

1 MARIANNE REINHOLD (CSB 106568)
KENT MORIZAWA (CSB 260453)
2 ANDREA K. LOVELESS (CSB 255434), Members of
REICH, ADELL & CVITAN
3 A Professional Law Corporation
2670 N. Main Street, Suite 300
4 Santa Ana, California 92705
Telephone: (800) 386-3860
5 Facsimile: (714) 834-0762
6 Attorneys for Charging Party
SAN BERNARDINO COUNTY
7 PUBLIC ATTORNEYS ASSOCIATION

PUBLIC EMPLOYMENT
RELATIONS BOARD
HEADQUARTERS OFFICE
2012 JUL 31 AM 9:25

8
9 STATE OF CALIFORNIA

10 PUBLIC EMPLOYMENT RELATIONS BOARD

11
12 SAN BERNARDINO COUNTY PUBLIC]
ATTORNEYS ASSOCIATION,]

CASE NO. LA-CE-431-M

13 Charging Party,

CHARGING PARTY'S SUPPORTING BRIEF

14 vs.

[Concurrently filed with Charging Party's
Response to Respondent's Statement of
Exceptions]

15 COUNTY OF SAN BERNARDINO]
16 (OFFICE OF THE PUBLIC DEFENDER),]

17 Respondent.
18
19
20

I. INTRODUCTION

21
22 This is the brief of Charging Party San Bernardino County Public Attorneys Association
23 (hereafter, "SBCPAA") in support of its concurrently filed Response to Respondent's Statement of
24 Exceptions. SBCPAA urges PERB to reject the exceptions filed by the County of San Bernardino
25 (hereafter, "County") and adopt the decision of the administrative law judge (hereafter, "ALJ") with
26 modifications consistent with SBCPAA's exceptions.

27 ///

28 ///

1
2
3 **II. ARGUMENT**

4
5 1. **PERB HAS JURISDICTION OVER THIS MATTER.**

6 SBCPAA requests that PERB take judicial notice of the Court of Appeal's unpublished
7 decision in *County of San Bernardino v. San Bernardino County Public Attorneys Association*
8 (Appeal No. E051576).¹ In its decision, the Court of Appeal denied the County's appeal and
9 determined conclusively, like the ALJ in this matter, that PERB has exclusive initial jurisdiction
10 over the underlying labor law issues in this matter. In doing so, it considered and rejected the
11 arguments that the County re-asserts in its Brief In Support of the Statement of Exceptions
12 (hereafter, "Supporting Brief"). Given the ALJ's prior determination on the issue and also that of
13 the Court of Appeal, SBCPAA feels that further argument is unnecessary and redundant on the
14 issue of PERB's initial jurisdiction over this matter. However, below is a brief restatement of
15 SBCPAA's position on this issue.

16 A. The Legal Standard for Determining PERB's Jurisdiction.

17
18 The Legislature has designated PERB as the agency charged with administering the Meyers-
19 Milias-Brown Act (hereafter, "MMBA"). Cal. Gov't. Code § 3541.3, incorporated by Cal. Gov't.
20 Code § 3509(a). Specifically, Government Code Section 3509(b) provides that, "The initial
21 determination as to whether the charge of unfair practice is justified and, if so, the appropriate
22 remedy necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive
23 jurisdiction of the board." *See also City of San Jose v. Operating Engineers Local Union No. 3,*
24 (Cal. 2010) 49 Cal. 4th 597, 606 (both the Educational Employment Relations Act (hereafter,

25
26 _____
27 ¹ Judicial notice may be taken of an unpublished court of appeal decision as a
28 record of a court of this state. Cal. Evid. Code § 452(d)(1); *Gilbert v. Master
Washer & Stamping Co., Inc.* (Cal. App. 2d Dist. 2001) 87 Cal. App. 4th 212,
217, fn. 14.

1 "EERA") and MMBA expressly vest in the administrative board exclusive initial jurisdiction over
2 unfair labor practice charges); *San Diego Teachers Ass'n. v. Superior Court* (Cal. 1979) 24 Cal. 3d
3 1, 14 ("PERB had exclusive initial jurisdiction to determine whether the strike was an unfair
4 practice and what, if any, remedies PERB should pursue"). In *El Rancho Unified School District v.*
5 *National Education Association*, the California Supreme Court set forth the analysis in determining
6 when PERB maintains initial jurisdiction over a labor dispute--whether the controversy presented
7 involves activities "arguably protected or prohibited" under the applicable labor statute. (Cal.
8 1983) 33 Cal. 3d 946, 953.

9
10 B. The Activity of Designating Representatives for Disciplinary Hearings Is Both
11 Arguably Protected and the County's Conduct Is Arguably Prohibited by the
12 MMBA.
13

14 The activity of SBCPAA in designating representatives is "arguably protected," and the
15 activity of the County in restricting who SBCPAA may designate is "arguably prohibited" by the
16 MMBA. As discussed in further detail in prior briefing, the representation by SBCPAA of its
17 members in disciplinary proceedings is specifically protected by the MMBA. Cal Gov't. Code §§
18 3503 & 3504. See *Redwoods Community College Dist. v. PERB*, (Cal. App. 1st Dist. 1984) 159
19 Cal.App.3d 617; *Social Workers' Union, Local 535 v. Alameda County Welfare Dept.* (Cal. 1974)
20 11 Cal.3d 382. Conversely, what the County seeks to do - restrict the ability of SBCPAA to
21 designate representatives for its members - is arguably prohibited by the MMBA. Specifically,
22 such conduct may constitute interference with protected rights under Government Code Sections
23 3502 and 3506, which can be charged as an unfair practice before PERB under Government Code
24 Section 3509(b) and is the conduct upon which PERB based its issuance of the complaint in this
25 matter. The issues PERB will need to determine to find a violation of the MMBA in the charges
26 already before it are: "(1) that employees were engaged in protected activity; (2) that the employer
27 engaged in conduct which tends to interfere with, restrain or coerce employees in the exercise of
28 those activities, and (3) that employer's conduct was not justified by legitimate business reasons."

1 *Public Employees Assn. v. Board of Supervisors (Tulare)* (Cal. App. 5th Dist. 1985) 167
2 Cal.App.3d 797, 807.

3 The issues which the County has raised throughout this matter are precisely the issues
4 involved in the "legitimate business reasons" defense under *Tulare*. The County here argues that
5 PERB does not have authority to regulate the practice of law or interfere with the Office of the
6 District Attorney (hereafter, "DA") or Office of the Public Defender (hereafter, "PD") in criminal
7 cases. These issues are the County's justifications for its actions and its affirmative defense to the
8 PERB charges against it. To say that PERB does not have authority to even address these issues, is
9 to say that it may not consider the "legitimate business reason" defense of a public employer as
10 required by *Tulare*. PERB is constantly called upon to address such issues and is equipped to do so
11 to resolve the issues underlying this matter.

12
13 2. THE PD'S RESTRICTIONS ON REPRESENTATION VIOLATED THE RIGHTS OF
14 SBCPAA AND ITS MEMBERS.

15
16 The refusal of the PD to allow Deputy District Attorneys (hereafter, "DDAs") to represent
17 Deputy Public Defenders (hereafter, "DPDs") in disciplinary investigations led to the issuance of a
18 complaint alleging several distinct unfair practices against the County, including: (1) the denial of
19 SBCPAA's right to represent its members in violation of Government Code Section 3503; and (2)
20 interference with the rights of SBCPAA members (and by extension SBCPAA) in violation of
21 Government Code Section 3506. [Complaint, at ¶¶ 5-6.] Each is addressed in turn below.

22
23 A. The Actions of the PD Denied SBCPAA Its Right to Represent Berman.

24
25 Separate and distinct from the unfair practice of interference, an employer commits an
26 unfair practice when it denies to employee organizations rights guaranteed to them under the
27 MMBA. 8 C.C.R § 32603(b). Included among these rights is the right of the employee
28 organization to represent its members. Cal. Gov't Code § 3503. The ALJ's proposed decision sets

1 forth the correct standard to determine whether a denial of representation has occurred: (1) the
2 employee requested representation; (b) for an investigatory meeting; (c) which the employee
3 reasonably believed might result in disciplinary action; and (d) the employer denied the request.
4 [Proposed Decision, at pp. 5-6.]

5 Here, the County's Exceptions and Supporting Brief do not appear to deny the fact that Lisa
6 Berman requested representation for an investigatory meeting that she reasonably believed would
7 result in discipline. It also does not deny that it deliberately denied her the right to an SBCPAA
8 representative or that in doing so it denied SBCPAA's right to represent its members. Accordingly,
9 SBCPAA urges PERB to adopt as its own the factual findings and legal conclusions of the ALJ
10 regarding the County's denial of representation to Berman.²

11
12 B. The Actions of the PD Were Not Justified By Legitimate Business Reasons.

13
14 The *Tulare* case sets forth the standard for establishing an interference with rights under the
15 MMBA: (1) that employees were engaged in protected activity; (2) that the employer engaged in
16 conduct which tends to interfere with, restrain or coerce employees in the exercise of those
17 activities, and (3) that the employer's conduct was not justified by legitimate business reasons.
18 *Tulare*, 167 Cal. App. 3d at 807. The primary thrust of the County's argument is that it did not
19 interfere with the rights of SBCPAA or its members because its conduct was justified by legitimate
20 business reasons.

21
22
23 ² While the PD did not go forward with the investigatory interview, the blanket
24 policy announced by Lauri Ferguson, Assistant Public Defender, during the
25 aborted interview of Berman prevented Berman and other DPDs from
26 participating in an investigatory interview with a representative from SBCPAA.
27 Indeed, Ferguson prohibited Berman from "discussing *anything* regarding this
28 interview" with a DDA employee representative, thereby announcing a rule that
both greatly exceeded the purported basis or concern of the PD and effectively
eviscerating Berman's and SBCPAA's rights under the MMBA to provide and
receive assistance in disciplinary situations. [Exhibit G, at p. 3.]

1 In addition to citing to *Tulare*, the County also relies on *Upland Police Officer's*
2 *Association v. City of Upland* (Cal. App. 4th Dist. 2003) 111 Cal. App. 4th 1294, and *Association*
3 *for Los Angeles Deputy Sheriffs (ALADS) v. County of Los Angeles* (Cal. App. 2d Dist. 2008) 166
4 Cal. App. 4th 1625. However, *Upland* and *ALADS* are distinguishable because they deal with the
5 rights of police officers under the Public Safety Officers Procedural Bill of Rights Act, not
6 employees' or a union's rights under the MMBA. Furthermore, the concerns raised in those cases
7 regarding the discipline of police officers are not analogous to those in this case. In *Upland*, the
8 court held a police officer did not have the discretion to delay an investigatory interview
9 indefinitely based on the unavailability of his attorney. *Uplands*, 111 Cal. App. 4th at 1309. In
10 *ALADS*, the court upheld a "no-huddle" rule prohibiting officers involved in shootings from
11 meeting collectively with a single attorney prior to investigatory meetings, but upheld the right of
12 each officer to meet with that attorney individually. *ALADS*, 166 Cal. App. 4th at 1647. In neither
13 case did the court sanction or otherwise approve of any restrictions on *classes of individuals* who
14 could serve as representatives in disciplinary meetings. As the ALJ noted in his proposed decision,
15 the County's reliance on *Upland* is inapposite. Accordingly, augmenting the *Tulare* standard with
16 the holdings from *Upland* and *ALADS* is not appropriate.

17 The County falsely asserts that the ALJ failed to consider any of its supposed legitimate
18 business reasons, *i.e.*, the ethical and logistical implications, for imposing a blanket policy
19 prohibiting deputy district attorneys from representing deputy public defenders in disciplinary
20 meetings. [Supporting Brief, at p. 8:27-23:3.] On the contrary, the ALJ clearly considered and
21 rejected the County's argument that the denial of representation was due to an inherent conflict of
22 interest between the deputy district attorneys and deputy public defenders. [Proposed Decision, at
23 p. 6.] The County seems to argue that, in order to prevent conflicts of interest or the appearance of
24 impropriety, DPDs and DDAs must refrain from associating with each other in any way. However,
25 this position is neither realistic nor is it supported by the rules of professional responsibility.

26 It is quite common for DDAs and DPDs to have been law school classmates or friends. A
27 DPD may even be in a romantic relationship with or married to a DDA. (VI Trans. 36:19-37:4; VI
28 Trans. 50:25-51:14; VIII Trans. 73:2-77:12.) Even in the case of a married couple, the State Bar

1 did not adopt a per se rule prohibiting the public defender spouse from representing a defendant
2 being prosecuted by the district attorney spouse. *See* State Bar of California Standing Comm. on
3 Prof's Responsibility and Conduct, Formal Op. No. 1984-83. The State Bar decided that the
4 representation could continue provided the public defender spouse obtained informed written
5 consent from her client and the district attorney spouse obtained informed consent from the District
6 Attorney. *Id.* Further, the State Bar had no issue with colleagues of the public defender spouse
7 representing a defendant who was prosecuted by the district attorney spouse, or with colleagues of
8 the district attorney spouse prosecuting a defendant represented by the public defender spouse. *Id.*
9 Similarly, in this case, when the DDA-representative and the DPD-employee are assigned to the
10 same case, the DPD may be required to disclose the relationship to his or her client. *See* State Bar
11 of California Standing Comm. on Prof's Responsibility and Conduct, Formal Op. No. 1987-93
12 (finding that, provided there is disclosure to the client, a defense attorney may continue to represent
13 his client when (1) a police officer who is a friend of the defense attorney's will be a witness for the
14 prosecution, and (2) the defense attorney is married to the bailiff or the court reporter). Even James
15 Hackleman, the County's deputy district attorney witness, testified that "disclosure is the salve that
16 covers the wound of a conflict of interest." (VI Trans. 36:19-37:4.) As such, there is no ethical
17 rule that would prohibit the representation altogether and the ALJ was correct in rejecting this
18 argument.

19 The ALJ also responded to the County's argument regarding confidential client information
20 by prohibiting deputy district attorneys from representing deputy public defenders only when it is
21 necessary to review case files containing client communications and attorney work product.
22 [Proposed Decision, at p. 7.] Therefore, PERB should, at the very least, affirm the standard
23 articulated by the ALJ. However, SBCPAA urges PERB to reject the ALJ's proposed decision to
24 the extent it prohibits DDAs from representing DPDs in any disciplinary meeting in which client
25 information is discussed, in favor of a standard that would allow DDAs and DPDs to evaluate their
26 ethical responsibilities on a case-by-case basis. Neither the California State Bar ethics opinions nor
27 the controlling caselaw support a blanket rule prohibiting such representation.

28

1 The County admits that *Santa Clara County Counsel Attorneys Association v. Woodside*
2 (1994) 7 Cal. 4th 525, lays out the legal standard for balancing public attorneys' rights under the
3 MMBA with their ethical obligations. [Exceptions, at pp. 15:26-16:15.] In *Woodside*, the California
4 Supreme Court rejected that county's argument for a blanket rule requiring public attorneys to
5 resign, if they wanted to pursue litigation to enforce their MMBA rights. 7 Cal. 4th at 552-3 ("If
6 the Attorneys are deprived of any formal means to enforce their rights, then these 'rights' are no
7 more meaningful than they were prior to the passage of the MMBA."). The Court held that public
8 attorneys could sue to enforce their MMBA rights, as could non-attorney public employees, but that
9 they would be held to "a professional standard that ensures that their *actual* representation of their
10 client/employer is not compromised." *Id.* at 553 (emphasis in original); *see also General Dynamics*
11 *Corp. v. Superior Court* (1994) 32 Cal. Rptr. 2d 1 (holding that an in-house attorney had the same
12 right as a non-attorney employee to a wrongful termination claim against his employer, provided he
13 maintained his ethical obligations to his client). Even Mark Tuft, the County's ethics expert,
14 testified that there were instances in which DDAs could represent DPDs, and that each instance
15 must be analyzed on a "case-by-case" basis. (IV Trans. 72:25-73:16.)

16 Consistent with *Woodside*, SBCPAA urges PERB to adopt a rule that DDAs may represent
17 DPDs in disciplinary meetings, but that each must ensure that the actual representation of their
18 clients is not compromised. This more flexible standard allows DDAs and DPDs to utilize the
19 mechanisms already in place to ensure that they comply with their ethical obligations. As
20 attorneys, DPDs and DDAs are able to recognize and resolve any conflicts of interest and to
21 maintain confidential information. Such a standard does not prohibit DDAs from representing
22 DPDs every time confidential client information is discussed at the disciplinary meeting, and
23 SBCPAA has filed an exception regarding the ALJ's rule prohibiting "cross-representation" when
24 confidential client information is discussed.

25 In adopting this rule, the ALJ explained that "[t]here may be counties in which the level of
26 trust between defenders and prosecutors would be high enough for simple recusal to be reasonably
27 acceptable, but I do not see evidence of that level of trust in this case." [Proposed Decision, at p.
28 7.] However, there is no evidence on the record to suggest that either a DDA-representative or a

1 DPD-employee has ever failed to adhere to his or her ethical obligations. Neither the County nor
2 the ALJ can cite to any evidence that a DDA- representative or DPD-employee ever failed to
3 disclose a potential conflict to an indigent criminal defendant, failed to recuse him or herself when
4 appropriate, publicly disclosed confidential client information he or she learned in a disciplinary
5 meeting, used confidential information to his or her advantage, used confidential client information
6 to the disadvantage of the PD or a DPD or any criminal defendant, or otherwise modified his or her
7 case strategy or tactics as a result of the “cross-representation.” The County did not present
8 evidence that the *actual* representation of a PD client was ever compromised; rather, it merely
9 presented evidence of hypothetical or speculative future ethical violations. (VII Trans. 35:24-37:9.)
10 The ALJ and the County err in assuming, without evidence, that either the DDA-representative or
11 the DPD-employee would violate his or her ethical obligations.

12 Moreover, a recent California State Bar ethics opinion indicates that an attorney may make
13 a limited disclosure of her firm’s client’s confidences to her legal representative for the purposes of
14 seeking advice regarding an employment dispute. *See* State Bar of California Standing Comm. on
15 Prof’s Responsibility and Conduct, Formal Op. Interim No. 2012-183; *see also* San Diego County
16 Bar Association, Ethics Op. 2008-1 (finding that an attorney would “not be subject to discipline for
17 disclosing to their employment counsel the facts they reasonably believe are necessary to evaluate
18 their claims”); American Bar Association, Formal Ethics Opinion 01-424 (finding that a former in-
19 house counsel may pursue a wrongful termination claim against a former employer, as long as he
20 “limit[s] disclosure of confidential client information *to the extent reasonably possible.*”)
21 (emphasis added).

22 The State Bar’s opinion relies on the California Court of Appeal’s decision in *Fox*
23 *Searchlight Pictures, Inc. v. Paladino* (Cal. App. 2nd Dist. 2001) 89 Cal. App. 4th 294, which held
24 that, although an attorney may not *publicly* disclose client confidences, an attorney may disclose
25 client confidences to her counsel to the extent they are relevant to challenging an employment
26 decision. 89 Cal. App. 4th at 308-315. The Court of Appeal reasoned that, because the attorney’s
27 counsel was bound by confidentiality, “disclosure to them was not a *public* disclosure.” *Id.* at 311
28 (emphasis in original).

1 Tufts based his expert opinion—that DDAs could not represent DPDs in a disciplinary
2 meeting in which confidential client information would be discussed—on the mistaken premise that
3 information provided to a DDA-representative would not be confidential. (IV Trans. 35:15-37:28.)
4 However, Bernadette Cemore, a DPD-representative from another county, testified that information
5 provided to a union representative in the course of his or her representation of an employee is kept
6 confidential. (VIII Trans. 68:22-70:3; *see also* State Bar of California Standing Comm. on Prof's
7 Responsibility and Conduct, Formal Op. Interim No. 2012-183 (stating an attorney's disclosure to
8 counsel did not violate his or her ethical responsibilities because the attorney's counsel must not
9 publicly disclose client confidences)). The County admits as much when it says that "[t]he
10 relationship between a representative and an employee under investigation or being disciplined is
11 an important one and is akin to an attorney [sic] attorney-client relationship or, if the representative
12 is an attorney, is actually an attorney-client relationship." [Supporting Brief, at p. 13.] Because the
13 union representative keeps as confidential the information discussed in a disciplinary meeting, a
14 disclosure of confidential client information to a DDA-representative during the course of a
15 disciplinary meeting is not a public disclosure.

16 Moreover, if the DDA-representative gains access to information about a particular indigent
17 criminal defendant as a result of his or her union representation, the DA's office can effectively
18 screen the DDA-representative from participating in any case in which that indigent criminal
19 defendant is a party or a witness. *See* State Bar of California Standing Comm. on Prof's
20 Responsibility and Conduct, Formal Op. No. 1993-128 (finding that a law firm may represent a
21 client in a criminal matter where a member of the firm assisted in prosecuting the case prior to
22 joining the firm, provided that he is effectively screened out of participating in the case or sharing
23 in the fees earned) (citing *Chadwick v. Superior Court* (Cal. App. 2nd Dist. 1980) 106 Cal. App. 3d
24 108, in which the court refused to disqualify the prosecutor's office on the basis of knowledge
25 imputed from a former DPD who was now working as a DDA because the former DPD was being
26 effectively screened out of the case).

27 The evidence is clear that, when the PD sought to interview DPD Berman, SBCPAA did
28 not have any DPD-representatives. As a result, by precluding her DDA-representative from

1 participating in the investigatory interview, the PD effectively deprived Berman of any union
2 representation.³ As the Court said in *Woodside*, her right to representation was “no more
3 meaningful than [it was] prior to the passage of the MMBA.” Because of the scarcity of DPD-
4 representatives, if PERB affirms the ALJ’s standard, there is a significant risk that DPD-employees
5 facing discipline for issues related to, for example, their handling of client matters will not have a
6 meaningful right to representation, as required by the MMBA, because these disciplinary meetings
7 may require some discussion of confidential client information. Therefore, SBCPAA urges PERB
8 to adopt a more flexible approach that relies on the mechanisms already set forth in the California
9 Rules of Professional Conduct.

10 In support of its argument that the ALJ’s rule impedes the independence of the PD, the
11 County relies heavily on *Coronado Police Officers Association v. Carroll* (Cal. App. 4th Dist.
12 2003) 106 Cal. App. 4th 1001. [Supporting Brief, at pp. 6:25-8:4.] However, *Coronado* is clearly
13 distinguishable; it analyzed whether the Public Defender’s electronically-stored case files and other
14 information are considered “public records,” and, thus, subject to mandatory public disclosure
15 under the Public Records Act. 106 Cal. App. 4th at 1006-12. The case did not arise under the
16 MMBA and thus the relevant statute, the MMBA, is not analyzed or discussed by the Court of
17 Appeal.

18 In *Coronado*, the union representing members of law enforcement argued that the officers
19 should be able to access the records maintained by the Public Defender and seek to remove from

20
21 ³ The County contends that the ALJ’s decision is incorrect in its conclusion that
22 Caldwell could have represented Berman as to those issues not involving case
23 files and client confidential information on the basis that the discipline of Berman
24 did involve such issues. [Exceptions, at pp. 4-7; Supporting Brief, at p. 23.] This
25 ignores that at the time of the interview, the PD had concluded that Berman had
26 *not* failed to effectively represent a client and was instead investigating whether
27 she had engaged in improper conduct with an individual with whom she had a
28 romantic relationship (but who was never her client, was represented by another
DPD, and entered into a plea deal while represented by that DPD). [Ex. E, at pp.
5-6.] At the time of the investigatory interview, no investigator’s report existed
and the PD had not interviewed any of the clients of the Office except the one
individual whose complaints against Berman were determined to be unfounded.
[Ex. E, at pp. 5-6.]

1 them information it believes the public defender is not entitled to retain or information that was
2 obtained in violation of the privacy rights of its members. *Id.* at 1009. In finding that the files did
3 not constitute “public records,” the Court of Appeal reasoned that the public defender is not a state
4 agent when representing a criminal defendant, rather he is “serving an essentially private function,
5 adversarial to and independent from the state.” *Id.* at 1007. As such, the Court of Appeal held that
6 the public defender should have the same independence as private criminal defense attorneys, and,
7 as a result, the union could not dictate what information the public defender could retain and
8 evaluate, particularly when private defense counsel was not subject to the same scrutiny. *Id.* at
9 1007, 1009. The Court of Appeal also held that, even if the records were “public,” they would be
10 exempt from disclosure because the public interest served by not disclosing the information
11 outweighed the public interest served by disclosing the information. *Id.* at 1012-16. The Court of
12 Appeal reasoned that the public’s interest in the information retained by the public defender was
13 “slight,” compared to the public interest in allowing public defenders to quickly and efficiently
14 share information and in providing indigent criminal defendants with legal representation equal to
15 that of private defense counsel. *Id.*

16 Critically, the Court of Appeal in *Coronado* did not find that discussing minimal client
17 information in a confidential disciplinary meeting was contrary to the public interest, nor did it
18 weigh that concern against the public interest in ensuring that attorneys have the same employment
19 rights as non-attorneys. Furthermore, our case does not implicate the independence of public
20 defenders as compared to private criminal defense attorneys. Public and private attorneys alike
21 must, on a case-by-case basis, determine their ethical obligations. These obligations may include
22 disclosing a potential or actual conflict to the court or a client and obtaining written consent,
23 screening out an attorney who has gained confidential information related to the representation
24 from a current or former client, and perhaps even recusing him or herself from the representation
25 altogether.

26 Because the mechanisms for addressing ethical issues are already in place, SBCPAA urges
27 PERB to adopt a rule allowing DDAs to represent DPDs in disciplinary meetings, provided that
28 each attorney continue to comply with their ethical obligations which may vary on a case-by-case

1 basis. To the extent they do not comply with these obligations, they will be subject to discipline by
2 the State Bar.

3
4 3. THE PD RETALIATED AGAINST WILLMS FOR ENGAGING IN PROTECTED
5 CONCERTED ACTIVITY.

6
7 The ALJ sets forth the appropriate standard to determine whether an employer retaliated
8 against an employee in violation of the MMBA. The County's exceptions to the ALJ's proposed
9 decision focus primarily on the ALJ's legal conclusion that Willms exercised rights under the
10 MMBA. [Exceptions, at pp. 21:23-22:1.] The other factual findings and legal conclusions
11 regarding the retaliation against Willms (including the existence of an adverse action against
12 Willms and the nexus between the adverse action and the protected activity) appear to be deemed
13 accepted.⁴

14 It is a fundamental tenet of labor law that a union member has the right to request
15 representation during an investigatory interview with his employer. *See N.L.R.B v. Weingarten*
16 (1975) 420 U.S. 251; *Rio Hondo Community College District* (1982) PERB Dec. No. 260. This
17 tenet is incorporated into the MMBA. *See Cal. Gov't Code §§ 3502, 3503, 3506.* Accordingly,
18 Willms' request for representation at the disciplinary meeting was an exercise of rights under the
19 MMBA. Regardless of whether a DDA or DPD was designated to represent Willms, the mere fact
20 that he sought representation constitutes protected activity.

21 The County appears to take the position that Willms did not exercise rights under the
22 MMBA because DDAs cannot represent DPDs in investigatory interviews. However, this conflates
23

24 ⁴ SBCPAA reasserts its position that the County is foreclosed from presenting
25 argument on the issues of retaliation against Willms and its refusal to provide
26 information based on the County's failure to address these issues in its opening
27 brief before the ALJ. *See American Drug Stores, Inc. v. Stroh* (Cal. App. 4th Dist.
28 1992) 10 Cal. App. 4th 1446 ("Points raised for the first time in a reply brief will
ordinarily not be considered, because such consideration would deprive the
respondent of any opportunity to counter the argument.")

1 the interference and retaliation charges in this matter. Whatever their merits, concerns regarding
2 "cross-representation" are irrelevant to the determination of retaliation against Willms, and the
3 County presents no legal authority to justify its retaliatory conduct.

4
5 4. THE COUNTY FAILED AND REFUSED TO PROVIDE INFORMATION.

6
7 In a letter dated August 5, 2007, Grover Merritt, the President of SBCPAA, requested from
8 Doreen Boxer, the Public Defender, among other things, the rules of conduct governing discipline
9 of employees in the PD's office. The PD's August 13, 2007 response to Merritt's letter did not
10 address Merritt's request for information, and SBCPAA did not receive any subsequent
11 correspondence regarding that request.

12 The County's exceptions misconstrue the evidence regarding its failure to provide
13 information to SBCPAA. The County states that it complied with its duty to provide information
14 because Boxer and Ferguson shared draft work performance standards with Merritt, and Merritt
15 confirmed receiving these standards. [Exceptions, at p. 8:11-6.] However, this was done in
16 December of 2006 and/or January of 2007 and predate SBCPAA's request. Therefore, it could not
17 have been in response to Merritt's August 5, 2007 letter. The County also states the PD's office
18 responded to Merritt's August 5, 2007 letter by informing SBCPAA that Rule X is the only
19 discipline policy for the PD's office. [Exceptions, at p. 8:8-11.] However, this assertion is not
20 supported by the record. Not only is the PD's August 13, 2007 response to Merritt's letter silent
21 regarding SBCPAA's request for information, Boxer testified that upon receipt of the request for
22 information, the PD did not provide any documents. [Tr. Vol. IV, at p. 132:11-13.]

23 Thus, the County's exceptions regarding this issue should be rejected.

24
25 ///
26 ///
27 ///
28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

III. CONCLUSION

Based on the above, SBCPAA urges PERB to reject the exceptions filed by the County of San Bernardino (hereafter, "County") and adopt the decision of the administrative law judge (hereafter, "ALJ") with modifications consistent with SBCPAA's exceptions.

Dated: July 30, 2012

REICH, ADELL & CVITAN
A Professional Law Corporation

MARIANNE REINHOLD
Attorney for Charging Party
SAN BERNARDINO COUNTY PUBLIC
ATTORNEYS ASSOCIATION

PROOF OF SERVICE
(Code Civ. Proc. § 1013a(3))

2012 JUL 31 AM 9:26
PUBLIC EMPLOYMENT
RELATIONS BOARD
HEADQUARTERS

1
2
3 STATE OF CALIFORNIA, COUNTY OF ORANGE

4 I am employed in the County of Orange, State of California. I am over the age of 18 and not
5 a party of the within action; my business address is 2670 North Main Street, Suite 300, Santa Ana,
6 CA 92705.

7 On July 30, 2012, I served the document described as **CHARGING PARTY'S**
8 **SUPPORTING BRIEF** on the interested parties in this action by placing a true copy thereof enclosed
9 in a sealed envelope addressed as follows:

10 California Public Employment Relations Board 11 Attention: Appeals Assistant 12 1031 - 18th Street, Suite 200 13 Sacramento, California 95811-4124 14 Telephone: (916) 322-8231 15 Facsimile: (916) 327-7960	Kenneth Hardy, Esq. Office of the San Bernardino County Counsel 385 North Arrowhead Avenue, 4th Floor San Bernardino, CA 92415 Telephone: (909) 387-5401 Facsimile: (909) 387-4068
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

16 <i>Sent via Facsimile and UPS Overnight Mail</i>	17 <i>Sent via Facsimile and Regular U.S. Mail</i>
	18 John Thomas, SBCPAA 19 E-Mail: Thomas_jp@msn.com
	20 <i>Sent via E-mail only</i>

- 21 **BY MAIL:** I deposited such envelope in the mail at Santa Ana, California. The envelope
22 was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice
23 of collection and processing correspondence for mailing. It is deposited with the U.S. postal
24 service on that same day in the ordinary course of business. I am aware that on motion of
25 party served, service is presumed invalid if postal cancellation date or postage meter date is
26 more than one day after date of deposit for mailing an affidavit.
- 27 **BY OVERNIGHT COURIER:** I sent such document(s) on the above date, by overnight
28 delivery with postage thereon fully prepaid at Santa Ana, California.
- 29 **BY FAX:** I sent such document by use of facsimile machine telephone number (714) 834-
30 0762. The facsimile machine I used complied with California Rules of Court Rule 2003(3)
31 and no error was reported by the machine.
- 32 **BY PERSONAL SERVICE:** I placed the above document in a sealed envelope. I caused
33 said envelope to be delivered by hand to the above addressee.
- 34 **BY EMAIL:** I caused to be sent such document by use of email to the email addressee
35 above. Such document was scanned and emailed to such recipient.

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

38 Executed on **July 30, 2012**, at Santa Ana, California.

Rita A. Pollard