THE HONORABLE THOMAS W. SNEDDON, JR., DISTRICT ATTORNEY, COUNTY OF SANTA BARBARA, has requested an opinion on the following questions:

1. May a county public defender's investigator lawfully identify himself to a member of the general public by displaying a badge?

2. What restrictions, if any, does the law place on the display of a badge by a county public defender's investigator?

3. May a county public defender's investigator display a badge which incorporates the Seal of the State of California or the seal of the county or the city and county?
CONCLUSIONS

1. A county public defender's investigator who is a county employee may lawfully identify himself or herself to a member of the general public by displaying a badge.

2. A county public defender's investigator may not display a peace officer's badge, a badge which falsely purports to be a peace officer's badge, or a badge which so resembles a peace officer's badge as would deceive an ordinary reasonable person into believing that it is being used by one who by law is given the authority of a peace officer.

3. A county public defender's investigator may not display a badge which incorporates the Seal of the State of California if such display would violate Government Code section 402 or Penal Code section 146a. A county public defender's investigator's badge may incorporate the county seal or the seal of the city and county if such use of the local seal is not prohibited by local laws.

ANALYSIS

I

The badge we are discussing is a device which is used to identify the person exhibiting it as an investigator for the county public defender. The badge will normally be displayed in the hand or in a wallet-size case which may also bear an identification card.

The office of county public defender is established by the board of supervisors. (Gov. Code, §§ 27700-27712.) In 62 Ops.Cal.Atty.Gen. 360 (1979) we determined that a county public defender's office was neither a law enforcement agency nor a criminal justice agency. As we noted at page 363, while a county public defender may make an investigation of certain factual matters surrounding a charged offense, the duty to do so is owed "to his client."

No statute creates the position of county public defender's investigator. We are informed that some public defenders may hire investigators as county employees; other public defenders may employ licensed private investigators on a contract or case-by-case basis. In any event, a county public defender's investigator is not a peace officer. (See Pen. Code, ch. 4.5, §§ 830-832.6.)
We find no provision in state law which would prohibit per se the display of a badge by a county public defender's investigator. Accordingly, such person may lawfully identify himself to a member of the general public by displaying a badge. However, as we shall see, there are state law restrictions on the use and design of badges.

II

Sheriffs and their deputies are furnished by the county board of supervisors with badges inscribed "Sheriff" or "Deputy Sheriff." (Gov. Code, § 26690.) Humane officers must exhibit badges when making arrests. (Civ. Code, § 607f.) Badges which bear the Seal of the State of California and are inscribed with the words "California Highway Patrol" are issued to members of the California Highway Patrol. (Veh. Code, § 2257.) Penal Code section 830.10 provides that any "uniformed peace officer shall wear a badge, nameplate, or other device which bears clearly on its face the identification number or name of such officer." These and other peace officers customarily are issued badges of a design authorized by their employing agencies and display such badges to identify themselves and to show their governmental authority. (See Batts v. Superior Court (1972) 23 Cal.App.3d 435, 438-439.)

Penal Code section 538d provides:

"Any person other than one who by law is given the authority of a peace officer, who willfully wears, exhibits, or uses the authorized badge, insigne, emblem, device, label, certificate, card, or writing, of a peace officer, with the intent of fraudulently personating a peace officer, or of fraudulently inducing the belief that he is a peace officer, is guilty of misdemeanor.

"Any person who willfully wears, exhibits, or uses, or who willfully makes, sells, loans, gives, or transfers to another, any badge, insigne, emblem, device, or any label, certificate, card, or writing, which falsely purports to be authorized for the use of one who by law is given the authority of a peace officer, or which so resembles the authorized badge, insigne, emblem, device, label, certificate, card, or writing of a peace officer as would deceive an ordinary reasonable person into believing that it is authorized for use of one who by law is given the authority of a peace officer, is guilty of a misdemeanor."

1 We have not examined county laws to determine if any local restrictions exist.
The first paragraph of the statute forbids a person who is not a peace officer from willfully displaying a genuine peace officer's badge with the intent of fraudulently impersonating a peace officer or inducing the belief that he or she is a peace officer. The second paragraph of the statute prohibits (1) the display of a badge which "falsely purports to be authorized for the use of one who by law is given the authority of a peace officer" or (2) the display of a badge which "so resembles the authorized badge" of a peace officer "as would deceive an ordinary reasonable person into believing that it is authorized for the use of one who by law is given the authority of a peace officer." This paragraph would forbid a person who is not a peace officer from using a badge designed or inscribed in such a manner that it "falsely purports" to be the genuine article, e.g., a badge with the words "Police Officer." This paragraph also would prohibit the use of a badge which "resembles" an authorized peace officer's badge, e.g., a badge shaped or inscribed similarly to that of the sheriff's department's badge. Under this last provision the ultimate test is whether an "ordinary reasonable person" would be deceived by the use of the similar badge.2

A county public defender's investigator may not display a peace officer's badge or a badge which on its face purports to be a peace officer's badge. We turn then to the question of when a badge "resembles" a peace officer's badge thus making its display illegal under section 538d.

The purpose of the prohibition is to prevent confusion among members of the general public as to the identity or authority of a person exhibiting a badge. In 27 Ops.Cal.Atty.Gen. 213, 214 (1956) we concluded that a private patrolman may wear a badge and cautioned that "it should be as distinguishable from those of the authorized peace officers as is possible so as not to cause confusion." (See Bus. & Prof. Code, § 7539, subd. (h).)

Peace officer badges are usually designed in the shapes of shields or stars or combinations of both such forms. The general public associates these designs with police officers, sheriff's deputies and other law enforcement officers. County public defender's investigators' badges similarly fashioned would resemble peace officers' badges similarly fashioned would resemble peace officers' badges similarly fashioned would resemble peace officers' badges similarly fashioned would resemble peace officers' badges similarly fashioned would resemble peace officers'

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badges and would likely deceive an ordinary reasonable person into believing that the investigators have the authority of peace officers. In our view a county public investigator's badge should not be in the form of a shield or a star. It has been suggested that the inscription "Public Defender's Investigator" upon the face of a shield or star badge would preclude any possible misunderstanding on the part of an ordinary person. This, of course, would be a question of fact depending upon the opportunity or ability of the ordinary reasonable person to see or read the badge and to comprehend its function. Badges are often "flashed", i.e., briefly exhibited, and persons may react to a badge "through fear or respect." (In re Tony C. (1978) 21 Cal.3d 888, 895.) The circumstance under which it is displayed or any statements made by the person showing it will be factors in deciding whether such badge deceives someone into believing the one exhibiting it is indeed a peace officer.

As we observed earlier, some county public defenders' investigators are licensed private investigators. The Private Investigator Act, in Business and Professions Code section 7539, provides:

"(d) No licensee, or officer, director, partner, manager, or employee of private investigator licensees, shall use a badge in connection with the official activities of the licensee's business."

Generally, a private investigator employed by a public defender on a contract or case-by-case basis may not use a badge while engaged in that employment. The public defender would be just another client of the private investigator. However, a county public defender's investigator who is a county employee is exempt from the Private Investigator Act when engaged in his governmental duties. (Bus. & Prof. Code, § 7522, subd. (b).) Such county employee, though also a licensed private investigator, may wear a badge when performing his official duties. Likewise, a licensed private investigator who is employed by a county public defender for wages or salary, who is listed on his employer's payroll records, who has all legally required deductions and contributions

3 Resemblance is the degree of likeness between two objects. "[I]f an object looks like a duck, walks like a duck and quacks like a duck, it is likely to be a duck." (In re Deborah C. (1981) 30 Cal.3d 125, 141 (Mosk, concurring).)

4 Such shield or star badge when exhibited to a peace officer, e.g., a correctional officer at a jail or prison, is unlikely to be misleading. However, members of the general public may not be able to distinguish a peace officer from one who is not, e.g., a district attorney's "investigator" (a peace officer under Pen. Code, § 830.1, subd. (a)) from a public defender's "investigator." Peace officer status is given to persons in a large number of employments and situations making it difficult to distinguish those who are and those who are not. (See Pen. Code, ch. 4.5, §§ 830-832.6.)
withheld by his employer and who is directed and controlled by his employer, is exempt from the Act and thereby its restriction on badges. (Bus. & Prof. Code, §§ 7512.10-7512.12, 7522, subd. (a).)

We conclude that a county public defender's investigator may not display a peace officer's badge, a badge which falsely purports to be a peace officer's badge, or a badge which so resembles a peace officer's badge as would deceive an ordinary reasonable person into believing that it is being used by one who by law is given the authority of a peace officer.

III

The design of the Great Seal of the State of California is set out in Government Code section 400. Government Code section 402 provides:

"Every person who maliciously or for commercial purposes uses or allows to be used any reproduction or facsimile of the Great Seal of the State in any manner whatsoever is guilty of a misdemeanor."

We have found no reported case construing this provision. However, the question we are asked assumes any reproduction of the state seal on a county public defender's investigator's badge would not be for commercial purposes. Could such use of the seal, nevertheless, be malicious within the meaning of section 402?

In People v. McCree (1954) 128 Cal.App.2d 196, 202 the court examined the term "maliciously" citing section 7, subdivision 4, of the Penal Code which defines "maliciously" as follows:

"The words 'malice' and 'maliciously' import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law."

The court continued, distinguishing the term "maliciously" from the term "intentionally":

"'Intentionally'" is often used as synonymous with 'knowingly,' and when so used an act is intentional if the person who does it is conscious of what he is doing, and its probable consequences, without regard to the motive which induced him to act. The fact an act was done intentionally or knowingly does not result in the conclusion that it was done maliciously. Moreover, an act willfully done is not necessarily a malicious act. (Royal Indemnity Co. v. Sherman, 124 Cal.App.2d 512 [269 P.2d 163].) In the
case of *In re Carneross*, 114 F.Supp. 119, the court, considering the identical contention which the appellant presses in the instant case, i.e., 'Are the terms "malicious" and "intentionally" synonymous,' held as follows: 'The words malicious and intentionally are not synonymous; nor does the one include the other. Something more than an intention to do the thing afterwards pronounced as a wrong and inexcusable is necessary to constitute malice.' To the same effect also is *State v. Willing*, 129 Iowa 72 [105 N.W. 355 ]."

Consequently, if the state seal were reproduced on a badge in order to vex, annoy or injure another person, or with the intent to do a wrongful act, such use of the seal would be prohibited. (See 59 Ops.Cal.Atty.Gen. 393 (1976).) However, a decision by a county public defender to incorporate the state seal on his investigators' badges for the sole purpose of providing his investigators with devices for identification would not, in our opinion, be a malicious use of the seal. This use, however, may be misleading to the general public.

The county public defender is not a state officer. Unpub. Ops.Cal.Atty.Gen. I.L. 75-256 (1975). The county public defender's salary, office, equipment and general expenses are paid by the county. (Gov. Code, §§ 27708-27711.) He reports to the county board of supervisors. (Gov. Code, § 27710.) When appointed by the court to represent an indigent, a county public defender does not represent the state but represents his client. (*In re Hough* (1944) 24 Cal.2d 522, 528-529; see Pen. Code, §§ 987-987.9.)

Penal Code section 146a forbids a person from falsely representing himself to be "a public officer, or investigator, inspector, deputy or clerk in any state department" and acting in certain ways in such assumed character. In our view a badge incorporating the state seal would suggest to the observer that the investigator using it is connected with some state department and this use together with conduct indicative of such association may result in a violation of section 146a.

Generally, a public seal is a stamp or impression made by a public officer with an instrument provided by law to attest the execution of an official or public document. (Code Civ. Proc., §§ 14, 1930-1931.) County clerks and courts keep seals for this purpose. (Gov. Code, §§ 26807, 68074-68078.) A county seal may be established by charter, ordinance or code. (See Charter of the City and County of San Francisco, art. I, § 1.101.) We see no obstacle to a public defender's investigator's badge bearing the county seal if such use is not forbidden by local law. However, if incorporation of the local seal makes the badge deceptively similar to a peace officer's badge, Penal Code section 538d would forbid the use of such badge.

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