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Yolanda M. Jackson

June 23, 2020

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

Dear Chair Alan Steinbrecher and Interim Executive Director Donna Hershkowitz:

We, of the Board of the Bar Association of San Francisco (“BASF”), write to you in the wake of the killings of George Floyd, Ahmaud Arbery, Breonna Taylor, and countless others in California and beyond to urge the State Bar to adopt a new rule of professional responsibility to reduce the possibility that law-enforcement unions will exert, or will be perceived as exerting, political influence over prosecutorial decision making.

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

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

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

his or her functions”; and her duty “is to seek justice, not merely to convict.” (ABA Criminal Justice Standards: Prosecution Function, Standard 3-1.2, subds. (b) & (c).) Because a prosecutor exercises vast discretion when deciding whether to investigate, whether to charge, and how to charge, she “should have, as nearly as possible, a detached and impartial view of all groups in his community.” (Robert H. Jackson, “The Federal Prosecutor,” speech delivered at the Second Annual Conference of United States Attorneys, Great Hall, Department of Justice Building, Washington, D. C., April 1, 1940.¹)

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

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

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

¹ Available at <https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf>.

prosecution where the prosecutor has received financial or political support from such an attorney.

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

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

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

Sincerely,



Yolanda Jackson
Executive Director and General Counsel
The Bar Association of San Francisco

cc: Donna Hershkowitz - Donna.Hershkowitz@calbar.ca.gov