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February 14, 2017

Via Electronic Mail

Rashida Ogletree, Special Counsel
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Re: Department of Justice Investigation of the Orange County District Attorney's Office

Dear Counsel,

This firm is legal counsel to the Orange County Attorneys Association (OCAA), whose membership includes the attorneys of the Orange County District Attorney's Office (DA's Office). We recently have become aware of the investigation of the DA's Office by the Department of Justice (DOJ), as described in the DOJ's press release regarding its investigation, and reflected in the January 19, 2017 First Document Request (First Request) from the DOJ to the DA's Office. By letter dated February 2, 2017, on which you were copied, we raised preliminary concerns about the First Request with the leadership of the DA's Office, on behalf of members within the DA's Office. We have received written confirmation from the DA's Office that the membership of the OCAA is expected to comply and will be directed to provide documents and respond to questions from the DOJ. Our membership has been instructed that compliance is mandatory, as reflected in the accompanying email message. If the DOJ takes the position that compliance is *not* mandatory, please indicate this fact right away, so that we can accurately apprise our members in this regard.

At this point we wish to apprise you of our concerns in greater detail, with a view towards reaching a mutually agreeable path going forward. As we have previously noted, the OCAA supports the desire of the DA's Office to cooperate with federal authorities, and our membership is committed to ensuring that the justice system operates at the highest level of integrity and fairness to all involved. Our members are devoted to the rule of law, and support protocols and procedures that will best facilitate this goal. This includes those concerning the issues that appear to have given rise to the DOJ's investigation – the use of jailhouse informants, and the discovery process applicable in those criminal cases. We believe a mutually cooperative course of action will best facilitate our mutual goals. To that end, we offer the following comments regarding the First Request.

Informants. The 'Definitions' section of the First Request does not include a definition of "informant." However, emails sent to our membership directing a response by February 13, 2017 to discrete items in the "DOJ first document production" define an informant as "Any individual who provides information to law enforcement who reasonably expects, requests or receives any 'benefits' . . . or any criminally charged individual who provides information to law enforcement concerning uncharged criminal conduct or pending criminal cases including but not limited to OCSD [Orange County Sheriff's Department] sources of information (SOI)." As defined, the term 'informant' is so broad that our membership could not reasonably be expected to recall, or garner from case files while managing their ongoing caseloads, the information sought in many of the requests in the First Request. This is particularly so in light of the broad definition of "benefits" set forth therein. For example, the definition of "informant" might be construed to include cooperating co-defendants (an extremely common phenomenon), U visa recipients (recipients of visas set aside for crime victims and their immediate family members who assist law enforcement), and/or material witnesses who have cooperated with law enforcement in lieu of prosecution. As construed, there is no system by which our members could provide accurate information without a thorough review of virtually all current and past case files – many thousands of files given the 10-year time period encompassed by the First Request. *See, e.g.,* Request Nos. 21 ("Informant documents produced by current or former OCSD employees"), 27 ("All informant records including but not limited to . . . ."), 30 ("All communications between OCSD and OCDA relating to informants or informant issues"), 36 & 39-40 ("Name(s) and contact information . . . informant documents . . . .").

In order to facilitate the identification of relevant information, we suggest the term "informant" be defined as set forth in California Penal Code § 1127(a) ("[a person, other than a codefendant, percipient witness, accomplice, or coconspirator whose testimony is based upon statements made by the defendant while both the defendant and the informant are held within a correctional institution.").

Documents. The term "Documents" in the "Definitions" section of the First Request states that it "includes material that can be located or obtained by reasonably diligent efforts, including documents under the control of counsel, and any other person or entity from whom

such documents can be obtained by request or which the County has a legal right to obtain." We request that the term 'reasonably diligent efforts' be defined as to our members, and that consideration be given to our members' need to continue their full work assignments while responding to the requests. As defined, the term would appear to encompass many thousands of files from the past decade that are in storage. Are our members expected to recall and review all closed case files? In this regard we also would note that the rotation of assignments, and offices, of our members would make it highly likely that there will be discrepancies between members' recollections of what cases may have involved informants. Members handling a case at a stage at which it involved no informants might be expected to recall no informant, in contrast to other members. Additionally, our members have no feasible way to obtain records which may be under the control of County Counsel.

Including. The term "Including" is defined in the First Request to mean "including, but not limited to." This renders the definition limitless, and thus potentially confusing to our members, and unduly burdensome.

Law Enforcement Agent. The term "Law Enforcement Agent" is defined in the First Request to include "prosecutors." This expansive definition would appear critical to the DOJ's assertion of jurisdiction over the DA's Office that is set forth in the second paragraph of the January 19, 2017 letter – 42 U.S.C. § 14141 (provision of the Violent Crime Control and Law Enforcement Act of 1994 which provides for a cause of action for "police pattern and practice" violations). We note that Section 14141, which was enacted in response to police officers' beating of Rodney King, does not by its terms apply to prosecutors. As set forth in the U.S. Attorney's Manual, § 8-2.241, the statute authorizes the DOJ to "examine allegations of misconduct by law enforcement officers," including through "Section 210401 of the Violent Crime Control and Law Enforcement Act of 1994 (**Police Misconduct Provision**), 42 U.S.C. § 14141, which authorizes the Department to file suit challenging a pattern or practice of misconduct by law enforcement officers (or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles) that deprives persons of constitutional rights." (emphasis added). Our review of relevant authorities evinces that the DOJ regularly utilizes this statute with respect to police and sheriff's departments, but we have identified no lawsuit against any prosecutor's office. We are aware of the 2014 Missoula County matter, and its negotiated resolution without any agreement or determination regarding jurisdiction. Please advise us if there are any matters in which an authority has determined that the DOJ's jurisdiction under Section 14141 extends to prosecutors' offices. Finally, we would note that in seeking to shield its prosecutors for alleged inappropriate conduct, the DOJ itself appears to take the position that prosecutors are not "law enforcement officers." *See, e.g. Tri-State Hosp. Supply Corp. v. United States*, 142 F. Supp. 2d 93, 98 (D.D.C. 2001) (government argues DOJ attorneys not 'law enforcement officers' under FTCA), *reversed on other grounds*, 341 F.3d 571 (D.C. Cir. 2003); s*ee also Trupei v. United States*, 304 Fed. Appx. 776 (11th Cir. 2008); *Moore v. United States*, 213 F.3d 705 (D.C. Cir. 2000).

If there are authorities we should consider in this regard, we would welcome them. In the interim, however, we question the basis for federal jurisdiction over our members. Of course, if the DOJ concedes a lack of jurisdiction over the DA's Office, please advise us.

Massiah Violation. Defining a *Massiah* violation to include "alleged . . . violations" of *Massiah v. United States*, 377 U.S. 20, 206 (1964) (Sixth Amendment prohibits government from eliciting incriminating statements from a defendant after attachment of Sixth Amendment right to counsel) is overly-broad insofar as our members may have no knowledge of alleged violations that were never substantiated. Additionally, because unsubstantiated allegations of *Massiah* motions are not uncommon in criminal cases, our members are likely not to recall unsubstantiated (or disproven) claims, particularly given the 10-year period encompassed by the First Request.

Attorneys. To the extent that the Definitions include "attorneys," it should be noted that as a matter of course, our members do not, as previously observed, have access to materials in possession of the County Counsel.

Protected and/or Confidential Materials in Case Files. The First Request does not address the issue of how our members should handle potentially responsive materials that are subject to courts' protective orders, or where disclosure is otherwise limited by applicable law, or where disclosure could put at risk the safety and/or privacy of persons referenced in it. Information such as personal information about victims or juveniles, the identification of undercover informants or law enforcement, home addresses, financial information or other items facilitating identify theft, are among the many types of information implicating our concern. We welcome the opportunity to discuss a productive way to address this critical issue, and hope that federal authorities may have a proposal beyond the reference to confidentiality on page 2 of the January 19, 2017 letter, as that alone does not fully address the issue. We also request advance assurance that our members will be indemnified if any adverse actions are taken against them by third parties based on the production of materials in response to the First Request.

Non-Existent Records/Loss/Destruction. The DA's Office has institutionalized protocols regarding the destruction of records, and in most cases our members will have no knowledge of the detailed types of information requested in items 6 and 7 of the 'Instructions' in the First Request.

Unsubstantiated and/or Disproven Complaints. Request Nos. 52-53 seek information about complaints or investigations of alleged violation of *Brady* and *Massiah*. To the extent these requests encompass unsubstantiated, disproven or otherwise groundless allegations, we object to disclosure of the information insofar as its revelation could unfairly impugn our members. Unsubstantiated allegations of discovery or other prosecutorial (or law enforcement) violations are often made in criminal cases, and are routinely adjudicated by our courts. This is a common feature of the adversary criminal justice system. Fairness weighs against investigating

our members for matters in which allegations are unsubstantiated and/or in which they were exonerated.

Request No. 54 seeks information about potential adverse employment actions based on discovery violations, and appears to encompass even matters in which our members were exonerated and/or violations were unproven. We object to the disclosure of this information as it could unfairly impugn our members. Moreover, because our members would have been regarded as insubordinate if they did not offer full cooperation with past investigations and proceedings in the employment context, we object to revelation of such (compelled) disclosures.

Personnel Files. To the extent that the First Request seeks information that may be contained in our members' personnel files, we object to the revelation of any information that, if revealed, could put at risk their safety, privacy and/or financial security (or the safety, privacy or security of their family members). Particularly given the danger our members would face if information such as their addresses and family members' identities were revealed, and the many offenders who may have animus against our members, we believe it is critical that a far greater degree of protection be afforded any disclosed information than that described on page 2 of the January 19, 2017 letter. We welcome the opportunity to discuss this issue with you, and hope the DOJ will have a proposal to fully address our concerns in this regard.

Other Issues. As indicated in our February 2, 2017 letter, we requested clarification from the DA's Office about whether our members are mandated to respond to the emails being sent to them by supervisors seeking records and information sought in the First Request. As previously stated, it is our understanding that the members are being directed to respond and that compliance is mandatory, as reflected in the enclosed email.

We also are requesting the DOJ's position on whether our members are mandated to (a) provide records and information in accordance with the First Request, and/or (b) respond to any questions or specific requests addressed to them by federal authorities involved in this matter. If the DOJ is taking no position in this regard, please advise us of any admonition you plan to provide to our members apprising them of their rights and/or obligations in this situation. Our goal is to provide our members with information regarding the preceding, and we want to ensure that we fairly and accurately represent the relevant information, so that our members may make informed decisions.

As noted, our members share the interest of the DA's Office in cooperating with federal authorities in aid of the lawful administration of justice, in accordance with the highest standards. A mutually cooperative and productive course of action should include consideration of our

members' concerns, however. Please advise whether you would be agreeable to meeting with us to discuss our concerns, and to devising a fair and reasonable process going forward.

Sincerely,

Marianne Reinhold

Marianne Reinhold
Of REICH, ADELL & CVITAN

MR:rp
Enclosure

cc: Tony Rackauckas, District Attorney (Tony.Rackauckas@DA.OCgov.com)
Jim Tanizaki, Chief Asst. District Attorney (Jim.Tanizaki@DA.OCgov.com)
Mena Guirguis, President, OCAA (via electronic mail)

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From: Tanizaki, Jim [mailto:Jim.Tanizaki@da.ocgov.com]
Sent: Friday, February 10, 2017 12:02 PM
To: Marianne Reinhold
Cc: Guirguis, Mena
Subject: DOJ Interviews

Ms. Reinhold:

Please let this email serve as a written confirmation that our Office expects our attorneys to make themselves available for questioning by DOJ representatives and to fully answer any questions asked by the DOJ representatives. Thank you.

Jim Tanizaki
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