild to ask for accountability. #curetheconflict</p>



LOS ANGELES COUNTY PUBLIC DEFENDERS LOCAL 148

July 24, 2020

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

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

RE: ETHICS RULE CHANGE REQUEST TO REDUCE CONFLICTS OF INTEREST FOR PROSECUTORS

Dear Chair Alan Steinbrecher and Interim Executive Director Donna Hershkowitz:

On behalf of nearly 700 public defenders represented by the Los Angeles County Public Defenders Union Local 148, we write to you to strongly urge the State Bar to implement a new rule of professional responsibility to reduce the possibility of political influence from law enforcement unions over prosecutorial decision making. In the wake of the recent killings of George Floyd, Ahmaud Arbery, Breonna Taylor, and countless others victimized by law enforcement, we need to ensure that our judicial system provides a fair and impartial process for all.

Across California, including in Los Angeles, there are dozens of law enforcement unions representing rank-and-file police officers, sheriff's deputies and correctional officers who play a major role in local, state and even national politics. Often when the unions grant an endorsement, they also provide financial support to their endorsed candidate. In Los Angeles, law enforcement unions have donated millions of dollars to support candidates for the District Attorney's Office over the past several election cycles.

Recent tragedies have illustrated the importance of independent prosecutors to assess wrongdoing of police officers. Prosecutors work closely with law enforcement officers and are often tasked with evaluating whether some of those same officers have committed crimes. When prosecutors initiate an investigation or prosecution of an officer, police unions often finance officers' representation. This creates the appearance of a conflict of interest. District Attorneys will undoubtedly review use of force incidents involving their members. When they do, the financial and political support of police unions should not be allowed to influence that decision making.

The State Bar's Rules of Professional Conduct generally prohibit a lawyer from representing a client when, "the lawyer has ... a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter" ("Rule 1.7, Conflict of Interest," 2018). The

Appendix 4: All Written Comments Received

American Bar Association's rules governing conflicts of interest reference a slew of responsibilities related to financial or political interests for prosecutors. Specifically, "a prosecutor who has a significant personal, *political*, *financial*, professional, business, property, or other relationship with another lawyer should not participate in the prosecution of a person who is represented by the other lawyer" [emphasis added] ("Standard 3-1.7 Conflicts of Interest," 2017).

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

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

We appreciate your consideration of this incredibly time sensitive and important matter. Thank you for your urgent attention to this matter. If you have any questions please contact me at (424) 307-4285 or via email at lapubdefunion@gmail.com.

Sincerely,

Nikhil Ramnaney

Nikhil Ramnaney
President Local 148

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

Appendix 4: All Written Comments Received

From: [Alexandra Malek](#)
To: [Lee, Mimi](#)
Subject: Proposal to Ban Police Union Funding
Date: Tuesday, August 11, 2020 10:54:19 AM

Alexandra Malek <a@alexandramalek.com>

10:47 AM (7 minutes ago)



to mimi.lee



Good morning,

I'm writing in support of banning police union funding for any DA race. This is an enormous conflict of interest. The current system is a gross misuse of Citizens United in elections. All campaign funding from organizations that could stand to benefit from their chosen candidate's election should be banned, and this is a meaningful first step. This is a chance to change technicalities that allow powerful organizations to influence elections unfairly, and to bring the law around to what is right and just for all people.

Thank you,
Alexandra Malek
GroundGame Los Angeles
831.238.4066

Appendix 4: All Written Comments Received

Public Comment Form - DA Request

Commenting on behalf of an organization	No
Name	Jennifer Martinez
City	Encino
State	California
Email address	jen.yvette.martinez@gmail.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>Police union money should not be used to fund the DA in any way. I live in Los Angeles, and Jackie Lacey has been in office for years and has chosen hundreds of times not to prosecute law enforcement officers who have killed citizens. These stories are egregious and numerous. How is that possible?? Jackie Lacey can claim to be unbiased, but judging by the money she has accepted from LAPPL, she appears to be motivated by that money and not fulfilling her duty to the citizens of this city. She can deny being swayed but how can we believe that until the money is out of the picture? We should not have to question the integrity and motives of our elected officials. I strongly urge you to disallow the LAPPL and other police unions in our state from donating to campaigns or offices of the DA. It's time for change and accountability.</p>

Appendix 4: All Written Comments Received



Executive Committee

Karen Suri &
Gilbert Saucedo
Co-Presidents

Kath Rogers
Executive Director

Dickran Sevlilian
Secretary

Jay Shin
Treasurer

July 27, 2020

Executive Board

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Pasquale Lombardo
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Robert Myers
Eva Nagao
Victor Narro
Ben O'Donnell
Olu Orange
Eric Post
Gilbert Saucedo
Dickran Sevlilian
Tarek Shawky
Jay Shin
Gary Silbiger
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Ira Spiro
Dan Stormer
Ian Stringham
Matthew Strugar
Karen Suri
Kim Tellez
Laurie Traktman
Julia Vázquez
Jenny Villegas
Adrienna Wong

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

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

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

Dear Chair Alan Steinbrecher and Interim Executive Director Donna Hershkowitz:

On behalf of the National Lawyers Guild of Los Angeles, we write to you in the wake of the recent killings of George Floyd, Ahmaud Arbery, Breonna Taylor, and countless others in California and beyond to strongly urge the State Bar to implement a new rule of professional responsibility to reduce the possibility of political influence from law enforcement unions over prosecutorial decision making.

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

Recent tragedies have illustrated the importance of independent prosecutors to assess wrongdoing of police officers. Prosecutors work closely with law enforcement officers and are often tasked with evaluating whether some of those same officers have committed crimes. When prosecutors initiate an investigation or prosecution of an officer, police unions often finance officers' representation. This creates the appearance of a conflict of interest. District Attorneys will undoubtedly review use of force incidents involving their members. When they do, the financial and political support of police unions should not be allowed to influence that decision making.

The State Bar's Rules of Professional Conduct generally prohibit a lawyer from representing a client when, "the lawyer has ... a legal, business, financial, professional, or

Advisory Board

Una Lee Jost
Sri Panchalam
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Appendix 4: All Written Comments Received

personal relationship with or responsibility to a party or witness in the same matter” (“Rule 1.7, Conflict of Interest,” 2018). The American Bar Association’s rules governing conflicts of interest reference a slew of responsibilities related to financial or political interests for prosecutors. Specifically, “a prosecutor who has a significant personal, *political*, *financial*, professional, business, property, or other relationship with another lawyer should not participate in the prosecution of a person who is represented by the other lawyer” [emphasis added] (“Standard 3-1.7 Conflicts of Interest,” 2017).

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

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

Whether the State Bar takes action in the form of a new rule of professional conduct or an ethics opinion, our goal is the same: to cure the conflict of interest inherent in allowing police unions to support prosecutors and ensure the independence of prosecutors in investigating and prosecuting police. We appreciate your consideration of this incredibly time sensitive and important matter.

Sincerely,



Kath Rogers

Executive Director, National Lawyers Guild of Los Angeles, NLG-LA.org

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

Appendix 4: All Written Comments Received

Public Comment Form - DA Request

Commenting on behalf of an organization	No
Name	Ellen Oh
City	Los Angeles
State	California
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>When will there NOT be a conflict of interest?</p> <p>While I have my own opinion, Jackie Lacey's inability to prosecute swiftly may or may not be due to the LAPPL. However, why leave it in gray area? At what point can we as citizens investigate the relationship between the union and the DA? There's never an opportunity, but yet the LAPPL continues to buy off politicians, intimidate critics and cover up the crimes of its members.</p> <p>This band of bullies is stalling progress, feeding bad behavior, and killing lives.</p> <p>Unions are supposed to leverage the power of the oppressed to protect workers' rights, not leverage the violence of the state to protect people who should be prosecuted.</p> <p>The only way to stop this nonsense is to leave them out of the election so we can ensure our elected DA can do their job without bias.</p> <p>#curetheconflict</p>

Appendix 4: All Written Comments Received

From: [Seth Oritano](#)
To: [Lee, Mimi](#)
Subject: Ban police union funding
Date: Tuesday, August 11, 2020 12:40:22 PM

Cheers! My name is Seth Oritano. I love in Los Angeles and I support the proposal to ban police union funding towards DA races.

Appendix 4: All Written Comments Received



June 16, 2020

Sent Via U.S. Mail

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

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

Re: Response to the request to change ethics rules for prosecutors

Dear Chair Alan Steinbrecher and Interim Executive Director Donna Hershkowitz:

On June 1, 2020, a coalition of four current and former District Attorneys sent a letter urging the California State Bar to pass a Rule of Professional Conduct prohibiting prosecutors from accepting political donations from police unions. Peace Officers Research Association of California (“PORAC”) strongly opposes the proposed rule, which is an overt attempt to muzzle the political speech of organizations opposed to these candidates of so-called criminal justice reform. The pretextual basis for the proposed rule-potential conflicts in the prosecutions of peace officers-are easily managed under the existing Rules of Professional Conduct. The true motivation for the rule change is to silence their political opponents while imposing no constraints on the political participation of organizations conditioning their support for District Attorney candidates on predetermined charging decisions, a reduction of incarceration through lower sentences, refusal to seek the death penalty, and hinging prosecutorial decisions on immigration status.

The proposed rule intentionally discriminates against law enforcement unions and violates their First Amendment rights. Moreover, the proposal is a political ploy designed to increase the electoral prospects of its authors by silencing the political voice of their opponents who advocate for victims’ rights and justice. The proponents’ insincerity is demonstrated by the omission of any constraints on the organizations representing criminal defendants and prisoners, who not only have an direct interest in the District Attorneys’ exercise of their discretion but also condition support on a predetermination of cases that will come before them. The establishment of a partisan political advantage has no place in the rules that govern the ethical duties of the legal profession.

Brian R. Marvel
President

Damon Kurtz
Vice President

Timothy Davis
Treasurer

Randy Beintema
Secretary



I. The Proposed Rule is Unconstitutional

A. The First Amendment protects campaign endorsements and expenditures.

It is well established that unions have the right to freedom of speech under the First Amendment. (*Citizens United v. Federal Election Commission* (2010) 588 U.S. 310 (*Citizens United*)). This includes the right to make campaign expenditures. (*Buckley v. Valeo* (1976) 424 U.S. 1.) In *Woodland Hills Residents Association, Inc. v. City Council of City of Los Angeles* (1980) 26 Cal.3d 938, 946, the California Supreme Court affirmed that campaign donations are protected political speech, and that a donation in itself does not give rise to a conflict of interest. The court determined that city council members could not be disqualified from voting on a subdivision map for a conflict of interest merely because developers had donated to the council members' campaigns. (*Ibid.*) The court stated, "Political contribution involves an exercise of fundamental freedom protected by the First Amendment..." (*Ibid.*) "To disqualify a city council member from acting on a development proposal because the developer made a campaign contribution to that member would threaten constitutionally protected political speech and associational freedoms." (*Ibid.*) In *Caperton v. A.T. Massey Coal, Co., Inc.* (2009) 556 U.S. 868, 884, the U.S. Supreme Court found that a judge should have recused himself from a case where one of the parties had contributed significantly to his campaign. However, the Court noted that this was "an exceptional case," and there was a "serious risk of actual bias" because of the disproportionately large donation. (*Ibid.*) Further, disqualification rules applicable to adjudicators are even more stringent than those that govern the conduct of prosecutors. (*County of Santa Clara v. Superior Ct.* (2010) 50 Cal.4th 25, 56 fn.12.) This case law makes clear that campaign endorsements and financial contributions to a campaign are forms of protected political speech, and do not create a conflict of interest.

B. The proposed rule violates the First Amendment because it is viewpoint-based.

Perhaps the most important principle of the First Amendment is that the government cannot regulate speech based on its content or viewpoint. (See, e.g., *Police Department of Chicago v. Mosley* (1972) 408 U.S. 92, 95; *R.A.V. v. City of Saint Paul* (1992) 505 U.S. 377, 382.) Content based restrictions on speech are "presumptively invalid." (*R.A.V. v. City of Saint Paul, supra*, 505 U.S. at p. 382.) Thus, courts use strict scrutiny when evaluating laws or regulations that discriminate against speech because of the viewpoint it espouses. (*Turner Broadcasting System v. Federal Communication Commission* (1994) 512 U.S. 622; see also *United States v. Playboy Entertainment Group, Inc.* (2000) 539 U.S. 803.)

The proposed rule is undeniably viewpoint based. It prohibits campaign contributions and endorsements by law enforcement unions alone and does nothing to prevent other organizations from contributing to D.A. campaigns. It is no accident that the members of the coalition are not supported by their local law enforcement unions. Adopting such a rule would allow the coalition's

Brian R. Marvel
President

Damon Kurtz
Vice President

Timothy Davis
Treasurer

Randy Beintema
Secretary

Appendix 4: All Written Comments Received



supporters to contribute to their campaigns while silencing their opponents. It is a political maneuver masquerading as an ethics rule, and it cannot withstand constitutional muster.

The proposed rule is overbroad, speculative, and fails to genuinely address the issue of a conflict. To pass the high standard of strict scrutiny, the law must be narrowly tailored to achieve a compelling government interest. (*United States v. Playboy Entertainment Group, Inc.*, *supra*, 539 U.S. at p. 813.) The coalition claims that the rule is justified to prevent any conflict of interest that might arise if a D.A. was forced to prosecute a member of the police union that had contributed to that D.A.'s election. Ensuring the integrity of the legal profession and effectively dealing with conflicts of interest is undoubtedly a compelling government interest. However, this proposed conflict is speculative and attenuated. The authors of this proposed rule are assuming that an individual officer may be charged, that the police union may fund their defense, that the union may have supported the D.A. who is handling the case, and that the D.A. will not recuse themselves in light of the conflict. This sort of speculation does not meet the high standard that strict scrutiny requires.

A blanket rule restricting police unions' participation in prosecutor elections is not a necessary or even effective solution. Attorney General Xavier Becerra has already analyzed the issue and came to the same conclusion: D.A. campaign contributions alone do not give rise to a conflict of interest. (See Enclosure A.) Should a true conflict of interest arise, the D.A. can simply recuse themselves from the case and ask another attorney to handle it. A hypothetical future conflict should not be used as justification to suppress the rights of one class of people.

II. The True Purpose for the Rule is to Promote the Authors' Political Agenda

This proposal is not only unconstitutional, it is disingenuous. It is not surprising that the D.A.s advocating for this rule are opposed by their local law enforcement unions. Forbidding union participation in elections would take money and resources away from their opponents. Meanwhile, the coalition would remain free to accept contributions from their own supporters. A sincere proposal would eliminate contributions and endorsements to D.A. races from all organizations, regardless of their viewpoint or politics. In short, it makes little sense to forbid police unions from contributing to elections, but continue to allow progressive groups like the American Civil Liberties Union (ACLU), California Attorneys for Criminal Justice, or the National Association for Criminal Defense Lawyers to do so.

Review of police use of force makes up less than 1 percent of a D.A.'s duties. 99 percent of their time is spent prosecuting and charging accused criminals. The coalition's supporters have political agendas that create a much more direct and reoccurring conflict. For example, the ACLU's Campaign for Smart Justice seeks to "empower a new generation of prosecutors committed to reducing incarceration." (ACLU, *ACLU Launches New Initiative to Overhaul Prosecutorial Practices* (April 26, 2017) <<https://www.aclu.org/press-releases/aclu-launches-new-initiative->

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President

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Appendix 4: All Written Comments Received



[overhaul-prosecutorial-practices](#)>.) The Equal Justice Initiative advocates for ending mandatory minimum sentences and habitual offender statutes. (Equal Justice Initiative, *Criminal Justice Reform* <<https://eji.org/criminal-justice-reform/>> [as of June 12, 2020].) Billionaire George Soros has channeled millions of dollars into D.A. campaigns with the goal of expanding drug diversion programs and reducing sentences. (Bland, *George Soros' quiet overhaul of the U.S. justice system*, Politico (August 30, 2016) <<https://www.politico.com/story/2016/08/george-soros-criminal-justice-reform-227519>>.) These policies go to the heart of the D.A.'s job. Electing D.A.'s who promise to implement these sorts of policies will affect how 99 percent of the D.A.'s duties are carried out. This certain conflict is far broader than the hypothetical conflict with police unions that the rule is designed to address.

In a clear example of this conflict, the ACLU of California sends out a questionnaire to all D.A. candidates to help their affiliates determine which candidate to back. (ACLU of Cal., *California District Attorney Candidate Questionnaire* (2018) <<https://www.cdca.org/wp-content/uploads/ACLU-California-District-Attorney-Candidate-Questionnaire.pdf>> [as of June 8, 2020].) Some of these questions include:

- Will you commit to implementing practices that will reduce the jail population and reduce state prison commitments by a specific percentage by the end of your first term? (Question 2.)
- Do you commit to ending the use of money bail in this County? (Question 12.)
- Will you pledge to adopt a written policy and training which encourages prosecutors to consider the unintended immigration-related consequences of prosecutorial decisions at all stages of a case and to use their discretion to reach immigration-safe dispositions for noncitizens whenever it is possible and appropriate? (Question 17.)
- Will you commit to keeping all children out of adult court by pledging not to prosecute any minors as adults and by expanding the use of informal diversion and pre-filing diversion in juvenile cases? (Question 20.)

Not only does this questionnaire condition support on pre-determining cases that have not yet arisen, it also constitutes a commitment to deny individuals equal protection in violation of the Fourteenth Amendment. The advocates of criminal defendants and convicted individuals call for the D.A. to charge and treat individuals differently based on immigration status. If a state or local legislature were to enact a law that made distinctions on who to prosecute based on race, ethnicity, or immigration status, it would be promptly invalidated on constitutional grounds. D.A.'s, by contrast, can achieve a similarly discriminatory result under the guise of prosecutorial discretion.

In sum, if the Bar is inclined to implement policies that bar speech due to a conflict of interest, the ACLU and other criminal justice reform groups have a much larger conflict. The questions posed

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in the questionnaire and the policies they advocate for involve the core functions of the D.A.'s Office. The way a D.A. answers these questions will have a huge impact on their community. Allowing progressive organizations to have a say in electing D.A.'s but barring police unions from doing so creates an uneven playing field. It allows one side to impose the candidates and policies they support while stifling competing viewpoints. Adopting such a rule would be unconstitutional and unjust.

III. There are Already Effective Systems in Place to Deal with Conflicts of Interest

As the coalition's letter mentions, there are already Rules of Professional Conduct that address how attorneys should respond when faced with a conflict of interest. Rule 1.7 prohibits a lawyer from representing a client when, "the lawyer has...a legal business, financial, professional, or personal relationship with or to a party or witness in the same matter." (State Bar Rules Prof. Conduct 1.7.) Further, the American Bar Association has outlined standards for prosecutors. These standards include that prosecutors should not allow their "professional judgement or obligations to be affected by the prosecutor's personal, political, financial, professional, business, property or other interests or relationships." (3 ABA Stds. for Crim. Justice (4th ed. 2017), The Prosecution Function standard 3-1.7(f).) When such a conflict exists, "the prosecutor should recuse from further participation in the matter." (*Id.* at standard 3-1.7(a).)

Penal Code section 1424 also deals with recusal of a D.A.'s office due to a conflict of interest. Under section 1424, recusal of a D.A.'s office requires proof of a conflict of interest that makes it unlikely that the defendant could receive a fair trial if that D.A.'s office prosecutes the case. A conflict has been described as "a structural incentive for the prosecutor to elevate some other interest over the interest in impartial justice, should the two diverge." (*People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 754.) "[A] prosecutor's interest should coincide with the interest of the public in bringing a criminal to justice and should not be under the influence of third parties who have a particular axe to grind against the defendant." (*People v. Parmar* (2001) 86 Cal.App.4th 781, 797 (*Parmar*).)

There are very few published cases in which a disabling conflict has been found. These cases generally only arise when an employee of the D.A.'s office is a victim of a crime, the D.A. represented the defendant previously, or the D.A.'s office received money for investigative costs from a victim. (See *People v. Conner* (1983) 34 Cal.3d 141 [D.A. employee victim of the crime]; *People v. Lepe* (1985) 164 Cal.App.3d 685 [D.A. previously represented the defendant]; *People v. Eubanks* (1996) 14 Cal.4th 580 [D.A. received money from the victim]). As stated in *Parmar*, "... *Eubanks* and virtually every other disqualification case has been concerned with situations in which the prosecutor has either had a personal interest or been claimed to be under the influence of a private party with a personal interest in the prosecution of the particular defendant, usually by virtue of having been a victim." (*People v. Parmar, supra*, 86 Cal.App.4th at p. 795.)

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In the rare case that there is a true conflict of interest, D.A.'s have a myriad of ways to resolve the conflict. In many instances, conflicts of interest can be handled by establishing an ethical wall around the affected employee. (See *Stark v. Superior Court* (2011) 52 Cal.4th 368; *People v. Gamache* (2010) 48 Cal.4th 347; *People v. Hamilton* (1985) 41 Cal.3d 211; *People v. Sy* (2014) 223 Cal.App.4th 44; *Hambarian v. Superior Court* (2002) 27 Cal.4th 826; *People v. Lopez* (1984) 155 Cal.App.3d 813; and *Trujillo v. Superior Court* (1983) 148 Cal.App.3d 368.) If there is a conflict with the office as a whole, another D.A.'s office, the Attorney General, or the U.S. Attorney can take over the case. If their impartiality is questioned after the fact, they can ask the Attorney General or U.S. Attorney to review their work. These measures can, and do, cure conflicts of interest in the small number of cases that they arise.

IV. Conclusion

This proposed rule is frankly inappropriate and exploitative. It is a poorly disguised attempt to silence the author's opponents and amplify the voices of their supporters. There are already rules and systems in place to deal with any legitimate conflicts of interest that might arise between prosecutors and police unions. It makes little sense to bar the participation of police unions but allow progressive groups that have a much more direct conflict to continue bankrolling D.A. elections. Arguably, under the rationale advanced by the coalition, *all* contributions or endorsements to *any* attorney who runs for elected office should be prohibited. Ultimately, this is not about true conflicts of interest. It is a political issue. It should be dealt with at the ballot box and not in the Rules of Professional Conduct.

Very Truly Yours,
BOARD OF DIRECTORS
Peace Officers Research Association of California

Brian R. Marvel
President

Enclosure(s)

Brian R. Marvel
President

Damon Kurtz
Vice President

Timothy Davis
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XAVIER BECERRA
Attorney General

State of California
DEPARTMENT OF JUSTICE



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RECEIVED

MAR 05 2018

ANNE MARIE SCHUBERT
District Attorney

February 28, 2018

Assistant Chief Deputy District Attorney Michael Blazina
Sacramento District Attorney's Office
901 G Street
Sacramento, CA 95814

RE: Conflict of Interest Analysis – Campaign Contributions

Dear Mr. Blazina:

In your letter, dated February 5, 2018, you asked whether campaign endorsements and contributions from an individual or an organization present a conflict that bars the District Attorney from impartially deciding whether to prosecute a case in which that individual is a potential defendant. Your questions focused on an officer-involved-shooting case in which an officer being prosecuted was a member of a labor union that had endorsed and financially contributed to the district attorney's campaign. The short answer to these questions is that there is no conflict.

Under Penal Code section 1424, recusal of a district attorney's office requires proof of a conflict of interest that makes it unlikely that the defendant could receive a fair trial if the district attorney's office prosecutes the case. A conflict has been described as "a structural incentive for the prosecutor to elevate some other interest over the interest in impartial justice, should the two diverge." (*People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 754.) "[A] prosecutor's interest should coincide with the interest of the public in bringing a criminal to justice and should not be under the influence of third parties who have a particular axe to grind against the defendant." (*People v. Parmar* (2001) 86 Cal.App.4th 781, 797 (*Parmar*).)

Published cases in which a disabling conflict has been found are few and generally fall into the following three categories: an employee of the district attorney's office is a crime victim (see *People v. Conner* (1983) 34 Cal.3d 141, *Lewis v. Superior Court* (1997) 53 Cal.App.4th 1277; *People v. Jenan* (2006) 140 Cal.App.4th 782); the district attorney represented the defendant previously (*People v. Lepe* (1985) 164 Cal.App.3d 685); or the district attorney's

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Assistant Chief Deputy District Attorney Michael Blazina
Sacramento District Attorney's Office
February 28, 2018
Page 2

office received money for investigative costs from a victim (see *People v. Eubanks* (1996) 14 Cal.4th 580). As stated in *Parmar*, "...*Eubanks* and virtually every other disqualification case has been concerned with situations in which the prosecutor has either had a personal interest or been claimed to be under the influence of a private party with a personal interest in the prosecution of the particular defendant, usually by virtue of having been a victim." (*People v. Parmar*, *supra*, 86 Cal.App.4th at p. 795.)

In many instances, cases with conflicts of interest can be handled by a district attorney's office after an ethical wall has been established around the affected employee. (See *Stark v. Superior Court* (2011) 52 Cal.4th 368; *People v. Gamache* (2010) 48 Cal.4th 347; *People v. Hamilton* (1985) 41 Cal.3d 211; *People v. Sy* (2014) 223 Cal.App.4th 44; *Hambarian v. Superior Court* (2002) 27 Cal.4th 826; *People v. Lopez* (1984) 155 Cal.App.3d 813; and *Trujillo v. Superior Court* (1983) 148 Cal.App.3d 368.) That focus on fair adjudication of a case is borne out by the fact that failure to recuse a district attorney's office can be harmless on appeal when the district attorney's office "did not infringe upon defendants' state or federal rights to due process of law." (*People v. Vasquez* (2006) 39 Cal.4th 47, 66.) An ethical wall ensures that a defendant receives a fair trial.

The few published cases ordering recusal, as well as courts' acceptance of ethical walls in lieu of recusal, demonstrate that recusal is a disfavored remedy that appellate courts have cautioned should be exercised with "particular caution." (*People v. Lopez* (1984) 155 Cal.App.3d 813, 821-822.) The policy reasons for this position were set out in *Lopez*:

'when the entire prosecutorial office of the district attorney is recused and the Attorney General is required to undertake the prosecution or employ a special prosecutor, the district attorney is prevented from carrying out the statutory duties of his elected office and, perhaps even more significantly, the residents of the county are deprived of the services of their elected representative in the prosecution of crime in the county. The Attorney General is, of course, an elected state official, but unlike the district attorney, is not accountable at the ballot box exclusively to the electorate of the county. Manifestly, therefore, the entire prosecutorial office of the district attorney should not be recused in the absence of some substantial reason related to the proper administration of criminal justice.'

(*Id.*, at p. 822, quoting *Younger v. Superior Court* (1978) 86 Cal.App.3d 180.)

As to whether political contributions create a conflict of interest, it was claimed in another case that city council members should have been disqualified from voting on a subdivision map because developers had donated to the council members' campaigns. The Supreme Court stated, "Political contribution involves an exercise of fundamental freedom

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Assistant Chief Deputy District Attorney Michael Blazina
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protected by the First Amendment to the United States Constitution and article I, section 2 of the California Constitution.” (*Woodland Hills Residents Association, Inc. v. City Council of City of Los Angeles* (1980) 26 Cal.3d 938, 946.) “To disqualify a city council member from acting on a development proposal because the developer had made a campaign contribution to that member would threaten constitutionally protected political speech and associational freedoms.” (*Ibid.*) The Court further found that law governing disclosure of campaign contributions “provides for disclosure of campaign contributions by recipients of contributions rather than disqualification of recipients from acting in matters in which the contributor is interested.” (*Ibid.*)

While the act precludes an elected official from participating in a decision in which he has ‘a financial interest’ (Gov. Code, § 87100), it expressly excludes from definition of ‘financial interest’ the receipt of campaign contributions. (Gov. Code, §§ 87103, subd. (c), 82030, subd. (b). Thus, the Political Reform Act -- dealing comprehensively with problems of campaign contribution and conflict of interest -- does not prevent a city council member from acting upon a matter involving the contributor.

(*Id.*, at pp. 946-947; see also *Caperton v. A.T. Massey Coal, Co. Inc.* (2009) 129 S.Ct. 2252, 2263 [“exceptional case” where campaign contributions required recusal of a judge]. Disqualification rules applicable to adjudicators are even more stringent than those that govern the conduct of prosecutors. (*County of Santa Clara v. Superior Ct.* (2010) 50 Cal.4th 25, 56 FN 12.)

Accordingly, 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.

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.

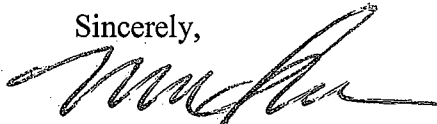
Additionally, the Attorney General’s unavoidable constraints of personnel, funds, and other resources require that the Penal Code section 1424 standard be taken seriously.

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Assistant Chief Deputy District Attorney Michael Blazina
Sacramento District Attorney's Office
February 28, 2018
Page 4

Thank you for your letter. And, of course, you are always welcome to call me if you have questions or comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. Farrell', written over the printed name.

MICHAEL P. FARRELL
Senior Assistant Attorney General

For XAVIER BECERRA
Attorney General

Appendix 4: All Written Comments Received



California

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AB-1506 Police use of force. (2019-2020)

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Date Published: 06/17/2020 09:00 PM

AMENDED IN SENATE JUNE 17, 2020

AMENDED IN ASSEMBLY JANUARY 15, 2020

AMENDED IN ASSEMBLY JANUARY 06, 2020

AMENDED IN ASSEMBLY MAY 17, 2019

AMENDED IN ASSEMBLY APRIL 11, 2019

AMENDED IN ASSEMBLY APRIL 01, 2019

AMENDED IN ASSEMBLY MARCH 26, 2019

CALIFORNIA LEGISLATURE— 2019–2020 REGULAR SESSION

ASSEMBLY BILL

NO. 1506

Introduced by Assembly ~~Member McCarty~~ **Members McCarty, Bauer-Kahan, Berman, Bloom, Bonta, Burke, Carrillo, Chiu, Chu, Eggman, Friedman, Gabriel, Cristina Garcia, Gipson, Gloria, Gonzalez, Grayson, Holden, Jones-Sawyer, Kalra, Kamlager, Levine, Medina, Muratsuchi, Quirk, Reyes, Luz Rivas, Robert Rivas, Santiago, Mark Stone, Ting, Weber, and Wicks**
 (Principal coauthors: Senators Allen, Beall, Bradford, Durazo, Lena Gonzalez, Hueso, Mitchell, Pan, Stern, Wieckowski, and Wiener)

February 22, 2019

An act to ~~amend Sections 42649.1, 42649.2, 42649.8, 42649.81, and 42649.82 of the Public Resources Code, relating to solid waste, and declaring the urgency thereof, to take effect immediately.~~ *add Section 12525.3 to the Government Code, relating to the Department of Justice.*

LEGISLATIVE COUNSEL'S DIGEST

AB 1506, as amended, McCarty. ~~Solid waste: commercial and organic waste: recycling bins.~~ *Police use of force.*

Existing law requires law enforcement agencies to maintain a policy on the use of force, as specified. Existing law requires the Commission on Peace Officer Standards and Training to implement courses of instruction for the regular and periodic training of law enforcement officers in the use of force.

Existing law requires law enforcement agencies to report to the Department of Justice, as specified, any incident in which a peace officer is involved in a shooting or use of force that results in death or serious bodily injury.

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This bill would create a division within the Department of Justice to, upon the request of a law enforcement agency, review the use-of-force policy of the agency and make recommendations, as specified.

The bill would also create a division within the Department of Justice to, upon the request of a law enforcement agency, conduct an independent investigation of any officer-involved shooting or other use of force that resulted in the death of a civilian and would authorize the Department of Justice to criminally prosecute any officer that, pursuant to such an investigation, is found to have violated state law.

The bill would provide that, if no appropriation is made by the Legislature to fund these programs, the programs shall operate using existing Department of Justice funds.

~~Existing law requires a business that generates 4 cubic yards or more of commercial solid waste or organic waste per week to arrange for recycling services, as specified. Existing law requires a business subject to either of those requirements to provide, on or before July 1, 2020, customers with a recycling bin or container for that waste stream that complies with prescribed requirements. Existing law exempts full service restaurants, as defined, from the requirement to provide customers with a recycling bin or container if the full service restaurant, on or before July 1, 2020, provides its employees a recycling bin or container for that waste stream to collect material purchased on the premises and implements a program to collect that waste stream.~~

~~This bill would specify that, with respect to a theme park, amusement park, water park, resort or entertainment complex, zoo, attraction, or similar facility that is subject to either of those requirements, the requirement to provide customers with a recycling bin or container only applies to permanent, nonmobile food service facilities with dedicated seating areas that are not full service restaurants. The bill would authorize such a facility subject to the organic waste recycling services requirement to alternatively implement a process for recycling organic waste from customers that yields results comparable to or greater in volume and quality to results attained by providing an organic waste recycling bin or container. The bill would also make other revisions to these provisions, including revising the definition of "full service restaurant," as specified, deleting obsolete provisions, and making conforming changes.~~

~~This bill would declare that it is to take effect immediately as an urgency statute.~~

Vote: ~~two-thirds~~majority Appropriation: no Fiscal Committee: yes Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. *Section 12525.3 is added to the Government Code, to read:*

12525.3. *(a) (1) There is hereby established within the Department of Justice, an independent division to investigate incidents of officer-involved use of force resulting in the death of a civilian.*

(2) The division created pursuant to this subdivision shall be known as the Statewide Officer-Involved Deadly Force Investigation Division. The division shall consist of three separate teams: one located in northern California, one in central California, and one in southern California.

(3) The division created pursuant to this subdivision shall do all of the following:

(A) Upon request from a local law enforcement agency or the district attorney, investigate and gather facts in incidents involving the use of force by a peace officer that result in the death of a civilian.

(B) Prepare and submit a written report to the entity requesting the independent review and, as applicable, a copy to the district attorney or law enforcement agency involved. The written report shall include, at a minimum, the following information:

(i) A statement of the facts.

(ii) A detailed analysis and conclusion for each investigatory issue.

(iii) Recommendations to modify the policies and practices of the law enforcement agency, as applicable.

(C) If criminal charges against the involved officer are found to be warranted, initiate and prosecute a criminal action against the officer.

(4) The Attorney General shall post and maintain on the Department of Justice's internet website each written report prepared by the division pursuant to this subdivision, appropriately redacting any information in the report

Appendix 4: All Written Comments Received

that is required by law to be kept confidential.

(b) (1) Commencing on July 1, 2023, the Attorney General shall operate a Police Practices Division within the Department of Justice to, upon request of a local law enforcement agency, review the use of deadly force policies of that law enforcement agency.

(2) The program described in this subdivision shall make specific and customized recommendations to any law enforcement agency that requests a review pursuant to this section, based on those policies identified as recommended best practices.

(c) This section does not limit the Attorney General's authority under the California Constitution or any applicable state law.

(d) If an appropriation is not made by the Legislature to fund this section, the Department of Justice shall implement the requirements of this section using existing department funding.

Appendix 4: All Written Comments Received

Public Comment Form - DA Request

Commenting on behalf of an organization	No
Name	Elizabeth Peterson
City	Los Angeles
State	California
Email address	peterston.elizabethc@gmail.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>Jackie Lacey's inability to prosecute swiftly may or may not be due to the LAPPL. However, why leave it in gray area? At what point can we as citizens investigate the relationship between the union and the DA? There's never an opportunity, but yet the LAPPL continues to buy off politicians, intimidate critics and cover up the crimes of its members.</p> <p>This band of bullies is stalling progress, feeding bad behavior, and killing lives.</p> <p>Unions are supposed to leverage the power of the oppressed to protect workers' rights, not leverage the violence of the state to protect people who should be prosecuted.</p> <p>The only way to stop this nonsense is to leave them out of the election so we can ensure our elected DA can do their job without bias.</p>

Appendix 4: All Written Comments Received

Public Comment Form - DA Request

Commenting on behalf of an organization	No
Name	Evan Pitts
City	Los Angeles
State	California
Email address	evieempitts@gmail.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	The Police Union should not be able to express their support to candidates financially. It is one thing to speak an endorsement, but contributing money to a policial campaign for a position that directly involves the police does not set up any DA candidate for a fair vote. No DA similarly should feel in any way indebted to the police by accepting money from them. I support the state bar prohibiting the police union's financial involvement in any prosecutor's campaign.

Appendix 4: All Written Comments Received

From: [Pamela Price](#)
To: [Lee, Mimi](#)
Cc: chesa@sfgov.org
Subject: Prohibitions on Elected Prosecutors from Seeking Political or Financial Support from Law Enforcement Unions - SUPPORT
Date: Tuesday, August 11, 2020 3:41:35 PM
Attachments: [STATE BAR COMMENT.pdf](#)

Ms. Lee, please accept the attached comments in support of the proposed rule or ethics opinion. Thank you.

Pamela Y. Price, Attorney at Law
California SuperLawyer (2004-2020)
National Lawyers Guild Champion of Justice (2016)
California Assembly District 18 Woman of the Year (2017)
P.O. Box 5843
Oakland, CA 94605
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Phone: (510) 452-0292

Fax: (510) 452-5625

"Injustice anywhere is a threat to justice everywhere." -- Martin Luther King, Jr.

Have you seen our website? Check out our site at pypesq.com and Pamela's blog at pamelaspape.com!



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Appendix 4: All Written Comments Received

PAMELA Y. PRICE, ATTORNEY AT LAW

P.O. Box 5843

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Voice: 510-452-0292

Oakland, California 94605

E-mail: pamela@pypesq.com

Fax: 510-452-5625

August 11, 2020

The State Bar of California
Committee on Professional Responsibility and Conduct
180 Howard Street
San Francisco, CA 94105

Re: Proposed Rule or Ethics Opinion Regarding Prohibitions on Elected
Prosecutors from Seeking or Accepting Political or Financial Support from
Law Enforcement Unions - SUPPORT

Dear Committee Members:

Thank you for allowing me to submit these written comments and for listening to me and other members of the public on this important issue. The perception of bias of local district attorneys across California is pervasive. The testimony we heard on August 11, 2020 was painful and insightful. As you heard, statewide, our communities are being adversely impacted by the historic relationship between police and prosecutors. The fact that prosecutors are perceived as protectors of the police instead of lawyers seeking justice undermines the administration of justice in every community.

As I advised you, I have been a member of the bar since 1983. I am a Black woman who lives and works in Oakland. Alameda County is a case study for this rule. I ran for District Attorney in Alameda County 2018. I am the first person to challenge an incumbent prosecutor in Alameda County since 1963 - in 55 years. I am an elected member of the Alameda County Democratic Party Central Committee and we recently voted unanimously to urge all local politicians, including the District Attorney to pledge not to take any contributions from law enforcement unions in the future.

In the 2018 District Attorney race, police unions spent more than \$400,000 to support the incumbent. "In May, the San Jose Police Officers' Association and the Los Angeles Police Protective League unions established the "Californians United for Safe Neighborhoods and Schools opposing Pamela Price for District Attorney 2018" committee. It was seeded with \$105,000 from the LAPD officers' union, \$75,000 from the California Correctional Peace Officers Association, which represents state prison guards, and \$40,000 from the Oakland police union. As of June 5, eleven other police unions had chipped in for a total of \$317,000."

<https://www.eastbayexpress.com/oakland/police-union-money-flooded-the-east-bays-district-attorneys-races/Content?oid=16716753>

Appendix 4: All Written Comments Received

The State Bar of California

August 11, 2020

Page -2-

A second police union committee, “Forward Alameda in support of Alameda County District Attorney Nancy O’Malley 2018” was also formed to which the elected Sheriff of Alameda County, donated \$50,000.00.

<https://ebcitizen.com/2018/05/27/sheriff-aherns-campaign-just-gave-50000-to-a-committee-supporting-da-omalley/>

The Sheriff’s support for O’Malley was shocking but not surprising. The Sheriff operates Santa Rita County Jail, renowned as one of the worst jails in California, if not the nation. Santa Rita Jail has been labeled “the most dangerous place to be in Alameda County” yet, nothing that has happened there has been the subject of any type of prosecution by our elected District Attorney.

<https://www.eastbayexpress.com/oakland/the-most-dangerous-place-in-alameda-county/Content?oid=26245173>

This lack of accountability has been devastating to our community. Santa Rita Jail is six times smaller than Los Angeles County jail system, the largest in the nation, but it has a 50-percent higher jail death rate: there were 13.6 deaths per 1,000 inmates at Santa Rita compared to 8.9 deaths in LA over a five-year period.

<https://www.ktvu.com/news/death-rate-at-santa-rita-exceeds-nations-largest-jail-system-as-critics-call-for-reform>

The most blatant display of a conflict of interest in our race which I spoke about in my remarks to you involves the case of Elena “Ebbie” Mondragon. District Attorney Nancy O’Malley accepted a \$10,000 contribution directly to her campaign for re-election from the Fremont Police Officers Association. She received it at the same time she was investigating Fremont officers – including the union president – for the murder of 16-year-old Ebbie, as well as an earlier case where a Fremont police officer killed an unarmed man. DA O’Malley cleared all of the officers of any wrongdoing after she got the contribution. This saga of unethical conduct was widely reported in our community.

<https://www.eastbaytimes.com/2018/03/20/da-accepted-10000-donation-from-fremont-cops-while-investigating-them/>

In 2018, in a very similar scenario, Sacramento District Attorney Anne Marie Schubert accepted \$13,000 in campaign contributions from the Sacramento police union while she investigated officers involved in the killing of Stephon Clark. Needless to say, her office did not charge any of the officers involved in that case. That case also received widespread attention in

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The State Bar of California

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the community and led to the passage of AB 1421 which changed the use of force standards in California.

In Oakland, our police department has been under federal oversight for 17 years. According to 68th Report of the independent federal monitor, filed on May 22, 2020, Black and Brown residents are still five (5) times more likely to be stopped by police than white residents. As the murder of George Floyd displayed, any contact for Black or Brown people with police can quickly turn deadly. Our District Attorney has never prosecuted any police officer for the use of excessive force against a resident of our County. Local activists regularly picket and demonstrate at her office because of her dismal record on police accountability.

Our District Attorney routinely clears officers and issues her “independent” review report in collaboration with the involved law enforcement agency. A glaring example is the case of Joshua Pawlik, a homeless man shot to death by Oakland police officers in March 2018. The District Attorney released a report a year later, on the same day that OPD released its report with the same conclusion – no fault. The fallout from Mr. Pawlik’s murder ultimately led to the firing of former OPD Chief Anne Kirkpatrick. The federal monitor rejected Chief Kirkpatrick’s findings and the City of Oakland paid Mr. Pawlik’s family \$1.4 million.

The District Attorney’s collaboration with Chief Kirkpatrick was widely reported in our community:

<https://www.kqed.org/news/11729878/federal-judge-appoints-outside-attorney-to-examine-oakland-police-shooting>

The case of Jody Woodfox is similarly disturbing. In that case, an OPD officer shot an unarmed Black man running away from him after a traffic spot. The OPD internal review board found that the officer’s actions were not justified. The DA issued her report six (6) years later, exonerating the officer with no mention of the OPD’s finding that the shooting was not justified. Their role in covering up the officer’s misconduct was widely reported in our community:

<https://www.mercurynews.com/2020/07/19/new-records-in-oakland-police-shooting-raise-questions-about-das-role-in-investigating-cops/>

Our District Attorney’s office routinely issues reports a year or more after an officer-involved shooting. Families members impacted by any officer-involved death have to wait indefinitely for any explanation about how their loved ones died. Some never receive it as there is no statewide requirement that District Attorneys investigate in-custody deaths, and the Alameda County District does not as a matter of policy or practice investigate in-custody deaths that do not involve the use of a firearm.

Appendix 4: All Written Comments Received

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Similarly, there are no statewide standards for addressing conflicts of interest for elected District Attorneys. All of these policies work to benefit and protect the police. Both the appearance of bias, the implicit bias and the explicit blatant favoritism that police officers receive from elected District Attorneys is an affront to the communities they serve and a stain on the fair administration of justice.

I urge you to take this first step to address the conduct of this oft-overlooked category of attorneys that have a huge impact on all of our lives. Thank you for your attention to this matter.

Very truly yours,



PAMELA Y. PRICE

cc: Hon. Chesa Boudin
Hon. Diana Becton
Hon. Tori Salazar
Hon. George Gascon

PYP:ap/SBEL200

Appendix 4: All Written Comments Received

From: [Bill Przylucki](#)
To: [Lee, Mimi](#)
Subject: Prosecutors should not take contributions from Law Enforcement Unions
Date: Tuesday, August 11, 2020 1:05:33 PM

To Whom It May Concern:

Prosecutors should be prohibited from taking contributions from Law Enforcement Unions, benevolent associations, and others. Prosecutors have to interact with LEOs in court regularly and rely on their testimony, and more importantly, prosecutors have to decide whether and how to hold LEOs accountable for violations of civil rights, criminal activity, and other abuses.

Please reject LEO money for DAs and prosecutors.

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Founded 1921

Appendix 4: All Written Comments Received Queen's Bench Bar Association

of the San Francisco Bay Area

August 11, 2020

Chair Alan Steinbrecher
Director Donna Hershkowitz
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Dear Chair Alan Steinbrecher and Interim Executive Director Donna Hershkowitz:

We, the Board of Directors of the Queen's Bench Bar Association of the San Francisco Bay Area, write to urge the State Bar to adopt a new rule of professional responsibility to eliminate any conflict of interest by reducing the possibility that law-enforcement unions will exert, or will be perceived as exerting, political influence over prosecutorial decision making.

Receiving endorsements and campaign contributions from law enforcement unions that finance opposing counsel in their own discipline or review proceedings creates, at a minimum, the appearance of a conflict of interest for elected prosecutors. Even worse, a successful candidate, once in office, may feel a sense of obligation or indebtedness to her or his campaign contributors, thereby increasing the risk that the prosecutor may act partially, whether consciously or not, in matters involving or connected to those contributors.

We believe that law-enforcement officers serve a vital, important and noble function in safeguarding the public. Law-enforcement officers are, first and foremost, employees of government - and, in a broader sense, employees of the citizens - who are paid to enforce the local and State laws in the public interest. As with any other employee, if an officer fails to perform his or her job, then he or she will be investigated and ultimately disciplined. The discipline process must be conducted in a fair and impartial manner.

Prosecutors are in a unique position of having to work closely with law enforcement officers and to evaluate whether some of those same officers have committed crimes or otherwise mishandled a case. When a prosecutor initiates an investigation or prosecution of an officer, law enforcement unions often finance their members' legal representation. Yet the same unions may have contributed to the prosecutor's campaign which creates a clear conflict of interest by opening a prosecutor up to influence by the law enforcement union with respect to how and if an officer will be disciplined. District Attorneys undoubtedly will review use-of-force incidents involving union members. When they do, the financial and political support of those unions should not influence, or appear to influence, the District Attorneys' decision making.

This is worse than unseemly: it corrodes public trust in the institution of judicial prosecution whose legitimacy hinges on the public's trust in its fairness and impartiality. Prosecutors, like judges, are charged with public duties that transcend those of ordinary advocates; and it is therefore of paramount importance that the public trusts prosecutors to carry out those duties fairly and impartially. A prosecutor is the "representative not of an

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Appendix 4: All Written Comments Received

ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” (Berger v. United States (1935) 295 U.S. 78, 88.) “The prosecutor is an administrator of justice, an advocate, and an officer of the court”; she “must exercise sound discretion in the performance of his or her functions”; and her duty “is to seek justice, not merely to convict.” (ABA Criminal Justice Standards: Prosecution Function, Standard 3-1.2, subds. (b) & (c).) Because a prosecutor exercises vast discretion when deciding whether to investigate, whether to charge, and how to charge, she or he “should have, as nearly as possible, a detached and impartial view of all groups in his community.” (Robert H. Jackson, “The Federal Prosecutor,” speech delivered at the Second Annual Conference of United States Attorneys, Great Hall, Department of Justice Building, Washington, D. C., April 1, 1940.1)

The State Bar’s Rules of Professional Conduct generally prohibit a lawyer from representing a client when, “the lawyer has ... a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter” (California Rules of Professional Conduct, rule 1.7, Conflict of Interest [2018]). Further, the California Court of Appeal has found that “a ‘conflict,’ for purposes of California Penal Code § 1424, ‘exists whenever the circumstances of a case evidence a reasonable possibility that the DA’s office may not exercise its discretionary function in an evenhanded manner.’” (People v. Vasquez (2006) 39 Cal.4th 47, 74, fn.2, 45 Cal.Rptr.3d 372, 137 P.3d 199 [italics omitted].) Thus, there is no need to determine whether a conflict is “actual” or only gives an “appearance” of conflict. Similarly, the American Bar Association’s conflicts-of-interest rules provide that “a prosecutor who has a significant personal, political, financial, professional, business, property, or other relationship with another lawyer should not participate in the prosecution of a person who is represented by the other lawyer.” (Am Bar Assn. Criminal Justice Standards for the Prosecution Function, Standard 3-1.7, subd. (h), Conflicts of Interest [2017].)

These rules and decisions ostensibly were crafted to avoid the conflict, or the appearance of a conflict, that arises when an attorney or prosecutor has a political or financial relationship with opposing counsel. They suggest that an elected prosecutor either should avoid soliciting financial contributions and support from an attorney representing an accused officer or should recuse their office from a prosecution where the prosecutor has received financial or political support from such an attorney.

But these rules do not preclude the attorney or prosecutor from soliciting or receiving financial support from an individual or organization that is financing opposing counsel. It is illogical that the rules prohibit a prosecutor from soliciting and benefiting from financial and political support from an accused officer’s advocate when the prosecutor is carrying out his duties but enable the prosecutor when campaigning to benefit financially and politically from an entity that funds the accused’s advocate.

To cure this conflict, or the appearance of conflict, and to maintain public confidence in the fairness and impartiality of prosecutors, ethical rules must explicitly preclude elected prosecutors, prosecutors seeking election, and their campaign committees from seeking or from accepting political or financial support from law enforcement unions. Such a rule would not only help to avoid conflicts and ensure the independence of elected prosecutors, it also would enhance trust in our criminal-justice system. And the rule would survive First Amendment scrutiny, as it is narrowly tailored to further the state’s compelling interest in maintaining public confidence in the integrity of prosecutors. (Cf. Williams-Yulee v. Florida Bar (2015) 575 U.S. 433 [upholding state ethical ban on personal campaign solicitations by judicial candidates]).

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

Sincerely,



Sophia Roman, President
Queen’s Bench Bar Association of the San Francisco Bay Area

Appendix 4: All Written Comments Received

From: [Jason Redlitz](#)
To: [Lee, Mimi](#)
Subject: Proposal to ban police union funding
Date: Tuesday, August 11, 2020 12:20:45 PM

To Whom it may concern,

I support the proposal to ban police union funding towards DA races.

Thank you for your time.

Sincerely,
Jason Redlitz

Appendix 4: All Written Comments Received

Public Comment Form - DA Request

Commenting on behalf of an organization	No
Name	Jordan S.
City	Los Angeles
State	California
Email address	jordansantos17@gmail.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>I demand that corruption and conflict of interest ends now. The LAPPL continues to buy off politicians, intimidate critics and cover up the crimes of its members.</p> <p>This encourages bad behavior and kills lives.</p> <p>Unions are supposed to leverage the power of the oppressed to protect workers' rights, not leverage the violence of the state to protect people who should be prosecuted.</p> <p>The only way to stop this nonsense is to leave them out of the election so we can ensure our elected DA can do their job without bias.</p>

Appendix 4: All Written Comments Received

Public Comment Form - DA Request

Commenting on behalf of an organization	No
Name	Katherine Samano
City	Los Angeles
State	California
Email address	ksamano@gmail.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>It is an obscene conflict of interest to allow DAs to accept donations from police unions. This is a straightforward and simple issue to fix.</p> <p>It's beyond clear to me why Jackie Lacey hasn't prosecuted any wrongdoing in LAPD, and it makes me sick to think about.</p> <p>Let's protect and serve our communities. Support this initiative.</p>

Appendix 4: All Written Comments Received

From: [Eric Sheehan](#)
To: [Lee, Mimi](#)
Subject: Ban Prosecutors from taking Police Union Money
Date: Tuesday, August 11, 2020 12:28:17 PM

Greetings,

I'd like to express my support for banning prosecutors from taking campaign money from police unions.

95% of elected prosecutors took money from or was endorsed by a Police Union.

That's clearly an issue. Prosecutors should have no bias towards police, or they will never be able to hold them accountable.

Make it clearly illegal to seek the support of Police Unions, We can't stop them from raising their voice, but we can stop prosecutors from pandering to them.

Act with conscience, follow the moment. The murder of George Floyd has got people demanding this type of reform, be on the right side of history.

Thanks

Eric Sheehan
650.766.7299
eric@ericsheehan.com

Appendix 4: All Written Comments Received

From: [Teagan Thompson](#)
To: [Lee, Mimi](#)
Subject: Public Comment - Ban Police Union Donations to Prosecutors
Date: Tuesday, August 11, 2020 4:19:36 PM

Hello,

My name is Teagan Thompson, and I live in San Francisco, CA.

I'm writing to ask that the California Bar bans elected prosecutors (and individuals running to be prosecutors) from seeking or accepting political or financial support from law enforcement unions.

I urge you to support the ethics proposal to cure the conflict of interest that arises when prosecutors accept law enforcement union money and support.

Prosecutors have incredible power in the criminal legal system. When prosecutors accept political/financial support from law enforcement unions, and then can choose how/if the justice system prosecutes the law enforcement officers who belong to those unions, a SERIOUS conflict of interest exists. This must be addressed and fixed!

Prosecutors must be independent in deciding when and who to prosecute. To do this, they must be free of influence from special interest groups. We need a rule to explicitly preclude prosecutor candidates from accepting donations from police unions. It will enhance trust in our criminal justice system at a time when it is seriously needed.

Thank you for your time, and I hope you will support this important proposal.

Best regards,
Teagan Thompson

Appendix 4: All Written Comments Received

Public Comment Form - DA Request

Commenting on behalf of an organization	No
Name	Emily Tong
City	Los Angeles
State	California
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>When will there NOT be a conflict of interest?</p> <p>While I have my own opinion, Jackie Lacey's inability to prosecute swiftly may or may not be due to the LAPPL. However, why leave it in gray area? At what point can we as citizens investigate the relationship between the union and the DA? There's never an opportunity, but yet the LAPPL continues to buy off politicians, intimidate critics and cover up the crimes of its members.</p> <p>This band of bullies is stalling progress, feeding bad behavior, and killing lives.</p> <p>Unions are supposed to leverage the power of the oppressed to protect workers' rights, not leverage the violence of the state to protect people who should be prosecuted.</p> <p>The only way to stop this nonsense is to leave them out of the election so we can ensure our elected DA can do their job without bias.</p> <p>Please enact this Rule of Professional Conduct!</p>

Appendix 4: All Written Comments Received

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Attorneys and Counselors at Law

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August 6, 2020

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

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

Re: Proposed Rule to Prohibit Campaign Endorsements and Contributions

“If all mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind.”

- John Stuart Mill

On behalf of a substantial number of Elected District Attorneys across California, the following written comment is submitted in response to the State Bar’s hearing on whether Elected District Attorneys or candidates for District Attorney should be prohibited from seeking endorsements or financial contributions from law enforcement unions.

The undersigned is a member in good standing of the California State Bar, has practiced campaign, election and constitutional law exclusively since 1980. I have represented numerous clients in litigation involving campaign finance and redistricting matters before federal and state courts, including the California Supreme Court and the United States Supreme Court. In 2010, I served as Co-Chair of Fair Political Practices Commission Chair Dan Schnur’s Task Force on Campaign Finance Reform. I have served as a member of the American Bar Association’s Standing Committee on Election Law (2015-2018) and currently serve as the Chair of the Advisory Committee of the Standing Committee. My views reflect those of my clients and do not represent the views of the Standing Committee.

Appendix 4: All Written Comments Received

Letter to State Bar regarding Proposed Rule to Prohibit Campaign Endorsements and Contributions

August 6, 2020

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I. The Proposed Rule Is Unconstitutional

A. Campaign Endorsements and Contributions are Protected by the First Amendment.

On June 1, 2020, the proponents of this rule change sent a letter to the State Bar asking them to prohibit “elected prosecutors-or prosecutors seeking election” from accepting endorsements or contributions from police unions. They claim there is a conflict of interest or appearance one, as District Attorneys work daily with law enforcement officers. Per their statement, “[p]rosecutors are in a unique position of having to work closely with law enforcement officers and evaluate whether some of those same officers have committed crimes.”

The proposed rule is patently unconstitutional and prohibited by the First Amendment. As the California Supreme Court stated in *Woodland Hills Residents Association, Inc. v. City Council of City of Los Angeles* (1980) 26 Cal.3d 938, 946:

“Political contributions involve an exercise of fundamental freedom protected by the First Amendment to the United States Constitution and article I section 2 of the California Constitution.”

In *Woodland Hills*, the court rejected the notion that elected city council members must be recused from voting on a development issue because developers had donated to the council members’ campaigns. In rejecting this claim, the Court went on to state,

“To disqualify a city council member from acting on a development proposal because the developer had made a campaign contribution to that member would threaten constitutionally protected political speech and association freedoms.”

Furthermore, while individual counties may, by state law or local ordinance, put campaign limits on direct contributions to candidates, there is no authority to limit what proportion of a candidate’s total contributions may be obtained from any individual, group or association. Any reliance on *Caperton v. A.T. Massey Coal, Co. Inc.* (2009) 556 U.S. 868 is misplaced. In that case, a party to a case *pending* in front of an appellate judge, donated \$3 million to the judge’s election campaign, equating to 300% more than the judge’s campaign committee had raised. The Supreme Court found that, given the disproportionately large donation, the judge should have *recused* himself. Nothing about the decision establishes that judges-or prosecutors-can be *prohibited* from accepting donations.¹

¹ The State Bar’s Committee on Professional Responsibility and Conduct posed several questions related to amount and percentage of contributions received. There is no legal authority for the government to impose a “proportionality” standard to the amount of contributions allowed.

Appendix 4: All Written Comments Received

Letter to State Bar regarding Proposed Rule to Prohibit Campaign Endorsements and Contributions

August 6, 2020

Page 3

B. The proposed rule is unconstitutional because it is content based

The proposed Rule of Professional Conduct prohibiting prosecutors from accepting political or financial support from police and “law enforcement” unions is not only violative of the First Amendment’s protection of freedom of speech through campaign expenditures, but constitutes an impermissible content-based restraint on speech as well.

The United States Supreme Court has long held that the First Amendment protects political and ideological speech, including campaign financing. *See West Virginia State Board of Education W. Va. State Bd. of Educ. v. Barnette* (1943) 319 U.S. 624, 642.; also, *NAACP v. Button* (1963) 371 U.S. 415, 428-429; *Citizens United v. FEC* (2010) 558 U.S. 310. As the Supreme Court stated in *Citizens United* at page 898:

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. *See Buckley v. Valeo* (1976) 424 U.S. 1, at 14-15, 96 S.Ct. 612 (“In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential”). The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment “‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.” *Eu v. San Francisco County Democratic Central Comm.* (1989) 489 U.S. 214, 223, 109 S.Ct. 1013, 103 L.Ed.2d 271 (quoting *Monitor Patriot Co. v. Roy* (1971) 401 U.S. 265, 272, 91 S.Ct. 621, 28 L.Ed.2d 35); see *Buckley, supra*, at 14, 96 S.Ct. 612 (“Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.”). For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are “subject to strict scrutiny,” which requires the Government to prove that the restriction “furthers a compelling interest and is narrowly tailored to achieve that interest.”

The proposed rule imposes restrictions on contributions and support from one particular group or presumed category of organizations based not on a legal conflict but on a disagreement with, and more pointedly, a disdain for, a particular philosophy. (See also Part III, *infra*, pp. 7-13.) The pretext for this proposed rule is to ensure and preserve the integrity of the legal profession and the role of the District Attorney in its oversight of police agencies. The real purpose of this proposed rule is to further an agenda designed to stifle and silence opposing viewpoints. This is antithetical to healthy political discourse.

The proposed rule is, by design, content based in its clear attempt to suppress the political speech of candidates supported by law enforcement unions. There can be little doubt that this effort is politically driven to silence and attempt to unseat District Attorneys who are supported by law enforcement.

Appendix 4: All Written Comments Received

Letter to State Bar regarding Proposed Rule to Prohibit Campaign Endorsements and Contributions

August 6, 2020

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II. Law enforcement endorsements and contributions do not create a conflict for a District Attorney.

The proponents claim that endorsements and contributions should be prohibited because there is a conflict or appearance of a conflict of interest since District Attorneys work daily with law enforcement officers. As they state, “Prosecutors are in a unique position of having to work closely with law enforcement officers and evaluate whether some of those same officers have committed crimes.”

The proponents fail to delineate what they mean by “law enforcement unions.” For instance, does this proposed rule ban *all* endorsements or contributions, irrespective of whether the union represents officers from the same jurisdiction as the individual Elected District Attorney? For instance, will this proposed rule prohibit:

- The Sacramento County or San Diego County District Attorney from seeking endorsements or contributions from the Los Angeles Police Protective League?
- The San Luis Obispo County District Attorney candidate from seeking the endorsement of the Hayward Police Officers Association (POA)? What if the Hayward POA gives endorsements but does not have a PAC to give financial contributions? Is the candidate still prohibited under this proposed rule?
- The candidate for Los Angeles County District Attorney from accepting endorsements from the Alameda Deputy Sheriffs Association?
- The Fresno County District Attorney from accepting contributions from the Riverside Police Officers Association?
- Elected District Attorneys or candidates for district attorney from receiving endorsements and/or contributions from law enforcement unions that represent officers from statewide agencies and have little or nothing to do with local prosecutions?²

² For instance, the California State Law Enforcement Association (CSLEA) represents DMV, Alcohol Beverage and Control, Fish and Wildlife, Fire Marshalls, DOJ criminalists, 911 dispatchers, and Bureau of Automotive Repair.

Appendix 4: All Written Comments Received

Letter to State Bar regarding Proposed Rule to Prohibit Campaign Endorsements and Contributions

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These questions are particularly relevant since the proponents' claim of conflict arises because District Attorneys "work closely" with these officers and evaluate whether some of these officers have committed crimes. Yet, this argument fails for several reasons:

- District Attorneys are bound by their prosecutorial ethics in making charging decisions. Those decisions are based upon the facts and the law.
- District Attorneys have in fact charged police officers with crimes when the facts and law support the prosecution. Just a few examples of such crimes include³:
 - Murder
 - Los Angeles Police Officer Stephanie Lazarus convicted of murder of Sherri Rasmussen
 - San Diego Sheriff's Deputy Aaron Russell: pending murder charges for an officer-involved fatal shooting
 - Riverside Sheriff Deputy Oscar Rodriguez: pending murder charges for an officer-involved fatal shooting
 - Rape
 - Sacramento Police Officer Darrell Rosen convicted of rape committed on duty; sentenced to state prison.
 - West Sacramento Police Officer convicted of multiple counts of rape while on duty; sentenced to 205 years to life
 - Excessive Force
 - Elk Grove Police Officer currently pending felony charges for excessive force (*People v. Bryan Schmidt*)
 - Placer County: in 2018, three correctional deputies were prosecuted and convicted of excessive force
 - Los Angeles: LAPD Officer Frank Hernandez currently pending charges of felony assault under color of authority (Case No. BA487734)
 - Public Integrity
 - El Dorado Deputy Sheriffs Association President Donald Atkinson convicted of embezzling over \$400,000 from the DSA; Atkinson was sentenced to 5 years in prison
- Endorsements and contributions by law enforcement unions outside the District Attorney's jurisdiction have a First Amendment right to do so⁴
- Officer-involved use of force cases represent a tiny fraction of all cases reviewed by a District Attorney

³ These examples are just a fraction of crimes prosecuted by District Attorneys against police officers in California. If the State Bar wants more information on the number and types of cases involving police officers, I can provide that upon request.

⁴ For instance, in the 2018 Election, the Sacramento District Attorney received over 80% of her law enforcement contributions either from statewide unions or those from associations outside Sacramento County.

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To further demonstrate the absurdity of the claimed “conflict” as the reason to adopt the rule are the following questions:

- Should District Attorneys be prohibited from accepting endorsements or donations from Crime Victims associations? After all, by the very nature of their jobs, “work closely” with crime victims.
- Should District Attorneys be prohibited from accepting donations from criminal defense attorneys? After all, by the very nature of their jobs, “work closely” with defense attorneys.
- Should District Attorneys be prohibited from accepting endorsements or donations from Real Estate Associations? After all, District Attorneys often investigate and prosecute real estate cases.
- Should District Attorneys be prohibited from accepting endorsements or donations from Insurance Associations? After all, District Attorneys often investigate and prosecute insurance fraud cases.

There can be little doubt that one of the underlying reasons for this proposed rule is the baseless claim that District Attorneys cannot fairly review use of force cases. However, these cases represent a miniscule number of cases reviewed each year by a District Attorney. In mid-large counties, thousands of cases are reviewed each year by a District Attorney’s Office for charging decisions. The number of use of force cases is less than 1%. For instance:

- In 2019, the Sacramento District Attorney’s Office reviewed approximately 33,000 cases for charging decisions. Of these 33,000 cases, only *six* fatal use of force cases were submitted for review. This represents .018% of all cases.
- The Riverside District Attorney’s Office reviews approximately 122,000 cases per year. In 2018, 173 of these cases involved use of force or police misconduct. This represents .014% of all cases.
- The Los Angeles District Attorney’s Office reviews approximately 65,000-70,000 felony cases per year. Of these, approximately 95-115 cases involve use of force. This represents .017% of all cases.

Even with this overly broad attempt to restrict the First Amendment right to accept endorsements and contributions, there is no authority to outright *prohibit* such constitutionally protected actions. (See, *Woodland Hills Residents Association, Inc., supra.*) In fact, in 2018, several months prior to the June elections, California Attorney General Xavier Becerra found that “the mere fact of a campaign endorsement and financial contributions to a campaign does not create a conflict of interest for a district attorney.” In his analysis, the Attorney General went on to state, “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.” (Attorney General’s Letter attached.)

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Furthermore, there are adequate protections in place to ensure the fair administration of justice and addressing either actual or perceived conflicts of interest. This includes the State Bar's Rules of Professional Conduct, the American Bar Association's Standards for Criminal Justice, and Penal Code section 1424 authorizing recusal of the District Attorney.

Finally, it cannot be understated that the Attorney General has the Constitutional authority to review any case, including decisions regarding allegations of police misconduct. It is unclear if this proposed rule would apply to the Attorney General. Whether or not it applies, the inherent authority of the Attorney General authorizes him or her to step in where there is an actual or perceived conflict. Given the Constitutional rights implicated by this proposed rule, the current safeguards are adequate to ensure impartiality in decisions being made by district attorneys.

III. The proposed rule applies only to some, not all.

Glaringly omitted from the proposed rule is any prohibition on any other organization or group posing an equally compelling conflict from providing similar contributions, endorsements or independent expenditures. Yet even more alarming is the absence of any analysis into other such organizations and their contributions and expenditures. Logic dictates and fairness demands that *any* group or organization with such a perceived conflict significant enough to warrant a prescription on contributions, independent expenditures and endorsements would be faithfully vetted and critically examined. The conspicuous absence of any such analysis provides clarity into the true motivation behind this proposed solution.

Engaging in a holistic and comprehensive examination of potential conflicts makes it readily apparent that there are a number of organizations whose contributions to and endorsements of the campaigns of District Attorney candidates would rise to the same level of conflict as with police unions that warrant this drastic proposal.

This effort to suppress the First Amendment rights of candidates supported by law enforcement unions is evidenced by the fact that the proponents are supported by individuals and organizations that promote anti-law enforcement agendas. No such attempt to limit contributions from groups who support the proponents demonstrates the glaring hypocrisy of this proposal.

Moreover, a one-sided ban on the contributions on one side also runs up against two issues: (1) violation of equal protection of the laws under the First and Fourteenth Amendments, which is related to but somewhat different than the prohibition on content-based regulation of speech (*Buckley v. Valeo*, *supra*, 424 U.S. at 48-49; *McConnell v. FEC*, (2003) 540 U.S. 93, 227, and *Davis v. FEC* (2008) 554 US 724, 741-742) ["the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."]), and (2) ignores the constitutional prohibition against limitations on independent expenditures by the very organizations the proposed rule purports to prohibit. (*Citizens United*, *supra*; and *Long Beach Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir. 2010).)

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Examples of these agenda driven groups include:

- In the recent 2018 election cycle, Soros and his network of foundations and supporters poured nearly \$3 million into California candidates who support his platforms. These include races in San Diego, Sacramento, and Alameda counties.

Similarly, Shaun King's Real Justice PAC has poured large amounts of money into candidates who support his progressive agendas. This organization actively recruits and endorses progressive candidates to defeat sitting District Attorneys who do not share his agendas. (<https://realjusticepac.org/>) It is also well-known that Shaun King, who has a social media following of millions of people, has made false accusations against police officers. In fact, in 2018 he falsely accused a Texas Trooper of kidnapping and rape on his various social media platforms. His twitter post, including naming the trooper, was as follows:



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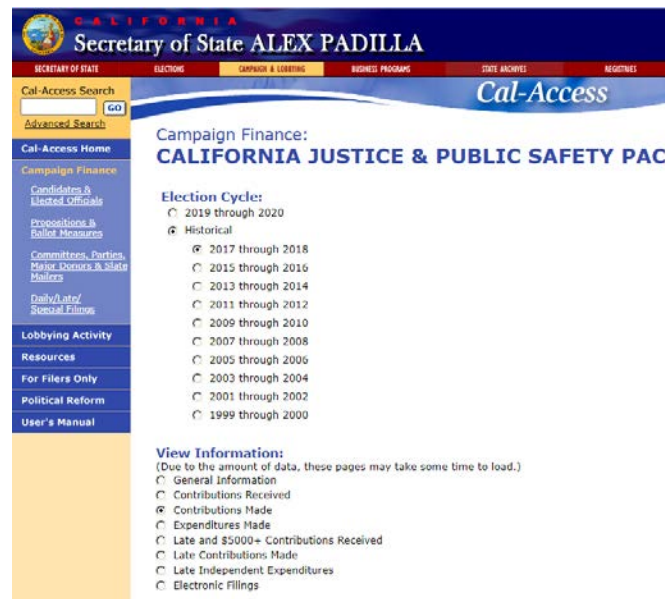
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These accusations were later proven false by bodycam videos and a confession by the woman who made the false allegation.

The candidates endorsed and supported by these groups often made campaign promises to “prosecute killer” cops,⁵ and often citing cases that had been found justified by the sitting District Attorney.⁶

A brief review of the Secretary of State’s campaign finance reports demonstrates the volume of money funneled into these races by Soros funded super PACs:



⁵ Examples of campaign mailers include:



⁶ Many District Attorney’s Offices post the police use of force reports online detailing the facts and legal analysis of each incident. Often, anti-law enforcement groups *demand* that police officers be prosecuted for murder. In these demands, these groups often make false claims about the true facts of these incidents.

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Who did the committee give contributions to, and how much?					
DOWNLOAD THESE RESULTS: MICROSOFT EXCEL					
DATE	PAYEE	CONTEST	POSITION	PAYMENT TYPE	AMOUNT
05/29/2018	PRICE, PAMELA	DISTRICT ATTORNEY	SUPPORT	IND	\$218,215.44
05/22/2018	JONES-WRIGHT, GENEVIEVE	DISTRICT ATTORNEY	SUPPORT	IND	\$209,055.00
05/08/2018	JONES-WRIGHT, GENEVIEVE	DISTRICT ATTORNEY	SUPPORT	IND	\$198,750.00
05/11/2018	JONES-WRIGHT, GENEVIEVE	DISTRICT ATTORNEY	SUPPORT	IND	\$198,750.00
05/03/2018	JONES-WRIGHT, GENEVIEVE	DISTRICT ATTORNEY	SUPPORT	IND	\$194,884.00
05/22/2018	JONES-WRIGHT, GENEVIEVE	DISTRICT ATTORNEY	SUPPORT	IND	\$124,035.79
05/19/2018	PRICE, PAMELA	DISTRICT ATTORNEY	SUPPORT	IND	\$121,250.00
05/23/2018	STEPHAN, SUMMER	DISTRICT ATTORNEY	OPPOSE	IND	\$111,968.05
05/29/2018	JONES-WRIGHT, GENEVIEVE	DISTRICT ATTORNEY	SUPPORT	IND	\$111,781.00
05/29/2018	STEPHAN, SUMMER	DISTRICT ATTORNEY	OPPOSE	IND	\$111,781.00
05/29/2018	JONES-WRIGHT, GENEVIEVE	DISTRICT ATTORNEY	SUPPORT	IND	\$108,963.30
05/08/2018	PHILLIPS, NOAH	DISTRICT ATTORNEY	SUPPORT	NON-MONETARY	\$101,475.00
05/04/2018	JONES-WRIGHT, GENEVIEVE	DISTRICT ATTORNEY	SUPPORT	IND	\$101,377.12
05/03/2018	PHILLIPS, NOAH	DISTRICT ATTORNEY	SUPPORT	NON-MONETARY	\$77,648.48
05/14/2018	PRICE, PAMELA	DISTRICT ATTORNEY	SUPPORT	IND	\$75,676.22
05/21/2018	O'MALLEY, NANCY	DISTRICT ATTORNEY	OPPOSE	IND	\$73,424.11
05/01/2018	PRICE, PAMELA	DISTRICT ATTORNEY	SUPPORT	IND	\$66,196.84
05/07/2018	PRICE, PAMELA	DISTRICT ATTORNEY	SUPPORT	IND	\$65,163.69
05/30/2018	O'MALLEY, NANCY	DISTRICT ATTORNEY	OPPOSE	IND	\$64,931.95
05/29/2018	PRICE, PAMELA	DISTRICT ATTORNEY	SUPPORT	IND	\$64,035.53

<http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1402586&view=contributions&session=2017>

For instance, in San Diego county, Soros funneled \$2 million in his effort to unseat District Attorney Summer Stephan. The shocking amounts donated include the following: Outside of California, Soros has poured many more millions into “Soros-minded” candidates. This includes over \$1,000,000 to Philadelphia District Attorney Larry Krasner. Prior to being elected, Krasner was a criminal defense attorney with a reputation for having suing police officers 75 times. (<https://www.nytimes.com/2017/06/17/us/philadelphia-krasner-district-attorney-police.html>)

Several articles document the amount of money being funneled to these candidates, either directly or indirectly, as well as who is supporting them.

- <http://contracostaherald.com/05271801cch/>
- <https://www.politico.com/states/california/story/2019/11/07/california-da-race-a-major-test-for-criminal-justice-reform-movement-1226372>
- <https://apnews.com/0aa7d76876c24be7a8a9d4cab737342b/Big-money-Soros-contributions-change-prosecutor-campaigns>

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Furthermore, a brief review of the Secretary of State's campaign finance reports demonstrates the volume of money funneled into these races by Shaun King's Real Justice PAC:

CALIFORNIA Secretary of State ALEX PADILLA					
SECRETARY OF STATE	ELECTIONS	CAMPAIGN & LOBBYING	BUSINESS PROGRAMS	STATE ARCHIVES	REGISTRARS
Cal-Access Search					
GO					
Advanced Search					
Cal-Access Home					
Campaign Finance					
Candidates & Elected Officials					
Propositions & Ballot Measures					
Committees, Parties, Major Donors & State Mailers					
Daily Filings / Special Filings					
Lobbying Activity					
Resources					
For Filers Only					
Political Reform					
User's Manual					
Campaign Finance: REAL JUSTICE PAC (FED PAC ID #C00632554)					
Election Cycle: <input checked="" type="radio"/> 2019 through 2020 <input type="radio"/> Historical					
View Information: (Due to the amount of data, these pages may take some time to load.)					
<input type="radio"/> General Information					
<input type="radio"/> Contributions Received					
<input checked="" type="radio"/> Contributions Made					
<input type="radio"/> Expenditures Made					
<input type="radio"/> Late and \$5000+ Contributions Received					
<input type="radio"/> Late Contributions Made					
<input type="radio"/> Late Independent Expenditures					
<input type="radio"/> Electronic Filings					
Who did the committee give contributions to, and how much?					
DOWNLOAD THESE RESULTS: MICROSOFT EXCEL					
DATE	PAYEE	CONTEST	POSITION	PAYMENT TYPE	AMOUNT
02/03/2020	RUN, GEORGE, RUN: GEORGE GASCON FOR LA DA 2020		SUPPORT	MONETARY	\$250,000.00
02/19/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$35,000.00
02/13/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$13,375.00
12/09/2019	GASCON, GEORGE	OTHER	SUPPORT	MONETARY	\$4,666.00
03/18/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$4,666.00
01/25/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$4,666.00
01/15/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$4,666.00
04/29/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$4,166.00
06/08/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$4,166.00
03/10/2019	SCHUBERT, ANN MARIE	OTHER	OPPOSE	IND	\$3,333.00
01/25/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$2,632.72
02/28/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$2,532.44
03/02/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$2,263.90
05/29/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$2,150.46
03/18/2019	SCHUBERT, ANN MARIE	OTHER	OPPOSE	IND	\$1,754.40
03/02/2019	SCHUBERT, ANN MARIE	OTHER	OPPOSE	IND	\$1,633.48
06/30/2019	SCHUBERT, ANN MARIE	OTHER	OPPOSE	IND	\$1,302.14
02/12/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$1,272.48
03/05/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$1,114.78
04/14/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$750.00
06/29/2020	GASCON, GEORGE	OTHER	SUPPORT	IND	\$600.00
03/18/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$577.32
04/14/2020	LACEY, JACKIE	OTHER	OPPOSE	IND	\$560.40
06/30/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$511.29
02/28/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$491.87
06/30/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$231.04
06/30/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$209.14
03/31/2019	SCHUBERT, ANN MARIE	OTHER	OPPOSE	IND	\$144.72
03/31/2019	SCHUBERT, ANN MARIE	OTHER	OPPOSE	IND	\$142.69
03/19/2019	SCHUBERT, ANN MARIE	OTHER	OPPOSE	IND	\$74.84
02/28/2020	ROSSI, RACHEL	OTHER	SUPPORT	IND	\$58.33
02/28/2020	GASCON, GEORGE	OTHER	SUPPORT	IND	\$58.33
06/25/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$58.28
02/12/2020	ROSSI, RACHEL	OTHER	SUPPORT	IND	\$50.00
02/12/2020	GASCON, GEORGE	OTHER	SUPPORT	IND	\$50.00
02/28/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$32.34
03/03/2020	GASCON, GEORGE	OTHER	SUPPORT	IND	\$29.25
03/03/2020	ROSSI, RACHEL	OTHER	SUPPORT	IND	\$29.25
03/02/2019	SCHUBERT, ANN MARIE	OTHER	OPPOSE	IND	\$22.62
02/28/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$15.44
06/30/2019	LACEY, JACKIE	OTHER	OPPOSE	IND	\$5.56

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<http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1404289&view=contributions>

To further demonstrate the viewpoint driven effort underway in this proposed rule is the fact that within just weeks of the proponents' June 1, 2020 letter, the Soros funded Justice Collaborative emailed Elected District Attorneys across California, demanding they "reject police union contributions and endorsements" and aggressively threatening: **"We will be publishing whether you respond "yes," "no," or "declined to answer" by Tuesday, July 7th."**

This email was followed a week later with a threat to publish non-compliance: "When [The Appeal](#) publishes the final list of responses, they will use the attached graphic."

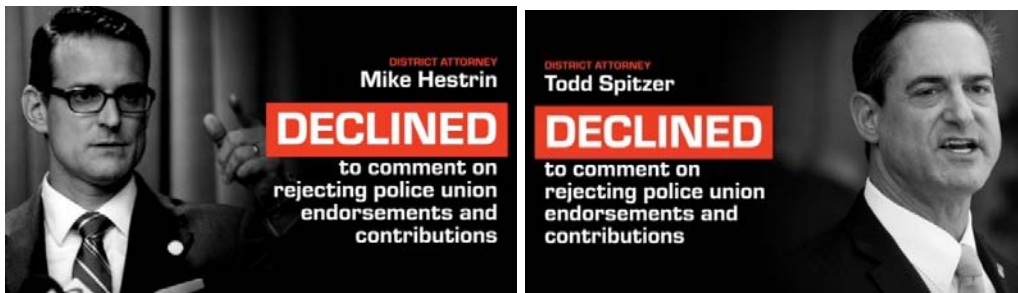


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Perhaps most ironic is the Justice Collaborative’s statement in their email, “Campaign endorsements and contributions send a message to constituents. They tell voters that a candidate aligns with the values and interests of the donor.”

The irony is that this very email demonstrates the core values of the First Amendment and the fundamental protection of political and ideological speech. As poignantly stated in *Citizens United*, “speech is the essential mechanism of democracy” ... and “For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence.”

Revealing all these viewpoint driven candidates begs the obvious question: Should these candidates and Elected District Attorneys be prohibited from accepting endorsements and contributions from these groups, or let alone any other group that “aligns with the values and interests” of the candidate? As divided the values may be among the candidates, the answer to the obvious question is clear: The First Amendment wins.

IV. Conclusion

It is as logically incongruous as it is intellectually disingenuous to assert that law enforcement contributions and endorsements to a District Attorney candidate create an intolerable conflict yet a contribution by an organization requiring a District Attorney candidate to decide to prosecute or not to prosecute a case in conformity with its stated beliefs and mission does not.

The proponents ignore the natural and logical extension of the purpose of the very rule they suggest. If this particular perceived conflict is so egregious as to warrant this proposed remedy, *all* contributions from any organization presenting a perceived conflict should also be prohibited. Moreover, the prohibition on contributions should be extended to *any* lawyer seeking to hold an elected office in order to preserve the integrity of the profession.

Fundamental to our democracy is the notion that the government cannot regulate speech based on its content or viewpoint. Content-based restrictions on speech are presumptively invalid and the United States Supreme Court and the California Supreme Court have held that campaign donations are protected political speech and that a donation in and of itself does not give rise to a conflict of interest. Likewise, California’s Attorney General reached the same conclusion in 2018.

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The proponents' proposed rule is unconstitutional, content driven and politically motivated to silence District Attorneys and candidates who are supported by law enforcement. It is a flawed attempt to stifle opposing viewpoints and chill political discourse. There is no conflict of interest that would authorize a *prohibition* on endorsements and contributions. This proposed rule violates the fundamental principles of democracy and should be wholly rejected.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Charles H. Bell, Jr.", written in a cursive style.

Charles H. Bell, Jr.

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XAVIER BECERRA
Attorney General

State of California
DEPARTMENT OF JUSTICE



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Facsimile: (916) 324-2960
E-Mail: Michael.Farrelle@doj.ca.gov

RECEIVED

MAR 05 2018

ANNE MARIE SCHUBERT
District Attorney

February 28, 2018

Assistant Chief Deputy District Attorney Michael Blazina
Sacramento District Attorney's Office
901 G Street
Sacramento, CA 95814

RE: Conflict of Interest Analysis – Campaign Contributions

Dear Mr. Blazina:

In your letter, dated February 5, 2018, you asked whether campaign endorsements and contributions from an individual or an organization present a conflict that bars the District Attorney from impartially deciding whether to prosecute a case in which that individual is a potential defendant. Your questions focused on an officer-involved-shooting case in which an officer being prosecuted was a member of a labor union that had endorsed and financially contributed to the district attorney's campaign. The short answer to these questions is that there is no conflict.

Under Penal Code section 1424, recusal of a district attorney's office requires proof of a conflict of interest that makes it unlikely that the defendant could receive a fair trial if the district attorney's office prosecutes the case. A conflict has been described as "a structural incentive for the prosecutor to elevate some other interest over the interest in impartial justice, should the two diverge." (*People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 754.) "[A] prosecutor's interest should coincide with the interest of the public in bringing a criminal to justice and should not be under the influence of third parties who have a particular axe to grind against the defendant." (*People v. Parmar* (2001) 86 Cal.App.4th 781, 797 (*Parmar*).)

Published cases in which a disabling conflict has been found are few and generally fall into the following three categories: an employee of the district attorney's office is a crime victim (see *People v. Conner* (1983) 34 Cal.3d 141, *Lewis v. Superior Court* (1997) 53 Cal.App.4th 1277; *People v. Jenan* (2006) 140 Cal.App.4th 782); the district attorney represented the defendant previously (*People v. Lepe* (1985) 164 Cal.App.3d 685); or the district attorney's

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Sacramento District Attorney's Office
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office received money for investigative costs from a victim (see *People v. Eubanks* (1996) 14 Cal.4th 580). As stated in *Parmar*, "...*Eubanks* and virtually every other disqualification case has been concerned with situations in which the prosecutor has either had a personal interest or been claimed to be under the influence of a private party with a personal interest in the prosecution of the particular defendant, usually by virtue of having been a victim." (*People v. Parmar*, *supra*, 86 Cal.App.4th at p. 795.)

In many instances, cases with conflicts of interest can be handled by a district attorney's office after an ethical wall has been established around the affected employee. (See *Stark v. Superior Court* (2011) 52 Cal.4th 368; *People v. Gamache* (2010) 48 Cal.4th 347; *People v. Hamilton* (1985) 41 Cal.3d 211; *People v. Sy* (2014) 223 Cal.App.4th 44; *Hambarian v. Superior Court* (2002) 27 Cal.4th 826; *People v. Lopez* (1984) 155 Cal.App.3d 813; and *Trujillo v. Superior Court* (1983) 148 Cal.App.3d 368.) That focus on fair adjudication of a case is borne out by the fact that failure to recuse a district attorney's office can be harmless on appeal when the district attorney's office "did not infringe upon defendants' state or federal rights to due process of law." (*People v. Vasquez* (2006) 39 Cal.4th 47, 66.) An ethical wall ensures that a defendant receives a fair trial.

The few published cases ordering recusal, as well as courts' acceptance of ethical walls in lieu of recusal, demonstrate that recusal is a disfavored remedy that appellate courts have cautioned should be exercised with "particular caution." (*People v. Lopez* (1984) 155 Cal.App.3d 813, 821-822.) The policy reasons for this position were set out in *Lopez*:

'when the entire prosecutorial office of the district attorney is recused and the Attorney General is required to undertake the prosecution or employ a special prosecutor, the district attorney is prevented from carrying out the statutory duties of his elected office and, perhaps even more significantly, the residents of the county are deprived of the services of their elected representative in the prosecution of crime in the county. The Attorney General is, of course, an elected state official, but unlike the district attorney, is not accountable at the ballot box exclusively to the electorate of the county. Manifestly, therefore, the entire prosecutorial office of the district attorney should not be recused in the absence of some substantial reason related to the proper administration of criminal justice.'

(*Id.*, at p. 822, quoting *Younger v. Superior Court* (1978) 86 Cal.App.3d 180.)

As to whether political contributions create a conflict of interest, it was claimed in another case that city council members should have been disqualified from voting on a subdivision map because developers had donated to the council members' campaigns. The Supreme Court stated, "Political contribution involves an exercise of fundamental freedom

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Sacramento District Attorney's Office
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protected by the First Amendment to the United States Constitution and article I, section 2 of the California Constitution.” (*Woodland Hills Residents Association, Inc. v. City Council of City of Los Angeles* (1980) 26 Cal.3d 938, 946.) “To disqualify a city council member from acting on a development proposal because the developer had made a campaign contribution to that member would threaten constitutionally protected political speech and associational freedoms.” (*Ibid.*) The Court further found that law governing disclosure of campaign contributions “provides for disclosure of campaign contributions by recipients of contributions rather than disqualification of recipients from acting in matters in which the contributor is interested.” (*Ibid.*)

While the act precludes an elected official from participating in a decision in which he has ‘a financial interest’ (Gov. Code, § 87100), it expressly excludes from definition of ‘financial interest’ the receipt of campaign contributions. (Gov. Code, §§ 87103, subd. (c), 82030, subd. (b). Thus, the Political Reform Act -- dealing comprehensively with problems of campaign contribution and conflict of interest -- does not prevent a city council member from acting upon a matter involving the contributor.

(*Id.*, at pp. 946-947; see also *Caperton v. A.T. Massey Coal, Co. Inc.* (2009) 129 S.Ct. 2252, 2263 [“exceptional case” where campaign contributions required recusal of a judge]. Disqualification rules applicable to adjudicators are even more stringent than those that govern the conduct of prosecutors. (*County of Santa Clara v. Superior Ct.* (2010) 50 Cal.4th 25, 56 FN 12.)

Accordingly, 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.

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.

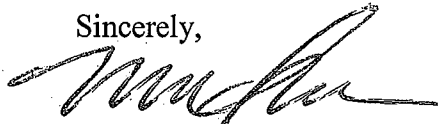
Additionally, the Attorney General’s unavoidable constraints of personnel, funds, and other resources require that the Penal Code section 1424 standard be taken seriously.

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Assistant Chief Deputy District Attorney Michael Blazina
Sacramento District Attorney's Office
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Page 4

Thank you for your letter. And, of course, you are always welcome to call me if you have questions or comments.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Farrell", written over the printed name.

MICHAEL P. FARRELL
Senior Assistant Attorney General

For XAVIER BECERRA
Attorney General

Appendix 4: All Written Comments Received

From: [Matt Wait](#)
To: [Lee, Mimi](#)
Subject: #curetheconflict
Date: Tuesday, August 11, 2020 12:20:08 PM

Good afternoon,

I am writing to support banning prosecutors from taking police union money. It is an obvious conflict of interest, creates perverse incentives, and results in innocent people being locked up.

--

Cheers,

Matt
(323) 505-8869
Organizer, [Ground Game LA](#)



Appendix 4: All Written Comments Received

From: [Anna W Yohannes](#)
To: [Lee, Mimi](#)
Subject: Public Comment on CA State Bar's Committee on Professional Responsibility and Conduct
Date: Tuesday, August 11, 2020 11:33:35 AM

Hello,

My name is Anna Wolde-Yohannes. I am a resident and voter in San Francisco, California.

I am writing to support the ethics proposal to cure the conflict of interest that arises when prosecutors accept law enforcement union money and support.

Prosecutors must be independent in deciding when and who to prosecute. To do this, they must be free of influence from special interest groups. When California's prosecutors are indebted to law enforcement unions that finance their campaigns, endorse their candidacy, and underwrite their political support, a conflict of interest exists. It becomes impossible to trust prosecutors to make decisions regarding officers fairly.

95% of all elected prosecutors receive donations and support from law enforcement unions. And over the past ten years, 98.5% of police that kill in the line of duty are not prosecuted. We need a rule to explicitly preclude prosecutor candidates from accepting support from law enforcement unions as it is the only way we can ensure independence on the part of our elected prosecutors.

I hope you will support this important proposal. Thank you for your consideration.

Sincerely,
Anna Wolde-Yohannes

Appendix 5: List of Speakers Who Provided Oral Comment

SPEAKERS WHO PROVIDED TESTIMONY ON DISTRICT ATTORNEYS REQUEST

<u>Commenter</u>	<u>Testimony Date</u>
Aiden Tawley	August 11
Alana Matthews	December 4
Alex Cerrilla	August 11
Alex Kalish	August 11
Alexander Malik	August 11
Alicia LaFrance	July 24 & August 11
Ana Elisa Fuentes	August 11
Angelena Zeisser	August 11
Asha	July 24
Brian Marvel	July 24 & August 11
Briana Mullen	December 4
Brianna Ruiz	August 11
Cameron Bird	July 24 & August 11
Caroline Cochran	August 11
Chesa Boudin	August 11
Cristine Soto DeBerry	July 24, August 11, October 23, & December 4
Daniel Moore	August 11
David Woolf	August 11
Deboarh Patricia Poulsen	August 11
Ebony Pegues-Gonzalez	August 11
Elizabeth Trejo	August 11
Erin Panichkul	August 11
Faramarz Nabavi	August 11
Galen Spor	August 11
George Chikovani	July 24
Gil Garcetti	December 4
Itak Moradi	August 11
Jadai Hamilton	August 11

Appendix 5: List of Speakers Who Provided Oral Comment

Jajit Singh	August 11
Jamie Yuen-Shore	July 24 & August 11
Jason Jagel	August 11
Jeremy Garrett	August 11
John Brasfield	July 24
John Mathews	July 24
Jonah Storr	August 11
Julian Sarkar	August 11
Julian Williams	August 11
Karina Alvarez	August 11
Kelsey Russom	August 11
Lizza Monet Morales	August 11
Marcus Kaye	August 11
Marshall E. McClain	August 11 & December 4
Maxwell Szabo	August 11
Michael Hartmann	December 4
Molly Watson (Courage California)	July 24
Monica Jaramillo	August 11
Nancy Haydt	December 4
Neha Shah	July 24
Nicholas Musni	August 11
Olympia Francis Taylor	August 11
Pamela Price	August 11
Pat Hardy	December 4
Paul	December 4
Paul Breed	August 11
Phi Tran	July 24
Rabbi Jonathan Klein	July 24
Rachel Marshall	August 11
Rebecca Romanov	July 24
Reiko Sakai	August 11

Appendix 5: List of Speakers Who Provided Oral Comment

Sam Miller	July 24 & August 11
Sharon Elrawi	August 11
Sonja Huang	July 24 & August 11
Soody Tronson	August 11
Stephanie Fudeross	August 11
Stephen Silver	August 11
Steven Le	July 24
TK Devine	July 24
Trang Nguyen	August 11
Travis Richards	July 24
Trea McElhone	July 24
Vern Pierson	August 11
Vivian	July 24
William Brotherson	August 11
Yoel Haile	August 11
Zachary Linowitz	August 11