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PUBLIC EMPLOYMENT  
RELATIONS BOARD  
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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 STATEMENT OF  
EXCEPTIONS

20 The County of San Bernardino (the "County") hereby files exceptions to the  
21 proposed decision dated May 17, 2012, in the above-referenced matter.

22 **I. EXCEPTION TO ISSUES OF PROCEDURE**

23 Exception No. 1

24 The Public Employment Relations Board does not have jurisdiction to resolve  
25 the dispute described in the amended complaint. By letter dated August 14, 2009, the  
26 County moved to have the case dismissed for lack of subject matter jurisdiction. The  
27 ALJ denied the motion. (VI Trans. 15:22-16:2.) This was a serious error of law. As  
28

1 discussed more fully in our supporting brief, resolution of the dispute involves  
2 regulating the practice of law, defining the constitutional rights of criminal defendants,  
3 and defining the discretionary authority and independence of the Public Defender and  
4 the District Attorney. PERB has no authority to do this and therefore has no jurisdiction  
5 to resolve the dispute. The courts have jurisdiction in this matter.

6  
7 Exception No. 2

8 The ALJ refused to receive into evidence the draft policy of the District  
9 Attorney's Office prohibiting DDAs from representing DPDs in investigative or  
10 disciplinary proceedings, or the Association's response to the draft policy. The ALJ  
11 noted that the draft policy post-dated the Berman and Willms proceedings, and stated  
12 that his ruling was based on the principle of judicial economy. (VI Trans. 42:8-44:11.)  
13 The ALJ failed to consider any of the testimony of Assistant District Attorney James  
14 Hackleman or any concern of the District Attorney, or even mention the District  
15 Attorney's Office, in the proposed decision. As we explain in our supporting brief, this  
16 was a serious mistake of law.

17  
18 **II. EXCEPTIONS TO ISSUES OF FACT**

19  
20 Exception No. 1

21 Page 2, second full paragraph, second sentence: "The Association is the  
22 exclusive representative of a bargaining unit of County employees that includes both  
23 Deputy Public Defenders (DPDs) and Deputy District Attorneys (DDAs)." This portion  
24 of the proposed decision omits the following material facts: There were at the time  
25 approximately 204 DDAs, 100 DPDs, and a very small number of other attorneys in  
26 the bargaining unit. (II Trans. 4:28-5:14.) The Board of Directors of the Association  
27 consisted of six DDAs, one DPD, and one Child Support Attorney. (I Trans. 5:17-6:10.)  
28 The Association President was DDA Grover Merritt. (I Trans. 5:23.)

1           These omitted facts are material for the following reasons: The ALJ finds, on  
2 page 7 (first full paragraph), that there is an inherent adversarial professional  
3 relationship between the Public Defender and DDAs. It is therefore meaningful that the  
4 exclusive representative, which appoints DDAs to represent DPDs and asserts that  
5 the Public Defender must adjust her representation of clients to accommodate the  
6 labor representation issue, is dominated by DDAs in membership and on the Board of  
7 Directors. These facts also show that not having DDAs represent DPDs in  
8 investigative or disciplinary proceedings should not pose any significant practical  
9 problem to the Association because it has a large pool of DPDs from which to appoint  
10 representatives for DPDs.

11

12           Exception No. 2

13           Page 2, third full paragraph, first sentence: "In July 2007, the County  
14 summoned DPD Lisa Berman (Berman) to an investigatory interview." The County  
15 disputes this finding of fact as being contrary to the testimony and evidence received  
16 at the hearing. There is also an omission of material fact.

17           The Public Defender, not the County, summoned DPD Berman to an  
18 investigative interview. (Stip. para. 5.) The distinction is important. The Public  
19 Defender, not the County, is the attorney of record for all criminal cases handled by  
20 her office. (II Trans. 30:14-17.) The Public Defender is ethically obligated to supervise  
21 the attorneys of her office and ensure that the constitutionally required level of  
22 representation is provided to clients. The Public Defender is ultimately responsible,  
23 both as manager of the law office and as attorney of record, if there is a failure of  
24 supervision as required by the Rules of Professional Conduct. (II Trans. 31:11-19; IV  
25 Trans. 79:25-80:18; Resp. Post-Hearing Brief 18:13-20.) The objections raised by the  
26 Public Defender derive from her status as public defense counsel and attorney of  
27 record in all criminal cases handled by her office. (See Exceptions to Issues of Fact  
28 Nos. 6, 7, and 13 [part 3].)

1           Exception No. 3

2           Page 2, third full paragraph, first block quotation: The quotation is misleading  
3 because it omits the following statement immediately following the last sentence in the  
4 quotation: "We are more than happy to give you a couple weeks in order to find  
5 representation that does not involve someone from the DA's Office who has a conflict  
6 because of the attorney/client work product and attorney/client privilege." (Joint Ex. G,  
7 p. 2.) This is evidence that the Public Defender did not intend to deprive DPD Berman  
8 of her right to representation, but only wanted to ensure that no attorney violated any  
9 ethical duties to a Public Defender client.

10  
11           Exception No. 4

12           Page 2, bottom: This portion of the proposed decision fails to include DDA  
13 Sharon Caldwell's response to Assistant Public Defender Ferguson's objections to  
14 disclosing, via the investigative proceeding, confidential information to a prosecutor.  
15 DDA Caldwell's response is: "It, it would be your obligation to get a waiver from the  
16 clients if you wish to move forward. That would be the union position on this." (Joint  
17 Ex. G, p. 3.) It is a significant fact that any outside entity or individual, let alone a  
18 prosecutor, would assert to the Public Defender what the Public Defender's ethical  
19 obligations are to clients.

20  
21           Exception No. 5

22           Page 3, line 1: "Berman ultimately chose not to be interviewed without her  
23 representative." The County disputes this finding of fact because there is an omission  
24 of fact and it is misleading. The sentence implies that the Public Defender demanded  
25 that DPD Berman proceed with the interview on the same day that Assistant Public  
26 Defender Ferguson objected to DDA Caldwell representing DPD Berman. As  
27 discussed in Exception No. 3 above, DPD Berman was provided with additional time  
28 to obtain a conflict-free representative. This portion of the proposed decision fails to

1 include the fact that the Association chose not to appoint a DPD or an outside attorney  
2 to represent DPD Berman during the investigative interview, even when given  
3 additional time to do so.

4

5 Exception No. 6

6 Page 3, line 2: "The Public Defender proceeded with an investigation and on  
7 September 25, 2007, issued Berman a Notice of Proposed Dismissal (Notice) ... ."  
8 The County disputes this finding because there is an omission of material fact.

9 There is no mention that the investigation consisted of the interview of two  
10 Public Defender clients (one in state prison) and a review of their respective case files  
11 as well as state prison records on visitations. There is no mention that the  
12 investigation was done to determine whether DPD Berman failed to effectively  
13 represent a client due to her personal relationship with another client, whether she  
14 made false representations to the state prison that she was this other client's attorney  
15 in order to have unmonitored access to the client, whether she provided unauthorized  
16 legal advice to this other client, whether she interfered with the representation of this  
17 other client, and whether she was a potential suspect for, or witness of, the crimes for  
18 which the other client was charged. (IV Trans. 134:5-136:11, 155:4-156:12, 180:6-9; V  
19 Trans. 112:1-113:17, 115:23-118:4; Joint Ex. T p. 6:17-24.)

20

21 Exception No. 7

22 Page 3, two-thirds down: "The Notice contained no reference to any case files,  
23 any client communications, or any legal work." The County disputes this finding of fact  
24 as being contrary to the testimony and evidence received at the hearing.

25 The Notice itself identifies Public Defender clients by name. These names were  
26 redacted on the copy of the Notice admitted into evidence. (Joint Ex. J.)

27 A report of investigation was attached to the Notice as Attachment 2. (See Joint  
28 Ex. J, p. 8 (p. 7 of the notice).) The report contains many witness statements,

1 references to clients and case file information, and conclusions of the Public Defender  
2 about issues of ineffective assistance of counsel, fraud, plea bargains, and the  
3 possibility of DPD Berman being an unidentified witness or suspect. (See Exception  
4 No. 6 above.) The report, or some reduced summary of it, was filed under seal with  
5 the ALJ, who did not review it but accepted it under seal as part of the record in the  
6 event that it is reviewed on appeal. (VIII Trans. 79:9-82:8.)

7 An expert witness reviewed the report and opined that it "definitely contained  
8 client confidential information that would be protected under 6068-E of the Business  
9 and Professions Code." (IV Trans. p. 21:17-22:27.) Association counsel herself stated  
10 that the report contained confidential information. (III Trans. 36:24:38:18.) Association  
11 counsel also reassured the ALJ and the Public Defender that neither DDA Merritt nor  
12 any other DDA accessed the report. (III Trans. 35:11-13, 20-23, 35:26-36:1.)

13

14 Exception No. 8

15 Page 3, last paragraph: "In a letter to Boxer dated August 5, 2007, Association  
16 President Grover Merritt (Merritt) stated in part: ..." This portion of the proposed  
17 decision omits the material fact that Merritt is a DDA and omits material statements  
18 made by DDA Merritt in this letter that relate to the adjustments he expects the Public  
19 Defender to make in the representation of her clients in order to accommodate the  
20 labor representation issue.

21 In the letter DDA Merritt states: "I have repeatedly suggested a reasonable  
22 accommodation: any DDA member representative of this Union will recuse herself or  
23 himself from handling or discussing any criminal case involving the subject matter of a  
24 Union representative. There is no question that access to such information in a Union  
25 matter would be incompatible under Penal Code § 1424(a)<sup>1</sup> with turning around and

26

27

28 <sup>1</sup> Penal Code section 1424, authorizing the filing of a motion to disqualify a district attorney, provides that the motion may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial.

1 prosecuting the same case." (Joint Ex. H p. 5.) In this same letter, DDA Merritt also  
2 states that a waiver from Public Defender clients would remedy any conflict problem.  
3 (Joint Ex. H p. 6.)

4 These omitted facts are material for the following reasons: They constitute an  
5 admission by the Association that a DDA representing a DPD in an investigative  
6 proceeding in which client information will be reviewed gives rise to ethical issues.  
7 They evidence that an outside entity – an entity dominated by DDAs and led by a DDA  
8 – demands that the Public Defender adjust her representation of clients, in ways that  
9 will result in ethical violations and that will necessitate waivers, or recusals, or the filing  
10 of motions in criminal court, in order to accommodate the labor representation issue.  
11 They also evidence the Association's demand that the District Attorney must accede  
12 to the recusal of DDAs from the prosecution of particular criminal cases without  
13 authorization from the District Attorney and in order to accommodate private interests,  
14 i.e., the interests of a union and its members.

15  
16 Exception No. 9

17 Page 3, last paragraph: "In a letter to Boxer dated August 5, 2007, Association  
18 President Grover Merritt (Merritt) stated in part: ... " This portion of the decision omits  
19 material facts in that it fails to include the response of Public Defender Boxer to DDA  
20 Merritt's letter of August 5, 2007, pertaining to representation.

21 By letter dated August 13, 2007, Public Defender Boxer provided DDA Merritt a  
22 detailed explanation, with citations to various authority, of why representation of a  
23 DPD in a disciplinary matter by a DDA would result in ethical violations and also would  
24 cause "unnecessary intrusions" into the representation of Public Defender clients.  
25 Public Defender Boxer also stated that her office will not waive any conflict on any  
26 employee discipline. (Joint Ex. I p. 1-2.) Public Defender Boxer also provided that "if a  
27 Deputy Public Defender requests representation, we will allow a reasonable time for  
28 them to obtain representation through SBCPAA, of a person whose involvement will

1 create a conflict. We are willing to work with you to encourage Deputy Public  
2 Defenders to act as SBCPAA representatives." (Joint Ex. I p. 3.)

3

4 Exception No. 10

5 Page 4, near the top of the page: "The County did not respond to this portion of  
6 the letter." The County disputes this finding of fact as being contrary to the testimony  
7 and evidence received at the hearing.

8 Public Defender Boxer and Assistant Public Defender Ferguson testified that  
9 there is no discipline policy for the Public Defender's Office other than Rule X of the  
10 County of San Bernardino Personnel Rules, that this fact was orally communicated to  
11 the Association, and that they did share with the Association draft work performance  
12 standards. (IV Trans. 131:16-132:13, 169:24-171:5; V Trans. 80:3-81:27, 89:15-28,  
13 100:22-106:3.)

14 DDA Merritt testified that he did receive and review the draft work performance  
15 standards. (I Trans. 32:27-33:9.) He also testified that the draft was a "rather large  
16 document which outlined expectations for deputy public defenders." (I Tran. 33:3-5.)

17 The proposed decision omits these facts. This is troubling given that: a  
18 document outlining expectations for DPDs is directly responsive to a request for a  
19 policy pertaining to the discipline of DPDs; DDA Merritt merely testified that he "could  
20 not recollect" receiving any kind of response to his request; and, at the hearing he  
21 could not clarify what document, other than Rule X of the Personnel Rules and the  
22 work performance standards, he was seeking. (I Trans. 34:5-9, 18-21.)

23

24 Exception No. 11

25 Page 4, first full paragraph, first line: "In January 2009, the County summoned  
26 DPD Stephan Willms (Willms) to an investigatory interview." The County disputes this  
27 finding of fact as being contrary to the testimony and evidence received at the hearing.  
28 The Public Defender, not the County, summoned DPD Willms to an investigative

1 interview. (II Trans. 38:25-26.) The distinction is important. (See Exceptions to Issues  
2 of Fact No. 2.)

3

4 Exception No. 12

5 Page 4, first full paragraph, fourth sentence: "Later that same day, Boxer  
6 responded that 'the Public Defender continues to object to having [DDAs] represent  
7 [DPDs] in administrative investigations on personnel issues.' " This finding of fact  
8 omits the basis for the Public Defender's objection and the Association's response.

9 The decision fails to include the following material facts: Public Defender Boxer  
10 objected when DDA Merritt included DDA Poston in the e-mail chain and appointed  
11 DDA Poston as a back-up to DDA Caldwell as DPD Willms' representative because  
12 both DPD Willms and DDA Poston handled death penalty cases. (Joint Ex. X pp. 1-3  
13 [Boxer e-mails of January 7 2009, 4:14 p.m., and January 7, 2009, 12:05 p.m.]) DDA  
14 Merritt responded that "Mr. Poston and Mr. Willms' respective caseloads are  
15 irrelevant," and that "[i]f 'privileged' or work product matter were involved, multiple  
16 cases under PC 1424 present possible remedies for your clients." DDA Merritt also  
17 states: "Why is it so difficult for you to believe that we know how to build 'ethical walls'  
18 as well as you do?" (Joint Ex. X p. 2 [Merritt e-mail of January 7, 2009, 2:51 p.m.] )

19 This portion of the proposed decision also omits the fact that Public Defender  
20 Boxer was willing to postpone the interview of DPD Willms in order that another  
21 representative without a conflict could be appointed. (Joint Ex. X p. 3.)

22

23 Exception No. 13

24 Page 6, middle of the page: "The County argues, however, that the denial was  
25 necessary because of the inherent conflict of interest between DPDs and DDAs, which  
26 (the County argues) can only be managed by a blanket policy against DDAs  
27 representing DPDs." The County disputes this finding of fact as not being accurate as  
28 to the different entities involved and because it omits material facts, as follows:

1 First, it is not the "County" but the Public Defender (Joint Ex. I p. 2; II Trans.  
2 27:26-73:26; IV Trans. 109:5-181:14) and the District Attorney (V Trans. 11:3-57:22;  
3 VI Trans. 29:5-57:4) who each separately raise the issue of inherent conflict. The  
4 expert witness also testified to the existence of such inherent conflict. (IV Trans. 25:5-  
5 29:25, 33:12-35:7; VI Trans. 59:15-61:2, 78:9-79:8)

6 Second, the sentence overstates the reach of the blanket policy. It prohibits  
7 DDAs representing DPDs not in all matters, and not in collective bargaining, but only  
8 in investigative and disciplinary proceedings. (See Resp. Ex. 11; Joint Exs. I, J (first  
9 page), M (first page), X, Z, AA, and BB).

10 Third, this portion of the proposed decision fails to describe the reasons why  
11 the Public Defender adopted a blanket policy. There are four reasons:

12 (a) The disclosure of confidential case information to a DDA acting as an  
13 employee representative would constitute a breach of the duty of loyalty and the duty  
14 of confidentiality owed to the Public Defender client. (Joint Ex. I p. 1-2; Joint Ex. J p. 1;  
15 II Trans. 40:11-20; IV Trans. 26:26-27:19.)

16 (b) The establishment of the DDA-DPD representative-employee  
17 relationship (with or without disclosure of confidential information) would create a  
18 conflict of interest and cause various violations of ethical duties, and would burden the  
19 Public Defender's ability to defend clients because she would be forced to keep track  
20 over time of which DDA is representing which DPD and would have to disclose to  
21 current and future clients when such DPD and DDA are both handling the same  
22 criminal case. (Resp. Ex. I p. 7:21-8:6, 16:3-14; IV Trans. 33:18-21, 46:13-48:15; VI  
23 Trans. 61:8-64:1, 65:3-67:15; *Wood v. Georgia* (1981) 450 U.S. 261, 271 (criminal  
24 defendant has a constitutional right to representation by "conflict-free" counsel).)

25 (c) The Public Defender would be further burdened because either she  
26 would avoid assigning certain DPDs to certain criminal cases prosecuted by the DDA  
27 representative, or, if this is not done, the criminal defendant may file a *Marsden*  
28 motion, which, in either event, would complicate and restrict the Public Defender's

1 ability to assign DPDs to criminal cases. (VI Trans. 62:28-64:1.)

2 (d) Lastly, the representation of a DPD in an investigative or disciplinary  
3 proceeding by a DDA would chill the attorney-client relationships maintained by the  
4 Public Defender (IV Trans. 126:6-127:28, 142:22-28 (Boxer). The Los Angeles County  
5 Public Defender also testified in support of this conclusion. (VII Trans. 10:22-40:1.)

6 Fourth, this portion of the proposed decision, and in fact the entire proposed  
7 decision, fails to acknowledge any of the concerns raised by the District Attorney or  
8 even that the District Attorney is an interested party to this matter.

9 The District Attorney's Office objected to a DDA representing a DPD in an  
10 investigative or disciplinary proceeding for the following reasons:

11 (a) The disclosure of confidential Public Defender case file information to a  
12 DDA acting as an employee representative would conflict with the ethical duties of  
13 DDAs as prosecutors and could introduce conflict or other ethical issues in criminal  
14 prosecutions. (V Trans. 26:6-28:3, 38:3-40:15.)

15 (b) The establishment of the DDA-DPD representative-employee  
16 relationship (with or without disclosure of confidential information) would create a  
17 conflict of interest and cause various violations of ethical duties, and would burden the  
18 District Attorney's ability to conduct prosecutions because his office would be forced to  
19 keep track over time of which DDA is representing which DPD and may have to  
20 disclose such relationship to the court if the DDA and DPD both handle the same  
21 case. (Resp. Ex. I p. 7:21-8:6, 16:3-14; IV Trans. 33:18-21, 46:13-48:15; VI Trans.  
22 36:19-39:14, 40:15-26, 61:8-64:1, 65:3-67:15; *Wood v. Georgia* (1981) 450 U.S. 261,  
23 271 (criminal defendant has a constitutional right to representation by "conflict-free"  
24 counsel).

25 (c) The District Attorney would be further burdened because he would have  
26 to avoid assigning certain DDAs to certain cases because of their prior or current  
27 representation of a DPD, or if this is not done, risk being recused via defense motion.  
28 (VI Trans. 38:6-39:14, 40:15-26.)

1 (d) Lastly, the representation of a DPD in an investigative or disciplinary  
2 proceeding by a DDA undermines the faith of crime victims, law enforcement, and the  
3 public in general in the District Attorney's Office. (VI Trans. 30:11-36:18, 39:15-24)

4  
5 Exception No. 14

6 Page 6, second full paragraph, third sentence: "The Association argues, on the  
7 contrary, that the issue can be managed if any DDA representative simply recuses  
8 himself or herself from handling or discussing any criminal case involving a  
9 representation matter." This finding of fact omits material facts.

10 The Association has asserted not only a recusal "remedy," but has also  
11 maintained the following positions: The Public Defender is obligated to obtain a waiver  
12 from Public Defender clients as to any conflict or disclosure of confidential information.  
13 (Joint Ex. D p. 1; Joint Ex. H p. 6.) The Public Defender may file a motion under Penal  
14 Code section 1424 to remedy any problems posed to Public Defender clients. (Joint  
15 Ex. X p. 2 [Merritt e-mail of January 7, 2009, 2:51 p.m.].) The Association can build  
16 ethical walls. (Joint Ex. X p. 2 [Merritt e-mail of January 7, 2009, 2:51 p.m.].)

17 The omitted facts are material. They constitute serious intrusions, or attempted  
18 intrusions, into the operations of the Public Defender and the District Attorney. They  
19 constitute an admission by the Association that the representation of DPDs in  
20 investigative or disciplinary proceedings raises attorney ethical issues (why else would  
21 the Association find it necessary to resort to such purported "remedies"?).

22  
23 Exception No. 15

24 Page 7, first full paragraph, second sentence: "There may be counties in which  
25 the level of trust between defenders and prosecutors would be high enough for simple  
26 recusal to be reasonably acceptable, but I do not see evidence of that level of trust in  
27 this case." The County disputes this finding of fact as being contrary to the testimony  
28 and evidence received at the hearing.

1 First, there was no testimony offered on behalf of any public defender's office of  
2 any other county or any district attorney's office of any other county that supports any  
3 finding that there is a high level of "trust" between prosecutors and defense counsel in  
4 other counties. The only testimony on behalf of an outside agency was the testimony  
5 of Michael Judge, Los Angeles County Public Defender. (VII Trans. 4-40.) His  
6 testimony supports the opposite conclusion. Assistant District Attorney James  
7 Hackleman testified that his office did a "little bit of a survey to see if this issue of  
8 cross-representation was duplicated in other counties, and we didn't find another  
9 county where there was cross-representation, even where both the public defenders  
10 and the DAs were in the same association." (V Trans. 36:22-26.)

11 The testimony of Senior Deputy Public Defender Bernadette Cemore does not  
12 constitute testimony of the Orange County Public Defender's Office. In any event,  
13 although she testified that she has been Vice-President of the Attorneys Association  
14 for her county (which represents DDAs and DPDs) since about 1995, the only  
15 testimony she offered on the issue was that she "believes" there was one instance  
16 where a DDA represented a DPD in an investigative matter, but that she was "not  
17 positive." (VIII Trans. 64:26-65:9, 70:23-71:4.) This testimony does not support any  
18 statement about "trust."

19 Second, there was no testimony, one way or the other, about "trust" between  
20 DPDs and DDAs of the County of San Bernardino. Thus, there is no evidence to  
21 support the statement: "I do not see evidence of that level of trust in this case." The  
22 dispute has nothing to do with "trust" between public defense counsel and  
23 prosecutors, but rather, is about the inherent professional conflict between them.

24  
25 Exception No. 16

26 Page 7, second full paragraph, third sentence: "As shown by the Notice of  
27 September 25, 2007, some (if not all) of the issues for investigation were separable  
28 from client communications, attorney work product, and other casefile issues." The

1 County disputes this finding of fact as being contrary to the testimony and evidence  
2 received at the hearing. This finding also contains omissions of material fact. See  
3 Exceptions to Issues of Fact Nos. 6 and 7.

4  
5 Exception No. 17

6 Page 11, last paragraph: "In its reply brief (to which the Association had no  
7 opportunity to respond), the County asserted (without citation to the record), 'The  
8 Association testified that such request was not in writing.' Although there is no legal  
9 requirement that a request for information be in writing, the Association did confirm its  
10 request in writing, in its letter of August 5, 2007. The County still failed to respond,  
11 thus violating the MMBA." The County disputes this finding of fact as being contrary to  
12 the testimony and evidence received at the hearing. This finding also contains  
13 omissions of material fact. The reply brief contained other statements. (Reply Brief  
14 33:26-34:4.) Most importantly, the Public Defender did respond. See Exceptions to  
15 Issues of Fact No. 10.

16  
17 Exception No. 18

18 Page 12, second full paragraph in which the expert witness is quoted: "I  
19 wouldn't go that far. Where I think the standard is, and frankly, I think this should be  
20 worked out with the two offices. I think there should be a protocol that addresses these  
21 issues." The County disputes this finding of fact as not fully portraying the expert's  
22 opinion and containing omissions of material fact.

23 The expert witness did make this response to a general question, but upon  
24 further examination and presentation of all the facts, the expert also testified in  
25 significant detail that, since the Association's appointment of DDAs to represent DPDs  
26 would be on a recurring basis, and because of additional operational impacts this  
27 manner of representation would have on the District Attorney's Office and the Public  
28 Defender's Office, a blanket policy prohibiting any representation of a DPD by a DDA

1 in an investigative or disciplinary proceeding would be justified. (VI Trans. 57:25-  
2 67:26.)

### 4 III. EXCEPTIONS TO ISSUES OF LAW

#### 6 Representation Rights

##### 8 Exception No. 1

9 Page 5, first paragraph under "Representation Rights," third sentence: "In order  
10 to establish a violation of this right, the charging party must demonstrate: (a) the  
11 employee requested representation; (b) for an investigatory meeting; (c) which the  
12 employee reasonably believed might result in disciplinary action; and (d) the employer  
13 denied the request. [Citations omitted.]"

14 The proposed decision fails to discuss the "legitimate business reasons"  
15 justification articulated in *Public Employees Association of Tulare County, Inc. v.*  
16 *Board of Supervisors of Tulare County* (1985) 167 Cal.App.3d 797. The proposed  
17 decision also does not mention, in the representation section, either *Upland Police*  
18 *Officers Assn. v. City of Upland* (2003) 111 Cal.App.4<sup>th</sup> 1294 or *Association for Los*  
19 *Angeles Deputy Sheriffs v. County of Los Angeles* (2008) 166 Cal.App.4<sup>th</sup> 1625  
20 (ALADS), both of which stand for the proposition that the right to representation may  
21 be reasonably regulated.

22 More specifically, nowhere in the proposed decision is there any mention of the  
23 legal standards applicable to determine whether the Public Defender and the District  
24 Attorney were justified in prohibiting DDAs from representing DPDs in investigative or  
25 disciplinary proceedings.

26 The California Supreme Court opinion *Santa Clara County Counsel Attorneys*  
27 *Association v. Woodside* (1994) 7 Cal.4th 525 is directly on point and lays out the  
28 legal standard to determine whether unionized public attorneys violate their ethical

1 duties due the manner in which they exercise their rights under the MMBA. There is  
2 also legal authority that recognizes that the nature and duties of a public prosecutor  
3 are inherently incompatible with the obligations of criminal defense counsel. (*People v.*  
4 *Rhodes* (1974) 12 Cal.3d 180, 186). There is also legal authority that analyzes when  
5 the actions of outside entities or individuals constitute impermissible incursions into  
6 the constitutionally required independence of public defenders and district attorneys  
7 when discharging their respective duties in the criminal justice system. (See, e.g.,  
8 *Coronado Police Officers Association v. Carroll* (2003) 106 Cal.App.4th 1001  
9 (regarding public defenders); *Hicks v. Board of Supervisors* (1977) 69 Cal.App.3d 228  
10 (regarding district attorneys).)

11 None of these opinions are cited in the proposed decision. The proposed  
12 opinion fails to set forth the legal standards against which the right of representation  
13 under the MMBA is balanced against the ethical duties of DDAs and DPDs and the  
14 independence of the Public Defender and the District Attorney when carrying out their  
15 respective duties in the criminal justice system. This is a serious mistake of law. We  
16 discuss these opinions and their application in our supporting brief.

17  
18 Exception No. 2

19 As discussed in Exceptions to Issues of Fact No. 13 (part 3 [paragraph 4])  
20 above, the proposed decision fails to identify all of the reasons why the Public  
21 Defender objected to a DDA representing a DPD in an investigative or disciplinary  
22 proceeding and instituted its blanket policy. Consequently, nowhere on pages 6 or 7 of  
23 the proposed decision or anywhere else in the proposed decision is there any analysis  
24 of these reasons or a determination of whether they justify the Public Defender's  
25 blanket policy. This is a serious mistake of law. As discussed in our supporting brief,  
26 the Public Defender has legitimate reasons for instituting a blanket policy.

27

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1           Exception No. 3

2           As discussed in Exceptions to Issues of Fact No. 13 (part 4 [paragraph 9])  
3 above, the proposed decision fails to identify any of the reasons why the District  
4 Attorney objected to a DDA representing a DPD in an investigative or disciplinary  
5 proceeding, and fails to even identify the District Attorney as an interested entity to the  
6 dispute. This is a serious mistake of law. The ALJ was obligated to analyze each of  
7 these reasons and determine whether they constitute a legitimate reason to justify the  
8 District Attorney's blanket policy. As discussed in our supporting brief, the District  
9 Attorney has legitimate reasons for objecting to, and instituting a blanket policy  
10 prohibiting, a DDA from representing a DPD in an investigative or disciplinary  
11 proceeding.

12  
13           Exception No. 4

14           Page 6, third full paragraph, beginning with "Carried to its logical extreme ... ."  
15 The rationale and conclusions in this paragraph are not supported by the facts and  
16 contain significant mistakes of law.

17           The arguments of the Public Defender and the District Attorney do not prevent  
18 the bargaining unit from functioning altogether. The Public Defender and the District  
19 Attorney have raised objections when a DDA *individually* represents a DPD in an  
20 *investigative or disciplinary proceeding*. Neither office has objected to DDAs and  
21 DPDs sitting together at the bargaining table. There are no facts from which to  
22 conclude that the positions of the Public Defender and the District Attorney prevent the  
23 Association from representing unit members at the bargaining table.

24           Furthermore, the respective positions of the Public Defender and the District  
25 Attorney do not prevent the Association from representing unit members in  
26 investigative and disciplinary proceedings. The solution, as both offices have  
27 reiterated, is simple. DDAs represent DDAs in such proceedings. DPDs represent  
28 DPDs in such proceedings. There are approximately 100 DPDs to choose from, so

1 this should not be a difficult task. Outside counsel without a conflict can also be used  
2 to represent unit members in such proceedings.

3 This portion of the proposed decision is also contradicted by the record as a  
4 practical matter. The record indicates that the Association first started representing the  
5 unit in 2001 (Joint Ex. A p. 1 [Recognition article]), but contains no evidence that any  
6 DDAs represented DPDs in investigative or disciplinary proceedings prior to 2006.  
7 During this five-year period the bargaining unit presumably functioned fine.

8 Lastly, there is no legal authority cited by the ALJ, and we are not aware of any,  
9 that stands for the proposition that labor law can authorize unionized public attorneys  
10 to exercise their labor rights in a manner that violates their ethical duties or interferes  
11 with the independence and authority of a public defender or a district attorney in the  
12 criminal justice system. The law is contrary to this position. (See *Woodside*.)

13

14 Exception No. 5

15 Page 7, fist full paragraph, beginning with: "The Association's argument, on the  
16 other hand, would require ... ." This portion of the proposed decision contains  
17 significant mistakes of law.

18 The proposed decision provides no legal authority for the proposition that the  
19 Public Defender or a DPD may disclose confidential case file information to a DDA  
20 acting as a representative in an investigative or disciplinary proceeding, without  
21 violating his or her ethical duties to the client, because of some high level of "trust  
22 between defenders and prosecutors."

23 The proposed decision provides no legal authority for the proposition that any  
24 violation of ethical duties that results from the disclosure of confidential Public  
25 Defender case file information to a DDA acting as a representative may be "cured" by  
26 that DDA recusing himself or herself from current or future criminal cases that involve  
27 such information.

28

1 The proposed decision provides no legal authority for the proposition that a  
2 DDA is authorized under the law, either at his or her own initiative or at the request of  
3 the Association, but without authorization from the District Attorney, to recuse himself  
4 or herself from any criminal case due to any private interest, including but not limited  
5 to union activity. The proposed decision does not explain why such recusal would not  
6 be an intrusion into the discretionary authority of the District Attorney under *Hicks v.*  
7 *Board of Supervisors* (1977) 69 Cal.App.3d 228 or *People v. Superior Court* (1977) 19  
8 Cal.3d 255, 265.

9  
10 Exception No. 6

11 Page 7, second full paragraph, first sentence: "I conclude that in order for the  
12 Association and the Public Defender to do their respective jobs, the County must allow  
13 DDAs to represent DPDs except to the extent that an investigatory interview is  
14 inseparable from the review of casefiles containing client communications and  
15 attorney work product." This is also stated on page 12, last full paragraph.

16 This portion of the proposed decision fails to analyze whether the disclosure of  
17 confidential Public Defender information violates the standards set forth in *Woodside*  
18 and other case law. Furthermore, as discussed more fully in our supporting brief,  
19 confidential information under Business and Professions Code section 6068(e) and  
20 the common law extends beyond just attorney-client privileged information and  
21 attorney work-product. Thus the exception created by the ALJ is too narrow.

22 This portion of the proposed decision contains further serious mistakes of law  
23 because it otherwise requires DDAs to represent DPDs in investigative and  
24 disciplinary proceedings. As discussed more fully in our supporting brief, the  
25 establishment of the representative-employee relationship between a DDA and DPD  
26 will itself, even without disclosure of confidential information, create various burdens  
27 on the operations of the Public Defender and the District Attorney in the criminal  
28 justice system.

1 As stated in Exceptions to Issues of Law Nos. 2 and 3, this portion of the  
2 proposed decision fails to even identify and analyze the reasons why the Public  
3 Defender and the District Attorney each object to DDAs representing DPDs in  
4 investigative or disciplinary proceedings even if no confidential Public Defender client  
5 information is disclosed.

6  
7 Exception No. 7

8 Page 7, second full paragraph, second through fourth sentences, beginning  
9 with: "I also conclude that the exception does not apply to the interview of DPD  
10 Berman ... ." This portion of the decision is contradicted by the facts, as discussed in  
11 Exceptions to Issues of Fact Nos. 6 and 7. If DDA Caldwell would have represented  
12 DPD Berman, DDA Caldwell and DPD Berman would have seriously violated their  
13 respective ethical duties.

14  
15 Exception No. 8

16 Beginning on page 12, last full paragraph, second sentence: "To the extent  
17 there are issues that are not separable from client communications, attorney work  
18 product and other casefile issues, the County should give the Association a written  
19 explanation of why this is so in the particular case and should offer to discuss that  
20 explanation with the Association. If, after any discussion with the Association, the  
21 County determines in good faith that certain issues are inseparable from casefile  
22 issues, it may present DDAs from representing DPDs as to those issues."

23 This portion of the proposed decision contains serious mistakes of law for the  
24 following reasons:

25 First, the Public Defender, not the County, determines whether it is necessary  
26 to review case-related information during an investigative interview with a DPD. The  
27 County proper, as are the courts and law enforcement and the District Attorney, is  
28 constitutionally obligated to respect the independence of the Public Defender's

1 representation of clients, including the supervision and review of the performance of  
2 DPDs in representing clients. (See, e.g., *Coronado Police Officers Association v.*  
3 *Carroll* (2003) 106 Cal.App.4th 1001.)

4 Second, as discussed more fully in our supporting brief, this protocol will  
5 interfere with the constitutionally required independence of the Public Defender in the  
6 representation of her clients.

7 This protocol will impermissibly delay any such investigative interview beyond  
8 any reasonable time limits. Instead of permitting the DPD a reasonable amount of time  
9 to obtain a representative to attend such interview, the Public Defender will now have  
10 to spend significantly more time prior to the interview satisfying the requirements of  
11 this protocol. This will unreasonably delay any investigative interview.

12 Furthermore, the protocol fails to take into consideration the DDA and DPD  
13 composition of the unit and forces the Public Defender to disclose information to DDAs  
14 about her need to review confidential case information. This itself constitutes an  
15 intrusion into the independence of the Public Defender in the representation of her  
16 clients. If there is any disclosure to the Association, it should only be to DPDs of the  
17 Association, with a promise from such DPDs that they will not disclose the information  
18 to DDAs.

19  
20 **Retaliation**

21  
22 **Exception No. 9**

23 Page 10, first partial paragraph beginning at the top of the page: "In the present  
24 case Willms chose a representative who was both reasonably available and physically  
25 able to represent him. Unlike conduct in *Upland*, this was clearly protected conduct."  
26 This conclusion constitutes a serious mistake of law. The proposed decision  
27 misconstrues *Upland* and the facts of our case.

28 Just as the police officer in *Upland*, neither DPD Willms nor the Association

1 engaged in protected activity. In *Upland*, the court found no violation of *Weingarten*  
2 when the police department informed the police officer that he had a right to  
3 representation, but that since he had delayed the investigation one time already, he  
4 could not delay the investigation again on grounds that the particular representative he  
5 wanted was not available. (*Upland, supra*, 111 Cal.App.4th 1294, 1298.)

6 The Public Defender had even stronger grounds than the police department in  
7 *Upland* not to accommodate the particular representative sought by DPD Willms and  
8 the Association. The interview was planned to involve, and in fact did involve, the  
9 review of the death penalty case files handled by DPD Willms. (II Trans. 36:25-38:28,  
10 60:18-28; IV Trans. 112:13-113:12; V 61:27-68:7.) Thus, even under the proposed  
11 decision's own protocol, neither DDA Caldwell nor DDA Poston were "reasonably  
12 available" to represent DPD Willms. In other words, neither DPD Willms nor the  
13 Association engaged in protected activity.

14 Furthermore, the Public Defender exhibited no less flexibility in the  
15 rescheduling of the interview than did the police department in *Upland*. In *Upland*, the  
16 police department accommodated the union and the police officer once to reschedule  
17 the interview, but when the union requested to reschedule it a second time, the police  
18 department refused and ordered the police officer to proceed with the investigative  
19 interview under threat of insubordination.

20 Public Defender Boxer scheduled the interview for January 8, 2009. (Joint Ex.  
21 X p. 5.) She informed the Association that she was willing to reschedule the interview  
22 until January 29, 2009, in order that another representative outside of the District  
23 Attorney's Office could be made available to represent DPD Willms. (Joint Ex. X p. 3  
24 [Boxer e-mail of January 7, 2009, 12:05 p.m.].) DDA Merritt rejected the Public  
25 Defender's objections to having a DDA represent DPD Willms during the investigative  
26 interview. (Joint Ex. X p. 2 [Merritt e-mail of January 7, 2009, 2:51 p.m.] )

27 It was at this point that Public Defender Boxer merely reiterated what the law  
28 provides for, i.e., that a union cannot hold up an investigative interview as long as the

1 employer was reasonable in its limitations on the right to representation, and that the  
2 employee could be disciplined for failing to participate in the interview. (*Upland*.)  
3 According to the protocol set forth in the proposed decision, the Public Defender was  
4 reasonable because case file information was going to be reviewed during the  
5 interview and the Public Defender already provided the Association one opportunity to  
6 find a representative who was acceptable. The ALJ's statement that the Public  
7 Defender had no justification in making the statement and that the Association's  
8 attempt to have a DDA represent DPD Willms was protected activity is simply  
9 incorrect as a matter of fact and law.

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**Information**

**Exception No. 10**

Page 11, last paragraph: "The County still failed to respond, thus violating the MMBA." The facts do not support this legal finding. See Exceptions to Issues of Facts No. 10.

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**CONCLUSION**

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

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  
Bernardino, California 92415-0140.

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

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

11 The document was served by the following means:  
12  **By United States Mail.** I enclosed the documents in a sealed envelope or package  
13 addressed to the persons at the addresses listed above and placed the envelope for  
14 collection and mailing, on June 25, 2012, following our ordinary business practices. I am  
15 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 San  
Bernardino, California, in a sealed envelope with postage fully prepaid.

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

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

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

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

26 DATE: June 25, 2012

27  
28 \_\_\_\_\_  
MARTHA H. FORRESTER, Declarant

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June 25, 2012

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**COMMENTS:**

Attached is the Respondent's Statement of Exceptions re *San Bernardino County Public Attorneys Association v. County of San Bernardino (Office of the Public Defender)* PERB Case No. LA-CE-431-M.

Kenneth C. Hardy  
Deputy County Counsel

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