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13 SAN BERNARDINO COUNTY  
14 PUBLIC ATTORNEYS  
15 ASSOCIATION,

CASE NO. LA-CE-554-M

16 Charging Party,

SAN BERNARDINO COUNTY PUBLIC  
ATTORNEYS ASSOCIATION'S BRIEF  
IN RESPONSE TO RESPONDENT'S  
STATEMENT OF EXCEPTIONS

17 vs.

18 SAN BERNARDINO COUNTY  
19 (PUBLIC DEFENDER'S OFFICE),

20 Respondent.



1 during an investigatory interview, despite the existence between the parties of a  
2 previously negotiated Memorandum of Understanding with provisions covering the  
3 issue of representation during an investigatory/disciplinary meeting which  
4 specifically recognized the Association's right to designate employee representatives,  
5 which also contains a Zipper clause.

6 This matter differs from the prior case in that, after concerns were raised by the  
7 County and the Office of the Public Defender, the Association designated Marianne  
8 Reinhold, a labor attorney who is the counsel for the Association and obviously not a  
9 deputy district attorney, to represent a deputy public defender during an investigatory  
10 interview. Reinhold had previously represented other deputy public defenders during  
11 disciplinary matters without objection from the Office of the Public Defender. In this  
12 matter, despite prior notice that Reinhold would be representing the deputy public  
13 defender, the Office chose to suddenly announce at the outset of previously scheduled  
14 administrative interview that Reinhold was no longer acceptable to the Office  
15 because of her relationship with the Association and ordered the deputy public  
16 defender to return within 90 minutes for an interview with other representation or be  
17 charged with insubordination and face disciplinary action of an unspecified nature.

18 When the deputy public defender was unable to find another representative—  
19 much less an Association designated representative—the employee was ordered to  
20 proceed with the interview without representation despite the fact that in the  
21 intervening 90 minutes the power had gone out in the building and the interview had  
22 to be moved from the usual interview room in order for it to take place next to a  
23 window so there would be sufficient light. It is extremely noteworthy that the  
24 Respondent's Brief in Support of the Statement of Exceptions (the County's Brief)  
25 repeatedly describes the legal issue as being whether a deputy district attorney is  
26 permitted to represent a deputy public defender during an administrative interview  
27 and discusses that specific issue at great length. Indeed, the County oddly makes the  
28 claim at the end of Section III that, "No prima facie case has been shown that the

1 Public Defender interfered with the representation rights of either Drew or the  
2 Association when the Public Defender refused to permit Caldwell to represent Drew  
3 at the disciplinary proceedings.” (County’s Brief at p. 13.) This statement or claim,  
4 which is repeated ad nauseam by the County in various incarnations, borders on  
5 nonsensical since it is very clear from even a cursory examination of the  
6 COMPLAINT that was issued and the Proposed Decision of Administrative Law  
7 Judge Eric J. Cu (the ALJ) that the issue, contrary to the County’s Brief, before the  
8 Public Employment Relations Board for consideration in this case, along with the  
9 unilateral change issue, is whether it was appropriate to refuse to permit Reinhold to  
10 represent a deputy public defender during an investigatory meeting and to thereafter  
11 order that deputy public defender to participate in an administrative interview without  
12 representation by means of threats of charges of insubordination and resulting  
13 disciplinary action.

14 In Section II of the County’s Brief entitled “Recommended Approach for  
15 Review” the County suggests that rather than consider the facts before it, the Board  
16 should first consider policies of the Office of the District Attorney (which are not  
17 before the Board) along with the challenged policies unilaterally issued by the Public  
18 Defender and issue what amounts to an advisory opinion determining whether “the  
19 Public Defender and the District Attorney are each justified in prohibiting [deputy  
20 district attorneys] from representing any [deputy public defenders] in any disciplinary  
21 hearing” and then the Board should develop a “rule of representation.” (County’s  
22 Brief at pp. 6-7.) The County’s suggested approach is seriously flawed for at least  
23 two reasons. First, as previously observed, the County is attempting to change the  
24 subject and redefine the issues in this case both as a factual and legal matter. Clearly,  
25 the issue is not whether the Public Defender’s Office could refuse to permit a deputy  
26 district attorney to represent a deputy public defender—it is whether the Office could  
27 properly refuse to allow Reinhold, outside counsel designated by the Association to  
28 act as an employee’s authorized representative during an investigatory meeting, to

1 represent the deputy public defender and thereafter could it force the employee to  
2 nonetheless participate in a more than two hour investigatory interview.

3         Second, the Board is not in the practice of issuing such advisory opinions. In  
4 essence the County is seeking an advisory opinion or declaratory judgment regarding  
5 the County's policies and requesting that the Board should develop a "rule of  
6 representation". "[T]he Board has long held that it does not render advisory opinions  
7 or provide declaratory relief." SEIU, Local 660 v. County of Orange (2006) PERB  
8 Decision No. 1868-M, at page 7. The Board has determined and long held that its  
9 "decision making is best conducted in the context of an actual set of facts so that the  
10 issues will be framed with sufficient definiteness to enable to the Board to render a  
11 decision to finally dispose of the controversy. Said another way, the Board, and for  
12 that matter, the public, is best served when the Board focuses on the resolution of  
13 specific legal disputes rather than the resolution of abstract differences of opinion."  
14 (Id.) The County's "Recommended Approach for Review" seeks to have the Board  
15 determine whether in a vacuum the policies adopted by the Public Defender's Office  
16 and the Draft policy of the Office of the District Attorney "are justified in prohibiting  
17 [deputy district attorneys] from representing [deputy public defenders] in any  
18 disciplinary proceeding." (County's Brief at p. 7, emphasis added.) As previously  
19 observed, the District Attorney's policy is not even before the Board and the Public  
20 Defender's Policies are only before the Board in the context of a unilateral change  
21 unfair labor practice charge. And significantly the County is asking the Board to  
22 engage in offering such an advisory opinion in a case where the COMPLAINT is not  
23 based upon an alleged denial of representation by a deputy district attorney although  
24 the County somewhat inexplicably is seeking to excuse because (contrary to the  
25 actual fact pattern) it was purportedly a deputy district attorney who was seeking to  
26 act as a representative for a deputy public defender. The Board should decline the  
27 County's invitation as it would "overturn long standing PERB precedent." SEIU,  
28 Local 660, at page 7.



1 Memorandum of Understandings (MOUs or MOU) since the Association became the  
2 exclusive bargaining representative. The MOUs contain an article expressly  
3 recognizing the right of the Association to “designate” members of the bargaining  
4 unit to serve as “authorized employee representatives or alternates to represent  
5 employees in the processing of grievances or during disciplinary proceedings....”  
6 (Exhibit A at pp. 5-6; Exhibit B at pp. 5-6.) The MOU applicable to the time period  
7 of this matter provides that the Association is to provide the Department Heads with a  
8 list of the attorneys whom the Association has designated as authorized employee  
9 representatives and that “At the request of an employee, an authorized employee  
10 representative or alternate may...represent the employee during disciplinary  
11 proceedings.” (Exhibit B at pp. 5-6.) There is no language in any of the MOUs  
12 limiting the authority of the Association to designate authorized employee  
13 representatives (Id.; Exhibit A at pp. 5-6). And indeed the language in the MOU at  
14 the time of this dispute specifically provided that only one representative and two  
15 alternates would be designated by the Association as authorized employee  
16 representatives “for each geographic region/division for which the District Attorney,  
17 Child Support Services and Public Defenders maintain a work force...” thereby  
18 making it clear that at some point the parties envisioned deputy district attorneys  
19 representing deputy public defenders and vice versa (Exhibit B at p. 5).

20 Doreen Boxer became the Public Defender in March, of 2006 (Transcript  
21 Volume II, Page 28, lines 5-10--transcript references to the testimony in LA-CE-431-  
22 M will be abbreviated to “Tr. Vol.” and followed by the pages and lines of the  
23 particular volume of the transcript). Grover Merritt became the President and chief  
24 executive officer with responsibilities for the day-to-day operations of the  
25 Association in December, of 2006 (Tr. Vol. I, 24/4-7). Prior to Boxer becoming the  
26 Public Defender, deputy district attorneys had been permitted to represent deputy  
27 public defenders in disciplinary matters (Tr. Vol. I, 35/18-36/17).<sup>2</sup> After Boxer

28 <sup>2</sup> Merritt testified that while he was a labor representative along with Caldwell and Cheryl Kersey,

1 became the Public Defender, a series of escalating events transpired involving the  
2 issue of the Association's providing representation to deputy public defenders during  
3 disciplinary investigations which has already resulted in prior unfair labor practice  
4 charges and court litigation brought by the County against the Association.

5 Commencing in December of 2006, e-mails were exchanged between Merritt,  
6 as the President of the Association, and Mark DeBoer, a County Human Resources  
7 Representative regarding representation of a deputy public defender during an  
8 investigatory interview (Exhibit C). Merritt received no response to his e-mail from  
9 any of the County Human Resources representatives he "cc'd" or from Lauri  
10 Ferguson, the Assistant Public Defender to whom he also sent a copy of his e-mail  
11 (Tr. Vol. I, 26/5-10). It is noteworthy that DeBoer's initial e-mail suggested that the  
12 Association utilize one of the "many labor/employment attorneys in the community"  
13 to provide representation (Exhibit C at p. 3) and it was to this e-mail from DeBoer  
14 that Merritt was responding.

15 In January of 2007, another issue arose. As of 2007, Susan Israel and Randy  
16 Isaeff had been designated by the Association as authorized labor representatives and  
17 both were deputy public defenders (Tr. Vol. I, 20/20-21/12). Both individuals  
18 resigned as representatives after Israel and Isaeff were directed by the administration  
19 of the Public Defender's Office to provide representation during an investigatory  
20 interview after both individuals had notified the administration of the Public

21  
22 another deputy district attorney, that Kersey had been responsible for representing a deputy public  
23 defender and that Kersey as part of her representation of the deputy public defender had asked  
24 Merritt to research some legal issues (Tr. Vol. I, 36/5-37/9). Merritt referenced Kersey representing  
25 a deputy public defender in his second communication with County Human Resources regarding the  
26 dispute between the parties, "We will as we have in the past, instruct our authorized representative  
27 to recuse themselves should they come in contact with the cases in the line of duty. No conflict will  
28 arise with Ms. Caldwell, as her office is far from the office in which the problem allegedly arose. I  
invite you to join me in this compromise in order to 'get on with it.'" (Exhibit C at p. 2.) Caldwell  
repeats this exact same statement to the Office of the Public Defender on January 26, 2007 in the  
communication she sends objecting to not permitting a deputy public defender to consult with an  
employee representative and notifying the Office that the two deputy public defenders who were  
employee representatives have quit (Exhibit D at p. 2). Merritt raises the same concerns and makes  
the same offer directly to Boxer in a letter dated August 5, 2007 (Exhibit H at p. 5).

1 Defender's Office that they were not the particular employee's representative and that  
2 Sharon Caldwell, a deputy district attorney and the senior labor representative for the  
3 Association, would be serving as the employee's authorized employee representative  
4 during any investigatory meeting.<sup>3</sup> Israel testified that despite the fact that she had  
5 informed the Public Defender's Office that she would not be acting as the employee's  
6 representative she was approached in court by her supervisor at the time, John Zitny,  
7 and he informed her that Ferguson "wanted" Israel to come to the administrative  
8 offices of the Public Defender for the purpose of representing the deputy public  
9 defender during a disciplinary discussion (Tr. Vol. VIII, 21/2-25/2). Israel testified  
10 that she felt she was being forced by the administration of the Office to represent  
11 someone she was unable and unwilling to represent and that both she and Isaeff quit  
12 as representatives rather than be subjected to that pressure (Id.). It was also Israel's  
13 testimony that she was currently unwilling to be an employee representative because  
14 she felt unqualified and because of concerns she would find herself in confrontations  
15 with the administration of the Office and her career would be damaged as a result  
16 (Tr. Vol. VIII, 25/3-26/12). While Israel testified regarding these concerns during the  
17 hearing in the prior matter, it is noteworthy that the events which are the subject of  
18 this COMPLAINT took place in the Spring of 2009. As a result, the events which are  
19 the subject of this Appeal took place during the time period between her resignation  
20 (and that of Isaeff's) and her testimony on October 7, 2009, during the prior hearing.  
21 Thus, her testimony regarding the climate in the Office, her reasons for resigning, the  
22 conduct of the administration in the Office, and the reasons no deputy public defender  
23 wished to serve as an employee representative are clearly relevant in this matter,  
24 which involves events transpiring prior to her testimony.

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26  
27 <sup>3</sup> Merritt testified that pursuant to the requirement in the MOU he had sent a letter notifying the  
28 County and Boxer of the identity of the authorized employee representatives of the Association (Tr.  
Vol. I, 20/4/21/3).

1           1.     Deputy Public Defender Lisa Berman

2  
3           In order to provide a context for the matters in this Appeal (and because the  
4 County refers extensively to the prior case) the incidents which were the subject of  
5 the earlier hearing and ALJ Allen's Proposed Decision will be briefly discussed.

6           On July 20, 2007, Lisa Berman, a deputy public defender, had been summoned  
7 to a disciplinary or investigative interview with Ferguson, the Assistant Public  
8 Defender. Berman appeared for the interview with Caldwell as her labor  
9 representative. Ferguson refused to go forward with the interview with Caldwell  
10 acting as the authorized employee representative stating,

11           “Lisa, the administrative interview for today involves matters that in my  
12 opinion are confidential. Which means that as [Caldwell] as a member  
13 of the district attorneys office, you would be waiving attorney client  
14 privilege and work product information. Which we are not prepared to  
15 waive. So you have a choice. You can either participate in the interview  
16 without representation by somebody who has a conflict, which would be  
17 anybody in the district attorneys office, or you can proceed without  
18 representation.... But discussing anything regarding this interview with a  
19 member of the district attorneys office is a violation of attorney/client  
20 privilege and work product and you can't do that.” (Exhibit G at p. 2,  
21 emphasis added.)

22           Caldwell in response stated to Ferguson that she was the representative  
23 assigned by the Association and that the position taken by Ferguson denied Berman  
24 “her representation.” Caldwell then continued her discussion with Ferguson and  
25 Ferguson stated to Berman that if she does not opt to appear at any of the offered  
26 dates with another individual representing her, “then we will go forward with the  
27 investigation. But you're not to discuss any attorney/client privilege matter or work  
28 product outside of this office.” (Exhibit G at p. 3.) In response Caldwell then asks,

1 “To my knowledge she’s got no notice as to what this is about. Is that correct?” (Id.)  
2 Ferguson refuses to answer the inquiry from Caldwell stating, “I’m not going to  
3 discuss anything about this. This is all we’re going to talk about. I’ve given her  
4 dates and we can go from there.” (Id., emphasis added.) Ferguson refused not just to  
5 conduct the investigation and ask questions of Berman while Caldwell was present,  
6 but actually refused to even talk with Caldwell about issues which clearly were not  
7 even arguably confidential or work product information--such as what notice the  
8 Office had provided Berman about the investigation. Thus, Ferguson’s conduct  
9 towards Caldwell was entirely dismissive consisting of stating she was not going to  
10 discuss “anything” about the matter with Caldwell and Ferguson’s addressing her  
11 comments directly to Berman while not even acknowledging Caldwell’s presence or  
12 right to act as a representative for Berman.

13 On August 5, 2007, Merritt sent a letter to Boxer asserting that the Berman  
14 situation was the third occasion that Ferguson had informed deputy public defenders  
15 that they could not have the assistance of an Association authorized employee  
16 representative and contended that Ferguson’s conduct was “a deliberate attempt to  
17 interfere with the representative rights that the County of San Bernardino has  
18 explicitly recognized.” (Exhibit H at p. 4.)<sup>4</sup> Merritt also again stated that it was the  
19 Association’s position that Ferguson’s statements to deputy public defenders that they  
20 should hire an outside attorney to represent them during the disciplinary process as  
21 they were not permitted to have a deputy district attorney act as their representative  
22 was not appropriate and violated the Association’s and the employee’s rights (Id. at p.

23  
24 <sup>4</sup> The Employee Relations Ordinance adopted by the County provides that, “Employees have ... the  
25 right to form, join and participate in the activities of employee organizations of their own choosing  
26 for the purpose of representation on all matter of employer-employee relations....[and t]he right to  
27 be free from interference, intimidation, restrain, coercion and discrimination or reprisal on the part  
28 of the appointing authority, supervisor, other employees, or employee organizations as a result of  
their exercise of rights granted in Section 13.024(a)(1) and (2).” (Exhibit CC at pp. 5-6, Section  
13.024) In addition, the Ordinance provides that, “Exclusive recognized employee organizations  
shall have the right to represent their members in their employment relations with the County.” (Id.  
at p. 36, Section 13.029(c).)

1 5). Significantly for this current Appeal involving another deputy public defender,  
2 Mark Drew, Merritt also states in his letter that Israel and Isaeff resigned because of  
3 Ferguson's conduct and that no other deputy public defender is willing to act as a  
4 representative because of the intimidating conduct of the administration of the Public  
5 Defender's Office (Id. at page 4).<sup>5</sup>

6 Boxer responded to Merritt's letter by a letter dated August 13, 2007, in which  
7 she asserted that attorney-client confidentiality attaches not just to the deputy  
8 handling a case but to all deputy public defenders and that only she, as the Public  
9 Defender, held the attorney-work-product-privilege and not individual deputy public  
10 defenders (Exhibit I, at p. 1). Boxer further asserted that it was permissible to share  
11 information with other nondeputy public defenders "that is necessary for the  
12 furtherance of the client's interest. The investigation by myself and my designees  
13 into the competence of the attorney handling the client matter is in furtherance of that  
14 client's interest, as it is to ensure they receive competent legal counsel from my  
15 office." (Id.)

16 Boxer then goes on to state that under Professional Rule of Conduct 3-310 (c)  
17 an attorney may not represent conflicting interests, except with the written consent of  
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19 <sup>5</sup> The County continues to argue that the Association should have filed unfair labor practice charges  
20 regarding Boxer's and Ferguson's conduct (County's Brief at pp. 2, 12-13). This ignores that the  
21 Association *did* repeatedly file unfair labor practice charges including one alleging in part that  
22 Boxer was unlawfully retaliating against deputy public defenders. Boxer in fact was determined to  
23 have been guilty of retaliation (Proposed Decision (ALJ Allen) at pp. 9-10). It is noteworthy that  
24 the Association raised these concerns and informed Boxer immediately in January of 2009, that they  
25 would be filing an unfair labor practice charge regarding her retaliatory conduct (Exhibit Y, at pp.  
26 1-2). Boxer and the Office were not deterred by this since her conduct only continued to escalate  
27 thereafter. Indeed, it appears that while the County demonstrates a consistent pattern of wishing to  
28 direct and control the conduct of the Association-- including telling the Association how and when  
it should pursue legal challenges--in reality the County appears to not be concerned about such  
allegations of retaliation by Boxer since it previously failed to even address or discuss the issue of  
her retaliation in its brief in the prior matter other than to state its "belief" it had not retaliated  
devoid of any factual or legal discussion (Id. at p.9). ALJ Allen was surprisingly "unpersuaded" by  
the County's stated belief (Id.). Indeed as further indication of the lack of acknowledgment or  
recognition of its unlawful behavior, the County even threatened Israel while she was testifying  
during the hearing (Tr. Vol. VIII, 6/22-12/3—specifically 8/14-9/25 wherein Israel expresses fear  
at being threatened with disciplinary action and the ALJ expresses similar concerns.).

1 all parties concerned and that the Public Defender’s Office “as the sole holder of the  
2 attorney-work-product privilege does not waive any conflict of interest created by  
3 having Deputy District Attorneys represent Deputy Public Defenders in the  
4 investigation and handling of personnel matters relating to the competence and  
5 conduct of Deputy Public Defenders.” (Id. at pp. 1-2.)

6 Boxer concludes by stating that,

7 “[I]f a Deputy Public Defender requests representation, we will allow a  
8 reasonable time for them to obtain representation through [the  
9 Association], of a person whose involvement will not create a conflict.  
10 We are willing to work with you to encourage Deputy Public Defenders  
11 to act as [Association] representatives. However, I am adamant that any  
12 information that is attorney-work product or attorney-client privileged  
13 may not be released to the [Association] as a whole and must only be  
14 provided to a [sic] representatives of the [Association] who do not have  
15 a conflict and agree to maintain the privilege.” (Id. at p. 3.)<sup>6</sup>

17 2. Deputy Public Defender Steve Willms

18  
19 In early January of 2009, Merritt became aware that another deputy public  
20 defender had been summoned for an investigatory meeting at the administrative  
21 headquarters of the Public Defender’s Office and he sent an e-mail to Ferguson  
22 indicating that Steve Willms, the deputy public defender involved, was requesting the  
23 Association represent him (Exhibit X at p. 5). Boxer directed Merritt to “address” all  
24 his comments in the future regarding members of HDU to her, Boxer, rather than  
25

26 <sup>6</sup> Despite her demands regarding the Association representatives and confidentiality Boxer routinely  
27 shared client confidential information with County HR employees and with other County  
28 administrators—an issue that the Association pointed out (Exhibit C at p. 1; Exhibit P; Exhibit R—  
demonstrating that Boxer had the County CEO review a Notice of Intent to Dismiss which included  
client confidential information she had refused to permit the Association to review).

1 Ferguson (Id.). Boxer also states that “the Public Defender continues to object to  
2 having Deputy District Attorneys, in this case [Caldwell] involved in administrative  
3 investigations or any internal Public Defender personnel issue.” (Id. at p. 4.)

4 Merritt continued to assert the Association’s positions regarding these issues  
5 including that he believed it was possible for deputy district attorneys to be placed  
6 behind an ethical wall, similar to the HDU unit, to address Boxer’s ethical concerns  
7 (Id.). Merritt did not include Willms in any of his e-mail exchanges with Boxer.  
8 Even though Willms had not been a party to the e-mail exchanges, Boxer chose to  
9 include Willms in an e-mail to Merritt stating that she was refusing to allow any  
10 member of the District Attorney’s Office to attend the meeting along with Willms  
11 and stating that if she did not receive a request for a postponement to make  
12 arrangements for another representative to attend, Willms was directed to attend a  
13 meeting with her the next day at 1:30 in the Public Defender’s Administration office  
14 “and as such [Willms was] ordered to be present at that time and place. Violation of  
15 this order can result in discipline up to an including termination.” (Id. at p. 2,  
16 emphasis added.)<sup>7</sup> In response to Boxer’s position regarding Willms’ interview,  
17 Willms indicated he would appear for the interview without representation and  
18 Merritt sent another letter to Boxer informing her the Association would be seeking  
19 to amend the unfair labor practice charge to add the incident involving Willms  
20 (Exhibit Y at pp.1- 2).

21 Ultimately, as previously observed, these incidents (along with a failure to  
22 provide requested information) resulted in the issuance of a prior complaint in the  
23 matter of LA-CE-431-M involving the conduct of Boxer and Ferguson towards  
24 Berman and Willms. After an eight day hearing, the Proposed Decision in that matter

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25  
26 <sup>7</sup> Amazingly Boxer testified in the prior matter that she “wanted Willms not to be affected by what’s  
27 going on here.” (Tr. Vol. II, 42/10-14.) Threatening someone with termination if they do not  
28 participate without representation in an investigatory meeting they have been “ordered” to appear at  
hardly seems either calculated or likely to minimize the impact on the deputy public defender on the  
receiving end of the e-mail. As is discussed, *supra*, this type of intimidating and threatening  
behavior was repeated against Drew by Ferguson in an even more brazen manner.

1 held the County had interfered with the rights of individual deputy public defenders  
2 and with the rights of the Association in these prior incidents, and that Boxer  
3 unlawfully retaliated against Willms after he sought the assistance of the Association.  
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7 3. Deputy Public Defender Mark Drew  
8

9 The COMPLAINT in this matter involves an administrative or investigatory  
10 interview of a deputy public defender, Mark Drew, and what occurred after Drew  
11 requested assistance from the Association. Merritt sent Boxer and Ferguson an e-  
12 mail requesting a continuance of the meeting and stating that Caldwell will act  
13 Drew's employee representative during the meeting (Drew Joint Exhibit 1 at  
14 paragraphs 28-31). The meeting was rescheduled for February 20, 2009, and prior to  
15 the interview, Ferguson was informed by Boxer that Reinhold, the Association's  
16 counsel, rather than Caldwell, would be acting as Drew's representative during the  
17 administrative interview (Id. at paragraphs 32-33). Not satisfied that the Association  
18 was acceding to prior requests/demands that the Association send an outside  
19 labor/employment attorney to represent deputy public defenders during an  
20 investigatory interview,<sup>8</sup> when Drew and Reinhold appeared for the administrative  
21 interview they were placed in an interview room in the main administrative office of  
22 the Public Defender's Office which allows for the interviews to be audio and video  
23 taped (Drew Joint Exhibit 4 at page 1/lines 6-9). The transcript of the meeting  
24 establishes that Ferguson immediately began asking questions regarding Reinhold's  
25 relationship with Drew and with the Association and sought to ascertain whether  
26

27 <sup>8</sup> Boxer, Ferguson and others had previously stated that deputy public defenders should be  
28 represented by an outside attorney hired by the Association (Exhibit C at p. 3; Exhibit H at pp. 2-3;  
Exhibit I at p. 3).

1 Reinhold was acting as counsel for the Association in attending the meeting as  
2 Drew's representative, to which Reinhold explained that she was present at the  
3 request of the Association and she was acting as the Association's counsel providing  
4 representation to Drew during the investigatory meeting (Id. at page 1/lines 17-28).

5 Ferguson then began asking a series of questions regarding whether despite her  
6 role as counsel for the Association, Reinhold would be able to give assurances she  
7 agreed that she "cannot discuss with anyone outside of Mr. Drew what's discussed,  
8 documents that are revealed, um, without a court order, um or a waiver from Mr.  
9 Drew, the Public Defender, and the clients whose cases may be discussed today."  
10 (Id. at page 2/lines 8-11, emphasis added.) Ferguson contended Reinhold was  
11 required, in order to meet her ethical obligations to Drew, to maintain the confidences  
12 of Drew "inviolable" which according to Ferguson meant Reinhold could not discuss  
13 with anyone "everything that's discussed here today as it results [sic] in this  
14 administrative interview and administrative matter." (Id. page 2/lines 3-6, emphasis  
15 added.)

16 Despite receiving assurances that no client confidential information nor the  
17 contents of any files would be discussed with the Association,<sup>9</sup> Ferguson insisted that  
18 the Office required that Reinhold commit that she would not discuss with the  
19 Association the "[i]nternal process of the Public Defender's Office, how we process  
20

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21 <sup>9</sup> The County contends that Reinhold refused to agree to not disclose "confidential client  
22 information" or "any confidential criminal case information" (County's Brief at pp. 3, 20-21). This  
23 is not an accurate statement on the part of the County. Contrary to the County's claim, Reinhold  
24 repeatedly and specifically stated she would not discuss "clients within the Public Defender's office  
25 that Mr. Drew has represented but [her] assessment of the disciplinary action if any is taken against  
26 Mr. Drew I would discuss that with my client, the Attorneys Association." (Drew Joint Exhibit 4 at  
27 page 2/lines 19-24.) Reinhold again stated she would need to discuss with the Association "not, you  
28 know, what happened in a particular case in this Office within the Public Defender's Office but  
certainly you know, what type of discipline is being proposed vis-a-vis Mr. Drew. . . what an  
appropriate response from the Association would be in assisting Mr. Drew." (Id. at page 4/lines 1-  
11.) Reinhold repeatedly asks Ferguson what her concern is and seeks an understanding of what  
Ferguson means by "confidential information" and Reinhold also specifically stated she would not  
discuss with the Association "what was in a particular file that Mr. Drew was handling." (Id. at  
page 4/line 21 - page 5/line 4.)

1 our cases, how we handle files, all of those things, um, and the work product that is  
2 generated as a result of a law firm, all of those things.” (Id. at page 4/lines 22-24.)  
3 Reinhold’s specific assurance she would not discuss a case file or client confidential  
4 information, but was unable to say she would not discuss issues “like process”  
5 because she did not see that as included within work product did not satisfy Ferguson.  
6 Ferguson announced that “Well, it doesn’t sound like you can provide the assurance.  
7 So I’m not comfortable going forward given that I have to protect the client and the  
8 integrity of the department.” (Id. at page 5/lines 1-8.) Ferguson then asked Reinhold  
9 and Drew to step into the lobby of the building for about 10 minutes and upon their  
10 return Ferguson stated that it was necessary for the Public Defender’s Office to be  
11 certain that Drew had an attorney/client relationship with his representative during  
12 the administrative interview and that the representative “does not have any fiduciary  
13 duty with obligations to the Association or anyone else that would interfere with this  
14 relationship. So can you assure me that even though the union is paying for your  
15 representation that you can have a fiduciary relationship with Mr. Drew and a  
16 relationship under the attorney/client relationship that would not, um, reveal any  
17 confidences that are revealed during this proceeding, including internal work process  
18 of Public Defender’s Office, work product, or any attorney/client privileged  
19 information?” (Id. at page 5/lines 18-28.)

20 Reinhold indicates she does have a fiduciary relationship with the Association  
21 and that as a result she cannot give assurances that she would not discuss with the  
22 Association things like the “process in the office, what I thought of the merits or, or  
23 lack of merit of any action that the Public Defender’s Office took or didn’t take  
24 against Mr. Drew. I mean, those would be issues I need to discuss with the Attorneys  
25 Association. I do not believe that puts me in any kind of conflict with Mr. Drew.  
26 Um...” (Id. at page 6/lines 1-8.) Ferguson then announces that Reinhold cannot  
27 represent Drew and that he has until “4:00 o’clock to find someone that can represent  
28 him in an attorney/client relationship that has the fiduciary duty that addresses all of

1 [Ferguson's] concerns" because the Office needed to interview Drew on that day (Id.  
2 at page 6/lines 9-13, emphasis added). Reinhold objects that this issue is being  
3 sprung on them for the first time after her having been in "innumerable interviews"  
4 without anyone raising the issue before and that the position the Office is taking is  
5 going to prevent Drew from being able to utilize an attorney with knowledge of the  
6 situation and require him to hire an attorney that he pays for out of his own pocket  
7 and reappear at 4:00 or be charged "with insubordination." (Id. at page 6/line 14 -  
8 page 7/line 15.) In response to Reinhold pointing out that the actions of Ferguson  
9 were "shocking" and that the Office was putting Drew in an "impossible situation,"  
10 Ferguson's response was to state to Drew, "I'll, uh, see you, Mr. Drew, at 4:00  
11 o'clock." (Id. at page 7/line 16.)

12 It is significant that this conversation was taking place at 2:25 on a Friday  
13 afternoon, and that the Office had given no warning it intended to raise such issues  
14 (which was a new position and contrary to prior demands that a deputy public  
15 defender needed to appear with Reinhold and not a deputy district attorney as their  
16 representative during investigatory interviews and ignores the fact that Reinhold had  
17 previously represented deputy public defenders on numerous occasions). It was  
18 doubly significant that rather than having attempted to discuss their concerns prior to  
19 the meeting on Friday afternoon and attempting to come to an understanding  
20 regarding their concerns, the Office ambushed the Association and Drew and  
21 Ferguson proceeded to unreasonably insist that Drew needed to nonetheless be  
22 interviewed at 4:00 p.m. and that he would be guilty of insubordination if he did not  
23 appear for the administrative interview at 4:00, without Reinhold to represent him as  
24 the Association's designated representative to assist him during the interview.

25 Given that Boxer had previously stated that "if a Deputy Public Defender  
26 requests representation, we will allow a reasonable time for them to obtain  
27 representation through [the Association], of a person whose involvement will not  
28 create a conflict" (Exhibit I at p. 3), this new position being taken by Ferguson was a

1 marked escalation of the already disputed issues existing between the Association and  
2 the Public Defender's Office which had already resulted in the Association's filing of  
3 an unfair labor practice charge prior to this interview.

4 Drew returned at approximately 3:35 and Ferguson went forward with the  
5 interview despite the fact that the power has gone out in the building and there were  
6 no lights and that the interview had to proceed in her office using the light from the  
7 window and obviously the interview could no longer be videotaped and was only  
8 being tape recorded (Drew Joint Exhibit 5 at page 1/lines 1-6). Ferguson  
9 immediately asked Drew if he had an opportunity to speak with Reinhold about the  
10 initial meeting and Drew requests to make two statements, one on the "advice of my  
11 counsel, Ms. Reinhold and the other one is one that I'd just like to make on my own  
12 volition."

13 Drew then clarifies that Ferguson has directed him to participate in the  
14 interview at 4:00 and that under the circumstances he is "being denied representation  
15 by the Association and by counsel, who is familiar with my situation. You had raised  
16 the possibility that I could proceed, or I could try to obtain an independent counsel,  
17 which is, you know by 4:00 o'clock today, which is a practical impossibility given  
18 the time. It's, it's late in the day on Friday afternoon. That plus I don't know how  
19 much that would cost, but I anticipate that it would probably be cost-prohibitive for  
20 me to be able to afford to hire an attorney. I don't know that because under these  
21 circumstances, given the late in the day on Friday, I have no opportunity to even get  
22 anyone on the phone to ask him about it. My counsel, Ms. Reinhold, has advised me  
23 not to answer any question, given the waiver of my rights, but if my understanding  
24 based upon the conversation that we had before we broke, which is videotaped as you  
25 mention, that I would be facing an insubordination charge with whatever penalty that  
26 that would include if I refused to answer questions. Based upon that, I, I'm in the  
27 position where I have to choose between proceeding without legal counsel, not  
28 understanding the rights that I have, um or facing punitive measures of some kind

1 that I don't know what they might be, potentially even losing my job, but I don't  
2 know. Um, if I don't go forward and I'm being charged with insubordination, which  
3 I certainly don't want to be perceived as being insubordinate to the things you are  
4 instructing me to do so... Based upon that, I don't feel that I have any choice but to go  
5 forward and answer the questions that you ask me; and under those circumstances,  
6 that my intention to do right now." (Id. at page 1/line 26 through page 2/line 25,  
7 emphasis added.) Drew then goes on to state that he has no desire to get in the  
8 middle of what he only vaguely understands as the "larger conflict" between the  
9 Association and the Public Defender's Office and that all he wants to do is address  
10 any issues Ferguson has and move on and work with Ferguson to address the Office's  
11 concerns (Id. at page 3/lines 4-14).

12 Ferguson then suggested that Drew utilize a deputy public defender to  
13 represent him, which is both an inaccurate representation to Drew on her part as a  
14 factual matter and constitutes another occasion when she has sought inappropriately  
15 to insert herself into the representation process and exercise control over who will act  
16 as an authorized representative. Specifically, Ferguson contends to Drew that "there  
17 are deputy public defenders that are part of the Union that are also representatives.  
18 You could have a deputy public defender represent you in this matter. That's not for  
19 me to say as management; that is something that is between you and the Union. But  
20 the option was that you had to have an attorney who could have an attorney/client  
21 relationship with you and maintain the fiduciary duty... The Union is district attorney  
22 and public defenders, not just district attorneys in terms of representation." (Id. at  
23 page 3/lines 15-23.) Ferguson (and Boxer) had been previously repeatedly informed  
24 that no deputy public defenders were willing to be employee representatives because  
25 of the tactics she and Boxer had utilized in prior situations (Exhibit D at p. 2; Exhibit  
26 H at p. 4). And the Association is required to inform Boxer who is an employee  
27 representative, so even without the specific information from Caldwell and Merritt,  
28 the Public Defender's Office was on notice there were no public defender employee

1 representatives. Thus, despite being repeatedly informed that there were no deputy  
2 public defender employee representatives, Ferguson states to Drew that such  
3 representatives do exist and attempts to force a deputy public defender to act as an  
4 employee representative representing yet another attempt on her part to bypass or  
5 override the Association's authority under the ERO, the MOU, and labor law to select  
6 and designate its own representatives.

7 Drew indicates he was unaware of this possibility and he is willing to proceed  
8 with a deputy public defender representative and Ferguson agrees to give him some  
9 time to see if he can find a deputy public defender to represent him, but insists the  
10 interview must go forward that day (Id. at page 4/line 28 - page 5/line 3). Drew then  
11 spoke with a deputy public defender Drew was aware had recently been elected to the  
12 executive board of the Association, Kawika Smith, who informed him according to  
13 Ferguson<sup>10</sup>, "that it was too late in the day and he was unable to obtain representation  
14 from any [deputy public defender]." (Drew Joint Exhibit 1 at paragraph 44.)

15 Ferguson then proceeds to conduct an interview which ends at 6:38 p.m. (Drew  
16 Joint Exhibit 5 at page 52/line 10). Hence, Ferguson questioned Drew for well over  
17 two hours without any representation and significantly past working hours on a  
18 Friday evening. Tellingly, the transcript actually recommences after the short break  
19 while Drew is seeking representation from Smith with no question from Ferguson but  
20 rather with a Drew response (which appears to be midresponse) regarding what he  
21 had previously discussed with Caldwell and Merritt with respect to his request for  
22 representation during the administrative interview (Id. at page 5, line 20). The first  
23 question reported in the transcript from Ferguson after the break, is a request that  
24 Drew, "tell [her] specifically what you talked about in terms of the personnel matter,  
25 um, and their [sic] request for representation with Ms. Caldwell and Mr. Grover  
26 Merritt." (Drew Joint Exhibit 5 at page 5/lines 25-28.) Ferguson asks repeated

27 <sup>10</sup> The transcript of the interview does not include what Drew said to Ferguson regarding this issue  
28 and only Ferguson's conclusory comments are available from the declaration that was prepared by  
the County to file in its litigation against the Association (Drew Joint Exhibit 1 at paragraph 44).

1 questions regarding what Drew had discussed with Caldwell and Merritt, and also  
2 states early in this line of questioning that she wants “to make sure that you  
3 understand, Mr. Drew, that um, uh, as the public defender, deputy public defender,  
4 our core duty is to represent our clients and to maintain their confidences, and that  
5 includes both the work product as well as attorney/client privilege information. And  
6 so, I’m asking you these questions to determine whether or not as a result of the  
7 initial request on February the 4th for you to attend this personnel interview whether  
8 or not you discussed with either Ms. Caldwell or Mr. Merritt or any other member of  
9 the District Attorney’s Office, or anyone outside of our office, anything that would be  
10 considered work product or confidential information.” (Id. at page 8/lines 7-16.)

11 Ferguson then proceeds to also ask questions about what Drew discussed with  
12 Reinhold, the attorney that Ferguson was clearly aware had been asked by the  
13 Association to assist and represent Drew during the investigatory interview, including  
14 what Drew had told Reinhold regarding what the issues were that were likely to be  
15 discussed during the investigatory interview, what questions Reinhold had asked of  
16 him, including specifically asking Drew, “Did you have any other discussions with  
17 her about what you felt was going to happen [during the interview]?” (Id. at page  
18 8/line 24 through page 10/line 17.) The demand from the Public Defender’s Office--  
19 through Ferguson--on pain of a threat of insubordination charges (and his fear that he  
20 might be terminated) forced Drew to proceed that afternoon with the interview  
21 despite his having been denied his Association representative and the fact that he was  
22 unable to obtain alternative representation due to the circumstances engineered and  
23 created by the Office. The scenario orchestrated by the Office permitted Ferguson to  
24 take advantage of the fact that Drew had no real choice but to go forward with the  
25 administrative interview without representation and to question Drew extensively  
26 about his conversations with the Association representatives from whom he had  
27 sought assistance and also regarding his conversations with Reinhold, the attorney  
28 who had been requested by the Association to represent Drew (Id. page 5/line 11 -

1 page 10/line 17). Many of the questions Ferguson asked in this regard had nothing to  
2 do with concerns about confidential information or work product information (Id.  
3 page 8/line 28 - page 10/line 17).

4  
5  
6  
7 B. UNILATERAL CHANGE

8  
9 On or about March 11, 2009, Boxer sent Merritt a letter acknowledging there  
10 was a “dispute over whether the Association has the right to appoint Deputy District  
11 Attorneys to represent Deputy Public Defenders in personnel matters in light of both  
12 the Public Defender’s duty to maintain confidential client and attorney work  
13 production information, as well as the resulting interference to the operations and  
14 legitimate prerogatives of the Public Defender’s Office due to an inherent conflict of  
15 interest.” (Drew Joint Exhibit 6, emphasis added.) Boxer states that because  
16 resolution of the related PERB action may take many months, “I have decided to  
17 issue two policies reiterating the legal and ethical obligation and duties of Public  
18 Defender attorneys. Enclosed are two draft policies. I plan on meeting with my  
19 attorney staff next week about this issue. Although I expect given the history of the  
20 dispute that you will not agree with these policies, I nevertheless wish to provide you  
21 the opportunity to make any comments or recommendations to me before I  
22 implement them. I recommend that we meet to discuss these policies, as well as any  
23 other issue that might settle this matter.” (Id., emphasis added.)

24 On March 19, 2009, Merritt, Caldwell and Reinhold, met with Boxer and  
25 Kenneth Hardy, the County Counsel representing the Public Defender’s Office (Drew  
26 Joint Exhibit 8 at p. 2). The Association stated before and during the meeting, that  
27 the meeting did not constitute negotiations between the parties, but rather that the  
28 Association was prepared to “discuss” the policies as Boxer had requested and that

1 the Association had questions regarding some of the terms utilized in the policies (for  
2 example the Association sought clarification as to what was meant by the term  
3 “fiduciary relationship” in the section 2.b.ii of the Policy regarding “Confidential  
4 Information in Attorney Personnel Matters” and also what was encompassed by the  
5 term “confidential information”) (Drew Joint Exhibit 9 at pp. 4-5; Drew Joint Exhibit  
6 6 at p. 2).

7 A few days after the March 19, 2009 meeting, and prior to any clarifications  
8 being provided, Boxer unilaterally announced to all the attorneys in the Public  
9 Defender’s Office that there were two new policies dealing with confidential  
10 information during a personnel investigation and potential conflict situations (Drew  
11 Joint Exhibit 7). The new policies specifically prohibited a deputy public defender  
12 from receiving assistance during an investigatory interview from anyone other than  
13 another “Public Defender attorney without a conflict” who was then prohibited from  
14 disclosing “confidential information” outside of the Public Defender’s Office or from  
15 an attorney without a conflict who “is subject to a legally binding agreement that he  
16 or she will not disclose any confidential information to the Association or any other  
17 person or entity outside of the Public Defender’s Office.” (Drew Joint Exhibit 7 at p.  
18 3.) The other newly announced policy sought to define what constitutes a “conflict”  
19 in a personnel matter as prohibiting an attorney from representing a client in a matter  
20 and also entering into “a personal relationship” with another attorney in that same  
21 matter or an attorney who previously had a “legal, business, financial, professional,  
22 familial or personal relationship with an attorney in the same matter” and “the  
23 previous relationship would substantially affect the attorney’s representation.” (Drew  
24 Joint Exhibit 7 at p. 4.)

25 The County and the Association had previously negotiated an article in the  
26 parties’ MOU which specifically acknowledged the right of the Association to  
27 appoint members of the bargaining unit to serve as employee representatives to  
28 provide representation during investigatory and grievance meetings (Exhibit B, at pp.

1 5-6). The agreed upon MOU language states that the Association may “designate”  
2 employee representatives to represent employees during “disciplinary proceedings  
3 subject to the following rules and procedures . . . .” And permits the Association to  
4 “designate one (1) authorized employee representative for each geographic  
5 region/division for which the District Attorney, Child Support Services and Public  
6 Defender maintain a workforce as provided in SBCPAA’s by-laws.” (Id. at p. 5.)  
7 The parties’ applicable MOU had a term of June 21, 2008 through June 17, 2011, and  
8 also contained a zipper clause providing the parties waived the right to meet and  
9 confer “with respect to any subject or matter referred to or covered in this  
10 Agreement.” (Id. at pp. 26-27, and 71.)

11  
12 LEGAL ISSUES

13  
14 A. PERB HAS JURISDICTION TO DECIDE THIS MATTER

15  
16 The County filed a Motion to Dismiss which was denied and addressed by ALJ  
17 Cu in issuing his Proposed Decision ( ALJ’s Decision at pp. 9-11 ). In addition, the  
18 Association requests that PERB take judicial notice of the Court of Appeal’s  
19 unpublished decision in County of San Bernardino v. San Bernardino County Public  
20 Attorneys Association (Appeal No. E051576).<sup>11</sup> In its decision, the Court of Appeal  
21 denied the County’s appeal and determined conclusively, as did ALJ Thomas Allen  
22 in the prior matter between the same parties involving many of the same issues, that  
23 PERB has jurisdiction over the issue of employees’ right to representation and an  
24 employee organization’s right to represent one of its members during an investigatory

25  
26 <sup>11</sup> Judicial notice may be taken of an unpublished court of appeal decision as a record of a court of  
27 this state. Cal. Evid. Code § 452(d)(1); Gilbert v. Master Washer & Stamping Co., Inc. (Cal. App.  
28 2d Dist. 2001) 87 Cal. App. 4th 212, 217, fn. 14. The County requested rehearing which was  
denied and the California Supreme Court denied review. 2012 WL 2389441, reh. den. July 20,  
2012, review den. Sept. 12, 2012.

1 interview, and that PERB had exclusive initial jurisdiction over the underlying labor  
2 law issues in that matter. In doing so, it considered and rejected the arguments that  
3 the County re-asserts herein. The County requested hearing and review by the  
4 California Supreme Court both of which were denied. Nonetheless, the County  
5 continues to claim that PERB does not have jurisdiction over this matter (County's  
6 Brief at p. 6). Given the ALJs' prior determinations on the issue and also that of the  
7 Court of Appeal, the Association feels that further argument is unnecessary and  
8 redundant on the issue of PERB's initial jurisdiction over this matter. Nevertheless,  
9 below is a brief restatement of the Association's position on this issue.<sup>12</sup>

10  
11 1. The Legal Standard for Determining PERB's Jurisdiction.

12  
13 The Legislature has designated PERB as the agency charged with  
14 administering the Meyers-Milias-Brown Act (hereafter, "MMBA"). Cal. Gov't.  
15 Code § 3541.3, incorporated by Cal. Gov't. Code § 3509(a). Specifically,  
16 Government Code Section 3509(b) provides that, "The initial determination as to  
17 whether the charge of unfair practice is justified and, if so, the appropriate remedy  
18 necessary to effectuate the purposes of this chapter, shall be a matter within the  
19 exclusive jurisdiction of the board." See also City of San Jose v. Operating Engineers  
20 Local Union No. 3, (Cal. 2010) 49 Cal. 4th 597, 606 (both the Educational  
21 Employment Relations Act (hereafter, "EERA") and MMBA expressly vest in the  
22 administrative board exclusive initial jurisdiction over unfair labor practice charges);  
23 San Diego Teachers Ass'n. v. Superior Court (Cal. 1979) 24 Cal. 3d 1, 14 ("PERB  
24

25 <sup>12</sup> The County's Motion to Dismiss seeks the dismissal of the entire COMPLAINT. Nowhere in its  
26 Motion did the County explain how its purported "legitimate business reasons" defense excuses  
27 threatening Drew and forcing him to be interrogated for more than two hours. Such conduct is not  
28 excused by its concerns, whatever the merits of those concerns since it should have allowed Drew to  
obtain representation before proceeding with the interview. And nowhere in its Motion does the  
County address the unlawful unilateral charge portion of the COMPLAINT. For these reasons  
alone, the Motion was properly denied.

1 had exclusive initial jurisdiction to determine whether the strike was an unfair  
2 practice and what, if any, remedies PERB should pursue”). In El Rancho Unified  
3 School District v. National Education Association, the California Supreme Court set  
4 forth the analysis in determining when PERB maintains initial jurisdiction over a  
5 labor dispute--whether the controversy presented involves activities “arguably  
6 protected or prohibited” under the applicable labor statute. (Cal. 1983) 33 Cal. 3d  
7 946, 953.

8  
9 2. The Activity of Designating Representatives for Disciplinary Hearings  
10 and Arranging for Their Attendance at a Hearing Is Arguably Protected  
11 and the County’s Conduct Is Arguably Prohibited by the MMBA.  
12

13 The activity of the Association in designating representatives is “arguably  
14 protected,” and the activity of the County in denying rights to be represented and to  
15 provide representation under the auspices of restricting who the Association may  
16 designate is “arguably prohibited” by the MMBA. The representation by the  
17 Association of its members in disciplinary proceedings is specifically protected by  
18 the MMBA. Cal Gov’t. Code §§ 3503 & 3504. See Redwoods Community College  
19 Dist. v. PERB, (Cal. App. 1st Dist. 1984) 159 Cal.App.3d 617; Social Workers’  
20 Union, Local 535 v. Alameda County Welfare Dept. (Cal. 1974) 11 Cal.3d 382. In  
21 this matter the County will apparently acknowledge that its agent, Ferguson, forced  
22 Drew to be interrogated for more than two hours without a representative, despite his  
23 requesting the assistance of an Association representative. As justification for this  
24 conduct the County contends it can restrict the ability of the Association to designate  
25 representatives for its members. All of this conduct is arguably prohibited by the  
26 MMBA. Specifically, such conduct constitutes denial of representation rights and  
27 interference with protected rights under Government Code Sections 3502 and 3506,  
28 which can be and has been charged as an unfair practice before PERB under

1 Government Code Section 3509(b) and is the conduct upon which PERB based its  
2 issuance of the COMPLAINT in this matter. The issues PERB will need to  
3 determine to find a violation of the MMBA in the charges already before it are: were  
4 rights to representation denied and as to the interference “(1) that employees were  
5 engaged in protected activity; (2) that the employer engaged in conduct which tends  
6 to interfere with, restrain or coerce employees in the exercise of those activities, and  
7 (3) that employer’s conduct was not justified by legitimate business reasons.” Public  
8 Employees Assn. v. Board of Supervisors (Tulare) (Cal. App. 5th Dist. 1985) 167  
9 Cal.App.3d 797, 807.

10 The issues which the County raises in its Motion to Dismiss are precisely the  
11 issues involved in the “legitimate business reasons” defense under Tulare. The  
12 County argues in its Motion to Dismiss that PERB does not have authority to regulate  
13 the practice of law or interfere with the Office of the District Attorney or Office of  
14 the Public Defender in criminal cases. These issues are the County’s justifications for  
15 its actions and its affirmative defense to the PERB charges against it. To say that  
16 PERB does not have authority to even address these issues, is to say that it may not  
17 consider the “legitimate business reason” defense of a public employer as required by  
18 Tulare. PERB is frequently and regularly called upon to address such issues and is  
19 equipped to do so to resolve the issues underlying this matter and has been given the  
20 sole and exclusive jurisdiction over the issues under the MMBA by the Legislature.

21  
22 B. THE ALJ CORRECTLY CONCLUDED THAT COMPELLING DREW--BY  
23 MEANS OF A THREAT OF A CHARGE OF INSURBORDINATION AND  
24 POTENTIAL RESULTING DISCIPLINE--TO PARTICIPATE IN THE  
25 ADMINISTRATIVE INTERVIEW DENIED DREW HIS RIGHT TO  
26 REPRESENTATION AND DENIED THE ASSOCIATION ITS RIGHT TO  
27 REPRESENT ONE OF ITS MEMBERS  
28

1 MMBA has been interpreted by both the Courts and PERB as providing for the  
2 right of an employee to be represented in an investigatory meeting. Social Workers’  
3 Union, infra.

4 In describing the contours of this right albeit under different statutes, PERB has  
5 stated,

6 “Interpreting the EERA counterpart to section 3515, PERB and the  
7 California Court of Appeal have held that employees are guaranteed the  
8 right to be represented by their employee organization at investigatory  
9 interviews where the employee reasonably believes that discipline may  
10 occur or in other highly unusual circumstances. . (Redwoods Community  
11 College District (1983) PERB Decision No. 293, affd in part in  
12 Redwoods Community College District v. Public Employment Relations  
13 Board (1984) 159 Cal.App.3d 617; see also, Weingerten, Inc. (1975) 420  
14 U.S. 251 [88 LRRM 2689]; Placer Hills Union High School District  
15 (1984) PERB Decision No. 377; Rio Hondo Community College District  
16 (1982) PERB Decision No. 272.)

17 “PERB has also held that an employee organization has a  
18 concurrent right to represent employees at such investigations.  
19 (Redwoods Community College District, supra, PERB Decision No.  
20 293, at p. 9; Rio Hondo Community College District, supra, PERB  
21 Decision No. 272, at p. 11; see also, Mt. Diablo Unified School District,  
22 et al. (1977) EERB<sup>13</sup> Decision No. 44.)”

23 California Union of Safety Employees v. State of California (Department of Parks  
24 and Recreation) (1990) PERB Dec. No. 310-S at page 5 (footnotes omitted).

25  
26 1. The Proposed Decision Accurately Determines that Drew Was Directed  
27 to Attend an Investigatory Interview Without the Assistance of his

28 <sup>13</sup> Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.

1                   Designated Representative and Further Directed to Proceed with the  
2                   Interview When an Alternative Representative Was Not Available

3  
4           The unfair labor practice COMPLAINT in this matter states:

5           “4.    On or about February 20, 2009 at 3:00 p.m., Mr. Drew was  
6           required to meet with Respondent’s agent Lori [sic] Ferguson, for  
7           purposes of a “disciplinary interview.” Mr. Drew had a reasonable  
8           belief that the interview would result in a disciplinary action or, in the  
9           alternative, the interview posed highly unusual circumstances.

10          “5.    Mr. Drew requested that his employee organization representative  
11          be present for the meeting. Respondent, acting through its agent, Ms.  
12          Ferguson, refused to permit the representative to attend the meeting.

13          “6.    By the acts and conduct described in paragraphs 4 and 5,  
14          Respondent denied the employee’s right to be represented by his  
15          employee organization in violation of Government Code section 3502  
16          and committed an unfair practice under Government Code section  
17          3509(b) and PERB Regulation 32603(a).

18          “7.    This conduct also denied Charging Party its right to represent  
19          bargaining unit members in violation of Government Code section 3503  
20          and is an unfair practice under Government Code section 3509(b) and  
21          PERB Regulation 32603(b).”

22          ALJ Cu’s Proposed Decision properly concludes that “the undisputed facts”  
23          establish that the County violated Drew’s *Weingarten* rights (ALJ Decision at pp. 11-  
24          13). Given there is a transcript of the two meetings, there can be no dispute that  
25          Drew requested representation from the Association, that Ferguson refused to go  
26          forward with the interview with the Association’s designated representative Reinhold  
27          present, and that Ferguson then ordered Drew to return for an investigatory interview  
28          within 90 minutes, at 4:00 p.m. and threatened him with discipline if he did not do so

1 (Drew Joint Exhibit 4 at page 4/line 9 - page 5/line 16). Indeed, the County does not  
2 dispute that Drew was entitled to the assistance of an Association representative and  
3 that he was directed to proceed with the investigatory interview without the assistance  
4 of the Association designated representative.

5       There is also no question that Reinhold had been designated by the Association  
6 to act as Drew's representative during the meeting and that Ferguson knew this was  
7 Reinhold's role (Drew Joint Exhibit 1 at paragraph 33). Thus, by refusing to permit  
8 Reinhold to act as his representative, Ferguson denied Drew representation and then  
9 insisted on going forward with the investigatory interview anyway. There were no  
10 merits to the concerns raised by Ferguson about Reinhold's ability to act as Drew's  
11 representative as Reinhold stated she would keep Public Defender's Office client  
12 information confidential and was willing to state she would maintain as confidential  
13 what Ferguson was defining as confidential, other than Ferguson's insistence that the  
14 "processes" of the Office be kept confidential as somehow protected by work  
15 product.

16       The County attempts to characterize Reinhold's response to being confronted  
17 without prior notice regarding the issue of her acting as a representative as a "casual  
18 approach to the problem" and argues it was entirely reasonable for Ferguson to reject  
19 Reinhold as a representative (County's Brief at p. 21). This ignores that previously  
20 the Office had accepted Reinhold's representation of deputy public defenders<sup>14</sup> and  
21 that the Association and Reinhold were clearly intentionally blindsided by the issues  
22 Ferguson was raising for the first time. It also ignores that Reinhold repeatedly  
23 sought clarification from Ferguson regarding what assurances Ferguson was seeking  
24 and what were the definitions of the confidential information, work product or  
25

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26 <sup>14</sup> Boxer had previously directed Berman that she could only be represented by someone who "does  
27 not pose a conflict." (Exhibit J at p. 1.) Reinhold had represented Berman during her Skelly  
28 hearing process without objection because "she was not a Deputy District Attorney." (Exhibit M at  
p. 1.) Reinhold had been present while Berman was interviewed by Boxer on October 9, 2007  
(Exhibit M at p. 5 of Proposed Notice of Dismissal; Exhibit N at p. 1).

1 processes in the Office that Ferguson was demanding that Reinhold not reveal to the  
2 Association (Joint Exhibit 4 at page 1/line 11 – page 5/line 12). For example,  
3 Reinhold states to Ferguson that she does not understand what Ferguson means by  
4 “work product issues” and repeatedly seeks clarification about whether Ferguson is  
5 taking the position that Reinhold cannot discuss “anything that happens here today  
6 with the Association or whether you’re concerned about client information within the  
7 client files in this office” (Id. at page 4/lines 1-11; 21). Ferguson had made  
8 statements indicating it was her position that Reinhold could not discuss “anything”  
9 that occurred during the interview with the Association and it was in response to  
10 these statements that Reinhold was expressing concerns (Id. at page 2, lines 3-5).  
11 There was nothing “casual” about Reinhold’s response to being blindsided in this  
12 manner and after repeatedly seeking clarification Reinhold objected strongly to the  
13 conduct of the Office towards Drew and the “shocking” violation of his rights.

14 As the ALJ observed in the Proposed Decision, once Drew requested that  
15 representation, the Public Defender’s Office and its agents had a few options as to  
16 how to proceed--and threatening Drew with discipline if he did not continue the  
17 interview without an employee organization representative is not among those  
18 options. (ALJ Decision at p. 13 relying upon San Bernardino City Unified School  
19 District (1998) PERB Decision No. 1270 (San Bernardino USD.) Thus, even if the  
20 objections Ferguson suddenly raised to Reinhold’s acting as a representative are  
21 credited, the County’s conduct was unlawful.

22 “In Roadway Express, Inc. (1979) 246 NLRB 1127 [103 LRRM 1050],  
23 the NLRB observed that once an employee makes a valid request for  
24 union representation, the employer has a choice of one of three options:  
25 (1) grant the request; (2) dispense with or discontinue the interview; or  
26 (3) offer the employee the choice of continuing the interview  
27 unaccompanied by a union representative or of having no interview at  
28 all, and thereby dispensing with any benefits which the interview might

1 have conferred on the employee. The employer, however, may not  
2 continue the interview without granting the requested union  
3 representation unless the employee 'voluntarily agrees to remain  
4 unrepresented after having been presented by the employer with the  
5 choices' described above or 'is otherwise made aware of these choices.'

6 U.S. Postal Service (1979) 241 NLRB 141 [100 LRRM 1520]"

7 CSEA v. California State University Long Beach (1991) PERB Dec. No. 893-H, at  
8 page 20 of the ALJ's adopted decision.) PERB clearly has adopted this standard  
9 from NLRB decisions just as it adopted *Weingarten* itself from NLRB decisions.

10 The Decision in CSEA, quoted above is relied upon and referenced in San Bernardino  
11 USD, the case cited in the Proposed Decision. The County is simply incorrect when  
12 it contends that the,

13 "[R]ecommended decision misconstrues *San Bernardino City Unified School*  
14 *District*, PERB Decision No. 1270. That case did not confront a set of facts, as  
15 we have here, where the employer acknowledged the employee's right to  
16 representation at an investigative interview but objected to the particular  
17 representative as unacceptable under the law. The case is simply not on point.  
18 And if the recommended decision stands for the proposition that, even if the  
19 Public Defender was justified in not permitting a [deputy district attorney] to  
20 represent Drew at the investigation interview, the Public Defender was  
21 obligated to provide more time to Drew to obtain an acceptable representative,  
22 then *San Bernardino* still would not be on point. *Upland* would be the case  
23 under which such [sic] issue should be considered." (County's Statement of  
24 Exceptions (Exceptions) at p. 8.)

25 First, the ALJ properly rejected Upland Police Officers Association v. City of  
26 Upland (2003) 111 Cal. App. 4<sup>th</sup> 1294, as distinguishable. Initially, Upland is a case  
27 decided under the Public Safety Officers Procedural Bill of Rights, not under  
28 MMBA. In addition, in Upland the employee's representative repeatedly did and then

1 attempted to further reschedule and cancel the investigatory interview and it was the  
2 Court's determination that at some point the employer was free to go forward with  
3 the investigatory meeting if the representative could not make themselves reasonably  
4 available. Nonetheless, the Court of Appeal does state that it "fully supports the  
5 officer's right to be represented by the person of his or her choice during an  
6 interrogation." Upland, at 1306. As the Proposed Decision accurately observes  
7 Upland is "distinguishable" since, "Here Drew selected a representative, Reinhold,  
8 who was both available and physically present." (ALJ Decision at 14.)

9 Second, as previously observed, the County spends by far and away the vast  
10 majority of its Brief and the Exceptions arguing that it was appropriate and justified  
11 for the Office and Ferguson to not permit *Caldwell* or a deputy district attorney to act  
12 as Drew's representative as it does in the above-quoted portion of the Exceptions.  
13 This is a rather transparent attempt to argue against a straw man. While the County  
14 may wish to argue and brief that issue, it is not the issue before the Board in this  
15 Appeal. Caldwell did not appear on February 20, 2009, to act as Drew's  
16 representative and Drew did not request or seek in any way on February 20, 2009, to  
17 have Caldwell act as his representative. Drew appeared for the administrative  
18 interview with Reinhold as his designated Association representative and indeed  
19 Ferguson was aware ahead of time that it would be Reinhold who was going to be  
20 representing Drew. Clearly, Ferguson did not refuse to go forward with an  
21 administrative interview of Drew on February 20, 2009 based upon objections to  
22 Caldwell's acting as Drew's employee representative. Nonetheless, the County  
23 repeatedly and extensively argues that its conduct was justified by the Office's  
24 concerns regarding having a deputy district attorney act as an employee  
25 representative for a deputy public defender.

26 As previously outlined, the COMPLAINT alleges that Ferguson's conduct on  
27 February 20 in denying Drew representation during the February 20 administrative  
28 interview constituted the unlawful conduct and there can be no disputing that on

1 February 20, 2009, Ferguson refused to permit Reinhold to act as Drew's  
2 representative. Caldwell simply was not involved in the interview on February 20,  
3 2009, and it is the interview on February 20 which is the basis for the  
4 COMPLAINT's allegations of the denial of representation rights. The ALJ's  
5 Decision not surprisingly and accurately and clearly states that "the County denied  
6 Drew's request to be represented by Reinhold." (ALJ's Decision at p. 13.)

7 Inexplicably, the County argues at great length in its Brief that revealing  
8 certain information regarding Drew's handling of cases, information about particular  
9 clients, and/or concerns regarding his performance to a deputy district attorney would  
10 have been revealing confidential information to a deputy district attorney and would  
11 have been inappropriate (County's Brief at pp. 13-18, 29-33, 34-39). Since Caldwell  
12 was not Drew's representative on February 20, 2009 and Caldwell is not the  
13 individual the Office refused to permit to represent Drew during the administrative  
14 interview the extensive discussion of this point throughout the County's Brief and  
15 Exceptions is puzzling to say the least. Nor can it be said that allowing Reinhold to  
16 represent Drew would have resulted in such information being "passed" to the  
17 Association since Reinhold did explicitly promise confidential information would not  
18 be provided to the Association.

19 Similarly, the County's contention that the Association was escalating the  
20 situation by insisting that Caldwell act as Drew's representative and that it was the  
21 Association which was "deviating" from past practice<sup>15</sup> and that its conduct

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22  
23 <sup>15</sup> The County contends that there was a past practice of only deputy public defenders representing  
24 other deputy public defenders in disciplinary meeting or investigatory interviews. This is not  
25 accurate as is described in footnote 2. The County also contends that there was no evidence that  
26 other counties permitted "cross-representation." In making this argument the County misrepresents  
27 the testimony of Bernadette Cemore a deputy public defender from the County of Orange (County's  
28 Brief at p. 11). Cemore testified that she had repeatedly engaged in cross-representation as a deputy  
public defender who acted an employee representative for deputy district attorneys (Tr. Vol. VIII,  
66/23-68/16) and that she could specifically recall one occasion when a deputy district attorney had  
acted as the representative for a deputy public defender (Id., 70/23-71/4). The County argues that  
the two Offices are so inherently adversarial in their positions that it is a conflict for cross-  
representation to occur. Contrary to the County's claims in its Brief, it is evident that in the County

1 represented an “abandonment of past practice” is so absurd as to be nonsensical and  
2 is yet another straw man (County’s Brief at pp. 10-12). First, as previously  
3 observed, any objections to Caldwell acting as a representative are irrelevant to the  
4 COMPLAINT and the ALJ’s Decision. Second, the Association is under no legal  
5 obligation to not change who it utilizes as an employee representative. The question  
6 of who is selected by the Association to act as an employee’s representative is an  
7 issue that is within the Association’s purview and an employer, assuming, arguendo,  
8 there was a change, has no basis for complaining about any change since it is the  
9 Association’s right to select the representative without interference from the  
10 employer. Finally, it was clearly the Association which was attempting to defuse the  
11 situation and attempting to not escalate the dispute between the parties by sending  
12 Reinhold, an individual whom the Office had previously accepted as a representative  
13 for other deputy public defenders. Indeed the Association was acceding to the  
14 previous requests from Boxer and other County representatives that the Association  
15 utilize an employment lawyer rather than a deputy district attorney to provide  
16 representation during an administrative interview.

17       It is rather evident that, contrary to the claims in the County’s Brief, by not  
18 notifying Reinhold or the Association prior to the interview that for the first time the  
19 Office was going to object to Reinhold’s acting as the employee representative after  
20 Reinhold had participated in “innumerable” prior interviews that it was actually the  
21 Office which was deliberately and consciously seeking to escalate the situation and  
22 deviating from past practice. This is evident from the conduct of setting up the  
23 situation to videotape the entire exchange between Ferguson, Drew, and Reinhold  
24 and springing the issue on Reinhold and Drew late on a Friday afternoon, rather than  
25 notifying Reinhold or the Association that a “new” objection was going to be raised  
26 and that the goal posts were being moved by the Office. Clearly, if any party should  
27

28 of Orange cross-representation did occur regularly even if it did not happen to be a deputy district attorney representing a deputy public defender.

1 be characterized as abandoning past practice, it is the Office and the County, when  
2 without warning it rejected Reinhold's acting as a representative despite previously  
3 accepting her in that role.

4 The fact that the County devotes less than one page of its 41 page brief to  
5 arguing that Reinhold was properly rejected as Drew's representative can perhaps be  
6 taken as an indication that it would prefer that this were not the issue before PERB  
7 and instead the County would like to have the issue before PERB consist of whether  
8 the Office could refuse to have Caldwell act as an employee representative during the  
9 February 20 investigatory meeting. However, it is beyond dispute that it is the  
10 Office's refusal to permit Reinhold to act as Drew's representative that is the basis of  
11 the COMPLAINT and the ALJ's Decision and that it is this conduct on the part of the  
12 Office that is the issue before PERB and not any objection on the part of the Office to  
13 have Caldwell act as a representative for Drew since Caldwell was not acting as  
14 Drew's representative on February 20, 2009 and indeed the Office was made aware  
15 of this fact prior to the start of the administrative interview.

16 Assuming, arguendo, the bona fides of the concerns raised by Ferguson with  
17 having Reinhold act as the representative, the issue was not raised in a manner that  
18 allowed for a meaningful opportunity for those concerns to be addressed. Reinhold  
19 had acted as a representative on recent prior occasions and indeed the Public  
20 Defender's Office had previously insisted that she should act as a deputy public  
21 defender's representative, rather than Caldwell or another deputy district attorney  
22 who was an Association designated employee representative. The scheduling of the  
23 meeting on a late Friday afternoon when this concern was suddenly sprung on Drew  
24 and Reinhold, while simultaneously refusing to provide Drew with any real  
25 opportunity to arrange for other representation before being compelled to participate  
26 in an investigatory interview appears to have been designed to deny Drew his right to  
27 representation and appears to have been strategically done to afford Ferguson the  
28 opportunity to extensively question Drew about his conversations with Reinhold and

1 with Caldwell and Merritt.<sup>16</sup>

2       Indeed, the Office's insisting on barreling ahead with the interview in such a  
3 manner created a scenario that left Drew and the Association with no "realistic"  
4 options as set forth in the Proposed Decision (ALJ's Decision at p. 13). While  
5 Ferguson purported to be offering Drew the opportunity to obtain other representation  
6 than Reinhold, as the ALJ correctly concluded, this as a practical matter was not  
7 possible. When Drew returned he explained why it was not possible for him to obtain  
8 alternative representation on such short notice Ferguson still insisted that he must  
9 proceed with the interview (Drew Joint Exhibit 4 at page 1/line 8 - page 2/line 25).  
10 Ferguson, despite having been previously told there were no deputy public defenders  
11 who were able to act as Association designated employee representatives, attempted  
12 to have Drew obtain representation from a deputy public defender (Id. at page 3/line  
13 15 - page 5/line 9). Not surprisingly, this was not successful and Drew was once  
14 again in the position of not having any employee organization representative to assist  
15 him during the investigatory interview. Thus, the bottom line is that Ferguson  
16 ordered Drew to proceed with the interview without representation and her purported  
17 alternatives were not meaningful. As a result she forced him to participate in a two-  
18 and-half-hour interview without representation when she refused to reschedule  
19 despite the fact that there was no power in the building<sup>17</sup> and Drew was unable to

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20 <sup>16</sup> Interestingly, for supposedly being concerned about protecting attorney-client confidential  
21 information it is telling that the Office and Ferguson thought it was appropriate to compel Drew on  
22 pains of serious disciplinary action to reveal what is clearly attorney-client confidential information.

23 <sup>17</sup> Ferguson's insistence that the investigatory interview take place that day even in the absence of  
24 power in the building and the absence of representation for Drew leads to an inescapable conclusion  
25 that the scheduling of the meeting and ambush nature of the objections being raised late on a Friday  
26 were all contrived and calculated to force Drew to be questioned for an extended period of time  
27 without the assistance of a representative. This appears to have done both in order to allow  
28 Ferguson to question Drew extensively about performance issues without the assistance of a  
representative and to also allow her to question him extensively about his communications with  
Association representatives in violation of his and the Association's right to be free from unlawful  
interrogation/interference and amounted to a coerced waiver in violation of his attorney/client  
relationship with Reinhold. See, Clovis Unified School District (1984) PERB Dec. No. 389,  
adopting Blue Flash Express, Inc. (1954) 109 NLRB 591; Regents of the University of California v.  
Superior Court (2008) 165 Cal.App.4th 672, 684.

1 have the assistance of a representative during the meeting.

2       Therefore, there is really no question that Ferguson, as the agent of the Public  
3 Defender's Office denied Drew his right to representation during an investigatory  
4 interview. Assuming, arguendo, the legitimacy of the concerns with Reinhold's  
5 representing Drew, under applicable legal authority, Ferguson should have  
6 rescheduled the interview for a time when Drew would have had a meaningful  
7 opportunity to arrange for other representation. As stated in the ALJ's decision,  
8 "Once Drew confirmed that he could not secure Association representation the  
9 County did not utilize one of the legally permissible options under *San Bernardino*  
10 *USD, supra*, PERB Decision No. 1270; it did not discontinue the interview and it did  
11 not offer Drew the option of foregoing the interview altogether or proceeding without  
12 representation. Instead, the County ordered Drew to participate unrepresented. This  
13 order interfered with Drew's right to representation." (ALJ's Decision at p. 13.)  
14 Clearly, Ferguson never offered Drew any alternative but to go forward with the  
15 interview or be disciplined. Hence, Drew did not voluntarily agree to remain  
16 unrepresented. Rather, he was forced to sit and answer questions for two-and-half-  
17 hours without representation on a Friday afternoon in Ferguson's office without  
18 electricity while being tape recorded. As a result, his rights to representation were  
19 violated and the Association's right to represent him were also violated, both in a  
20 rather ham fisted manner.

21  
22 C.     THE ALJ CORRECTLY CONCLUDED THAT THE ACTIONS OF THE  
23 PUBLIC DEFENDER'S OFFICE INTERFERED WITH THE  
24 ASSOCIATION'S RIGHT TO REPRESENT ITS MEMBERS AND WITH  
25 DREW'S RIGHTS TO BE REPRESENTED DURING AN  
26 INVESTIGATORY MEETING

27  
28 The COMPLAINT alleges that:

1           “8. On or about February 20, 2009, Respondent, acting through its  
2 agent Ms. Ferguson, threatened Mr. Drew with insubordination and  
3 disciplinary action, up to and including termination, if he did not proceed  
4 with the disciplinary meeting described in paragraph 3 [sic] by 4:00 p.m.  
5 on February 20, 2009.

6           “9. By the acts and conduct described in paragraph 8, Respondent  
7 interfered with employee rights guaranteed by the Meyers-Milias-Brown  
8 Act in violation of Government Code section 3506 and committed an  
9 unfair practice under Government Code section 3509(b) and PERB  
10 Regulation 32603(a).

11          “10. This conduct also denied Charging Party its right to represent  
12 employees in violation of Government Code section 3503 and is an  
13 unfair practice under Government Code section 3509(b) and PERB  
14 Regulation 32603(b).”

15          As previously discussed, the threats made by Ferguson exist in the transcript of  
16 the first meeting during which she states that she is unwilling to go forward with  
17 Reinhold acting as Drew’s representative and then states directly to Drew that he  
18 must return by 4:00 p.m. for the investigatory interview (Drew Joint Exhibit 4 at page  
19 7/line 16). When Reinhold inquires whether Drew is being threatened with a charge  
20 of insubordination, Ferguson acknowledges that he is (Id. at page 6/lines 22-25).  
21 Similarly, during the second meeting while Drew is unrepresented and he expresses  
22 concerns that he is being ordered to participate in the interview or be charged with  
23 insubordination and potentially disciplined, even terminated, Ferguson does nothing  
24 to disabuse him of his fears (Drew Joint Exhibit 5 at page 1/line 26 - page 2/line 19;  
25 page 4/line 28 - page 5/line 3).

26          The threatened discipline is thus beyond dispute and that the threat was made  
27 to secure Drew’s participation in an investigatory interview without an employee  
28 representative from the Association being present is also beyond dispute. Thus, the

1 threat was made to interfere with Drew's right to representation which as previously  
2 discussed, Drew clearly had under MMBA, and to interfere with the right which the  
3 Association also clearly possessed--the right to be able to represent one of its  
4 members during an investigatory meeting.

5         The ALJ properly rejected the County's contention this conduct did not  
6 interfere with protected rights after considering the County's proffered justifications  
7 for its conduct. The Proposed Decision appropriately analyzes the proffered  
8 justifications for the County's conduct and concludes that the County's conduct  
9 involves "an employer's attempt to limit a fundamental statutory right." (ALJ's  
10 Decision at pp. 14-15.) Under MMBA, PERB, following prior decisions of the Court  
11 of Appeal has held that "if the employer's conduct is 'inherently destructive' of  
12 important employee rights, proof of unlawful intent is not required under MMBA,  
13 even if the employer's conduct was motivated by business considerations." Union of  
14 American Physicians & Dentists v. County of San Joaquin (Health Care Services)  
15 (2001) Case No. SA-CE-6-M, PERB Order No. IR-55-M, at p. 9. PERB relied upon  
16 Campbell Municipal Employees Assn. v. City of Campbell (1982) 131 Cal. App. 3d  
17 416, 423-424, 182 Cal. Rptr. 46, in concluding that if the adverse effect on employee  
18 rights is "comparatively slight" and the employer produces evidence of legitimate and  
19 substantial business reasons for its actions, the employee must present evidence of  
20 unlawful intent.

21         PERB has previously explicitly recognized that interfering with a labor  
22 organization's right to represent a member during disciplinary proceedings is  
23 "'inherently destructive' of important employee rights" and therefore a charging party  
24 need not provide proof of unlawful intent. In a case involving a public employer  
25 excluding the individual who was both the employee's and the labor organization's  
26 designated labor representative from the final disciplinary hearing before the City  
27 Council on the basis that he would be a witness during that hearing, PERB held that  
28 such conduct by the public agency was an unfair practice in violation of MMBA.

1 “The MMBA prohibits a public agency from interfering with employee  
2 representational rights. Specifically section 3506 provides in relevant  
3 part that ‘public agencies...shall not interfere with, intimidate, restrain,  
4 coerce or discriminate against public employees because of their  
5 exercise of rights under Section 3502.’ And PERB Regulation 32603(b)  
6 provides that it is an unfair practice for a public agency to interfere with  
7 the rights of an employee organization granted by section 3503.

8 “The test for whether the City has interfered with rights guaranteed by  
9 the MMBA do not require that unlawful motive be established; it  
10 requires only that at least slight harm to employee rights results from the  
11 conduct. The courts have described the standard as follows:

12 ‘All [a charging party] must prove to establish an interference  
13 violation of section 3506 is: (1) that the employees were engaged  
14 in protected activity; (2) that the employer engaged in conduct  
15 which tends to interfere with, restrain or coerce employees in the  
16 exercise of those activities; and (3) that employer’s conduct was  
17 not justified by legitimate business reasons.’ Public Employees  
18 Association of Tulare County, Inc. v. Board of Supervisors of  
19 Tulare County (1985) 167 Cal. App. 3d 797, 807, 213 Cal. Rptr.  
20 491.”

21 Laborers Local No. 270 v. City of Monterey (2005) PERB Decision No. 1766-M, at  
22 p. 8.

23 Furthermore, PERB has held that an employee’s right to representation during  
24 an investigatory interview is mirrored by the right of the labor organization to provide  
25 representation in that situation. “PERB has also held that an employee organization  
26 has a concurrent right to represent employees at such investigations. (Redwoods  
27 Community College District, supra, PERB Decision No. 293, at p. 9; Rio Hondo  
28 Community College District, supra, PERB Decision No. 272, at p. 11; see also, Mt.

1 Diablo Unified School District, et al. (1977) PERB Decision No. 44). California  
2 Union of Safety Employees v. State of California (Department of Parks and  
3 Recreation (1990) PERB Decision No. 310-S, at p. 5.

4 Nor under PERB authority must the Association establish that an employee  
5 actually felt threatened or intimidated. “In Clovis Unified School District (1984)  
6 PERB Decision No. 389, the Board held that a finding of coercion [or interference]  
7 does not require evidence that the employee actually felt threatened or intimidated or  
8 was in fact discouraged from participating in protected activity.” Delano Elementary

9 Teachers v. Delano Union Elementary School District (2007) PERB Decision No.  
10 1908, at p. 17. Thus, in order to uphold the Proposed Decision’s conclusion  
11 regarding unlawful interference it must only be found that the Public Defender’s  
12 Office interfered with the Association’s right to represent it members during  
13 investigatory interviews when Ferguson refused to permit Reinhold, the Association’s  
14 designated representative, to represent Drew. The Association was not required for  
15 purposes of this aspect of the unfair practice case to establish that Ferguson was  
16 motivated by an unlawful desire to interfere with the Association’s right to represent,  
17 only that her conduct resulted in “a slight harm” to the right of the Association to  
18 represent its members.

19 Once the Association established that the conduct of the employer tended to or  
20 did interfere with protected rights, then the burden shifted to the employer to prove  
21 operational necessity for its conduct. Assuming an operational necessity can be  
22 shown, PERB is then required to balance the competing interests of the parties.

23 The refusal to permit Reinhold to represent Drew or stated another way the  
24 refusal to allow a deputy public defender to have representation from the  
25 Association’s designated employee representative constitutes a grievous and serious  
26 interference with the Association’s rights to represent its members and further a  
27 resulting harm to the individual employees’ rights. The right of an employee to be  
28 represented during such an investigation and the right of the union to provide that

1 representation are fundamental to the over all representation rights protected by  
2 MMBA. By not allowing the Association's designated representatives to function in  
3 the role of employee representative in what was clearly an investigatory interview,  
4 the Public Defender's Office was interfering with the right of the Association to  
5 provide representation in violation of section 3503. The repeated actions of Ferguson  
6 in first denying Drew the right to have an Association authorized representative  
7 present during the investigatory interview interfered with the Association's ability to  
8 function effectively and to provide representation to the members of the bargaining  
9 unit. This wrong was seriously compounded by Ferguson's conduct once she had  
10 Drew alone--initially by attempting to once again interfere with who would act as an  
11 employee representative--by suggesting he obtain what she had to know was a non  
12 Association authorized employee representative and then by improperly extensively  
13 questioning Drew (without a representative being present) about his communications  
14 with Caldwell, Merritt, and Reinhold. This conduct constituted further interference  
15 with the Association's rights to represent its members and Drew's right to seek and  
16 obtain the assistance of the Association.

17 Thus, the ALJ properly concluded that the County's argument that its conduct  
18 was justified because no alternative course of action was available is a burden the  
19 County failed to meet. Unquestionably it was the County's burden to demonstrate or  
20 establish that there was no alternative course of action under *Stanislaus Consolidated*  
21 *Fire Protection District* (2012) PERB Decision No. 2231-M. (ALJ Decision at pp.  
22 16-18.) The County simply did not meet its burden of establishing that there were no  
23 alternatives to the course of action it chose to pursue as the ALJ properly concluded  
24 that some of the County's claims about concerns regarding confidential information  
25 were not supported by the record and that ultimately the Office could have foregone  
26 the interview of Drew.<sup>18</sup>

27 <sup>18</sup> The County contends that it was not a realistic option to forego the interview or to utilize  
28 redaction because Drew had a right pursuant to *Skelly* to confront and respond to evidence against  
him (County's Brief at pp. 28-29). The February 20 interview was an investigatory interview in

1 For example, the County contends in its Exceptions that it was a serious  
2 omission of a material fact by the ALJ because the “[P]roposed [D]ecision fails to  
3 include any findings of fact on the Public Defender’s position that there is an inherent  
4 conflict of interest when a [deputy district attorney] represents a [deputy public  
5 defender] in a disciplinary investigation or proceeding conducted by the Public  
6 Defender’s Office.” (Exceptions at p. 2.) Similarly, the County contends in its  
7 Exceptions that it was a serious omission of a material fact when the Proposed  
8 Decision only identified the draft policy entitled “Confidential Information in  
9 Attorney Personnel Actions and did not reference the other policy “Potential Conflict  
10 Situations Due to Defined Relationships” because both Offices raise the “underlying  
11 inherent conflict as a legitimate basis to prohibit a [deputy district attorney] from  
12 representing a [deputy public defender] in a disciplinary matter, and also because the  
13 proposed decision in effect, also holds that the Public Defender had no lawful basis to  
14 deny Drew from being represented by a DDA.” (Exceptions at pp. 2-3.) The County  
15 is again ignoring that there was no deputy district attorney attempting to represent  
16 Drew on February 20 when Ferguson refused to permit Drew to have representation  
17 and the policies it is arguing should have been considered by the ALJ were  
18 considered as part of the Proposed Decision, but have limited relevance to the denial  
19 of representation and interference issues since both policies are inapplicable as a  
20 justification for Ferguson’s conduct in any event.

21 The County contends in rejecting the suggested alternative of redacting  
22 material that it was “contrary to the evidence” for the ALJ to conclude there was  
23 “Very little said about what items need to be annotated or how those annotations were  
24 used by the Office” and cites to the transcript of the interview (Exceptions at p. 3).

25  
26 which the Office was presumably attempting to determine what had occurred, not a *Skelly* hearing.  
27 There were no charges pending against Drew and he had no *Skelly* rights during the interview. It is  
28 a serious misunderstanding (or intentional misrepresentation) for the County to contend that Drew  
or the Association had a due process right under *Skelly* to all the information which would be  
utilized against Drew and therefore redaction of names was not a meaningful alternative.

1 This Exception takes the Proposed Decision out of context and ignores the prior two  
2 sentences of the Proposed Decision which state, “Ferguson then proceeded to question  
3 Drew about his work performance, with specific attention to Drew’s failure to  
4 annotate otherwise document his work in his case files. The focus of the discussion  
5 was Drew’s need to improve on completing these annotations.” The quoted sentence  
6 from the Exceptions follows the two additional sentences cited above which  
7 specifically acknowledge that the issues of annotations was a focus of the interview,  
8 but ALJ then goes on to observe that there was little specific discussion of what items  
9 needs to be annotated and how the annotations would be used by the Office. An  
10 examination of the portion of the transcript of the interview of Drew that is cited by  
11 the County in Exception No. 5 indicates that there is no redacted material. (Drew  
12 Joint Exhibit 5 at pages 10-17 (the County uses the bates stamped numbers for Drew  
13 Joint Exhibit 5 and page 10 is 833 of the bates stamped numbers on the exhibit).  
14 Hence, as the ALJ properly noted the County agreed to use the transcript of the  
15 interview as a Joint Exhibit and redacted material it felt was confidential so that it  
16 would not become part of the public record. Given that there is no material redacted  
17 in this portion of the interview, the ALJ’s conclusion that specific cases and failure to  
18 annotate those cases and or how those annotations were utilized by the Office was not  
19 something that was discussed during the interview is a conclusion which is supported  
20 by the record.

21 The County also contends it was a serious omission of a material fact because  
22 the Proposed Decision does not include a finding of fact that the investigative  
23 interview with Drew included (1) a discussion of communicating with clients prior to  
24 trial; and (2) a discussion of ensuring his criminal case files included up to date client  
25 interview sheets (Exceptions at p. 3). The County in its Brief argues that the Office  
26 had “a legitimate business reason in prohibiting such the disclosure of such  
27 information to a [deputy district attorney] acting as an employee representative given  
28 the adversarial professional relationship between prosecutors and defense counsel.”

1 (County's Brief at p. 13.)<sup>19</sup> Whatever the merits of the Office's position with respect  
2 to a deputy district attorney becoming aware of such information, Reinhold had  
3 clearly assured Ferguson she would maintain exactly this type of information as  
4 confidential so any discussion of such information during the interview would not  
5 have resulted in it becoming known to a deputy district attorney. Thus, once again  
6 the County is arguing against a straw man.

7 Furthermore, ultimately under San Bernardino and other legal authority the  
8 County has not explained why it was not required to simply forego the interview if in  
9 fact it felt it could not proceed due to concerns with Reinhold acting as a  
10 representative. The violation occurred because the Office demanded with very  
11 unsubtle threats of discipline that Drew proceed to be interviewed without  
12 representation. This conduct clearly violated both Drew and the Association's rights  
13 even if one accepts all the other arguments made by the County.

14  
15 D. THE RESPONDENT'S CONDUCT OF UNILATERALLY ANNOUNCING  
16 NEW POLICIES VIOLATED ITS OBLIGATION TO MEET AND CONFER

17  
18 The parties had entered into an MOU which was in full force and effect in

19  
20 <sup>19</sup> The County fails to acknowledge the fact, as specifically addressed by the ALJ, that the concept  
21 of work product has a much narrower definition in the context of criminal law (ALJ Decision at pp.  
22 17-18). Penal Code Section 1054.6 which became effective in 1990 after the passage of Proposition  
23 115, limits the definition of work product in the criminal case context to only "a writing that reflects  
24 an attorney's impressions, conclusions, opinion, or legal research or theories" pursuant to Civil  
25 Code of Civil Procedure Section 2018.030(a). This significant narrowing of the definition of work  
26 product in a criminal case has been recognized repeatedly in court decisions. People v. Bennet  
27 (2009) 45 Cal. 4<sup>th</sup> 577, 595; People v. Zamudio (2008) 43 Cal. 4<sup>th</sup> 327, 354-355. Thus, discussion  
28 of "processes" followed within the Office or when an attorney was late for court, or whether a judge  
expressed displeasure with the deputy public defender, etc. are simply not covered by the narrow  
definition of work product that is applicable in the context of criminal cases. There was no  
evidence presented by the County that the interview included viewing the interview sheets  
containing Drew's or other attorneys impressions, but rather the interview establishes that what a  
occurred was a general discussion of paperwork which Drew purportedly was not updating or the  
annotations he was making or making belatedly (Drew Joint Exhibit 5). Hence, the County did not  
meet its burden of establishing that the information in the interview was protected by work product  
or consisted of attorney client confidential information.

1 March of 2009 (Exhibit B at p. 71). That MOU provided that the Association had the  
2 right to designate employee representatives to assist deputy public defenders during  
3 an investigatory meeting or disciplinary proceedings (Exhibit B at pp. 5-6). Despite  
4 the fact that the parties had agreed upon this MOU provision which established the  
5 “rules and procedures” which delineated the Association’s right to “designate”  
6 employee representatives, on or about March 11, 2009, Boxer sent a letter stating that  
7 she “had decided to issue” two new policies to the attorney staff in the Public  
8 Defenders’ Office and solicited comments from the Association (Drew Joint Exhibit  
9 6 at p. 1, emphasis added). After the parties met on March 19, 2009, to discuss the  
10 policies that Boxer had sent to the Association as attachments to her March 11, 2009  
11 letter, on March 24, 2009 Boxer provided copies of slightly different policies to the  
12 attorney staff and informed them that, “The Association asserts the right to appoint  
13 Deputy District Attorneys as employee representatives to represent Deputy Public  
14 Defenders in personnel matters, regardless of whether work product or client  
15 confidential information will be disclosed, and regardless of the respective  
16 assignments of the Deputy District Attorney and the Deputy Public Defender. The  
17 representation of a Public Defender attorney by a Deputy District Attorney causes a  
18 conflict of interest.” (Drew Joint Exhibit 7 at p. 1.) And goes on to state “attached  
19 hereto are two policies that articulate some of the duties of Public Defender attorney  
20 in light of currently existing law and ethics rules on confidential information and  
21 conflicts of interest.” (Id. at p. 2.)

22 As the ALJ noted the Association did not agree to negotiate new policies  
23 during the time that an MOU was in effect, which new policies clearly related to a  
24 subject matter covered in the MOU, and which policies had the impact of attempting  
25 to change the terms of the existing MOU language. As is implicit in Boxer’s  
26 Memorandum, the two policies were in conflict with the position the Association was  
27 asserting that it had a right to “appoint” employee representatives and indeed in the  
28 MOU the parties had previously agreed that the Association had a right to

1 “designate” employee representatives and agreed upon the rules and procedures  
2 governing that process.

3         Boxer could not force the Association to negotiate or agree to new policies  
4 during the term of the MOU. And she particularly could not do so when the two  
5 policies dealt with a subject matter that was “referred to or covered” in the MOU or,  
6 where as herein, the policies were actually inconsistent with the language of the  
7 MOU. The parties were subject to a binding MOU with a zipper clause that provided  
8 that “the County and SBCPAA for the life of this Agreement, each voluntarily waives  
9 the right to meet and confer in good faith with respect to any subject or matter  
10 referred to or covered in this Agreement.” (Exhibit B at pp. 26-27).

11         The ALJ correctly concluded the policies concerned matters within the scope  
12 of representation and did not concern a fundamental managerial or policy issue  
13 traditionally within management’s discretion (ALJ Decision at pp. 21-26). As the  
14 County has consistently done throughout these hearings (including the prior PERB  
15 matter) the County’s Brief focuses on extended discussions of attorney’s ethical  
16 obligations and the duties of prosecutors and public defenders and barely touches up  
17 on the issue of a unilateral change (again less than a page is devoted to this topic) and  
18 instead for the first time puts forward a claim its conduct was consistent with past  
19 practice and therefore is excused. Its conduct was not consistent with past practice  
20 and even if it were, that would not excuse unilaterally adopting policies under these  
21 circumstances.

22         The Association was formed in 2001. Merritt began raising this issue in 2006  
23 and also testified that prior to his becoming the President in 2006 he was aware of a  
24 deputy district attorney, Kersey, who had been the representative for a deputy public  
25 defender. Given this record it simply is not accurate to claim--as the County does--  
26 that there is a past practice of only deputy public defenders representing other deputy  
27 public defenders. Indeed, given that Merritt began raising this concern in 2006 and  
28 relied on the MOU (in part in raising the issue) it is clear that there has been a greater

1 amount of time during which the Association has been vociferously claiming that it  
2 had a right to designate representatives and that a deputy district attorney could under  
3 some circumstances represent a deputy public defender since from 2006 to present is  
4 seven years which is greater than the five years between 2006 and 2001 when the  
5 Association first came into existence and this bargaining unit was formed.

6 Furthermore, even if one assumes, arguendo, the existence of a past practice  
7 such a practice would not excuse the County's unilateral adoption of policies during  
8 the term of an MOU with a zipper clause and which MOU addresses the topic in a  
9 way that is not consistent with the unilaterally adopted policies. A party to a  
10 collective bargaining agreement is not free to unilaterally change the terms and  
11 conditions of employment on a topic within the scope of representation even if,  
12 assuming, arguendo, the changes purportedly represent a past practice. Any party to  
13 a collective bargaining agreement is always free to insist that its terms be honored  
14 and permitting the County to unilaterally adopt such policies would be permitting the  
15 County to change the terms of the collective bargaining agreement between the  
16 parties. The existence of a past practice would not excuse such action. CSEA,  
17 Chapter 318 v. Stockton Unified School District (2005) PERB Decision No. 1759, at  
18 pages 3-4.

19 In the meager few paragraphs devoted to this issue the County continues to  
20 argue, along with its new past practice argument, that the newly announced policies  
21 were both (1) nothing but restatements of the existing ethical obligations of the  
22 attorneys and/or (2) that the policies do not conflict with the MOU provisions and  
23 therefore the Public Defender's Office was free to unilaterally adopt these policies  
24 and promulgate them to the attorney staff in the Office. First, the policies are not  
25 mere restatements of existing ethical obligations. The policies go far beyond and in  
26 some cases conflict with the existing statements of ethical rules. For example,  
27 California Rules of Professional Conduct Rule 3-310(B) appears to be the "model"  
28 for the policy regarding a conflict, but Boxer's policy differs in that it inserts

1 “attorney” into the list of the types of relationships that may create a conflict, where  
2 the rule itself does not contain that classification or word. Even more significantly,  
3 the new policy ignores Rule 3-320 which is specifically and obviously applicable in  
4 that it is the rule applicable to “Relationships With Other Party’s Lawyer.” The  
5 policy also ignores opinions of the State Bar regarding relationships between  
6 prosecutors and public defenders. See State Bar of California Standing Comm. on  
7 Prof. Responsibility and Conduct, Formal Op. No. 1984-83 and Op. No. 1987-93.

8 In addition, the adoption of the policy, to the extent a deputy public defender  
9 felt obligated to comply with it, would eviscerate the ability of the Association to  
10 select employee representatives. Boxer and Ferguson would obviously make use of  
11 the policies as a basis for preventing the Association from exercising its authority  
12 under the MOU provision to appoint certain employee representatives for a  
13 geographic region to represent deputy public defenders. And the policies would also  
14 have the no doubt desired impact that individual deputy public defenders would be  
15 frightened of running afoul of the policy and would not be willing to accept  
16 assistance from a representative designated by the Association for fear that they  
17 would be seen as being in violation of the policy and potentially run afoul of Boxer or  
18 Ferguson.

19 Given that the County cannot establish that the issue of designation of  
20 authorized employee representatives is one that should be exempted from the  
21 obligation an employer has to bargain regarding issues within the scope of  
22 representation, the ALJ properly concluded that the County was not free to act  
23 unilaterally as it did when Boxer announced the two new policies. Given the  
24 significance of the issue of representation and that it has traditionally been  
25 “considered to be within the scope of representation” the ALJ’s conclusion is correct  
26 that the County’s claimed need for unrestricted decision making authority was  
27 outweighed by “the strong interests in protecting employee rights...” (ALJ Decision  
28 at p. 28.)



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

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party of the within action; my business address is 3550 Wilshire Boulevard, Suite 2000, Los Angeles, CA 90010.

On May 31, 2013, I served the document described as **SAN BERNARDINO COUNTY PUBLIC ATTORNEYS ASSOCIATION'S BRIEF** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Public Employment Relations Board  
Attention: Appeals Assistant  
1031 18<sup>th</sup> Street  
Sacramento, CA 95811-4124  
Tel: (916) 322-8231  
Fax: (916) 327-7960

**Via fax and U.S. mail (original and one copy)**

Kenneth C. Hardy, Deputy County Counsel  
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Office of County Counsel  
385 N. Arrowhead Ave., 4<sup>th</sup> Floor  
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**Via fax, email and U.S. mail**

2013 JUN -5 AM 11:04  
PUBLIC EMPLOYMENT  
RELATIONS BOARD  
HEADQUARTERS OFFICE

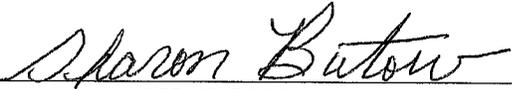
**BY MAIL:** I deposited such envelope in the mail at Santa Ana, California. The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

**BY FAX:** I sent such document by use of facsimile machine telephone number (714) 834-0762. The facsimile cover sheet and confirmation are attached hereto indicating the recipient's facsimile number and time of transmission pursuant to California Rules of Court Rule 2008(e). The facsimile machine I used complied with California Rules of Court Rule 2003(3) and no error was reported by the machine.

**BY EMAIL:** I caused to be sent such document by use of email to the email addressee above. Such document was scanned and emailed to such recipient.

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

3 Executed on May 31, 2013, at Los Angeles, California.

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6 SHARON BUTOW

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