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CONFIDENTIAL

November 4, 2016

Via Electronic Mail

Mr. Mark D. Servino
Senior Deputy County Counsel
P.O. Box 1379
Santa Ana, California 92702

RE: Indemnity for Orange County Grand Jury Special Counsel

Dear Mr. Servino:

Thank you for speaking with me yesterday. In follow-up to our telephone conversation, we are requesting that Orange County agree that it would defend and indemnify the special counsel requested by the 2016-2017 Orange County Grand Jury from any claims and losses arising out of special counsel's work on the investigation.

This summer the grand jury requested, pursuant to California Penal Code section 936, that the Attorney General's office employ special counsel and special investigators (collectively, "special counsel"), whose duties would be to investigate and present evidence to the grand jury, for possible further action by the grand jury. The services of the special counsel are a charge of the county. (Pen. Code, § 936.) The Attorney General's office agreed to the grand jury's request, and retained as special counsel for the grand jury Andrea Sheridan Ordin and Strumwasser & Woocher, LLP.

The bases for the indemnity request are as follows. As you know, grand juries, when exercising their watchdog function, can be sued for defamation by persons identified in grand jury reports. (See Pen. Code, § 930; *McClatchy Newspapers v. Superior Court* (1988) 44 Cal.3d 1162, 1176-1177 [action for defamation lies against individual grand jurors for statements made in grand jury report]; *Brooks v. Binderup* (1995) 39 Cal.App.4th 1287, 1292 [Penal Code section 930 provides defamation remedy for unindicted individuals wrongfully targeted for criticism in grand jury report]; *Harmston v. Kirk* (1989) 216 Cal.App.3d 1410, 1413 [deputy attorney general (DAG) acting as special counsel sued by deputy sheriff who alleged damages arising from the grand jury's accusation of misconduct against him; complaint alleged that the DAG was negligent in advising the grand jury, deceived deputy as to his right of silence, and violated deputy's civil rights]; *Gillett-Harris-Duranceau & Associates, Inc. v. Kemple* (1978) 83

Cal.App.3d 214, 219-220 [grand jurors may be sued for defamation and interference with prospective business advantage].)

In this case, we are confident that the special counsel will provide sound advice to the grand jury throughout the investigation. Further, we have no reason to believe that the grand jury will not exercise sound judgment with respect to deciding whether to identify particular individuals in any report(s) issued at the conclusion of the investigation. Nevertheless, because the potential remains that the grand jury and/or special counsel could be sued for defamation by persons identified in grand jury reports, special counsel have requested assurances that they will be defended and indemnified if such a suit were filed.

We note that this office has previously issued a formal Attorney General Opinion that a county is required to provide indemnification and defense for grand jurors sued for statements made within the scope of their reporting duties that are contained in a final grand jury report. (81 Ops.Cal.Atty.Gen. 199 (1998).) A copy of this opinion is enclosed herewith. Since the special counsel anticipate working with the grand jurors on the report, it follows logically that the special counsel should also receive a defense and indemnity. Indeed, the activities of the civil investigative grand jury and special counsel are substantially intertwined. Pursuant to Penal Code section 936, special counsel, at the request of the Orange County Grand Jury, will investigate and present evidence to the grand jury. And, as we understand the relationship between the Orange County Grand Jury and special counsel Andrea Ordin and Strumwasser & Woocher, the grand jury and special counsel are planning and executing the investigation together, will collaborate on any reports together, and generally work in tandem to carry out the investigation.

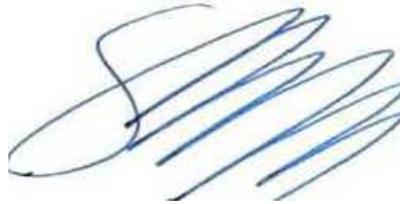
But it is our understanding that ultimately it will be the grand jury, not special counsel, that will have final decision making authority regarding investigatory steps taken and the content of any final report, albeit with input and advice from the special counsel. Given the substantial overlap between the activities of the grand jury and the activities of the special counsel, and the ultimate decision making authority of the grand jury, it would be anomalous for the county to defend and indemnify the grand jurors but not special counsel.

The indemnity provided should also apply if special counsel are obliged to defend the state under the indemnity provision in the state's standard contract. The standard state contract contains an indemnity provision, obligating contractors (such as the special counsel here) to defend the state from claims resulting from the contractor's work. Although in this case it is very unlikely that the state would be sued, since this office is not conducting the investigation nor participating in any grand jury reports, the special counsel have also requested protection from that provision in the event they are obliged to defend a lawsuit filed against the state arising out of special counsel's work.

Mr. Mark D. Servino, Senior Deputy County Counsel
November 4, 2016
Page 3

Thank you for reviewing this letter, and we look forward to discussing this issue with you further at your earliest opportunity.

Sincerely,



ANTHONY V. SEFERIAN
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

Enclosure

cc: Angela Sierra
Senior Assistant Attorney General
Civil Rights Enforcement Section