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PUBLIC EMPLOYMENT
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12 STATE OF CALIFORNIA
 13 PUBLIC EMPLOYMENT RELATIONS BOARD

14 SAN BERNARDINO PUBLIC COUNTY
 15 PUBLIC ATTORNEYS ASSOCIATION,

16 Petitioner,

17 vs.

18 COUNTY OF SAN BERNARDINO,

19 Respondent.

PERB CASE NO. LA-CE-431-M

RESPONDENT'S BRIEF IN
 SUPPORT OF THE STATEMENT
 OF EXCEPTIONS

20 The County of San Bernardino (the "County") hereby files this brief in support of
 21 its statement of exceptions to the proposed decision dated May 17, 2012, concurrently
 22 filed herewith.

23 I. INTRODUCTION

24
 25 The San Bernardino County Public Attorneys Association claims that under the
 26 Meyers-Milias-Brown Act it may appoint a Deputy District Attorney (DDA) to represent
 27 a Deputy Public Defender (DPD) in investigative and disciplinary proceedings, even if
 28 confidential Public Defender client case file information will be disclosed in the

1 proceedings. The Public Defender and the District Attorney of San Bernardino County
2 each object to DDAs representing DPDs in any investigative or disciplinary proceeding
3 on grounds that: (1) disclosure of confidential Public Defender case file information to
4 DDA-representatives would violate the ethical duties of the involved attorneys; and (2)
5 even without such disclosure, the representation of a DPD by a DDA will create
6 conflicts of interest, lead to ethical violations, adversely affect the defense and
7 prosecution functions, and interfere with the independence of the Public Defender and
8 the discretionary authority of the District Attorney.

9 It is the County's position that the Public Employment Relations Board has no
10 jurisdiction because the dispute centers on issues implicating the ethical duties of
11 attorneys and the functioning of the criminal justice system.

12 If it is found that PERB has jurisdiction, then the County's position is as follows:

13 The proposed decision correctly identifies the inherently adversarial
14 professional relationship between the Public Defender and DDAs. The ALJ's effective
15 conclusion that the Public Defender may refuse to disclose attorney-client privileged
16 information and attorney work-product to a DDA-representative is correct, but the
17 category of information that may not be disclosed is not broad enough.

18 The proposed decision contains other serious errors: it fails to consider all of
19 the reasons underlying the Public Defender's blanket policy prohibiting DDAs
20 representing DPDs in investigative and disciplinary proceedings and fails to cite the
21 controlling authority; it fails to consider any of the District Attorney's objections or to
22 even identify the District Attorney as an interested party, and fails to cite the controlling
23 authority; it's conclusion that the blanket policy would prevent the Association from
24 representing DPDs is not supported by the evidence; it's conclusion that there was no
25 protected information in the Berman proceeding is contrary to the evidence; it's
26 conclusion that the Public Defender retaliated against DPD Willms is contrary to the
27 evidence and the law; and its conclusion that the Public Defender failed to respond to
28 a request for information is contrary to the evidence.

1 implicitly,⁴ that the other issues raised by the Public Defender and the District Attorney
2 are not relevant to the resolution of the dispute.

3 The ALJ has no authority to define the ethical duties of public attorneys. There
4 is no evidence that the Legislature, when it vested initial jurisdiction over unfair
5 practice charges under the MMBA with PERB, intended to grant PERB the power to
6 regulate the practice of law. In SB 1296 (2008), the Legislature found that “where
7 PERB’s jurisdiction over unfair labor practice charges may overlap with the statutory
8 authority granted to other entities, the overlap should not remove the jurisdiction of
9 other forums.”⁵ (Sec. 1, subpart (f).)

10 Even if the Legislature intended to grant such power to PERB, such grant of
11 power would be unconstitutional.

12 In California, article VI courts have the inherent and exclusive power to regulate
13 the practice of law. (*Woodside, supra*, 7 Cal.4th at 542-543 (citing *Hustedt v. Workers’*
14 *Compensation Appeals Board* (1981) 30 Cal.3d 329, 336, and *Brotsky v. State Bar*
15 (1962) 57 Cal.2d 287, 300.) The California Supreme Court has, however, respected
16 the Legislature’s exercise, under the police power, of a reasonable degree of
17 regulation over the practice of law. But the courts still retain the final review of whether
18 the Legislature overstepped its authority and violated the principle of separation of
19 powers. (*Woodside, supra*, 30 Cal.3d at 543; see Bus. & Prof. Code, § 6087; *In re*
20 *Attorney Discipline System* (1998) 19 Cal.4th 582, 602; *Emslie v. State Bar* (1974) 11
21 Cal.3d 210, 224-225.)

22 There is no case law in which the courts have acquiesced to any such
23 Legislative grant of power to PERB over the regulation of the practice of law. There is
24 no chance the courts would do so. In *Hustedt v. Workers’ Compensation Appeals*
25 *Board* (1981) 30 Cal.3d 329, the California Supreme Court reviewed a much more
26

27 ⁴ The proposed decision makes no mention of the extensive objections on this point.

28 ⁵ Courts primarily, but also the State Bar and, to a lesser degree, the Attorney General, regulate the
practice of law.

1 limited statutory grant of power to a non-article VI court to regulate the practice of law -
2 Labor Code section 4907, which invested in the WCAB the right to suspend attorneys
3 from practicing before it. Despite the Legislature's broad grant of authority to the
4 WCAB to determine any dispute or matter arising under workers compensation
5 legislation, the Court found that Labor Code section 4907 impermissibly trespassed on
6 the inherent power of article VI courts to regulate attorney discipline and thus violated
7 the principle of separation of powers. (30 Cal.3d at 340-342; *Woodside, supra*, 7
8 Cal.4th at 543 (discussing *Hustedt*.)

9 Another way to look at the problem of jurisdiction is that in order to resolve the
10 dispute, the adjudicative body will have to determine whether the MMBA permits
11 DDAs and DPDs to act in such a way as to seriously violate the integrity of the
12 attorney-client relationship, so as to materially impair the functioning of the courts. If
13 the answer is "yes," then the MMBA, in this application, would be constitutionally
14 suspect and violate the principal of separation of powers. (*Woodside, supra*, 7 Cal.4th
15 at 544.) PERB has no authority to make such determination because it has no power
16 to engage in separation of powers analysis. More generally, PERB has no authority to
17 declare a statute unconstitutional. (Cal. Const., art. 3, sec. 3.5.)

18 Likewise, PERB has no jurisdiction to determine whether the Association's
19 actions interfere with the District Attorney's discretionary authority. This is because
20 such interference also implicates the separation of powers doctrine. The judicial
21 branch, through its power to decide cases and controversies, has jurisdiction to
22 resolve disputes involving claims of such encroachment. (See, e.g., *Nixon v.*
23 *Fitzgerald* (1982) 457 U.S. 731, 751; *People v. Superior Court (Greer)* (1977) 19
24 Cal.3d 255, 262.) PERB has no authority to resolve such disputes or to otherwise
25 define the boundaries of the constitutional powers of the executive branch or any other
26 branch of government.⁶

27 _____
28 ⁶ Even the body that does have jurisdiction to resolve our dispute – the courts – will have to be heedful,
when adjudicating the matter, not to encroach upon the powers constitutionally committed to the District
Attorney. (See *State of California v. Superior Court* (1986) 184 Cal.App.3d 394, 397-398.)

1 The County therefore respectfully requests the Board to dismiss the amended
2 complaint and the charges on the ground of lack of jurisdiction.

3
4 **III. THE PROPOSED DECISION'S CATEGORY**
5 **OF NON-DISCLOSEABLE INFORMATION**
6 **IS NOT BROAD ENOUGH**
7

8 The duty of confidentiality reflects a public policy of paramount importance.
9 Such duty is fundamental to the attorney-client relationship because a client is not only
10 encouraged to reveal sensitive and potentially incriminating information to his or her
11 counsel, but also because the client reposes confidence in the lawyer. Thus the
12 lawyer may not do anything to breach this trust. The obligation to protect client
13 confidential information has been described as a "very high and stringent one." (IV
14 Trans. 17:3-23; *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 289.)

15 This duty encompasses matters protected by the attorney-client privilege, the
16 work product doctrine, but also a much *broader* category of information, including
17 information obtained during such representation that would be embarrassing or likely
18 detrimental to the client. (Bus. & Prof. Code, § 6068(e)(1); Rules Prof. Conduct, rule 3-
19 100, Discussion (Resp. Ex. 12); IV Trans. 17:24-18:18.)

20 The proposed decision therefore correctly identifies attorney-client privileged
21 information and attorney work-product as being in the category of information that may
22 not be disclosed to DDAs, but it fails to include information that is confidential under
23 Business and Professions Code section 6068(e)(1). The decision also fails to identify
24 another category of information that may not be disclosed to DDAs.

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

1 including information about alleged Fourth Amendment violations by officers,
2 augmented with information from public sources. (106 Cal.App.4th at 1004-1006.)

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

8 The Court stated that the database was retained and used to assist in the
9 defense of clients. The Court stated that the public defender is charged with protecting
10 the interests of its clients, that these were private functions to which the public
11 defender is entitled to maintain a level of independence equivalent to a private
12 attorney, and that allowing the association to dictate what information the public
13 defender may retain and evaluate would unnecessarily intrude upon its work, when
14 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
16 would be detrimental to the public interest in providing legal representation to indigent
17 criminal defendants. (106 Cal.App.4th at 1008-1009, 1015-1016.)

18 The police officers association emphasized that it sought the information not as
19 representatives of the prosecution or as individuals interested in any criminal
20 proceedings. The court stated that the purpose for the request was irrelevant. (106
21 Cal.App.4th at 1015.)

22 It is important to note that in *Coronado*, the issue was not whether the union
23 was attempting to compel the public defender to disclose attorney-client privileged
24 information, attorney work-product, or any other confidential information as defined
25 under Business and Professions Code section 6068(e)(1), but simply whether forcing
26 the public defender to disclose its database, even if not otherwise confidential, would
27 interfere with the public defender's ability to represent clients.

28 Therefore, the category of information that may not be disclosed to DDAs must

1 include attorney-client privilege information, attorney work-product, information that is
2 confidential under Business and Professions Code section 6068(e)(1), and also, under
3 the principles articulated in *Coronado*, any Public Defender information the disclosure
4 of which would interfere with the Public Defender's ability to represent clients.

5 Finally, we note that the ALJ's rationale in this part of the proposed decision is
6 incorrect and incomplete. The ALJ fails to cite any of the controlling case law or
7 statutes or Rules of Professional Conduct. The ALJ cites no authority to support the
8 principle of "trust" discussed in the proposed decision.

9
10 **IV. THE PROTOCOL INTERFERES WITH THE**
11 **INDEPENDENCE OF THE PUBLIC DEFENDER**
12

13 The Public Defender objects to the protocol pursuant to which she must explain
14 in writing to the Association, i.e., to DDA Association officials, why confidential
15 information must be reviewed in an investigative or disciplinary proceeding. This is an
16 improper intrusion into the independence of the Public Defender's representation of
17 clients. If any such protocol is to be maintained, then the Public Defender should make
18 such explanation only to Association officials who are DPDs, who must themselves
19 promise not to disclose any details of such information to any DDAs. As discussed
20 below, the Public Defender and the District Attorney object to any representation of
21 DPDs by DDAs in investigative and disciplinary proceedings. A blanket rule would
22 render such protocol unnecessary.

23
24 **V. THE ALJ FAILED TO CONSIDER ANY ARGUMENTS**
25 **UNRELATED TO THE DISCLOSURE OF CONFIDENTIAL INFORMATION**
26

27 In rejecting the blanket prohibition advocated by the Public Defender (and the
28 District Attorney), the ALJ failed to consider any of the arguments that were not

1 directly related to the disclosure of attorney-client privileged information and attorney
2 work-product. The ALJ was obligated to consider these arguments under the
3 "legitimate business reasons" test articulated in *Public Employees Association of*
4 *Tulare County, Inc. v. Board of Supervisors of Tulare County* (1985) 167 Cal.App.3d
5 797.⁷

6 In *Laborers Local No. 270 v. City of Monterey* (2005) PERB Decision No. 1766-
7 M, a much later decision than any cited in the proposed decision, the ALJ determined
8 whether the city's conduct in excluding a representative from a disciplinary hearing
9 was justified as a legitimate business reason under the *Tulare* test. (Page 10.) The
10 ALJ identified the two arguments made by the city and then provided detailed reasons
11 why each argument did not qualify as a legitimate business reason under *Tulare*. The
12 proposed decision in our case does not refer to or apply the *Tulare* test to any of the
13 arguments unrelated to the disclosure of attorney-client privileged information or
14 attorney-work product.

15 The ALJ also should have reviewed these arguments under the standards set
16 forth in *Upland Police Officers Assn. v. City of Upland* (2003) 111 Cal.App.4th 1294
17 and *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2008) 166
18 Cal.App.4th 1625 (*ALADS*). Both cases provide that an employer may impose
19 reasonable limits on the right to representation. *ALADS* is particularly applicable
20 because in the situation described in that case the sheriff imposed a "no huddle" rule
21 (officers in a shooting could not be represented by the same representative at the

22
23
24 ⁷ The ALJ in *Laborers Local No. 270 v. City of Monterey* (2005) PERB Decision No. 1766-M, on page
25 8, described the applicable standard: "The test for whether the City has interfered with rights
26 guaranteed by the MMBA does not require that unlawful motive be established; it requires only that at
27 least slight harm to employee rights results from the conduct. The courts have described the standard
28 as follows: 'All [a charging party] must prove to establish an interference violation of section 3506 is: (1)
That employees were engaged in protected activity; (2) that the employer engaged in conduct which
tends to interfere with, restrain or coerce employees in the exercise of those activities, and (3) that
employer's conduct was not justified by legitimate business reasons. [*Public Employees Association of*
Tulare County, Inc. v. Board of Supervisors of Tulare County (1985) 167 Cal.App.3d 797, 807 [213
Cal.Rptr. 491] (*Tulare*).]' "

1 post-shooting interview) in order to preserve the integrity of sheriff investigations and
2 foster greater public trust. The Court found no violation of *Weingarten*. As discussed
3 below, the operational concerns of the Public Defender and the District Attorney
4 justifying a blanket rule are equal to, if not greater than, the operational concerns of
5 the sheriff in *ALADS*.

6
7 **VI. THE ALJ WAS OBLIGATED TO CONSIDER**
8 **THE CONCERNS OF THE DISTRICT ATTORNEY**
9

10 The District Attorney adopted a draft blanket policy prohibiting a DDA from
11 representing a DPD in any investigative or disciplinary proceeding. The ALJ failed to
12 receive such draft policy into evidence (see Exceptions to Issues of Procedure No. 2)
13 and failed to consider the reasons why the District Attorney prepared such draft policy
14 and to even acknowledge the District Attorney as an interested party. These are
15 serious mistakes of law.

16 Although the District Attorney's Office was not involved in the representation
17 disputes involving DPDs Berman and Willms, the District Attorney is very much an
18 interested party. The concerns of the District Attorney should be considered for the
19 following reasons:

20 The District Attorney has a substantial interest in the case. (See generally
21 PERB Regulation 32164.) The proposed decision defines the scope of the ethical
22 duties of DDAs in the context of this dispute. The proposed decision directly affects
23 the prosecutorial operations of the District Attorney. The District Attorney is charged
24 with enforcing the criminal laws and is entitled to have his concerns considered in a
25 proceeding in which the outcome of such proceeding will directly affect the handling of
26 prosecutions. The District Attorney's concerns are related to, but entirely independent
27 of, the Public Defender's concerns in this dispute.

28 Another reason is that Assistant District Attorney James Hackleman's testimony

1 will contribute substantially to a just resolution of the case. (See generally PERB
2 Regulation 32164.) His testimony relates directly to issues that are relevant to the
3 resolution of the dispute. The legal issues are extensive and complicated.

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

13
14 **VII. A BLANKET RULE IS REQUIRED TO ENSURE THE**
15 **PROPER FUNCTIONING OF THE CRIMINAL JUSTICE SYSTEM**
16

17 The Public Defender and the District Attorney each object to DDAs
18 representing DPDs in investigatory and disciplinary proceeding even if no confidential
19 Public Defender case file information is disclosed during such representation. (See,
20 e.g., IV Trans. 126:6-127:28, 142:22-8; VI Trans. 30:1-44:14.) Even without such
21 disclosure, there are a number of reasons why such representation would result in the
22 violation of the ethical duties of DPDs and DDAs (*Woodside, supra*, 7 Cal.4th at 542)⁸

23
24 ⁸ The *Woodside* Court articulated the standard to be used to determine when a public attorney, in
25 pursuit of a union's goals, oversteps ethical boundaries: "That occurs when the attorney violates actual
26 disciplinary rules, most particularly rules pertaining to the attorney's duty to represent the client
27 faithfully, competently, and confidentially. In California, those duties are found principally in Rule 3-110,
28 which prohibits a member from 'intentionally, recklessly or repeatedly fail[ing] to perform legal services
with competence.' ... [Citation omitted.]" (7 Cal.4th at 552.) The Court also stated: "We emphasize that
attorneys in such circumstances are held to the highest ethical obligations to continue to represent the
client in the matters they have undertaken, and that a violation of their duty to represent the client
competently or faithfully, or of any other rule of conduct, will subject those attorneys to the appropriate
discipline, both by the employer and by the State Bar." (7 Cal.4th at 553.)

1 and would endanger the proper functioning of the criminal justice system (*People v.*
2 *Rhodes* (1974) 12 Cal.3d 180, 185) and therefore should be prohibited.

3
4 **A. Vital Interests of Criminal Defendants and the Prosecution and**
5 **Defense Functions Are Adversely Affected.**

6 The criminal justice system is based on an adversarial system between
7 prosecutor and defense attorney where both sides are expected to zealously
8 represent their respective clients. There is an array of protected and privileged
9 communications and confidential information, specific to both sides, that is recognized
10 through laws and defined ethical obligations. The California Supreme Court has found
11 that the nature and duties of a public prosecutor are inherently incompatible with the
12 obligations of criminal defense counsel. (*Rhodes, supra*, 12 Cal.3d at 186.) The ALJ
13 also found that there is an inherently adversarial professional relationship between
14 DDAs and DPDs.

15 Consequently, the courts, the Legislature, the Attorney General, and various
16 national bar associations have all recognized the need to strictly separate the
17 prosecution and defense functions. Thus, a prosecutor may not represent or assist in
18 the defense of any person accused of a crime. (Gov't Code, § 26540; Gov't Code, §
19 24100; *Rhodes, supra*, 12 Cal.3d 180; Bus. & Prof. Code, § 6131.) A prosecutor may
20 not circumvent this prohibition by taking a leave of absence. (66 Ops.Cal.Atty.Gen. 30
21 (1983).)

22 In our situation, DDAs are not representing criminal defendants, but rather, are
23 representing attorneys who are counsel to these criminal defendants. The question is,
24 does this DDA-DPD representative-employee relationship trigger the same concerns
25 that led to the prohibition against prosecutors representing criminal defendants and
26 the other restrictions⁹ on prosecutors? The answer is "yes."

27
28 ⁹ For example, a prosecutor may not represent any private party in any action against a city, district, or
political subdivision of the State. (Gov't Code, §§ 26543, 24100.)

1 It is important to recognize that to enter into a representative-employee
2 relationship is a significant act. The relationship between a representative and an
3 employee under investigation or being disciplined is an important one and is akin to an
4 attorney attorney-client relationship or, if the representative is an attorney, is actually
5 an attorney-client relationship.¹⁰ The quality of the representation may have a direct
6 bearing on what, if any, disciplinary charges will be brought forward and what level of
7 discipline will be imposed. The representative has a duty to vigorously defend the
8 employment interests of the employee, which includes challenging the basis of the
9 discipline and exploring and mounting affirmative defenses. The employee has an
10 understandable level of dependency on the representative, whose efforts could
11 ultimately affect the attorney's employment status and professional standing. Courts
12 have long recognized the importance of such representation. (*National Labor*
13 *Relations Board v. Weingarten* (1975) 420 U.S. at 260, 262-263 (representative
14 exercises "vigilance" to ensure punishment is not unjust); *Civil Service Assn. v. City*
15 *and County of San Francisco* (1978) 2 Cal.3rd 552, 566, 568.)

16 We first note that there is a specific ethical rule for prosecutors that expressly
17 prohibits the representation in question. According to the National Prosecution
18 Standards of the National District Attorneys Association,¹¹ a prosecutor should avoid
19 representation of a person who is under criminal investigation, charged or indicted,
20 and *any agent or close relative of that person*. (National District Attorneys Association,
21 National Prosecution Standards, Second Edition (1991), 7.2c and accompanying
22 commentary (Resp. Ex. 15).) In our situation we have a prosecutor representing the

24 _____
25 ¹⁰ The attorney-client relationship is created by contract, either expressed or implied. (*Neel v. Magana,*
26 *Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 181; *Houston General Insurance Co. v. Superior*
27 *Court* (1980) 108 Cal.App.3d 958, 964.)

28 ¹¹ The National Prosecution Standards of the National District Attorneys Association have been cited
by the California Supreme Court as well as by the United States Supreme Court. (*Hoines v. Barney's*
Club, Inc. (1980) 28 Cal.3d 603, 614 n.1 (1st ed. 1977); *People v. Bolton* (1979) 23 Cal.3d 208, 213 n.2
(1st ed. 1977); *Buckley v. Fitzsimmons* (1993) 509 U.S. 259, 278 (2nd ed. 1991); *U.S. v. Sells*
Engineering, Inc. (1983) 463 U.S. 418, 431 n. 14 (1st ed. 1977))

1 agent of many persons who are "under criminal investigation, charged or indicted,"
2 i.e., that agent being public defense counsel.

3 This representation also gives rise to the same ultimate concerns identified by
4 the California Supreme Court in *Rhodes*. In that case a city attorney, whose
5 prosecutorial duty was limited to prosecuting municipal code violations, represented a
6 criminal defendant who was ultimately convicted of forgery. The Court found that,
7 notwithstanding that this representation did not directly conflict with his duties as city
8 attorney,¹² there nevertheless were "considerations of a practical nature which have a
9 potentially debilitating effect on both the quality of the legal assistance rendered by a
10 city attorney to criminal defendants and the ability of a city attorney to properly
11 discharge his prosecutorial responsibilities." (12 Cal.3d at 183.)

12 Specifically, the Court found that if the same police officers who testify for the
13 city attorney in code enforcement prosecutions are witnesses in a criminal case in
14 which the city attorney is acting as legal defense counsel, the city attorney in his
15 capacity as defense counsel may be reluctant to vigorously cross-examine or criticize
16 the conduct of such officers. Such a conflict of interest would deprive a criminal
17 defendant of the undivided loyalty of defense counsel to which he is entitled. (12
18 Cal.3d at 183-184.) On the other hand, if a vigorous representation of a criminal
19 defendant by a public prosecutor results in the weakening of assistance provided by
20 the law enforcement agencies in his code enforcement prosecutions, the prosecutor's
21 ability to enforce those criminal laws falling within the scope of his responsibilities as a
22 city attorney would be severely undermined. (12 Cal.3d at 184-185.)

23 The Court also stated that, wholly apart from the detrimental effects
24 engendered by the conflicting loyalties of defense counsel and public prosecutor,
25 there were other compelling public policy considerations that render it inappropriate for
26

27 ¹² The Court noted that Government Code section 26540 prohibits *district attorneys* from defending any
28 persons accused of a crime and that there was no express statutory provision prohibiting city attorneys
who are public prosecutors from engaging in private practice representing criminal defendants. (12
Cal.3d at 183 n. 3.)

1 a city attorney with prosecutorial duties to represent criminal defendants. The Court
2 found that it was essential that the public have absolute confidence in the integrity and
3 impartiality of the criminal justice system. The Court found that this confidence could
4 be adversely affected by the appearance of impropriety incident to a public
5 prosecutor's private representation of a criminal defendant. (12 Cal.3d at 185, 186.)

6 Although literally the types of parties involved in our situation at some level
7 differ from those in *Rhodes*, the ultimate problems created by the relationship of the
8 various parties are very similar.

9 Even if no confidential Public Defender case file information is disclosed during
10 such representation, a DDA representing a DPD may be tempted to use or to let
11 another DDA use any information, which is adverse to the DPD obtained during such
12 representation, against the DPD and to the advantage of the prosecution in future
13 criminal proceedings. Such adverse information could involve health issues, drug or
14 alcohol abuse, unprofessionalism, tardiness, sexual, racial, or other harassment or
15 discrimination, dishonesty, insubordination, failure to cooperate with other attorneys,
16 workplace violence, or any other conduct or alleged conduct that forms the basis of
17 the investigative or disciplinary proceeding in which the DPD is being represented by
18 the DDA.

19 The DDA, while assisting the DPD in preparing an affirmative defense in the
20 personnel proceeding, may obtain information adverse to the Public Defender or other
21 public defense counsel. The DDA could use such information in future criminal
22 proceedings to the benefit of the prosecution. The DDA could be motivated to be
23 extra-aggressive in representing the DPD for the purpose of attacking or discrediting
24 the Public Defender in criminal court.

25 A DDA representing a DPD may be interested in *not* vigorously defending, or
26 even undermining, the employment interests of the DPD because that DPD may be
27 particularly effective in criminal court. The termination of such DPD would benefit
28 prosecutors.

1 A DPD may feel, and in a certain practical sense would actually be, beholden to
2 the DDA-representative, especially in those situations where the DPD seeks to save
3 his or her professional career. The DPD may be tempted to take actions in criminal
4 court that have nothing to do with the best interests of the criminal defendant and
5 more to do with attempting to curry favor with the DDA-representative or other DDAs,
6 especially those active in the Association, in order to ensure a vigorous defense in the
7 employment matter.

8 A DPD, trying to preserve his or her professional career, may go on the
9 offensive in any disciplinary proceeding and try to discredit the Public Defender or
10 other management involved in the personnel proceeding. Information obtained or
11 fabricated in such effort would be beneficial to any DDA-representative or other
12 prosecutors who wish to undermine the Public Defender's credibility in the eyes of the
13 courts.

14 We discuss in several sections below various other adverse affects on the
15 prosecution function and defense function that result from a DDA representing a DPD
16 in an investigative or disciplinary proceeding, including the chilling of the attorney-
17 client relationships of the Public Defender, the negative effect on the confidence of the
18 public and crime victims in the District Attorney and the negative effect on the working
19 relationship between law enforcement and the District Attorney, disqualification of
20 attorneys from participation in criminal cases, disclosure requirements, and the
21 restrictions on both the District Attorney and the Public Defender in making
22 assignments.

23 As can be seen here, although the particular problems that arise from the
24 representation of DPDs by DDAs in investigative or disciplinary proceedings are
25 somewhat different that the problems that arose in *Rhodes*, the common denominator
26 is that the inherent incompatibility between the nature and duties of a prosecutor and
27 the obligations of public defense counsel gave rise to both sets of problems. And both
28 sets of problems adversely affect the representation of the private client of the

1 prosecutor as well as adversely affect the proper functioning of the criminal justice
2 system.

3 There are other national ethical rules for prosecutors that anticipate the very
4 problems described above and that would, if followed, prevent such problems. We
5 discussed above the ethical rule that prohibited a prosecutor from representing
6 criminal defense counsel. The National Prosecution Standards also provide that a
7 prosecutor should avoid even indirect involvement in criminal defense matters. Thus,
8 a prosecutor should avoid representation in which there is a reasonable belief that the
9 subject matter will be that of a criminal investigation. (National District Attorneys
10 Association, National Prosecution Standards, Second Edition (1991), 7.2b and
11 accompanying commentary (Resp. Ex. 15).) Another rule is that a prosecutor should
12 avoid interests and activities that are likely to appear, or in fact do, conflict with the
13 duties and responsibilities of the prosecutor's office. (National District Attorneys
14 Association, National Prosecution Standards, Second Edition (1991), 7.1 and
15 accompanying commentary (Resp. Ex. 15).)

16 Based on the foregoing, it is reasonable for the Public Attorney and the District
17 Attorney to object not only to any DDA-representative obtaining confidential Public
18 Defender case file information but also to a DDA entering into a representative-
19 employee relationship with any DPD subject to an investigative or disciplinary
20 proceeding.

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22 **B. Tracking System, Reduced Discretion in Assignments, and Risk of**
23 **Ethical Violation or Conflict of Interest.**

24 Even if no confidential Public Defender case file information is disclosed, both
25 the District Attorney and the Public Defender will have to keep track of which DDAs
26 are representing which DPDs in investigative and disciplinary proceedings. If a DDA
27 currently represents a DPD, then both offices will have to be careful and not assign
28 these attorneys to the same criminal case. But even if the representation was in the

1 past, each office will likely avoid making the assignment. There was expert testimony
2 that, in the context of a continuing policy and practice of the Association having DDAs
3 represent DPDs in investigative or disciplinary proceedings, such past DDA-DPD
4 relationship would have to be disclosed. Disclosure itself may result in the criminal
5 defendant filing a *Marsden* motion for new defense counsel or a motion to disqualify
6 the DDA. A failure to make such disclosure would likely result in defense counsel on
7 appeal seeking reversal of any conviction on grounds of ineffective assistance of
8 counsel. (VI Trans. 62:28-67:15.)

9 A DPD creates all of these problems for clients and the defense function by
10 allowing himself or herself to be represented by a DDA in an investigative or
11 disciplinary proceeding. A DPD in such circumstance would be violating his or her duty
12 under Rules of Professional Conduct Rule 3-110 and the common law duty of loyalty.
13 Similarly, a DDA creates all of these problems for the People and the prosecution
14 function by allowing himself or herself to represent a DPD in an investigative or
15 disciplinary proceeding. A DDA in this circumstance would be violating his or her duty
16 of loyalty and the duty not to permit private interests to seriously interfere with criminal
17 prosecutions.¹³

18 Even if these actions by the DDAs and DPDs do not result in any violation of
19 ethical duties, allowing DDAs to represent DPDs in investigative and disciplinary
20 proceedings would nevertheless adversely affect the prosecution function and the
21 defense function. Such policy and practice by the Association would also constitute an
22 unnecessary intrusion upon the work of the Public Defender and would violate the
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25 ¹³ It is particularly important to note that the discharge of prosecutorial duties must be exercised with
26 the highest degree of integrity and impartiality. Prosecutors have a duty of zealous advocacy, but the
27 accused and public have a legitimate expectation that this zeal will be born of objective and impartial
28 considerations. The goal is not to win cases, but to achieve justice. 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.)

1 constitutionally required independence of the Public Defender. (*Coronado*,
2 Cal.App.4th at 1007, 1009, 1015.)

3 Such policy and practice by the Association would also constitute an
4 impermissible encroachment upon the discretionary authority of the District Attorney in
5 his role as public prosecutor. The District Attorney is vested with broad discretionary
6 authority in the initiation and conduct of criminal proceedings, including making
7 assignments. (*Dehle, supra*, 166 Cal.App.4th at 1387; see *People v. Superior Court*
8 (*Greer*) (1977) 19 Cal.3d 255, 265.) This discretionary authority may not be interfered
9 with by the courts, the Board of Supervisors of the County of San Bernardino, a crime
10 victim, or any other private individual.¹⁴ Allowing the Association to take actions that
11 will compel the District Attorney keep track of the DDA-DPD representative-employee
12 relationships, to avoid making certain assignments, to make disclosures, and to
13 increase the risk of ethical violations or conflict, would unnecessarily intrude upon the
14 discretionary authority of the District Attorney.

15
16 **C. Chilling Effect on Attorney-Client Relationships.**

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

20 California courts have long recognized the difficult and fragile nature of the
21 attorney-client relationship between public defense counsel and indigent criminal
22 defendants. Many clients believe public defense counsel are incompetent,
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25 ¹⁴ *Modoc County v. Spencer* (1894) 103 Cal. 49 8, 499-502 (the board of supervisors does not have
26 power to employ counsel on behalf of the county to prosecute criminal cases); *Hicks v. Board of*
27 *Supervisors* (1977) 69 Cal.App.3d 228, 240 (the board of supervisors may not lawfully require the
28 district attorney to perform his investigative functions through the sheriff's department); *People v.*
Municipal Court (Pellegrino) (1972) 27 Cal.App.3d 193, 207 (the discretionary power vested in the
district attorney to control the institution of criminal proceedings may not be controlled by the courts);
Dix v. Superior Court (1991) 53 Cal.3d 442, 448 (neither a crime victim nor any other member of the
public has general standing to intervene in an ongoing criminal proceeding against another person).

1 untrustworthy, or both. One Court of Appeal observed: "The need for trust and
2 confidence between an accused and his attorney is vital in providing effective
3 assistance of counsel. [Citation omitted.] It is essential that a defendant feel free to
4 disclose information in confidence and be assured that the attorney will represent his
5 interests with all competence. It is well recognized that the relationship between
6 indigents who are criminally accused and their appointed counsel is, at best, tenuous.
7 [Citations omitted.] The indigent defendant frequently views appointed defense
8 counsel with distrust and believes counsel is to be in league with the judge and district
9 attorney. [Citation omitted.]" (*Olson v. Superior Court (People)* (1984) 157 Cal.App.3d
10 780, 204 Cal.Rptr. 217, 224, cause retransferred by 705 P.2d 1260, 218 Cal.Rptr.
11 572.)

12 The personal experiences of long-time Los Angeles County Public Defender
13 Michael P. Judge and Public Defender Boxer correspond with these judicial
14 observations. (IV Trans. 126:26-127:28; VII Trans. 10:22-13:15.) Even a witness for
15 the Association, Bernadette Cemore, Senior Deputy Public Defender of the County of
16 Orange, confirmed this phenomenon. (VIII Trans. 71:18-73:1.)

17 Because of such beliefs of defendants, public defender attorneys have to spend
18 more time than other attorneys trying to build trust with their clients. Public Defender
19 Judge testified that public defender attorneys "often have to spend a lot more time
20 with a client just to attempt to assure them that we, in fact, will be loyal to them and
21 diligent and that we are not in any fashion working with the DA against them, or city
22 prosecutor against them." (VII Trans. 11:7-13.) These beliefs may also result in real
23 harm to defendants. Public Defender Judge testified that clients may not cooperate or
24 even reject the sound advice of the public defender attorney and make a terrible
25 mistake that can result in serious consequence to them. Such beliefs may cause a
26 client to rely on cellmates or other people in jail. An inmate may write a motion for
27 them that includes harmful disclosures. Some clients go pro per, which is virtually in
28 every case a disaster. (VII Trans. 12:22-13:15.)

1 The representation of DPDs by DDAs in investigative or disciplinary
2 proceedings will exacerbate the already challenging situation in which DPDs attempt
3 to gain the trust and confidence of their clients. Expert witness Mark Tuft testified that
4 when DPDs enter into representative-employee relationships with DDAs, "there is a
5 high prospect that the clients are going to be quite reluctant to confide in them, and it
6 could interfere with their, with their ability to be effective as lawyers for their clients."
7 (IV Trans. 29:17-24.) He elaborated on this issue and stated that the issue ultimately
8 relates back to the duty of loyalty and that courts not only look at attorney conduct in
9 conflict of interest analysis but also review situations from the client's point of view,
10 i.e., "whether clients would really have trust and confidence in their lawyers and be
11 willing to disclose serious and confidential information that could be embarrassing to
12 their lawyer, which the lawyer needs to be able to defend the client, if they knew that
13 there were these relationships and didn't fully understand, you know, all that was
14 going on." (IV Trans. 81:1-26.) Public Defender Judge also testified that "[t]he
15 relationship [the DDA-DPD representative-employee relationship] is one that would
16 confirm what heretofore had only been a myth, that, in fact, deputy public defenders
17 were subordinate to and beholden to deputy district attorneys.." (VII Trans. 14:21-
18 15:5.)

19 A DPD violates his or her duty under Rules of Professional Conduct Rule 3-110
20 and the common law duty of loyalty when engaging in conduct, i.e., allowing a DDA to
21 represent himself or herself, that will undermine the very ability of the Public
22 Defender's Office to obtain the trust and confidence of clients. Even if no ethical
23 violation would occur, such action adversely affects the defense function. Given the
24 resulting chilling effect, allowing the Association to appoint DDAs to represent DPDs in
25 investigative and disciplinary proceedings unnecessarily burdens the Public Defender
26 in her representation of clients and violates the constitutionally required independence
27 of the Public Defender. (*Coronado, supra*, 106 Cal.App.4th at 1007, 1009, 1015.)
28

1 **D. Undermining District Attorney's Relationship with Law**
2 **Enforcement, Victims, and the Public.**

3 The District Attorney's Office testified that the representative-employee
4 relationship between a DDA and a DPD in investigative and disciplinary proceedings
5 will undermine the ongoing and crucial relationship between law enforcement and the
6 District Attorney's Office, the relationship between crime victim and the District
7 Attorney's Office, and the confidence of the general public toward the District
8 Attorney's Office. (VI Trans. 30:11-36:18, 51:18-56:13.) DPDs are the very persons
9 who, day in and day out in court, attempt to attack the credibility of law enforcement.
10 There is a steady stream of *Pitchess* motions filed by DPDs seeking the personnel
11 record of law enforcement. DDAs routinely attack the appropriateness of such
12 motions. Yet under the Association's practice, DPDs will be vigorously defending the
13 interests of the very attorneys who regularly attack the personal or professional
14 standing of law enforcement and who seek, in the minds of law enforcement, to thwart
15 their efforts.

16 Case law substantiates these concerns of the District Attorney. The California
17 Supreme Court recognized the risk to the working relationship between law
18 enforcement and prosecutors in the situation where prosecutors represent criminal
19 defendants. (*Rhodes, supra*, 12 Cal.3d at 184-185.) A wholly separate compelling
20 public concern is the essential need for the public to have absolute confidence in the
21 integrity and impartiality of the criminal justice system. This requires that prosecutors
22 not only in fact properly discharge their responsibilities but also that they avoid the
23 appearance of impropriety. (*Rhodes, supra*, 12 Cal.3d at 185-186; *Dehle, supra*, 166
24 Cal.App.4th at 1387.)

25 A DDA violates his or her duties as a prosecutor when engaging in conduct,
26 i.e., representing a DPD, that undermines the District Attorney's relationship with
27 crime victims, law enforcement, and the public. A DDA is not permitted to let private
28 interests interfere with criminal prosecutions. By engaging in actions that undermines

1 such relationships, the Association is endangering the proper functioning of the
2 prosecution function in the criminal justice system and intruding upon the discretionary
3 authority of the District Attorney.

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**VIII. A Blanket Rule Will Not Prevent the Association from
Representing DPDs in Investigative and Disciplinary Proceedings**

At the time of the hearing before the ALJ, there were approximately 204 DDAs and 100 DPDs in the bargaining unit. (II Trans. 4:28-5:14.) This fact shows that not having DDAs represent DPDs in investigative or disciplinary proceedings should not pose any significant practical problem to the Association or to DPDs needing representation because the Association has a large pool of DPDs from which to appoint representatives for DPDs. The Association may also appoint conflict-free outside counsel to represent DPDs.

IX. OTHER MATTERS

As more fully set forth in our statement of exceptions the proposed decision's conclusion that there was no protected information in the Berman proceeding is contrary to the evidence, the conclusion that the Public Defender retaliated against DPD Willms is contrary to the evidence and the law, and the conclusion that the Public Defender failed to respond to a request for information is contrary to the evidence.

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X. CONCLUSION.

Based upon the exceptions and this brief in support of the exceptions, the County respectfully requests that the Board dismiss the amended complaint and charges on grounds that PERB lacks jurisdiction. If the Board does not dismiss the amended complaint and charges, the County respectfully requests that the Board reverse in part and modify in part the proposed decision for the reasons set forth herein and in the exceptions.

DATED: June 25, 2012

JEAN-RENE BASLE
County Counsel

By: _____
KENNETH C. HARDY
Deputy County Counsel
Attorneys for Respondent
County of San Bernardino

1 **PROOF OF SERVICE**

2 At the time of service I was over 18 years of age, a citizen of the United States,
3 employed in the County of San Bernardino, State of California, and **not a party to this**
4 **action.** My business address is 385 North Arrowhead Avenue, Fourth Floor, San
5 Bernardino, California 92415-0140.

6 On June 25, 2012, I served the following document:
7 **RESPONDENT'S BRIEF IN SUPPORT OF THE STATEMENT OF**
8 **EXCEPTIONS; PERB CASE LA-CE-431-M**

9 I served a true copy of the document on the person below, as follows:
10 Marianne Reinhold, Esq. Fax: (714) 834-0762
11 Reich, Adell & Cvitan Email: marianner@rac-law.com
12 2670 N. Main Street, Suite 300
13 Santa Ana, CA 92705

14 The document was served by the following means:
15 **By United States Mail.** I enclosed the documents in a sealed envelope or package
16 addressed to the persons at the addresses listed above and placed the envelope for
17 collection and mailing, on June 25, 2012, following our ordinary business practices. I am
18 readily familiar with this business's practice for collecting and processing correspondence
19 for mailing. On the same day that correspondence is placed for collection and mailing, it is
20 deposited in the ordinary course of business with the United States Postal Service, in San
21 Bernardino, California, in a sealed envelope with postage fully prepaid.

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

24 **By fax transmission.** Based on an agreement of the parties to accept service by
25 fax transmission, I faxed the documents to the persons at the fax numbers listed
26 above. No error was reported by the fax machine that I used. A copy of the record of
27 the fax transmission, which I printed out, is attached.

28 **By e-mail or electronic transmission.** Based on a court order or an agreement of
the parties to accept service by e-mail or electronic transmission, I caused the
documents to be sent to the persons at the e-mail addresses listed above. I did not
receive, within a reasonable time after the transmission, any electronic message or
other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the United States of
America, that the above is true and correct.

DATE: June 25, 2012

MARTHA H. FORRESTER, Declarant

PUBLIC EMPLOYMENT
RELATIONS BOARD
HEADQUARTERS OFFICE
2012 JUN 27 AM 10:51