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12 STATE OF CALIFORNIA

13 PUBLIC EMPLOYMENT RELATIONS BOARD

14 SAN BERNARDINO COUNTY PUBLIC  
15 ATTORNEYS ASSOCIATION,

16 Petitioner,

17 vs.

18 COUNTY OF SAN BERNARDINO,

19 Respondent.

20 PERB CASE NO. LA-CE-554-M

21 RESPONDENT'S BRIEF IN SUPPORT  
22 OF ITS STATEMENT OF  
23 EXCEPTIONS

24 The County of San Bernardino (the "County") hereby files this brief in support of its  
25 statement of exceptions to the proposed decision dated March 27, 2013, in PERB Case No.  
26 LA-CE-554-M (*Drew*), pertaining to Deputy Public Defender (DPD) Mark Drew.

27 *Drew* is a companion case to *San Bernardino County Public Attorneys Association v.*  
28 *County of San Bernardino*, PERB Case No. LA-CE-431-M (*Berman/Willms*), pertaining to  
DPDs Lisa Berman and Stephen Willms. (Prop. Dec. p. 2, fn. 2.) The County and the San  
Bernardino County Public Attorneys Association (Association) stipulated that the parties could  
in *Drew* reference evidence admitted into evidence in *Berman/Willms*. (Prop. Dec. p. 2.)

The County filed exceptions to the proposed decision in *Berman/Willms*. PERB has not  
issued a decision in *Berman/Willms*. As discussed herein, the proposed decision in the current

1 case contradicts crucial portions of the proposed decision in *Berman/Willms*. The County  
2 requests that both proposed decisions be considered together and that PERB issue a single  
3 decision at to all issues in both cases.

## 4 5 I. INTRODUCTION.

### 6 7 A. Background.

8  
9 Deputy District Attorneys (DDAs) and DPDs of the County are part of the same  
10 bargaining unit<sup>1</sup> and since 2001 have been represented by the Association.<sup>2</sup> The Association's  
11 Board of Directors consists mainly of DDAs.<sup>3</sup> The MOUs between the parties for the relevant  
12 time provide that the Association may designate employee representatives in disciplinary  
13 proceedings.<sup>4</sup> Beginning in late 2006, DPDs did not want to be representatives anymore  
14 because of the alleged behavior of then Public Defender Doreen Boxer.<sup>5</sup> The Association never  
15 filed an unfair practice charge alleging that Boxer interfered with the right of DPDs to be  
16 representatives, but instead started appointing DDAs to represent DPDs in disciplinary  
17 proceedings. This happened five times,<sup>6</sup> with the Drew interview being number five. In each  
18 interview, for conflict of interest and client confidentiality reasons, Boxer did not allow the  
19 DDA to represent the DPD. The Public Defender wanted to review with Drew certain  
20 performance issues. (Jt. Drew Ex. 1 1:20-2:4.) After Boxer refused to permit DDA Sharon  
21

22 <sup>1</sup> The Attorney Unit comprises County employees in the classification of DDA, DPD, Child Support Attorneys,  
23 and Legal Research Attorneys. (E.g. Appendix B of the 2005-2008 Memorandum of Understanding (2008 MOU)  
24 (Joint Ex. A.) At all times relevant herein, this unit consisted of approximately 240 DDAs, 100 DPDs, and a  
small number of the other attorneys. (*Berman/Willms* Trans. Vol. II 4:28-5:14.)

25 <sup>2</sup> See "Recognition" article of 2008 MOU (Joint Ex. A p. 1).

26 <sup>3</sup> At all times relevant herein, the Board of Directors consisted of six DDAs, one DPD, and one Child Support  
27 Attorney; DDA Grover Merritt was a board member and the president of the Association. (*Berman/Willms* Trans.  
28 Vol. I 17:10-19:9.)

<sup>4</sup> Jt. Ex. A p. 5; Jt. Ex. B p. 5.

<sup>5</sup> Boxer is no longer employed by the County.

<sup>6</sup> See the investigative interviews of DPDs Rodrigo Curbelo (Jt. Ex. C), Carson (Jt. Ex. D), Berman (Jt. Ex. G),  
and Willms (Jt. Ex. X). The Curbelo and Carson interviews were briefly discussed in *Berman/Willms*.

1 Caldwell to represent Drew,<sup>7</sup> the Association appointed Marianne Reinhold, who is general  
2 counsel to the Association.<sup>8</sup> Reinhold was rejected because she would not promise not to  
3 disclose confidential client information to DDAs. Drew was given several hours to find another  
4 representative. Another DPD or another outside attorney was acceptable as long as the attorney  
5 would agree not to disclose confidential client information to DDAs. Drew was ordered to  
6 appear at the interview upon threat of insubordination. Eventually Drew proceeded with the  
7 interview without representation.<sup>9</sup>

8 The Public Defender and the District Attorney believe that, given the function of each  
9 office in the criminal justice system, there is an inherent adversarial professional relationship  
10 between the attorneys of each office, and that because of such adversarial relationship, a  
11 DDA's representation of a DPD in any disciplinary proceeding gives rise to conflicts of interest  
12 and violations of ethical duties and adversely effects the operations of each office. Soon after  
13 the Drew interview, the Public Defender's Office prepared and adopted two written policies,<sup>10</sup>  
14 and the District Attorney's Office prepared a draft written policy,<sup>11</sup> which essentially  
15 memorialized their respective concerns and objections. Both offices' draft policies were  
16 submitted to the Association for review and comment.<sup>12</sup>

17 The Public Defender and the District Attorney believe that their respective positions on  
18 representation merely constitute formal justifications for what was already the past practice of  
19 the parties, i.e., DDAs represent DDAs and DPDs represent DPDs in disciplinary hearings.

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21 <sup>7</sup> (Jt. Drew Ex. 2.) Also, at this time Caldwell and Drew were opposing counsel in the multi-felony case of *People*  
22 *v. Anthony Esparza Garcia*, San Bernardino Superior Court Case No. FSB704832. (Jt. Drew Exs. 3 and 10.)

22 <sup>8</sup> Drew Ex. 1 2:14-16.

23 <sup>9</sup> Jt. Drew Ex. 4.

24 <sup>10</sup> One was entitled "Confidential Information in Attorney Personnel Actions" and the other was entitled  
25 "Potential Conflict Situations in Personnel Actions." (Drew Jt. Ex. 6; Resp. Exs. 10 and 11.)

25 <sup>11</sup> In late May or early June 2009, the District Attorney had his office prepare a draft policy prohibiting a DDA  
26 from representing or being represented by a DPD in a disciplinary proceeding. (Resp. Drew Ex. A.)

26 <sup>12</sup> The Public Defender also offered to meet with the Association to discuss the draft policies and any other  
27 matters that might help to settle the dispute. The Public Defender also offered to assist in the development of  
28 DPDs as representatives. (Jt. Drew Ex. 6.) The parties met but no agreement was reached. (Jt. Drew Exs. 8 and 9.)  
The Public Defender adopted the two policies. (Resp. Exs. 10 and 11.) Assistant District Attorney James  
Hackleman forwarded the draft policy to Merritt. Merritt, on behalf of the Association, rejected the concerns of  
the District Attorney and considered the draft policy to violate the MMBA. (Resp. Drew Ex. B.)

1           **B. The Proposed Decision.**  
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3           Although the County has filed exceptions to some of the findings of fact regarding the  
4 interview with Drew, overall the ALJ correctly concluded that Drew requested representation  
5 for an investigatory meeting that he reasonably believed might result in disciplinary action.  
6 (Pp. 12-13.) The County does not dispute that under the circumstances Drew's right to  
7 representation and the Association's right to appoint representatives were triggered. The Public  
8 Defender and the District Attorney contest, however, the *manner* in which these rights were  
9 exercised. The ALJ correctly found that the Public Defender's Office denied Drew's request to  
10 be represented either by DDA Caldwell or Reinhold. (Pp. 12-13.)

11           The County believes that the ALJ did not apply the correct legal standards and made  
12 significant mistakes and omissions of material fact.  
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14           **1. Interference with protected rights.**  
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16           In summary, the ALJ opined that: The option to Drew to find another representative  
17 "was not a realistic option given the short notice and because there were no other DPD  
18 Association representatives at the time." Ferguson ordered Drew to participate in the meeting  
19 unrepresented and that this order interfered with Drew's right to representation. (P. 13.) The  
20 argument that the Association was aware of the County's opposition to DDAs being informed  
21 of confidential information discussed during personnel meetings was "unimpressive" because  
22 "[a]dvance notice that an employer will violate protected rights is not a defense." (Pp. 13-14.)

23           The ALJ found that that the case was not about accommodating Drew's preference but  
24 rather was about the County's "total denial" of Drew's right to be represented by the  
25 Association, since having a DPD as a representative was not an option. (Pp. 15-16.) The ALJ  
26 found that: "[T]he thrust of the County's position is that its actions were necessary to protect  
27 against conflicts of interest that arise from the inherent adversarial relationship between the  
28 Public Defender's Office and the District Attorney's Office. The County also asserts that its

1 actions were needed to prevent disclosure of confidential client information and internal work  
2 product to the District Attorney's Office." (P. 16.)

3 The ALJ found that no confidential information or attorney work product was disclosed  
4 during the interview of Drew (p. 17), but that even if it had been disclosed, "the County has not  
5 shown that it had 'no alternative' to a total denial of Drew's right to representation." (P. 19) The  
6 ALJ found that if the County was unwilling to accommodate Drew's request for Association  
7 representation, the County had the option of cancelling the interview, providing Drew the  
8 option of either forgoing the interview altogether or proceeding without representation,  
9 obtaining client consent for the disclosure of confidential information, or redacting the  
10 confidential information. (Pp. 19-20.) The ALJ found that the County did not utilize any of  
11 these options or establish why those or other options were unavailable. (P. 20.)

12 The ALJ concludes that, among other things, the County interfered with Drew's right to  
13 representation and the Association's right to represent its members. (P. 20.)

## 14 15 **2. Unilateral Change to Policy Within Scope of Representation.**

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17 The ALJ reviewed only the Public Defender's confidential information policy. The ALJ  
18 found that: The policy completely prevents DDAs from representing DPDs in disciplinary  
19 proceedings involving confidential client information and restricts DPDs from being appointed  
20 as representatives unless they agree not to disclose such information to "the Association." The  
21 policy fundamentally changes the Association's right to appoint representatives as set forth in  
22 the MOU. (P. 21.) Under the MOU's "zipper" clause the Association was under no obligation  
23 to bargain over the policy. (P. 22.) The policy "actually" prevents all current Association  
24 representatives from representing DPDs in disciplinary proceedings and that DPDs must face  
25 the possibility of discipline without any Association representation. (Pp. 24-25.)

26 The ALJ found that, although it may be argued that preventing DPDs from violating  
27 their ethical duties to clients concerned the Public Defender's representation services to the  
28 public, "this argument is ultimately unpersuasive due to the profound effect on traditionally

1 negotiable subjects and the lack of any legal authority indicating that monitoring attorneys'  
2 ethical responsibilities has traditionally been treated as a managerial prerogative." (P. 26.)

3 The ALJ stated that the County fails to explain why the Public Defender's exercise of  
4 independence in representing criminal defendants must come at the expense of MMBA-  
5 protected rights and that the mere fact that the Public Defender has ethical obligations to its  
6 clients does not override the County's obligations under the MMBA to negotiate over issues  
7 within the scope of representation, and that the County's prior negotiations over the  
8 representation clause undermines the argument about independence. (Pp. 27-28.)

9 The ALJ concluded that the policy is within the scope of bargaining and its adoption  
10 violates the duty to negotiate in good faith. (P. 28.)

### 11 12 **3. Jurisdiction.**

13  
14 The ALJ found that PERB, not the courts, has jurisdiction over the current dispute. The  
15 Court of Appeal found that PERB has jurisdiction in the matter. (*County of San Bernardino v.*  
16 *San Bernardino County Pub. Attys. Ass'n*, 2012 Cal. App. Unpub. LEXIS 4776, Court of  
17 Appeal of California, Fourth Appellate District, Division Two, June 26, 2012, Opinion Filed,  
18 Case No. E051576.) The County believes that the Court of Appeal and the ALJ ruled  
19 incorrectly on the issue of jurisdiction, for the reasons stated in its motion to dismiss in the  
20 instant case.

## 21 22 **II. RECOMMENDED** 23 **APPROACH FOR REVIEW.**

24  
25 The County does not believe it makes sense to review the interference charge regarding  
26 the Drew interview (and the Berman and Willms interviews) separately from the unilateral  
27 change charge regarding the Public Defender's information policy. The Public Defender's  
28 conflict policy should also be reviewed together. This is because the Public Defender's actions

1 in the Berman, Willms, and Drew interviews were not isolated incidents, but rather, reflected  
2 the office's "policy" position. Likewise, the District Attorney's "policy" position should also be  
3 reviewed. The District Attorney is an indispensable party. His deputies' ethical duties are also  
4 at issue and the prosecution function is adversely affected by the Association's actions.

5         Consequently, the County believes that it would appropriate, as well as the most  
6 effective use of administrative resources, if PERB first determined whether the Public  
7 Defender and the District Attorney are each justified in prohibiting DDAs from representing  
8 DPDs in any disciplinary proceeding. PERB should also determine whether any meet and  
9 confer obligations were necessary or already met, and whether such obligations were limited to  
10 the "effects" of any actions by the Public Defender or District Attorney. If PERB finds that an  
11 outright ban is not justified, then PERB should determine under what circumstances, if any, a  
12 DDA may be prohibited from representing a DPD in a disciplinary proceeding. See, e.g., the  
13 confidential client information "exception" formulated by ALJ Allen in *Berman/Willms*. If a  
14 total or partial prohibition is justified, then PERB should review the Public Defender's two  
15 written policies to ensure that they conform accordingly and order any necessary revisions  
16 thereto.

17         Second, PERB should take whatever "rule of representation" it determines is justified  
18 and apply it to the Berman, Willms, and Drew matters to determine whether the Public  
19 Defender's denial of the DDA representative was appropriate.

20         Third, PERB should determine whether Ferguson's rejection of Reinhold as Drew's  
21 representative was justified, in light of any rule permitting the non-disclosure of confidential  
22 client information to DDA representatives.

23         Fourth, PERB should determine whether Boxer's directive to Willms that he attend the  
24 interview under threat of insubordination and whether Ferguson providing several hours for  
25 Drew to find another representative and insistence that he participate in the investigative  
26 interview upon threat of insubordination were appropriate.

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**III. FAILURE TO FIND AN INHERENT ADVERSARIAL  
PROFESSIONAL RELATIONSHIP BETWEEN PROSECUTORS  
AND PUBLIC DEFENSE COUNSEL**

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Before turning to the ALJ's analysis of whether the Public Defender was justified in rejecting Caldwell and Reinhold as a representative for Drew, we think it is important to reiterate that the entire dispute here is predicated on the Public Defender's and the District Attorney's understanding that there is an inherent adversarial professional relationship between the prosecutors and the public defense counsel of the County, and that because of such adversarial relationship, a DDA's representation of a DPD in a disciplinary proceeding gives rise to conflicts of interest and violations of ethical duties and adversely effects the operations of each office in a number of ways.

Thus, what is troubling to the Public Defender in the current dispute is not that confidential client information, material to a disciplinary proceeding involving a DPD, is disclosed to a third party, i.e., the DPD's representative,<sup>13</sup> but rather, that such confidential information is disclosed to a representative who is a *prosecutor*. The ethical duties at issue are not just the Public Defender's and the DPD's duty of confidentiality, but also the duty of loyalty and the duty of competence.

This is why, as we discuss below, it is an ethical and constitutional problem for DDA representatives to obtain detailed adverse information about DPDs even though such information may not necessarily be considered attorney-client privileged or attorney work

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<sup>13</sup> The Public Defender believes that the rationale and holding in *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294 (*Fox Searchlight*) allow the Public Defender to disclose confidential client information to a representative of a DPD in a disciplinary proceeding, as long as there are sufficient legally binding safeguards in place regarding the disclosure. In *Fox Searchlight*, the court concluded that, notwithstanding the duty of loyalty and duty of confidentiality, an in-house counsel could disclose ostensible employer-client confidences to her own attorneys to the extent they might be relevant to the preparation and prosecution of her wrongful termination action against her former client-employer. The court recognized that the attorneys for the in-house counsel are themselves bound by the rules of confidentiality and attorney-client privilege. The facts of the current case differ in important respects, but the Public Defender believes that the analysis is applicable, especially in light of the court's recognition that "fundamental fairness" permits such limited disclosure of otherwise confidential client information in order that an attorney-employee may vindicate his or her employment rights otherwise enjoyed by non-attorney employees. The Public Defender believes that the rationale and holding in *Fox Searchlight* should be construed narrowly.

1 product. The fact of this inherent adversarial professional relationship also means that a DDA's  
2 representation of a DPD in a disciplinary hearing causes other ethical and operational problems  
3 above and beyond the improper disclosure of confidential client information.

4 ALJ Cu fails to make any finding that there is such inherent adverse professional  
5 relationship.

6 To summarize the main factors that create such inherent adversarial professional  
7 relationship: The criminal justice system is based on an adversarial system between prosecutor  
8 and defense attorney where both sides are expected to zealously represent their respective  
9 clients. (*People v. Dehle* (2008) 166 Cal.App.4th 1380, 1387; *People v. Cropper* (1979) 89  
10 Cal.App.3d 716, 720-721.) There is an array of protected and privileged communications and  
11 confidential information, specific to both sides, that is recognized through laws and defined  
12 ethical obligations. Both sides are required to protect the confidences of their clients. The cases  
13 handled by the Public Defender account for the large majority of all criminal filings, and all  
14 civil commitment filings, of the District Attorney each year. (*Berman/Willms* Trans. Vol. II  
15 30:4-13.) DPDs and DDAs face each other repeatedly in court throughout the year. This  
16 adversarial relationship between the two groups of attorneys is inherent, full-time, and  
17 institutionally defined.

18 Consequently, the courts, the Legislature, the Attorney General, and various national  
19 bar associations have all recognized the need to strictly separate the prosecution and defense  
20 functions. Thus, a prosecutor may not represent or assist in the defense of any person accused  
21 of a crime. (Gov't Code, § 26540; Gov't Code, § 24100; *People v. Rhodes* (1974) 12 Cal.3d  
22 180; Bus. & Prof. Code, § 6131.) A prosecutor may not circumvent this prohibition by taking a  
23 leave of absence. (66 Ops.Cal.Atty.Gen. 30 (1983).) A prosecutor should not participate in a  
24 prosecution if defense counsel and the prosecutor have a significant personal or financial  
25 relationship. (Cal. Rules Prof Conduct, rule 3-320; American Bar Association, Standards of  
26 Criminal Justice, Prosecution Function (Third Edition) ("ABA Prosecution Function"), std. 3-  
27 1.3(g) (Resp. Ex. 16).) A prosecutor should avoid representation of an *agent* of any person who  
28 is under criminal investigation, charged, or indicted. (National District Attorneys Association,

1 National Prosecution Standards, Second Edition (1991), 7.2c and accompanying commentary  
2 (Resp. Ex. 15.)

3 The ALJ's failure to make a finding that there is an inherent adversarial professional  
4 relationship between the attorneys of the two offices is a significant mistake of fact and law.

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6 **IV. THE REJECTION OF CALDWELL AS DREW'S**  
7 **REPRESENTATIVE WAS APPROPRIATE BECAUSE IT**  
8 **CONTRADICTED THE PARTIES' PAST PRACTICE.**  
9

10 The Public Defender does not dispute that Drew had a right to be represented during the  
11 investigative interview. The question is whether his request to be represented by Caldwell  
12 constituted an appropriate exercise of this right. If the answer is "no," then such particular  
13 request cannot be considered to be protected activity and the first element of an interference  
14 violation based on such particular request would not be satisfied.<sup>14</sup>

15 The answer is "no." Drew's request to be represented by DDA Caldwell, and the  
16 Association's appointment of Caldwell to represent Drew, were directly contrary to the past  
17 practice of the parties. The Association has argued that prior to Boxer becoming the Public  
18 Defender, DDAs had been permitted to represent DPDs in disciplinary proceedings.  
19 (Association post-hearing brief p. 3:23.) The evidence in the record contradicts this claim.

20 The Association's claim rested on the testimony of DDA Merritt at the hearing in  
21 *Berman/Willms* that in one instance prior to Boxer's appointment as Public Defender, the  
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23  
24 <sup>14</sup> The *Tulare/Carlsbad* standard applies in cases where an employer is alleged to have interfered with the rights of  
25 an employee. First, a charging party must establish that the employee was engaged in a protected activity. Second,  
26 the charging party must establish that the employer engaged in conduct that tends to interfere with, restrain, or  
27 coerce the employee in the exercise of the activity. Third, once the charging party demonstrates this, the burden  
28 shifts to the employer to produce a legitimate business reason for its conduct. Where the harm to the employee's  
rights is slight, and the employer offers justifications based on operational necessity, the competing interest of the  
employer and the rights of the employee will be balanced and the charge resolved accordingly. Where the harm is  
inherently destructive of the employee's rights, the employer's conduct will be excused only on proof that it was  
occasioned by circumstances beyond the employer's control and that no alternative course of action was available.  
(*Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231-M (*Stanislaus*), citing *Public*  
*Employees Association of Tulare County, Inc., v. Board of Supervisors of Tulare County* (1985) (*Tulare*) 167  
Cal.App.3d 797, 807, and *Carlsbad Unified School District* (1979) PERB Decision No. 89 (*Carlsbad*)).

1 Association contemplated using DDA Cheryl Kersey to represent a DPD in a disciplinary  
2 proceeding. (*Berman/Willms* Tran. Vol. I 35:19-36:23.) But Merritt admits that Kersey never  
3 represented the DPD. (*Berman/Willms* Tran. Vol. I 36:21-23.) In any event, one instance does  
4 not make a past practice.

5 Assistant District Attorney James Hackleman's testimony also refutes the Association's  
6 claim that DDAs had represented DPDs in disciplinary proceedings prior to Boxer's  
7 appointment as Public Defender. He testified that he had been involved in disciplinary  
8 proceedings, and that he did not recall DDAs representing or being represented by DPDs in  
9 any disciplinary proceedings prior to 2001 (prior to the Association being designated as the  
10 exclusive representative of the Attorney Unit). (*Berman/Willms* Trans. Vol. V 33:1-11.) He  
11 testified that after 2001 DDAs had represented DDAs in disciplinary proceedings and that he  
12 was not aware of Kersey representing any DPDs. (*Berman/Willms* Trans. Vol. V 33:12-26,  
13 34:11-16, 42:28-43:4.)

14 The Association attempted to offer evidence that the practice of DDAs representing  
15 DPDs in disciplinary proceedings was established in the County of Orange. This was  
16 presumably done in an attempt to prove that such practice was not unusual. The Association  
17 had Bernadette Cemore, Senior Deputy Public Defender at the County of Orange Public  
18 Defender's Office, testify. She testified that she had been vice-president of their attorneys  
19 association (which represents DDAs and DPDs) since about 1995. Yet the only testimony she  
20 offered on the issue was that she "believes" there was one instance where a DDA represented a  
21 DPD in an investigative matter, but that she was "not positive." (*Berman/Willms* Trans. Vol.  
22 VIII 64:26-65:9, 70:23-71:4.) One possible instance in 14 years (she testified in 2009) does not  
23 establish a past practice.

24 Hackleman testified that his office did a "little bit of a survey to see if this issue of  
25 cross-representation was duplicated in other counties." He testified that "we didn't find another  
26 county where there was cross-representation, even where both the public defenders and the  
27 DAs were in the same association." (*Berman/Willms* Trans. Vol. V 36:22-26.)

28 The evidence in the record therefore shows that prior to the dispute with the

1 Association over representation, the past practice of the parties had been that DDAs do not  
2 represent DPDs in disciplinary proceedings. This past practice was also shared by the County  
3 of Orange and apparently other counties. These are material facts because they show that the  
4 Public Defender's Office and the District Attorney's Office did not change positions on the  
5 issue of representation -- the Association did. These facts also give credence to the objections  
6 of the Public Defender and the District Attorney. It was only when the Association broke with  
7 this widely-followed practice that the Public Defender, and then the District Attorney, were  
8 forced to object to the Association's new practice and to articulate the specific reasons why it  
9 was so problematic.

10 The Association attempted to justify its total deviation from past practice. Beginning in  
11 early January 2007, DDA Merritt claimed that DPDs no longer wanted to be representatives of  
12 other DPDs in disciplinary proceedings because of the alleged mistreatment they received from  
13 Boxer. Merritt therefore started appointing DDAs to represent DPDs in disciplinary  
14 investigations. (Jt. Ex. E p. 2; Jt. Ex. H p. 4; Resp. Ex. Drew B p. 2.)

15 These allegations against Boxer, even if we assume *arguendo* they are true, in no way  
16 justifies the Association's abandonment of past practice. The Association had a fully adequate  
17 means to seek redress. It could have filed an unfair practice charge alleging that Boxer  
18 interfered with a DPD's right to be an employee representative in disciplinary proceedings.  
19 The Association never did this. Instead, it took an improper short-cut and abandoned a widely-  
20 held past practice, causing unnecessary strife between the parties, a significant expenditure of  
21 time and resources by the parties, and disruptions to the criminal justice system.<sup>15</sup> The  
22 Association did this, moreover, when, as a practical matter, maintaining the past practice would  
23 be relatively easy -- there are approximately 100 DPDs from which the Association may  
24 choose representatives for DPDs in disciplinary proceedings.

25 The ALJ makes no mention of any of the above-described material facts. By omitting  
26 them, the ALJ is able to characterize Boxer's refusal to permit Caldwell to represent Drew and  
27 Ferguson's statement on February 20, 2009, that a DPD would be an acceptable representative  
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<sup>15</sup> See, for example, *People v. Garcia*, n. 7.

1 of Drew, as some type of unprecedented action in violation of the literal wording of the  
2 representation article of the MOU, rather than what it was -- merely adhering to a common-  
3 sense past practice. Neither Drew nor the Association was engaged in protected activity when  
4 Caldwell was appointed to represent Drew in the disciplinary proceeding. No prima facie case  
5 has been shown that the Public Defender interfered with the representation rights of either  
6 Drew or the Association when the Public Defender refused to permit Caldwell to represent  
7 Drew at the disciplinary proceeding.

8  
9 **V. THE ALJ'S FINDING THAT NO CONFIDENTIAL**  
10 **INFORMATION WAS DISCLOSED DURING THE**  
11 **INTERVIEW WITH DREW IS INCORRECT.**  
12

13 The ALJ found that no attorney client privileged information or attorney work product  
14 was discussed during the meeting. (P. 17.) The ALJ's finding is not supported by the evidence  
15 in the record or law. The Public Defender had a legitimate business reason in prohibiting the  
16 disclosure of such confidential information to a DDA acting as an employee representative,  
17 given the inherent adversarial professional relationship between prosecutors and public defense  
18 counsel. This reason is more significant than the reason the Los Angeles County Sheriff used  
19 to justify his restriction on representation in *Association for Los Angeles Deputy Sheriffs v.*  
20 *County of Los Angeles* (2008) 166 Cal.App.4<sup>th</sup> 1625 (*ALADS*) (sheriff prohibited deputies  
21 involved in a shooting from consulting collectively with the same lawyer or union  
22 representative before being interrogated by the department.) In *ALADS*, the justification was  
23 not based on a statutory or other lawful requirement, but rather, was based on the public policy  
24 of ensuring the integrity of the investigative process. The justification of the Public Defender is  
25 based on clearly established ethical duties and the fact of the inherent adversarial professional  
26 relationship.

1           **A. The ALJ failed to acknowledge the scope of the duty of confidentiality.**  
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3           The duty of confidentiality is fundamental to the attorney-client relationship because a  
4 client is not only encouraged to reveal sensitive and potentially incriminating information to  
5 his or her counsel, but also because the client reposes confidence in the lawyer. Thus the  
6 lawyer may not do anything to breach this trust. The obligation to protect client confidential  
7 information has been described as a “very high and stringent one.” (*Flatt v. Superior Court*  
8 (1994) 9 Cal.4<sup>th</sup> 275, 288-289.) This duty encompasses matters protected by the attorney-client  
9 privilege, the work product doctrine, but also a much *broader* category of information,  
10 including information obtained during such representation that would be embarrassing or likely  
11 detrimental to the client. (Bus. & Prof. Code, § 6068(e)(1); Rules Prof. Conduct, rule 3-100,  
12 Discussion (Resp. Ex. 12).)

13           Nowhere in the proposed decision is there any language that suggests that the Public  
14 Defender or DPDs have a “very high and stringent” obligation to protect such confidential  
15 information. Nor does the ALJ acknowledge the “broader category of information” that is  
16 deemed confidential under Business and Professions Code section 6068(e), including  
17 information likely detrimental to clients. Nowhere does the ALJ mention that the duty of  
18 confidentiality is particularly stringent in the context of disclosure to prosecutors.  
19

20           **B. The ALJ failed to accurately describe the confidential information discussed at**  
21 **the investigative interview.**  
22

23           In describing the investigative meeting with Drew, the ALJ failed to mention that  
24 Ferguson discussed with Drew a *Marsden* motion<sup>16</sup> filed against him and identified the name  
25 of the client who filed it. Drew provided details of the *Marsden* hearing, including his  
26

27 <sup>16</sup> *People v. Marsden* (1970) 2 Cal. 3d 118. In *Marsden*, the California Supreme Court held that a defendant must  
28 be permitted to state the reasons why he believes a court-appointed counsel should be discharged. The issue in a  
*Marsden* hearing is whether the continued representation by an appointed counsel would substantially impair or  
deny the right to effective counsel. (*Marsden, supra*, 2 Cal.3d at p. 123; see also *People v. Carr* (1972) 8 Cal.3d  
287, 299.)

1 recollection of the allegations made against him and his representation of the client. (Drew J.  
2 Ex. 5 865:22-868:8.) This discussion between Drew and a managing attorney was clearly  
3 attorney work product. Furthermore, prosecutors are not even permitted to attend a *Marsden*  
4 hearing itself (where they would discover the reasons why a client seeks the discharge of his or  
5 her appointed counsel) – it is held in camera.<sup>17</sup> No DDA in his or her capacity as a  
6 representative had a right to discover why a client sought the discharge of Drew.<sup>18</sup>

7 The ALJ failed to mention that Ferguson identified by name a number of clients that  
8 Drew was supposed to have pre-trial interviews with, and that Ferguson asked Drew why the  
9 interviews did not occur. (Drew Jt. Ex. 5 860:14-863:10.) This discussion between Drew and a  
10 managing attorney was attorney work product. Such disclosure to a prosecutor could also be  
11 damaging to the identified clients, since a prosecutor would know which clients were not  
12 adequately prepared before trial. More generally, it is prejudicial to the Public Defender and  
13 her clients for prosecutors to discover through the internal discipline process that Drew has an  
14 apparent tendency not to meet with clients before trial.

15 The ALJ mentioned that Ferguson discussed with Drew his failure to annotate his case  
16 files, but failed to mention that Ferguson identified the names of the clients. (Drew Jt. Ex. 5  
17 845:14-16.) The annotations relate directly to the Public Defender's conflict check system.<sup>19</sup>  
18 The ALJ did not mention that Ferguson informed Drew about a particular case, identified by  
19 client name, in which the Public Defender had to declare a conflict because Drew had not  
20 updated his case file. (Drew Jt. Ex. 5 869:1-5.). Such information is attorney work product and  
21 its disclosure is harmful to clients. A prosecutor should not discover through the internal  
22 review process information about potential unchecked conflicts of interest in criminal cases.

23  
24  
25 <sup>17</sup> *People v. Barnett* (1988) 17 Cal.4th 1044, 1094 (*Marsden* hearings are held outside the presence of  
26 prosecutors.)

27 <sup>18</sup> This was not the *Marsden* motion filed in *People v. Garcia*. See note 7.

28 <sup>19</sup> Appointed counsel has the ethical obligation, as does a private attorney, to screen prospective clients for  
conflicts before accepting employment and before interviewing prospective clients. Prescreening can avoid  
potential disqualification that result from interviewing both clients. (See *Yorn v. Superior Court* (1979) 90  
Cal.App.3d 669, 675-676.)

1 The ALJ stated that Ferguson discussed with Drew his failure to appear in court on  
2 time. The ALJ did not mention, however, that a particular judge, identified by name, had  
3 contacted the Public Defender's Office to complain about Drew. A DDA should not be privy to  
4 a judge's private complaints to the Public Defender's Office about a DPD. DDAs appear in  
5 court on a regular basis with this very judge and with the DPD in question.

6 All of the above-described information discussed at the meeting was attorney-client  
7 privileged, attorney work product, or fell within the much *broader* category of information  
8 under Section 6068(e), including information that would likely be detrimental to the client.

9  
10 **VI. THE ALJ FAILED TO FIND THAT UNDER *CARROLL***  
11 **OTHER PUBLIC DEFENDER INFORMATION WAS ALSO**  
12 **PROTECTED FROM DISCLOSURE TO DDAS.**  
13

14 The only category of Public Defender information that ALJ Cu (and ALJ Allen) found  
15 problematic if disclosed to DDAs in their capacity as representatives was attorney-client  
16 privileged information and attorney work product. This was a mistake of law. ALJ Cu (and  
17 ALJ Allen) failed to acknowledge that the Public Defender was constitutionally entitled not to  
18 disclose to DDA representatives information produced during the interview with Drew if such  
19 disclosure would interfere with the Public Defender's independence in the representation of  
20 clients, regardless of whether the information was attorney-client privileged or attorney work  
21 product. Protection of such information was further justification for the Public Defender's  
22 actions.

23  
24 **A. The *Carroll* standard.**  
25

26 In *Coronado Police Officers Association v. Carroll* (2003) 106 Cal.App.4th 1001  
27 (*Carroll*), a police officers association sought a writ of mandate to compel a public defender to  
28 grant the association access to the public defender's database pursuant to the Public Records

1 Act. The database comprised information from client files, including information about alleged  
2 Fourth Amendment violations by officers, augmented with information from public sources.  
3 (*Carroll, supra*, 106 Cal.App.4<sup>th</sup> at pp. 1004-1006.)

4 The Court's analysis focused on the principle articulated in *Polk County v. Dodson*  
5 (1981) 454 U.S. 312, 321-322 (*Polk*), that in the capacity as public defense counsel, a public  
6 defender maintains the same level of professional independence as a private attorney, and thus  
7 the state is *constitutionally* obligated to respect that independence. (*Carroll, supra*, 106  
8 Cal.App.4<sup>th</sup> at p. 1007.)

9 The Court found the database was retained and used to assist in the defense of clients.  
10 The Court stated that the public defender is charged with protecting the interests of its clients,  
11 that these were private functions to which the public defender is entitled to maintain a level of  
12 independence equivalent to a private attorney, and that allowing the association to dictate what  
13 information the public defender may retain and evaluate would unnecessarily intrude upon its  
14 work, when private defense counsel is not subject to similar intrusion. The Court stated that  
15 requiring the public defender to disclose the contents of its database on demand would be  
16 detrimental to the public interest in providing legal representation to indigent criminal  
17 defendants. (*Id.* at pp. 1008-1009, 1015-1016.)

18 It is important to note that in *Carroll*, the issue was not whether the information sought  
19 to be disclosed was attorney-client privileged or attorney work product, but whether it was of  
20 such nature that its disclosure to the union would interfere with the public defender's ability to  
21 represent clients.

22  
23 **B. Disclosure of the information in the Drew interview to DDAs would interfere**  
24 **with the Public Defender's ability to represent her clients.**

25  
26 If Caldwell was permitted to represent Drew during the investigation and thereafter,  
27 Caldwell would have received during the interview specific negative information about Drew's  
28 performance in the representation of clients, including information about his failure to

1 interview clients prior to trial, his receiving a *Marsden* motion, his failure to update his client  
2 files and the conflict check system, his failure to provide up-to-date witness lists in his files,  
3 and a judge's private criticism of him.

4 Caldwell would have, due to her being a prosecutor, an inherently adverse interest in  
5 such negative information about Drew. How helpful this information would be to Caldwell or  
6 any other DDA in the prosecution of criminal cases cannot be measured with any specificity,  
7 but it is reasonable to conclude that the interference caused by such disclosure would be far  
8 greater than any interference caused by the disclosure of a database of the type described in  
9 *Carroll*. A relevant similarity with *Carroll* is that the unions in both cases represent employees  
10 who are part of the "prosecution team."

11 The Public Defender has a duty to provide competent representation to clients. Such  
12 duty obligates the Public Defender to supervise the work of subordinate attorney employees  
13 and, if necessary, to take disciplinary action.<sup>20</sup> (*Layton v. State Bar* (1990) 50 Cal.3d 889, 900;  
14 Cal. Rules Prof. Conduct, Rule 3-110, Discussion.) Allowing Caldwell or any other DDA to  
15 represent a DPD in a disciplinary proceeding would interfere with such duties.

16 Prosecutors would never get the opportunity to literally go within the four walls of a  
17 private criminal defense law firm to participate in the office's internal review process and to  
18 discover the weaknesses of certain associates in representing clients or the instances when such  
19 associates have violated their ethical duties. Allowing Caldwell to represent Drew in the  
20 disciplinary proceeding would mean that the Public Defender was not entitled to maintain the  
21 same level of professional independence as a private defense attorney.

22  
23  
24  
25  
26 <sup>20</sup> The State Bar has specifically found that there may be circumstances under which the competence of a deputy  
27 public defender would be of concern to the public defender since the public defender has some responsibility to  
28 supervise the work of a subordinate attorney. In such situation, an issue relating to the imposition of office  
discipline could arise out of the representation of a client by the deputy. Thus the public defender may want to  
review the office file relating to that representation. (Cal. State Bar Standing Committee on Professional  
Responsibility and Conduct, State Bar Formal Opinion No. 2002-158 (Resp. Ex. 14).)

1           **C. The ALJ misinterpreted *Carroll*.**

2  
3           The ALJ found that “the present case is readily distinguishable” from *Carroll* because  
4 the Association did not request records under the Public Records Act and is not asserting that  
5 the Public Defender is a “state actor,” but rather, was attempting to represent a unit member in  
6 an investigatory interview. The ALJ also noted that *Carroll* did not address the duty of  
7 confidentiality. (Pp. 18-19.)

8           These factual observations are correct; but not relevant. The rationale and holding of  
9 *Carroll* are in no way dependent on these “distinguishing” factors. *Polk* had nothing to with a  
10 request for public records or the duty of confidentiality. *Polk* dealt with a plaintiff convict's 42  
11 U.S.C.S. § 1983 action alleging that the public defender failed to adequately represent the  
12 convict on appeal, which action the Supreme Court found unavailable to the plaintiff.

13           The core principle articulated in *Polk*, and utilized in an entirely *different* context in  
14 *Carroll*, was that notwithstanding that a public defender is paid by and has a relationship to the  
15 state and is otherwise subject to laws regulating government actors, the Constitution will not  
16 permit other government actors or private actors to interfere with the *independence* necessary  
17 for a public defender to discharge his or her duty to effectively represent indigent criminal  
18 defendant clients.

19           The ALJ, like the dissent in *Carroll*,<sup>21</sup> failed to recognize the broad *constitutional*  
20 principle at issue. The ALJ failed to consider the application of this constitutional principle to  
21 the current case.

22           The ALJ, when reviewing the Public Defender's confidential information policy, also  
23 found that there is a “lack of any legal authority indicating that monitoring attorneys' ethical  
24 responsibilities has traditionally been treated as a managerial prerogative.” The ALJ continues:  
25 “In fact, the Rules of Professional Conduct regulate the conduct of all members of the State  
26

27 <sup>21</sup> The dissent in *Carroll* found the public defender's maintenance of the database was not closely related enough  
28 to the individualized representation of particular clients to immunize such information from disclosure. (*Carroll*,  
*supra*, 106 Cal.App.4th at p. 1026.) The *Carroll* majority disagreed and found that “[a]lthough the facts and  
procedural context in *Polk* are distinguishable, the principle stated therein is apposite.” (*Id.* at 1007.)

1 Bar, not just managers. (Rules Prof. Conduct, rule 1-100.)." (P. 26.) The ALJ's analysis is  
2 inapposite. Rule 3-310 places the ethical duty to monitor subordinate attorneys precisely on the  
3 managing attorney. That the Public Defender is the attorney of record for all cases handled by  
4 her office (*People v. Sapp* (2003) 31 Cal.4th 240, 256), reinforces this duty. The Rules of  
5 Professional Conduct do not obligate any other attorney or person to monitor and supervise the  
6 performance of subordinate attorneys. In any event, ethical duties are not negotiable.

7 The ALJ also found that: "The County asserts that it has a significant interest in  
8 protecting the independence of the Public Defender in representing criminal defendants . . . .  
9 The County fails to explain, however, why its exercise of this independence must come at the  
10 expense of MMBA-protected rights." (P. 27.) The Public Defender has not taken a high-handed  
11 approach with respect to her need to supervise her attorneys performance and discharge of the  
12 duty of competence. It is not unreasonable for the Public Defender to consider that her own  
13 ethical duties preclude her from allowing opposing counsel to take part in and access sensitive  
14 information produced in the disciplinary process. The expense is minimal, given that all the  
15 Association needs to do is to appoint DPDs to represent DPDs in disciplinary proceedings.  
16 Given the significant constitutional and ethical issues implicated, appointing a DPD in such  
17 circumstance is reasonable. There is no significant adverse effect on the right to representation.

18  
19 **VII. REINHOLD WAS REJECTED AS A REPRESENTATIVE**  
20 **BECAUSE SHE REFUSED TO PROMISE NOT TO PROVIDE**  
21 **PROTECTED INFORMATION TO DDAS.**  
22

23 The Public Defender's position with respect to Reinhold representing Drew was simple.  
24 Reinhold would be acceptable if she promised not to disclose to DDAs any information that  
25 DDAs were not entitled to obtain directly via their role as representatives. The record is clear  
26 that, although Reinhold was exasperated about Ferguson's demand and seemed to suggest that  
27 she would take a common sense approach to the issue given that she was obligated to  
28 communicate *something* to the Association Board of Directors so it could do its job in

1 representing unit members, ultimately Reinhold did not promise not to disclose protected  
2 information to DDAs. Given the seriousness of the Public Defender's duties of loyalty,  
3 competence, and confidentiality, it was entirely reasonable for Ferguson to reject Reinhold's  
4 casual approach to the problem.

5 Prior to the dispute with the Association over representation, there had been an  
6 informal but clear-cut accommodation of the potential difficulties lurking in a unit that  
7 included two sets of attorneys that had a inherent adversarial professional relationship -- DDAs  
8 simply did not represent DPDs in disciplinary proceedings. All of the subsequent difficulties  
9 created when the Association started appointing DDAs to represent DPDs in disciplinary  
10 proceedings, as identified by the Public Defender and the District Attorney and which have  
11 posed an obvious headache for the courts and PERB to analyze, have forced the Public  
12 Defender to formalize its approach in making sure that the ethical duties of her and her  
13 deputies are discharged. This included requiring Reinhold to formally promise not to disclose  
14 confidential information to DDAs. Reinhold did not do this. The Public Defender was justified  
15 in rejecting her as a representative for Drew in the disciplinary proceeding.

16  
17 **VIII. THE FINDING THAT THE PUBLIC DEFENDER PROVIDED**  
18 **NO "REALISTIC" OPTIONS TO DREW AND THAT THERE WAS A**  
19 **"TOTAL DENIAL" OF DREW'S RIGHT TO REPRESENTATION**  
20 **ARE NOT SUPPORTED BY THE EVIDENCE OR THE LAW.**  
21

22 The ALJ found that: "It offered to reschedule the meeting later that day if Drew could  
23 find a DPD to represent him, but this was not a realistic option given the short notice and  
24 because there were no DPD Association representatives at the time." (P. 13.) Later in the  
25 proposed decision, the ALJ found that that the case was not about accommodating Drew's  
26 preference but rather was about the County's "total denial" of Drew's right to be represented by  
27 the Association, since having a DPD as a representative was not an option and that therefore  
28 the County's conduct was "inherently destructive" of MMBA-protected rights. (Pp. 15-16.)

1           These essentially identical findings are not supported by the evidence in the record or  
2 the law.

3  
4           **A. It was unreasonable for the Association not to appoint DPDs to represent**  
5 **DPDs in disciplinary proceedings.**

6  
7           The ALJ puts too much stock in the Association's position that there are currently no  
8 DPDs appointed to be employee representatives of DPDs in disciplinary proceedings. As  
9 previously discussed, the past practice of the parties was that DDAs do not represent DPDs in  
10 disciplinary proceedings. Prior to the current dispute, DPDs, including DPD Susan Israel  
11 (Berman/Willms Trans. Vol. VIII 14:18-27), represented DPDs in disciplinary proceedings.  
12 This past practice was also followed in the County of Orange and apparently in other counties.

13           The fact that in late 2006 or early 2007 the Association *chose* to stop appointing DPDs  
14 as representatives of DPDs in disciplinary proceedings does not negate the fact that DPDs have  
15 been appointed to represent DPDs in disciplinary proceedings for many years. That the  
16 Association chose to stop doing this does not negate the fact that there are at least 100 DPDs in  
17 the Attorney Unit. There is no legal or practical barriers that prevents the Association from  
18 drawing upon this pool of unit members when appointing employee representative for DPDs in  
19 disciplinary proceedings.

20           There is no reason why the ALJ should transform the fact that there are *currently* no  
21 DPDs appointed to be employee representatives of DPDs in disciplinary proceedings into some  
22 immutable condition that precludes their appointment as representatives now or hereafter. The  
23 ALJ's position begs the question: Why can't the Association simply appoint DPDs to represent  
24 DPDs in disciplinary proceedings? The County is aware of no case law or decisions of PERB  
25 or the NLRB where a union, when in a dispute with an employer about the availability of  
26 certain employee representatives or the appropriateness of certain employee representatives,  
27 can simply cordon off almost half of its membership and legally insulate them from any  
28 consideration by the adjudicative body when resolving the dispute.

1           The fact that the Association chooses not to appoint DPDs as employee representatives  
2 of DPDs in disciplinary proceedings did not prevent ALJ Allen from finding that, when  
3 confidential Public Defender client information is material to a disciplinary action, the Public  
4 Defender is justified in prohibiting a DDA from representing a DPD in a disciplinary  
5 proceeding.

6  
7           **B. No further advance notice or options were necessary for Drew.**

8  
9           The ALJ found that the option to Drew to find another representative "was not a  
10 realistic option given the short notice and because there were no other DPD Association  
11 representatives at the time." (P. 13.)

12           If the Drew interview was the first instance in which the Association appointed a DDA  
13 to represent a DPD in a disciplinary proceeding, and the first time the Public Defender objected  
14 to such type of appointment, then it would be important to determine whether the Public  
15 Defender provided sufficient time for the Association and Drew to discuss the issue with the  
16 Public Defender and to find alternative representation. But that is not the situation in the instant  
17 case. The alleged shortness of the notice was not an issue. As discussed above, the Public  
18 Defender had been objecting to DDAs representing DPDs for over two years.

19           In any event, Ferguson did provide the Association and Drew further time to find  
20 another representative. Ferguson also provided Reinhold with the opportunity to further discuss  
21 the disclosure of confidential information issue with the Association.<sup>22</sup> If the options were  
22 limited to Drew, this was primarily because the Association simply refuses to appoint DPDs to  
23

24  
25           <sup>22</sup> The ALJ failed to mention that Ferguson was willing to reschedule the meeting to later that  
26 day to give Reinhold the opportunity to contact the Association to tell them that, as his  
27 attorney, Reinhold has a fiduciary duty to Drew and that she would have a "sacred oath" that  
28 she could not violate by "sharing information with them that's not appropriate." (Drew Jt. Ex.  
4 6:27-7:2.)

1 represent DPD in disciplinary hearings. As discussed above, this is not reasonable or  
2 acceptable behavior, given the uncontested inherent adversarial professional relationship  
3 between the two groups of attorneys.

4 It is unclear why, as a practical matter, Reinhold could not have agreed to some  
5 relatively high level concept about not disclosing confidential information to any DDAs. The  
6 Public Defender did not object to Reinhold disclosing non-confidential information to DDAs.  
7 And the Public Defender was acceptable to the disclosure of confidential information to DPDs.  
8 There is no reason why a panel of DPDs of the Association could not review the confidential  
9 information produced in a disciplinary matter and advise the Association board without  
10 violating any duty of confidentiality. The DDAs who run the Association seem to forget that  
11 DPDs can also take part in running the Association. There were plenty of options for the  
12 Association to respect the constitutional and ethical issues raised by the Public Defender and  
13 the District Attorney while at the same time attend to the representation needs of its members.

14 The Public Defender was justified in rejecting Cadlwell and Reinhold as  
15 representatives for Drew and were justified in proceeding with the investigative interview after  
16 the Association failed to act reasonably and responsibly and find acceptable representation for  
17 Drew.

18  
19 **IX. THE OPTIONS THE ALJ FOUND**  
20 **AVAILABLE TO THE PUBLIC DEFENDER ARE**  
21 **NOT LEGALLY VALID OPTIONS.**  
22

23 The ALJ found that even if confidential information had been disclosed during the  
24 interview of Drew, "the County has not shown that it had 'no alternative' to a total denial of  
25 Drew's right to representation." (P. 19) The ALJ found that if the County was unwilling to  
26 accommodate Drew's request for Association representation, the County had the option of  
27 cancelling the interview, providing Drew the option of either forgoing the interview altogether  
28 or proceeding without representation, obtaining client consent for the disclosure of confidential

1 information, or redacting the confidential information if Reinhold attended the interview. (Pp.  
2 19-20.) The ALJ found that the County did not utilize any of these options or establish why  
3 those or other options were unavailable. (P. 20.)

4 The ALJ's finding is incorrect as a matter of law and is not supported by the evidence in  
5 the record.

6  
7 **A. Cancelling the meeting.**  
8

9 As for cancelling the meeting or providing Drew the option of either forgoing the  
10 interview altogether or proceeding without representation, the ALJ relies on *San Bernardino*  
11 *City Unified School District* (1998) PERB Decision No. 1270 (*San Bernardino City USD*). In  
12 that case, the employee seeking representation had a right to be represented by the union and  
13 unquestionably had a right to be represented by the particular representative the union  
14 provided. There was no dispute about the particular representative provided. The manager  
15 calling the meeting simply told the representative to "get the hell out." This was a classic,  
16 straight-forward *Weingarten* situation. In that situation, PERB observed: "One element of a  
17 *Weingarten* violation is the employer's persistence in conducting an interview without  
18 representation. [Citation omitted.] Faced with an assertion of the *Weingarten* right, the  
19 employer may (as one option) dispense with or discontinue the interview." (P. 63.)

20 The ALJ misinterprets *San Bernardino City USD*. That decision does *not* stand for the  
21 proposition that whenever there is a bona fide dispute over the appropriateness of a particular  
22 representative or over the availability of a particular chosen representative, the employer must  
23 always consider the "option" of dispensing with the interview entirely, otherwise the employer  
24 risks violating *Weingarten*. If *San Bernardino City USD* did stand for this proposition, then this  
25 "option" would legally preclude the need of PERB or the courts inquire into whether the  
26 regulation of the right to representation, like in *ALADS*, was reasonable, or whether  
27 "extenuating circumstances" exist that justify an employer's rejection of the particular  
28 representative chosen by the employee or the union. (*Anheuser-Busch, Incorporated* (2001))

1 337 NLRB 3 (*Anheuser-Busch*) (identifying the extenuating circumstances exception.) But  
2 this is not the state of the law.

3 ALJ Cu's position also renders ALJ Allen's exception, which is triggered when  
4 confidential client information is material to a disciplinary investigation, meaningless. There  
5 would be no need for this exception because, according to ALJ Cu, the Public Defender has the  
6 option of simply cancelling the investigative interview. ALJ Cu's interpretation of *San*  
7 *Bernardino City USD* essentially swallows up any legally recognized exception to the principle  
8 that an employee has the right to select the particular person who will act as the employee's  
9 representative.

10 There are other legal and practical complications with this option. An employer is  
11 obligated to conduct a reasonable investigation when it suspects or has information indicating  
12 that an employee has either committed misconduct or has failed to adequately perform his or  
13 her job duties. Not interviewing the employee under review calls into question the  
14 reasonableness of the investigation. The Association, in fact, has already raised this very issue.  
15 The Association claimed, in essence, that the Public Defender's issuance of a notice of  
16 proposed termination against DPD Berman without first interviewing her (she "declined" the  
17 interview because DDA Caldwell was not permitted to represent her) was legally problematic.  
18 (Jt. Ex. K p. 2.)

19  
20 **B. Obtaining client consent for the disclosure of confidential information.**

21  
22 After stating that the Public Defender had the option of cancelling the meeting, the ALJ  
23 stated that: "In addition, Rule 3-100(A) of the Rules of Professional Conduct expressly allows  
24 for the disclosure of confidential information with the informed consent of the client."

25 This is clearly not an ethically permissible option. It would be inappropriate for the  
26 Public Defender to drag her clients into a labor dispute they have nothing to do with. It would  
27 be doubly inappropriate for the Public Defender to seek their consent for the disclosure of  
28 confidential information to a prosecutor. The Public Defender owes clients a duty of

1 confidentiality and a duty of loyalty. It is difficult to fathom how seeking such consent would  
2 serve either of these duties. Clients would likely respond to such request with a *Marsden*  
3 motion.

4 As a practical matter, this option would not be workable. For example, there were at  
5 least five or six, if not more, clients identified by name in the Drew interview. Under the ALJ's  
6 finding, when the Association appointed Caldwell to represent Drew, the Public Defender was  
7 then obligated to determine, prior to the meeting, precisely what client files would be  
8 reviewed, identify the names of these clients, travel to where the clients resided, be it in  
9 County jail or state prison or a private residence. And what if the client refuses?

10 The attorney-client relationship between the Public Defender and clients is already  
11 tenuous. Explaining to a client why the client's appointed counsel may be in trouble and stating  
12 that therefore the Public Defender needs the client's consent to disclose the client's  
13 confidential information to a prosecutor would certainly not improve the relationship.

14 Furthermore, indigent criminal defendants are likely not to be sophisticated and  
15 experienced users of the legal system. Any consent actually obtained in these circumstances  
16 would likely be deemed invalid. (See generally *VISA U.S.A., Inc. v. First Data Corp.* (N.D.  
17 Cal. 2003) 241 F.Supp.2d 1100, 1106 (discussing factors for validity of prospective waiver,  
18 including client sophistication); *People v. Fuller* (1969) 268 Cal.App.2d 844, 856 (discussing  
19 lack of sophistication of individual indigent criminal defendant in context of potential conflict  
20 of interest among codefendants).)

21 Finally, such option is unconstitutional under *Polk* and *Carroll* in that it intrudes upon  
22 the independence necessary for the Public Defender to effectively represent her clients. Private  
23 defense counsel would never be in a situation where they would be compelled to seek the  
24 consent of their clients for the disclosure of confidential client information to a prosecutor.

1           **C. Redaction.**

2  
3           The ALJ found that: "In the alternative, the County could have also redacted or  
4 otherwise excluded actual confidential information from the discussion that day. Notably, the  
5 parties submitted a joint exhibit the County's copy of a full transcript of the meeting at issue,  
6 redacting only the names of clients, judges, and attorneys not affiliated with the DPDs office.  
7 Presumably the redacted items were the only portions of the interview that the County felt unfit  
8 to include in a public record. The County offered no explanation why similar redaction could  
9 not have addressed its concerns with having Reinhold present at the meeting." (Pp. 19-20.)

10           Even if we assume that the only basis of objection of the Public Defender and the  
11 District Attorney is disclosure of confidential information to a DDA representative and not  
12 broader conflict of interest and operational issues, the alternative identified by the ALJ is  
13 neither lawful nor realistic.

14           In *Skelly v. State Personnel Board* (1975) 15 Cal. 3d 194, the California Supreme Court  
15 held that the constitutional right to due process requires that, before a public agency may take  
16 disciplinary action against a permanent public employee, the employer must at a minimum  
17 provide the employee "notice of the proposed action, the reasons therefor, a copy of the  
18 charges and materials upon which the action is based, and the right to respond, either orally or  
19 in writing, to the authority initially imposing discipline." (Id. at p. 215.)

20           If the Public Defender had somehow redacted the names of clients, judges, and case  
21 numbers during the interview with Drew, the Public Defender would very likely have failed to  
22 comply with the due process requirements of *Skelly*. The Association, in fact, already made  
23 this argument in the Berman matter. At the *Skelly* meeting, Reinhold objected to the fact that  
24 the investigative report attached to the notice of proposed dismissal had been redacted. (Jt Ex.  
25 N p. 1.) In a letter to Boxer thereafter, Reinhold stated: "[T]he purpose of the Skelly meeting  
26 conducted on October 9, 2007, was to afford Ms. Berman the opportunity to confront the  
27 evidence against her and provide any relevant information to be considered by the Office prior  
28 to a decision being made regarding her employment. By failing to provide the full materials

1 prior to the meeting on October 9, 2007, the Office compromised and violated Ms. Berman's  
2 due process rights. Particularly given that a portion of the redacted materials was the statement  
3 in the investigator's report that ... Failing to provide Ms. Berman this information prior to the  
4 Skelly hearing, along with redacting the other material, constitutes a gross violation of Ms.  
5 Berman's due process rights." (Jt Ex. N p. 3.)

6 Along with the legal problems described above, there are significant practical  
7 problems. An employer will ahead of time never know with exact precision what information  
8 will be produced during an investigative interview. Answers to a line of questioning may lead  
9 to an unexpected line of questioning. An employee may introduce new information in an  
10 attempt to mount an affirmative defense. It would be difficult enough, in the "live" setting of  
11 an interview, to essentially "bleep" out the names of clients, witnesses, case number, or the  
12 names of judges for the cases the Public Defender had prepared to review with the employee.  
13 The redaction task becomes even that much more difficult when applied to the unanticipated  
14 information disclosed during the meeting.

15 There is another legal issue. It is possible that information that would be considered  
16 attorney-client privileged would not be safeguarded by the mere redaction of names. See, e.g.,  
17 the investigative report in the Berman matter. (Berman/Willms Trans. Vol. VIII 79:9-82:8.)

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19 **X. APPOINTMENT OF CALDWELL VIOLATED**  
20 **THE PROFESSIONAL RULES OF CONDUCT**  
21 **AND OTHER ETHICAL RULES**  
22

23 Rule 3-320 of the Rules of Professional Conduct provides: "A member shall not  
24 represent a client in a matter in which another party's lawyer is a spouse, parent, child, or  
25 sibling of the member, lives with the member, is a client of the member, or has an intimate  
26 personal relationship with the member, unless the member informs the client in writing of the  
27 relationship."  
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1 Rule 3-320 expressly prohibited the appointment of Caldwell to represent Drew at the  
2 meeting under the circumstances. If we restate Rule 3-320 using the facts at hand, DDA  
3 Caldwell shall not represent the People in a matter, e.g., *People v. Garcia*, in which Garcia's  
4 lawyer, i.e., DPD Drew, is a client of Caldwell, unless Caldwell informs the People in writing  
5 of the relationship. There is no evidence that Caldwell informed the District Attorney of such  
6 relationship or obtained the consent of the District Attorney. In any event, the District Attorney  
7 obviously objects to such relationship. Caldwell was appointed to represent Drew in the  
8 disciplinary proceeding. We believe that for purposes of Rule 3-320, Drew was the client of  
9 Caldwell.

10 Such violation of Rule 3-320 by Caldwell is not excused merely because such violation  
11 occurred in the exercise of the Association's right under the MMBA to appoint a representative  
12 to represent a unit member. (*Santa Clara County Attorneys Association v. Woodside* (1994) 7  
13 Cal.4th 525, 548 (*Woodside*) (the MMBA would be unconstitutional on separation of power  
14 grounds if there is a direct and substantial conflict between the operation of the MMBA and an  
15 attorney's settled ethical obligations, as embodied in the Rules of Professional Conduct or some  
16 well-established common law rule).)

17 Caldwell's appointment to represent Drew also violated Standard 7.2c of the National  
18 District Attorneys Association, National Prosecution Standards, Second Edition (1991). (Resp.  
19 Ex. 15). Rule 7.2 provides in part: "In those jurisdictions which do not prohibit private practice  
20 by a prosecutor: ... (c) The prosecutor should avoid any representation of a person who is  
21 under criminal investigation, charged or indicted, and any agent or close relative of such  
22 person." Restating Rule 7.2 with the facts in the record, Caldwell should avoid any  
23 representation of any agent of Garcia. As appointed defense counsel for Garcia, Drew was  
24 Garcia's agent. The California Supreme Court has cited the National Prosecution Standards in  
25 support of a finding that a prosecutor's conduct was improper. (*People v. Bolton* (1979) 23 Cal.  
26 3d 208, 213.)

27 The foregoing reasons justify the exclusion of Caldwell as a representative of Drew in  
28 the disciplinary interview.

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**XI. THE ALJ FAILED TO CONSIDER THE  
OTHER OBJECTIONS OF THE PUBLIC DEFENDER**

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Although Boxer and Ferguson focused on the disclosure of confidential client information when objecting to Caldwell and Reinhold's appointment to represent Drew, Boxer was obviously not just concerned about disclosure of confidential information to any third party, but disclosure to prosecutors. The Public Defender, as well as the District Attorney, subsequently expressed concern that a representative-employee relationship between a DDA and a DPD itself gives rise to a conflict of interest or an unreasonable risk of a conflict of interest and otherwise adversely affects the criminal justice operations of each office. The ALJ mentioned, in general, these conflict of interest concerns (p. 16), but failed to analyze, or even identify, any of the specific concerns articulated by both offices with respect to the rejection of Caldwell as a representative. (See pages 16 - 20.)

**A. Tracking and disclosing the DDA-DPD representative-employee relationship.**

Even if no confidential Public Defender case file information is disclosed, due to the inherent adversarial professional relationship between the attorneys of the two offices, the Public Defender believes that she will have to keep track of which DDAs are representing which DPDs in investigative and disciplinary proceedings. If a DDA currently represents a DPD, then the Public Defender will have to be careful and not assign the DPD to the case. But even if the representation was in the past, the Public Defender will likely avoid making the assignment. There was expert testimony that, in the context of a continuing policy and practice of the Association having DDAs represent DPDs in investigative or disciplinary proceedings, such past DDA-DPD relationship would have to be disclosed. Disclosure itself may result in the criminal defendant filing a *Marsden* motion for new defense counsel. A failure to make such disclosure would likely result in defense counsel on appeal seeking reversal of any conviction on grounds of ineffective assistance of counsel. (*Berman/Willms* Trans. Vol. VI

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3 **B. Chilling of the Public Defender's attorney-client relationships.**

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5 The Public Defender believes that such representation by DDAs will also, regardless of  
6 whether any confidential information is disclosed, chill the attorney-client relationships  
7 maintained by the Public Defender.

8 California courts have long recognized the difficult and fragile nature of the attorney-  
9 client relationship between public defense counsel and indigent criminal defendants. Many  
10 clients believe public defense counsel are incompetent, untrustworthy, or both. One Court of  
11 Appeal observed: "The need for trust and confidence between an accused and his attorney is  
12 vital in providing effective assistance of counsel. [Citation omitted.] It is essential that a  
13 defendant feel free to disclose information in confidence and be assured that the attorney will  
14 represent his interests with all competence. It is well recognized that the relationship between  
15 indigents who are criminally accused and their appointed counsel is, at best, tenuous. [Citations  
16 omitted.] The indigent defendant frequently views appointed defense counsel with distrust and  
17 believes counsel is to be in league with the judge and district attorney. [Citation omitted.]"  
18 (*Olson v. Superior Court (People)* (1984) 157 Cal.App.3d 780, 204 Cal.Rptr. 217, 224, cause  
19 retransferred by 705 P.2d 1260, 218 Cal.Rptr. 572.)

20 The personal experiences of long-time Los Angeles County Public Defender Michael P.  
21 Judge and Boxer correspond with these judicial observations. (IV Trans. 126:26-127:28; VII  
22 Trans. 10:22-13:15.) Even Cemore, the Senior Deputy Public Defender of the County of  
23 Orange who testified in support of the Association, confirmed this phenomenon.  
24 (*Berman/Willms* Trans. Vol. VIII 71:18-73:1.)

25 Because of such beliefs of defendants, public defender attorneys have to spend more  
26 time than other attorneys trying to build trust with their clients. Public Defender Judge testified  
27 that public defender attorneys "often have to spend a lot more time with a client just to attempt  
28 to assure them that we, in fact, will be loyal to them and diligent and that we are not in any

1 fashion working with the DA against them, or city prosecutor against them." (*Berman/Willms*  
2 *Trans. Vol. VII 11:7-13.*) These beliefs may also result in real harm to defendants. Public  
3 Defender Judge testified that clients may not cooperate or even reject the sound advice of the  
4 public defender attorney and make a terrible mistake that can result in serious consequence to  
5 them. Such beliefs may cause a client to rely on cellmates or other people in jail. An inmate  
6 may write a motion for them that includes harmful disclosures. Some clients go pro per, which  
7 is virtually in every case a disaster. (*Berman/Willms Trans. Vol. VII 12:22-13:15.*)

8         The representation of DPDs by DDAs in investigative or disciplinary proceedings will  
9 exacerbate the already challenging situation in which DPDs attempt to gain the trust and  
10 confidence of their clients. Expert witness Mark Tuft testified that when DPDs enter into  
11 representative-employee relationships with DDAs, "there is a high prospect that the clients are  
12 going to be quite reluctant to confide in them, and it could interfere with their, with their ability  
13 to be effective as lawyers for their clients." (*Berman/Willms Trans. Vol. IV 29:17-24.*) He  
14 elaborated on this issue and stated that the issue ultimately relates back to the duty of loyalty  
15 and that courts not only look at attorney conduct in conflict of interest analysis but also review  
16 situations from the client's point of view, i.e., "whether clients would really have trust and  
17 confidence in their lawyers and be willing to disclose serious and confidential information that  
18 could be embarrassing to their lawyer, which the lawyer needs to be able to defend the client, if  
19 they knew that there were these relationships and didn't fully understand, you know, all that  
20 was going on." (*Berman/Willms Trans. Vol. IV 81:1-26.*)

21         Public Defender Judge also testified that "[t]he relationship [the DDA-DPD  
22 representative-employee relationship] is one that would confirm what heretofore had only been  
23 a myth, that, in fact, deputy public defenders were subordinate to and beholden to deputy  
24 district attorneys.." (*Berman/Willms Vol. VII Trans. 14:21-15:5.*)

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**XII. THE ALJ FAILED TO CONSIDERED THE  
CONCERNS OF THE DISTRICT ATTORNEY**

The District Attorney has a substantial interest in the case. The District Attorney's interest in the case is as serious as the interest of the Public Defender. The proposed decision explicitly and implicitly defines the scope of the ethical duties of DDAs in the context of this dispute. The proposed decision directly affects the prosecutorial operations of the District Attorney. The District Attorney is charged with enforcing the criminal laws and is entitled to have his concerns considered in a proceeding the outcome of which will directly affect the handling of prosecutions. The District Attorney's concerns are related to, but entirely independent of, the Public Defender's concerns in this dispute.

The District Attorney's concerns should also be considered because the precise issues in the current PERB case will recur. Courts have inherent power to decide cases where the issues presented are important and of continuing interest, particularly when the issue is likely to recur. (*Dobbins v. San Diego Civil Service Commission* (1999) 75 Cal.App.4th 125, 128 n. 3.) The current issue, i.e., representation of DPDs by DDAs, will recur. It would be a waste of judicial or administrative resources to resolve the current dispute without input from the District Attorney. The District Attorney would be compelled to file a separation action on precisely the same issues being resolved in the current dispute.

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**A. Conflicting duties.**

The District Attorney believes that, given the ethical duties of prosecutors<sup>23</sup> a DDA's representation of a DPD in a disciplinary investigation conducted by the Public Defender creates a conflict of interest for DDAs and causes DDAs to violate their ethical duties.

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<sup>23</sup> Prosecutors have a duty of zealous advocacy, but the accused and public have a legitimate expectation that this zeal will be born of objective and impartial considerations. A prosecutor is expected to exercise his or her discretionary functions in the interests of the People at large, and not under the influence or control of an interested individual. (*People v. Dehle* (2008) 166 Cal.App.4th 1380, 1387-1388.) Prosecutors are held to a higher standard than other attorneys. (*People v. Zurinaga* (2007) 148 Cal.App.4th 1248, 1258; I SAA 61-66.)

1 (*Berman/Willms V Trans.* 26:6-28:3, 38:3-40:15; Resp. Drew Ex. A. See also expert witness  
2 Tuft: Resp. Ex. 1 pp. 7:21-8:6, 16:3-14. *Berman/Willms IV Trans.* pp. 33:18-21, 46:13-48:15;  
3 *Berman/Willms V Trans.* pp. 61:8-64:1, 65:3-67:15.)

4         The ethical and practical problems that arise when the prosecution function and the  
5 defense function too closely overlap is nicely demonstrated in *People v. Rhodes* (1974) 12  
6 Cal.3d 180. In that case, a city attorney who enforced the city code also was appointed to  
7 defend defendants in misdemeanor proceedings. Government Code section 26540, which  
8 prohibited district attorneys from defending any person accused of a crime, did not apply to the  
9 city attorney. The California Supreme Court found that such appointments were contrary to  
10 public policy. The Court pointed to "considerations of a practical nature" which have the  
11 potentially debilitating effect on both the quality of the legal assistance rendered by a city  
12 attorney to criminal defendants and the ability of a city attorney to properly discharge his  
13 prosecutorial responsibilities. (*Id.* at p. 183.) The Court pointed out that the city attorney might  
14 go soft on cross examining police officers in the criminal proceedings because of his need to  
15 maintain good relations with them in his role as city attorney prosecutor. On the other hand, if  
16 the city attorney does not go soft on police officer witnesses, his working relationship with law  
17 enforcement might suffer and his ability to discharge his city attorney prosecutorial duties  
18 would suffer. (*Id.* at pp. 183-185.) The Court recognized there would be a duty of loyalty  
19 issue. (*Id.* at p. 184.)

20         Although the facts in the present case differ from those in *Rhodes*, the cases are similar  
21 in that difficulties are created in the current case that arise from the conflicting duties of  
22 prosecutors due to the prosecutors indirect involvement in the criminal defense function via  
23 their role as labor representatives.

24         A DDA has one full-time client – the People. The interest of the People in the matter of  
25 the investigation or discipline of a DPD would be adverse to the DPD and to Public Defender  
26 clients. Information about problems of the DPD could possibly help or inform the prosecution  
27 effort and thus would, as a matter of law, be of adversarial interest to the People. For example,  
28 a DDA who obtains in the course of the disciplinary representation information adverse to the

1 DPD – for example, the DPD has a substance abuse problem, has consistently failed to  
2 investigate cases or utilize expert witnesses, or has consistently agreed to plea deals deemed  
3 inappropriate by the Public Defender – has a built-in motive, due to his or her being a  
4 prosecutor, to use the information to the benefit of the prosecution. (See Resp. Drew Ex. A p.  
5 2.)

6 If the information is attorney-client privileged information, attorney work product, or  
7 otherwise confidential under Business and Professions Code section 6068, subdivision (e), the  
8 prosecutor-representative obtaining it runs a serious risk of prosecutorial misconduct (see  
9 *People v. Leon* (2001) 91 Cal.App.4th 812, 818 (prosecutor’s deliberate attempt to obtain  
10 confidential information from the defense is an invasion of the “defense camp”).) The  
11 prosecutor-representative would also be obligated, according to the District Attorney, to turn  
12 the information over to his or her supervisor or the prosecutor in the relevant criminal case or,  
13 in certain circumstances, to defense counsel. (Resp. Drew Ex. A p. 2; *Berman/Willms V Trans.*  
14 26:12-28:3.)<sup>24</sup>

15 A prosecutor is a minister of justice. From whatever source they learn that justice was  
16 not obtained, they have an affirmative responsibility to bring that information forward so that a  
17 defendant can receive fair and impartial treatment in the criminal justice system. Thus,  
18 prosecutors are obligated to investigate and search for the truth, whether the search produces  
19 information that is incriminating or exculpatory. (See *Morris v. Ylst* (2006) 447 F.3d 735, 743-  
20 744; ABA Standards for Criminal Justice, std. 3-3.1 and std. 3-3.11 and comments.)  
21 Prosecutors are obligated to disclose to defendants or their attorneys all material and  
22 information that is incriminating or exculpatory. (Penal Code, § 1054.1.) This includes  
23 evidence that may negate guilt, mitigate the degree of the offense, or reduce the appropriate  
24 punishment in a criminal case. (*Brady v. State of Maryland* (1963) 373 U.S. 83, 87); see also  
25 *Morris, supra*, 447 F.3d at 743-744 (perjury); *Benn v. Lambert* (9th Cir. 2002) 283 F.3d 1040,  
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27 <sup>24</sup> They are obligated to investigate and search for the truth, whether the search produces information that is  
28 incriminating or exculpatory. (See *Morris v. Ylst* (2006) 447 F.3d 735, 743-744.) They are obligated to disclose to  
defendants all material and information that is incriminating or exculpatory. (Penal Code, § 1054.1.) This includes  
evidence that may negate guilt, mitigate the degree of the offense, or reduce the appropriate punishment in a  
criminal case. (*Brady v. State of Maryland* (1963) 373 U.S. 83, 87).

1 1056-1062 (government witness credibility).) A DDA who, acting as a representative of a  
2 DPD, obtains information that falls within any of the above categories would not be exempt  
3 from the duty to investigate and disclose such information.

4 Even in a situation where an Association-appointed employee representative does not  
5 intend to obtain confidential information originating in the other office, experience has  
6 demonstrated that administrative investigations very often lead to areas not contemplated at the  
7 outset of the inquiry, and that therefore even the most diligent attempt to avoid receiving  
8 confidential information will at times be unsuccessful.

9 All of the above-described responsibilities of prosecutors are paramount and cannot be  
10 limited by any conflicting duties that may be present when acting as an employee  
11 representative. A prosecutor's duty to protect liberty trumps any other consideration. A  
12 prosecutor cannot ethically accept any other responsibility, including union duties, that  
13 conflicts with his or her duty as a prosecutor. (See *Woodside, supra*, 7 Cal.4th at 552-553; 66  
14 Ops.Cal.Atty.Gen. 30 (1983); *Alhambra Police Officers Association v. City of Alhambra*  
15 *Police Department* (2004) 113 Cal.App.4th 1413, 1422-1433 (police officer's duties as a  
16 representative did not supplant his official police officer duties; society does not engage its  
17 peace officers on the basis of divided loyalties).)

18  
19 **B. Tracking and disclosing the DDA-DPD representative-employee relationship.**  
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21 If DDAs were permitted to represent DPDs in disciplinary proceedings, the District  
22 Attorney, in order to mitigate ethical problems, would be compelled to keep track of which  
23 DDAs and DPDs were, are, and likely will be entering in such representative-employee  
24 relationship and the respective case loads of these attorneys. Such tracking would apply to the  
25 six DDA Association board members since the Association claims they have a right to review  
26 all information received by Association appointed employee representatives. Such practice by  
27 the Association would shrink the pool of DDAs eligible for assignment. It would also raise the  
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1 issue of whether and under what circumstances such representative-employee relationship  
2 would have to be disclosed to the courts and defendants.

3 In criminal cases that involve both attorneys, the District Attorney's Office believes it  
4 would have to disclose such representative-employee relationship to the court, likely resulting  
5 in a defendant filing a motion seeking recusal of the prosecutor. The District Attorney's Office  
6 will be forced to consider whether reassignment is necessary in order to avoid any actual or  
7 potential conflict. (*Berman/Willms* VI Trans. 36:19-39:14, 40:15-26, 62:28-64:1, 65:3-67:15.)  
8 Each of these consequences would constitute significant interference with the discretionary  
9 authority of the District Attorney.

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11 **C. Other adverse effects.**

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13 When a DDA represents a DPD this relationship would create, at the very least, a  
14 significant risk of the appearance of a conflict. Victims would not understand or appreciate  
15 why DDAs would so closely affiliate with counsel for the alleged victimizers. The working  
16 relationship between prosecutors and law enforcement would suffer. And the public's  
17 confidence in the integrity and impartiality of the criminal justice system would be  
18 undermined. This weakening of the District Attorney's standing with all three groups alone  
19 justifies the prohibition of cross-representation. (See *Rhodes, supra*, 12 Cal.3d at 184-186;  
20 *Dehle, supra*, 166 Cal.App.4<sup>th</sup> at 1387; NDAA National Prosecution Standards, std. 5  
21 commentary ("The maintenance of good relations between the prosecuting attorney and the  
22 law enforcement agencies within the community is essential for the smooth functioning of the  
23 criminal justice system.")) This appearance of impartiality is also important to those  
24 individuals suspected or accused of crimes. (*Dehle, supra*, 166 Cal.App.4<sup>th</sup> at 1387.)  
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1 Public Defender. When Tuft was informed that such manner of representation would occur on  
2 an ongoing basis, he testified that a blanket rule would be reasonable. Furthermore, Tuft did  
3 not testify as to the operational or public policy bases underlying the Public Defender's and  
4 District Attorney's support of such blanket ban. He did testify, however, that he believed that it  
5 would be ethically responsible for each office to disclose in criminal court the fact that DDAs  
6 represent DPDs in disciplinary proceedings. As discussed herein, this obligation to report itself  
7 could cause significant operational and ethical problems for both offices in criminal court  
8 proceedings.

#### 9 10 **XIV. MEET AND CONFER**

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12 As discussed above, the County did not unilaterally change a term and condition of  
13 employment because the actions of the Public Defender in Berman, Willms, and Drew matters,  
14 and the subsequent more fully developed rationale for its actions, including the adoption of the  
15 two policies, and the District Attorney's position in the matter, all merely reflect the past  
16 practice of the parties.

17 And even if PERB does not find a binding past practice, the Public Defender's, and the  
18 District Attorney's, prohibition of DDAs representing DPDs in disciplinary actions are justified  
19 by a legitimate business reason given the serious constitutional and ethical issues that are  
20 implicated by the prohibited actions of the Association and the relative ease with which the  
21 Association may appoint DPDs to represent other DPDs. The actions taken by the Public  
22 Defender and the District Attorney are in response to the Association's *new* practice of  
23 appointing DDAs to represent DPDs in disciplinary proceedings. The actions of the Public  
24 Defender and the District Attorney are merely intended to maintain the status quo, to prevent  
25 conflicts of interest and the violation of ethical duties, and to protect the efficiency and  
26 integrity of the criminal justice functions of each office. The issues faced by the Public  
27 Defender and the District Attorney are significantly more serious than the operational issues  
28 faced by the Los Angeles County Sheriff in *ALADS*. As in *ALADS*, no meet and confer should

1 be necessary in the current case.

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3 **XV. CONCLUSION.**

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5 Based upon the exceptions and this brief in support of the exceptions, the County  
6 respectfully requests that the Board reverse the proposed decision for the reasons set forth  
7 herein and in the exceptions.

8  
9 DATED: May 6, 2013

10 JEAN-RENE BASLE  
County Counsel

11  
12 By: 

13 KENNETH C. HARDY  
14 Deputy County Counsel

15 Attorneys for Respondent  
16 County of San Bernardino  
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**PROOF OF SERVICE**

I am employed in the County of San Bernardino, State of California. I am a citizen of the United States, employed in the County of San Bernardino, State of California, over the age of 18 years and not a party to nor interested in the within action. My business address is 385 North Arrowhead Avenue, Fourth Floor, San Bernardino, CA 92415-0140.

On May 6, 2013, I served the following documents (*specify*):  
RESPONDENT'S BRIEF IN SUPPORT OF ITS STATEMENT OF  
EXCEPTIONS; PERB CASE NO. LA-CE-554-M

I served the documents on the persons below, as follows:

Marianne Reinhold, Esq.  
Reich, Adell & Cvitan  
2670 North Main Street, Suite 300  
Santa Ana, California 92705

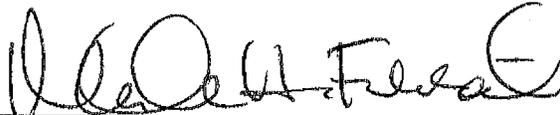
The documents were served by the following means:

**By United States Mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at San Bernardino, California.

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

DATE: May 6, 2013

  
MARTHA H. FORRESTER, Declarant