June 16, 2020

Sent Via U.S. Mail

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

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

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

Dear Chair Alan Steinbrecher and Interim Executive Director Donna Hershkowitz:

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

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

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I. The Proposed Rule is Unconstitutional

A. The First Amendment protects campaign endorsements and expenditures.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Conclusion

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

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

Brian R. Marvel
President

Enclosure(s)

Brian R. Marvel — *President*
Damon Kurtz — *Vice President*
Timothy Davis — *Treasurer*
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