



The State Bar of California

COMMITTEE ON
RESPONSIBILITY AND CONDUCT

E.4. DA Request
12-03-21 Meeting
Open Session

DATE: December 3, 2021

TO: Members, Committee on Professional Responsibility and Conduct

FROM: Andrew Tuft, Staff Counsel

SUBJECT: E.4. Consideration of Request for Rule Amendment or Ethics Opinion re Campaign Contributions and Prosecutorial Conflicts Following 2021 Legislative Activity

On January 22, 2021, the State Bar Board of Trustees adopted a resolution assigning State Bar the task of monitoring legislative activity concerning restrictions on campaign contributions to candidates for elected prosecutorial office or limitations on prosecutorial offices based on campaign contributions. Following consideration of this activity, COPRAC is asked to determine whether revisions to the Rules of Professional Conduct, or the development of an ethics opinion, would be appropriate.

This memorandum provides a summary of, and attachments related to, the Legislature's consideration of Senate Bill 710 (SB 710). In short, no legislation was enacted during the 2021 legislative session.

BACKGROUND

On June 1, 2020, four district attorneys submitted a letter to the State Bar of California requesting 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.

On July 2, 2020, the State Bar sent a reply letter in which it 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. However, the State Bar acknowledged that the policy issue was “deserving of thoughtful attention and analysis.” The State Bar referred the matter to COPRAC for a more in-depth comprehensive analysis.

COPRAC devoted extensive study and discussion to this issue, including holding a public hearing on August 11, 2020 to receive input regarding the proposal.¹ On December 4, 2020, COPRAC approved a memorandum that addressed the district attorneys' request for a new rule of professional conduct, or an ethics opinion related to campaign contributions and prosecutorial conflicts. That memo is provided as Attachment A.

On January 22, 2021, that memorandum was presented to the State Bar Board of Trustees (Board) along with four options for the Board to consider. After discussion, the Board directed State Bar staff to monitor legislation during the first year of the 2021-2022 legislative session by adopting the following resolution:

RESOLVED, that the Board of Trustees directs staff to monitor legislation and to reach out to the Legislature to offer technical assistance in the first year of the 2021–2022 legislative session concerning the restrictions on campaign contributions to candidates for elected prosecutorial office or limitations on prosecutorial offices based on 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.

DISCUSSION

SB 710 proposed to add sections 1425 and 1425.5 to the Penal Code that would require a district attorney or the Attorney General to recuse themselves from a decision relating to investigating, charging, or prosecuting a peace officer for alleged criminal conduct while on duty if the district attorney or Attorney General received a monetary benefit from a member organization or association solely representing law enforcement in specified circumstances. The proposed legislation also addressed jurisdictional concerns by providing that if a district attorney had to recuse themselves in a matter, the Attorney General would assume responsibility for investigating, charging, or prosecuting the peace officer. If the Attorney General had to recuse themselves under the law, they would need to appoint a special prosecutor to investigate, charge, or prosecute the peace officer. The bill text is provided as Attachment B.

SB 710 was not enacted this year. We do not know the reason why it was not enacted. The legislative history documents² identify some of the following: an estimated yearly fiscal impact of \$24,870,000 beginning in fiscal year 2022-2023; First Amendment and political speech

¹ In advance of the public hearing, 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. That list of questions is provided as Attachment D.

² The bill analyses conducted by the Assembly Committee on Public Safety and the Assembly Committee on Appropriations are provided as Attachment C.

concerns; and political opposition. To be clear, attributing a reason why this legislation was not enacted would be speculative based on the available information.

The Board has assigned COPRAC to consider the Legislature's activity on this issue during 2021, and then determine whether revisions to the Rules of Professional Conduct, or the development of an ethics opinion, would be appropriate. Some options for the Committee to consider include, but are not limited to:

1. The Committee could recommend a new rule of professional conduct that prohibits an elected prosecutor, or a candidate seeking election, from soliciting or receiving political or financial support from law enforcement unions. However, consideration of the proposed rule by COPRAC and the Board would involve addressing the constitutional law, separation of power, and other concerns identified in the December 4, 2020 memo.
2. The Committee could develop a new Comment to Rule of Professional Conduct 1.7 that addresses the adoption of Assembly Bill 1506, as identified in the December 4, 2020 memo, 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.)”

3. The Committee could develop an ethics opinion examining prosecutorial conflicts under rule 1.7(b), including those that may result from campaign contributions or other political support.
4. If and when there are any further developments either via legislation or other legal authority concerning this issue, the Committee could evaluate whether there is a stronger legal foundation for consideration of a rule amendment, ethics opinion, or other option to address this issue.



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

AMENDED IN SENATE MAY 20, 2021

AMENDED IN SENATE MARCH 25, 2021

SENATE BILL

No. 710

Introduced by Senator Bradford

(Principal coauthor: Assembly Member Friedman)

(Coauthor: Assembly Member Lee)

February 19, 2021

An act to add Sections 1425 and 1425.5 to the Penal Code, relating to criminal procedure.

LEGISLATIVE COUNSEL'S DIGEST

SB 710, as amended, Bradford. District attorneys: conflicts of interest.

Existing law authorizes a party to file a motion to disqualify a district attorney, city attorney, or city prosecutor from performing an authorized duty. Existing law requires notice of the motion to be served on the district attorney and the Attorney General at least 10 court days before the motion is heard. Under existing law, 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.

This bill would require a district attorney or the Attorney General to recuse themselves from a decision relating to investigating, charging, or prosecuting a peace officer for alleged criminal conduct while on duty if the district attorney or Attorney General has a conflict of interest, as specified. The bill would state that a conflict of interest exists when a district attorney or the Attorney General who is investigating, charging, or prosecuting a peace officer for alleged criminal conduct while on duty received a monetary benefit from a member organization or association solely representing law enforcement in specified ~~circumstances~~. *circumstances at any point between the time the district*

attorney or the Attorney General filed to run for the office of district attorney or Attorney General until the conclusion of their term in that office.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. The Legislature finds and declares all of the
2 following:

3 (a) The people of California vest peace officers with
4 extraordinary authority, including the power to detain, search,
5 arrest, and use force, including deadly force. The public's faith in
6 the legitimacy of law enforcement, and in the justice system more
7 broadly, depends on officers being held accountable when they
8 abuse that authority.

9 (b) Prosecutors play a fundamental role in pursuing
10 accountability for all who have broken the law, including peace
11 officers. In wielding this authority, they exercise broad discretion
12 in deciding whom to prosecute, what to charge, whether to offer
13 a plea bargain, or whether to dismiss a case altogether. The
14 integrity of this decisionmaking process depends on its
15 independence from financial influence, both real and perceived.

16 (c) Prosecutors and police have a unique relationship.
17 Prosecutors rely on police as their primary witnesses and they
18 work hand-in-hand on a daily basis, often developing close
19 relationships. As a result, there is a widespread perception that
20 prosecutors are subject to undue influence when investigating
21 peace officers accused of crimes alleged to have occurred on duty.

22 (d) When prosecutors accept financial support from associations
23 solely representing peace officers, the public's confidence that
24 they will objectively review allegations of criminal conduct by the
25 officers represented by that association is further undermined.

26 (e) Law enforcement associations regularly provide
27 representation to their members during the course of criminal
28 investigations by the district attorney, when peace officers are
29 alleged to have committed criminal conduct while on duty.

30 (f) Receiving monetary ~~benefits~~ *benefits*, including campaign
31 ~~contributions~~ *contributions*, from entities that finance opposing
32 counsel is in direct contradiction to rule *implicates Rule 1-7* of the

~~State Bar California~~ Rules of Professional Conduct, which ~~generally prohibit~~ *applies to situations in which* a lawyer ~~from representing~~ *represents* a client ~~when and~~ the lawyer has “a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter,” as well as ~~standard~~ *Standard* 3-1.7 of the American Bar Association Criminal Justice Standards for the Prosecution Function, which establish 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,” except as specified.

(g) The California ~~Court of Appeals~~ *Supreme Court* found in *People v. Vasquez* (2004), 122 Cal.App.4th 1027, *People v. Conner* (1983) 34 Cal. 3d 141, 148, that a conflict, for purposes of Section 1424, 1424 of the Penal Code, exists “whenever the circumstances of a case evidence a reasonable possibility that the DA’s office may not exercise its discretionary function in an evenhanded manner. Thus, there is no need to determine whether a conflict is “~~actual~~” ‘*actual*’ or only gives an ‘appearance’ of conflict.”

(h) Procedures exist to ensure that a prosecutor will be disqualified if there is a conflict of interest that would deny the defendant a right to a fair trial. There are currently no means for addressing actual or perceived conflicts of interests that might prevent a prosecutor from fairly investigating and prosecuting a peace officer who allegedly committed a crime while on duty, thereby denying the public and victims of police violence equal justice.

(i) The courts have recognized that attorneys and judges may be subject to laws and ethical rules that limit their speech in order to protect the integrity of the judicial process.

(j) The United States Supreme Court has recognized that ~~financial soliciting campaign contributions to political campaigns~~ *present presents* unique concerns to the fair administration of justice and that the state has an interest in ensuring fair and equal justice by guarding against actual or perceived conflicts of interest in the judicial system. (*Williams-Yulee v. Florida Bar* (2015), (2015) 575 U.S. 433, and *Caperton v. A.T. Massey Coal Co., Inc.* (2009), (2009) 556 U.S. 868.)

(k) It is the intent of the Legislature to eliminate the conflict of interest between prosecutors and peace officers, whether real or

1 perceived, to protect the integrity of the prosecutorial function,
2 support the fair administration of justice, ensure equal justice for
3 victims of police crimes, and build public trust in law enforcement.

4 SEC. 2. Section 1425 is added to the Penal Code, to read:

5 1425. (a) For purposes of this chapter, a conflict of interest
6 exists when both of the following occur:

7 (1) A district attorney or the Attorney General investigating,
8 charging, or prosecuting a peace officer for alleged criminal
9 conduct while on duty received a monetary benefit from any of
10 ~~the following:~~ *following organizations or associations at any point*
11 *between the time the district attorney or the Attorney General filed*
12 *to run for the office of district attorney or Attorney General until*
13 *the conclusion of their term in that office:*

14 (A) A member organization or association solely representing
15 law enforcement that is involved in the investigation.

16 (B) A member organization or association solely representing
17 law enforcement that employed the officer who allegedly
18 committed the crime at the time the alleged crime was committed.

19 (C) A member organization or association solely representing
20 law enforcement of which the officer is a member or was a member
21 at the time of the alleged crime.

22 (2) The member organization or association solely representing
23 law enforcement makes representation in criminal investigations
24 available to its employees or members under criminal investigation
25 for alleged criminal conduct that occurred while on duty.

26 (b) As used in this section, the following definitions apply:

27 (1) A “member organization or association” means a formal,
28 legal organization representing individuals and includes unions.

29 (2) A “monetary benefit” means any financial benefit and
30 includes a direct financial campaign contribution.

31 (3) “Peace officer” has the same meaning as in Section 830.

32 SEC. 3. Section 1425.5 is added to the Penal Code, to read:

33 1425.5. (a) A district attorney or the Attorney General shall
34 recuse themselves from a decision related to investigating,
35 charging, or prosecuting a peace officer for alleged criminal
36 conduct while on duty if the district attorney or the Attorney
37 General has a conflict of interest.

38 (b) Except as otherwise provided in subdivision (c), in the event
39 that a district attorney recuses themselves pursuant to this chapter,

1 the Attorney General shall assume responsibility for investigating,
2 charging, or prosecuting the peace officer.

3 (c) If the Attorney General investigating, charging, or
4 prosecuting the peace officer has a conflict of interest, the Attorney
5 General shall recuse themselves and appoint a special prosecutor
6 to investigate, charge, or prosecute the peace officer.

7
8
9 REVISIONS: _____

10 Heading—Line 3. _____

O

Date of Hearing: June 29, 2021
Counsel: Cheryl Anderson

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

SB 710 (Bradford) – As Amended May 20, 2021

SUMMARY: Requires an elected district attorney or the Attorney General to recuse themselves from a decision relating to investigating, charging, or prosecuting a peace officer for alleged criminal conduct while on duty if that district attorney or Attorney General has received a monetary benefit creating a conflict of interest, as specified. Specifically, **this bill:**

- 1) Provides that a conflict of interest exists when both of the following occurs:
 - a) A district attorney or the Attorney General investigating, charging, or prosecuting a peace officer for alleged criminal conduct while on duty received a monetary benefit from any of the following, at any point between the time they filed to run for office until the conclusion of their term in that office: a member organization or association solely representing law enforcement: (i) that is involved in the investigation, (ii) that employed the officer at the time the alleged crime was committed, or, (iii) of which the officer is or was a member at the time of the alleged crime; and,
 - b) The member organization or association makes criminal representation available to its employees or members under investigation for alleged criminal conduct that occurred while on duty.
- 2) Defines “member organization or association” as a formal or legal organization representing individuals and includes unions.
- 3) Defines “monetary benefit” as any financial benefit and includes a direct financial campaign contribution.
- 4) Defines “peace officer” as specified in current law.
- 5) Requires a district attorney or the Attorney General to recuse themselves from a decision related to investigating, charging, or prosecuting a peace officer for alleged criminal conduct while on duty if the district attorney or the Attorney General has a conflict of interest.
- 6) States that when a district attorney recuses themselves because a monetary benefit has created a conflict, the Attorney General shall assume responsibility for investigating, charging, or prosecuting the peace officer, unless the Attorney General has a conflict of interest.
- 7) Provides that if the Attorney General investigating, charging, or prosecuting the peace officer has a conflict of interest, the Attorney General must recuse themselves and appoint a special prosecutor to investigate, charge, or prosecute the peace officer.

- 8) Makes findings and declarations, including that prosecutors and police have a unique relationship. Prosecutors rely on police as their primary witnesses and they work hand-in-hand on a daily basis, often developing close relationships. As a result, there is a widespread perception that prosecutors are subject to undue influence when investigating peace officers accused of crimes alleged to have occurred on duty. When prosecutors accept financial support from associations solely representing peace officers, the public's confidence that they will objectively review allegations of criminal conduct by the officers represented by that association is further undermined.

EXISTING LAW:

- 1) Sets forth the requirements of a motion to disqualify a district attorney, city attorney, or city prosecutor. (Pen. Code, § 1424.)
- 2) Provides that a motion to disqualify 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. (Pen. Code, § 1424, subd. (a)(1).)
- 3) Provides that if a court finds a prosecuting attorney deliberately or intentionally withheld relevant, material exculpatory evidence or information in violation of the law, and the violation occurred in bad faith, the court may disqualify the prosecuting attorney. (Pen. Code, § 1424.5, subds. (a) & (b)(1).)
- 4) States that a motion to disqualify may be directed at the entire prosecutor's office if there is sufficient evidence that other employees of the prosecuting attorney's office knowingly and in bad faith participated in or sanctioned the intentional withholding of the relevant, material exculpatory evidence or information and that withholding is part of a pattern and practice of violations. (Pen. Code, § 1424.5, subd. (b)(2).)
- 5) 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." (Rules Prof. Conduct, rule 1.7.)

FISCAL EFFECT: Unknown.

COMMENTS:

- 1) **Author's Statement:** According to the author, "SB 710 is a straightforward measure that would address the conflict of interest between prosecutors and law enforcement officers who have committed misconduct. This bill will require prosecutors who have received a monetary benefit from an association that solely represents law enforcement to recuse themselves from the investigation, charging, and prosecution of an officer who is a member of that association. Communities throughout our state are rightfully critical of the relationship between district attorneys and law enforcement associations. This is a clear ethical issue, and our criminal justice system will benefit greatly by addressing this conflict of interest."
- 2) **California Rules of Professional Conduct – Conflict of Interest:** "The California Rules of Professional Conduct are intended to regulate professional conduct of attorneys licensed by

the State Bar through discipline.” (< <http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct> > [as of June 16, 2021].)

Under Rule 1.7(b), a lawyer may not, without informed written consent from each affected client, and as further specified, 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.

Even when a significant risk requiring a lawyer to comply with Rule 1.7(b) is not present, where 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, a lawyer may not represent a client without written disclosure of the relationship to the client, and as further specified. (Cal. Rules Prof. Conduct, rule 1.7(c).)

“The primary purpose of this prophylactic rule is to prevent situations in which an attorney might compromise [their] representation of the client in order to advance the attorney’s own financial or personal interests” (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal. 4th 525, 546 [applying former Rule 3-310].)

This rule does not explicitly preclude a prosecutor from receiving financial support from an organization or association that is financing opposing counsel, and it is unclear if the reach of this rule includes a relationship between a campaign donor and a prosecutor.

- 3) **Statutory Disqualification (Recusal) of Prosecutor on the Ground of Conflict of Interest:** Penal Code section 1424 governs disqualification of a prosecutor: a disqualification 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.” (Pen. Code, § 1424, subd. (a)(1).) The motion may be directed at an individual prosecutor or the entire prosecutor’s office. (See *People v. Hernández* (1991) 235 Cal.App.3d 674, 680.)

The test for disqualification has two parts. First, the moving party must show a conflict, such that 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. Conner* (1983) 34 Cal.3d 141, 148; accord, *People v. Cannedy* (2009) 176 Cal.App.4th 1474, 1479–1480.) Second, to warrant disqualification the conflict must be “so grave as to render it unlikely that defendant will receive fair treatment during all portions of the criminal proceedings.” (*People v. Eubanks* (1996) 14 Cal.4th 580, 592.) The “threshold necessary for recusing an entire office is higher than that for an individual prosecutor.” (*Cannedy, supra*, 176 Cal.App.4th at p. 1481.) “The showing of conflict of interest necessary to justify so drastic a remedy must be especially persuasive. [Citation.]” (*Id.* at p. 1482.)

Importantly, Penal Code section 1424 addresses prosecutorial conflicts that implicate a defendant’s right to a fair trial. This bill is aimed at preventing a defendant from possibly receiving more favorable treatment because of a prosecutorial conflict of interest.

Further, the remedy in Penal Code section 1464 – disqualification (recusal) of the prosecution – isn’t available until charges have been filed. This bill seeks to address a conflict of interest which might result in the prosecution not filing charges against peace

officers in the first place.

This bill contemplates disqualifying the entire office. Does a monetary contribution to the elected district attorney or Attorney General – the head of the office – rise to that level? (*Younger v. Superior Court* (1978) 77 Cal.App.3d 892 [(decided before enactment of Pen. Code, § 1464) conflict wall could not be effectively created with third-ranking administrative prosecutor in the office].)

- 4) **First Amendment and Free Political Speech Considerations:** “Political contribution involves an exercise of fundamental freedom protected by the First Amendment to the United States Constitution and article I, section 2 of the California Constitution.” (*Woodland Hills Residents Assn. v. City Council of L.A.* (1980) 26 Cal.3d 938, 946 (*Woodland Hills*).) “Governmental restraint on political activity must be strictly scrutinized and justified only by compelling state interest.” (*Ibid.*)

In *Woodland Hills*, the California Supreme Court considered whether disqualifying 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. (*Woodland Hills*, *supra*, 26 Cal.App.3d at p. 946.) The Court noted that while disqualifying contribution recipients from voting would not prohibit contributions, it would nonetheless curtail contributors’ constitutional rights. (*Id.* at pp. 946-947.) “Representative government would be thwarted by depriving certain classes of voters (i.e., developers, builders, engineers, and attorneys who are related in some fashion to developers) of the constitutional right to participate in the electoral process.” (*Id.* at p. 947.) According to the Court:

Public policy strongly encourages the giving and receiving of campaign contributions. Such contributions do not automatically create an appearance of unfairness. Adequate protection against corruption and bias is afforded through the Political Reform Act and criminal sanctions.

(*Ibid.*) The Court noted the Political Reform Act provided for disclosure of campaign contributions by recipients of contributions rather than disqualification. (*Id.* at p. 945.)

The campaign contributions at issue in this bill may be more akin to those in the judicial system, as addressed by the *United States Supreme Court in Williams-Yulee v. Florida Bar* (2015) 575 U.S. 433. There, the High Court addressed a local bar rule banning judicial candidates from soliciting campaign contributions. In concluding that the First Amendment permitted this restriction on speech, the Court reasoned:

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. A State may assure its people that judges will apply the law without fear or favor—and without having personally asked anyone for money.

(*Id.* at pp. 437-438.) The Court held that states have a compelling interest in preserving public confidence in their judiciaries. When a state adopts a narrowly-tailored restriction like

the one at issue, those principles do not conflict. (*Id.* at p. 436.)

Proponents of this bill contend that to the extent it implicates political speech, it is narrowly tailored to address a compelling state interest. They contend it is narrowly tailored in that it would not prohibit law enforcement associations from contributing to district attorneys' or Attorney Generals' campaigns. Nor would it prohibit district attorneys or Attorney Generals from accepting such contributions. Instead, the bill would require a district attorney or Attorney General to recuse themselves from the investigation or prosecution of an officer alleged to have committed a crime while on duty if they received a monetary benefit from an association also providing the officer with representation. Proponents contend that maintaining public confidence in the integrity of prosecutors and their investigations of alleged criminal conduct by on-duty officers is a compelling state interest.

- 5) **Argument in Support:** According to the *Prosecutors Alliance of California*, the sponsor of this bill, "Prosecutors play a fundamental role in pursuing accountability for all who have broken the law, including peace officers. Yet California peace officers have seriously harmed or killed hundreds of people and only a handful have faced criminal consequences. As a result, many communities believe that district attorneys are failing to investigate and prosecute police officers with the same objectivity as they do other members of the community. When a district attorney accepts a monetary benefit from an association that represent peace officers, the public's confidence that the district attorney will fairly review allegations of an officer's criminal conduct is critically undermined. When the same association also provides representation to the officer for the criminal investigation, the conflict of interest is even greater, crossing the threshold of what is ethically permissible for any attorney. [¶]...[¶]"

"SB 710 is narrowly tailored to address the unique situation of law enforcement associations contributing to prosecutors' campaigns and then also providing direct representation to an individual suspected of committing a crime. SB 710 does not repeal the right of these associations to make these contributions, nor the right of district attorney candidates to accept those contributions. Rather, the bill will require a district attorney to simply recuse themselves from the investigation or prosecution of an officer alleged to have committed a crime on-duty only if the district attorney received a monetary benefit from an association that also provides representation to the officer for the criminal investigation.

"This bill advances a compelling state interest in maintaining public confidence in the integrity of prosecutors and their investigations of police wrongdoing. The all-too-common act of prosecutors accepting campaign contributions from law enforcement associations, and then failing to hold accountable members of those associations for seemingly criminal acts, corrodes public trust in an institution whose legitimacy hinges on the public's faith in its fairness and impartiality and undermines the integrity of state power more broadly."

- 6) **Argument in Opposition:** According to the *Santa Ana Police Officers Association*, "This bill is a blatant attempt to infringe upon the first amendment rights of peace officer organizations to participate in the political process. Cops alone are singled out here for creating a conflict of interest with these prosecutors.

"Teachers can contribute to the DA and AG and have no restrictions on prosecutions of the educators. Same for doctors, corporate polluters and wildfire-causing utility companies. No

limits on DA or AG authority to prosecute such organizations.

“Curiously, SB 710 allows criminal defense attorneys and anti-police organizations to contribute to the DA or AG without any concern about a similar conflict of interest.

“Does this bill really claim that these sworn officers of the court are improperly influenced by a small contribution made by a cop group? Should lawmakers be prohibited from accepting campaign contributions from organizations that have business before the legislature?”

REGISTERED SUPPORT / OPPOSITION:

Support

Prosecutors Alliance California (Sponsor)
 Asian Americans Advancing Justice - California
 Asian Solidarity Collective
 California Attorneys for Criminal Justice
 California Changelawyers
 California for Safety and Justice
 California Public Defenders Association (CPDA)
 Californians United for a Responsible Budget
 Change Begins With Me Indivisible Group
 Communities United for Restorative Youth Justice (CURYJ)
 Community Advocates for Just and Moral Governance
 Contra Costa County District Attorney's Office
 Del Cerro for Black Lives Matter
 Democratic Club of Vista
 Drug Policy Alliance
 Ella Baker Center for Human Rights
 Friends Committee on Legislation of California
 Govern for California
 Grassroots Law Project
 Hillcrest Indivisible
 Hope for All: Helping Others Prosper Economically
 Initiate Justice
 Legal Services for Prisoners with Children
 Los Angeles County District Attorney's Office
 Los Angeles Regional Reentry Partnership (LARRP)
 Mission Impact Philanthropy
 Nextgen California
 Partnership for the Advancement of New Americans
 Pillars of the Community
 Racial Justice Coalition of San Diego
 Riseup
 San Diego Progressive Democratic Club
 Sd-qtpoc Colectivo
 Showing Up for Racial Justice (SURJ) San Diego
 Showing Up for Racial Justice North County San Diego

Smart Justice California
Social Workers for Equity & Leadership
Team Justice
The Dream Corps
Think Dignity
Uncommon Law
Uprise Theatre
We the People - San Diego
Young Women's Freedom Center

Oppose

California Coalition of School Safety Professionals
California District Attorneys Association
California School Employees Association
Los Angeles School Police Officers Association
Palos Verdes Police Officers Association
Peace Officers Research Association of California (PORAC)
Riverside Sheriffs' Association
Santa Ana Police Officers Association

Analysis Prepared by: Cheryl Anderson / PUB. S. / (916) 319-3744

Date of Hearing: August 19, 2021

ASSEMBLY COMMITTEE ON APPROPRIATIONS

Lorena Gonzalez, Chair

SB 710 (Bradford) – As Amended May 20, 2021

Policy Committee: Public Safety

Vote: 5 - 2

Urgency: No

State Mandated Local Program: No

Reimbursable: No

SUMMARY:

- 1) Provides that a conflict of interest occurs when both of the following occur:
 - a) A district attorney or the Attorney General (AG) investigating, charging or prosecuting a peace officer for alleged criminal conduct while on duty received a monetary benefit from any of the following organizations or associations at any point between the time the district attorney or the AG filed to run for the office until the conclusion of their term in that office:
 - i) A member organization or association solely representing law enforcement that is involved in the investigation.
 - ii) A member organization or association solely representing law enforcement that employed the officer who allegedly committed the crime at the time the alleged crime was committed.
 - iii) A member organization or association solely representing law enforcement of which the officer is a member or was a member at the time of the alleged crime.
 - b) The member organization or association solely representing law enforcement makes representation in criminal investigations available to its employees or members under criminal investigation for alleged criminal conduct that occurred while on duty.
- 2) Provides when a district attorney recuses themselves under this chapter, the AG shall assume responsibility for investigating, charging, or prosecuting the peace officer.
- 3) Provides if the AG investigating, charging or prosecuting the peace officer has a conflict of interest, the AG shall recuse themselves and appoint a special prosecutor to investigate, charge, or prosecute the peace officer.

FISCAL EFFECT:

Costs (General Fund) of \$15,528,000 in fiscal year (FY) 2021-22, \$24,870,000 in FY 2022-23 and \$24,870,000 annually thereafter to the Department of Justice (DOJ) in additional staff and infrastructure to investigate and prosecute cases where the county district attorney's office declares a conflict of interest. DOJ estimates it will need 135 new positions to investigate and prosecute local cases. Costs are based on DOJ's estimate that county district attorney offices will have to recuse themselves in 80% of cases involving fatal officer involved shootings (OIS), 80%

of cases regarding non-fatal OIS and 10 cases regarding in-custody death cases for a total of 124 cases annually. DOJ anticipates filing charges in 6 cases annually. Additionally, DOJ anticipates 80% of all other case types in which district attorney offices may have to recuse themselves, for an additional 160 cases annually. DOJ costs assume a greater degree of law enforcement union contributions than may actually exist. An increasing number of district attorneys have eschewed contributions from police unions.

COMMENTS:

1) **Purpose.** According to the author:

This bill will require prosecutors who have received a monetary benefit from an association that solely represents law enforcement to recuse themselves from the investigation, charging, and prosecution of an officer who is a member of that association. Communities throughout our state are rightfully critical of the relationship between district attorneys and law enforcement associations.

2) **Conflict of Interest.** Elected district attorneys are licensed attorneys. As attorneys, they are required to comply with the California Rules of Professional Conduct. California Rule of Professional Conduct 1.7, subdivisions (b) and (c) states a lawyer may not, without informed written consent from each affected client, 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. Even when a significant risk of conflict exists, where 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, a lawyer may not represent a client without written disclosure of the relationship to the client. This rule, in a practical sense, does not limit prosecutors from accepting law enforcement contributions because they do not have a "client" in the traditional sense and are also elected officials.

3) **Constitutional Concerns.** Law enforcement unions has expressed concerns that this bill unconstitutionally interferes with protected speech in the form of political contributions. Existing law arguably prohibits interfering with or creating legal consequences for political contributions. "Public policy strongly encourages the giving and receiving of campaign contributions. Such contributions do not automatically create an appearance of unfairness." (*Woodland Hills Residents Asso v. City Council of L.A.* (1980) 26 Cal.3d 938, 947.) However, existing case law also allows for jurisdictions to prohibit certain political contributions to judges. United States Supreme Court in *Williams-Yulee v. Florida Bar* (2015) 575 U.S. 433.) The Court held that states have a compelling interest in preserving public confidence in their judiciaries. The Court's reasoning in the *Williams-Yulee* case arguably applies to district attorneys in that the state has a compelling interest in preventing the appearance of conflict in the operations of district attorney's office. California also has several existing conflict of interest.

4) **Argument in Support.** According to the Prosecutors Alliance:

This bill advances a compelling state interest in maintaining public confidence in the integrity of prosecutors and their investigations of police wrongdoing. The all-too-common act of prosecutors accepting campaign contributions from law enforcement associations, and then failing to hold accountable members of those associations for seemingly criminal acts, corrodes public trust in an institution whose legitimacy hinges on the public's faith in its fairness and impartiality and undermines the integrity of state power more broadly.

5) **Argument in Opposition.** According to the Santa Ana Police Association:

This bill is a blatant attempt to infringe upon the first amendment rights of peace officer organizations to participate in the political process. Cops alone are singled out here for creating a conflict of interest with these prosecutors. Teachers can contribute to the DA and AG and have no restrictions on prosecutions of the educators. Same for doctors, corporate polluters and wildfire-causing utility companies.

Analysis Prepared by: Kimberly Horiuchi / APPR. / (916) 319-2081



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?

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.