

PROFESSIONAL LIABILITY UPDATE

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DISQUALIFICATION

California Law

By Ann L. Strayer

City and County of San Francisco v. Cobra Solutions, Inc. (2004) 119 Cal.App.4th 304 (rev. granted)

The Supreme Court has accepted a case from the First District that holds a City Attorney's prior representation of the target of a public investigation in matters substantially related to that investigation requires vicarious disqualification of the entire City Attorney's Office.

In September 2000, Cobra Solutions, Inc. (Cobra) approached Dennis Herrera (Herrera) and retained him and his firm to represent it in a variety of business matters, including dealings with the City of San Francisco (City) and an ongoing dispute with the City's Department of Building Inspections. In September 2001, the San Francisco City Attorney's Office (City Attorney's Office) began investigating Marcus Armstrong, the head of the City's Department of Building Inspections, who had illegally authorized prepayments on a city contract with Government Computer Sales, Inc. (GCSI) who had failed to fulfill the contract. In November 2001, Herrera was elected San Francisco City Attorney and left private practice.

In February 2003, the City sued GCSI, Armstrong, and others, alleging that GCSI paid Armstrong kickbacks through various fictitious business entities in order to have him select GCSI for the

contract and authorize illegal prepayments. Further investigation uncovered evidence of payments by Cobra, another City contractor, to Armstrong's fictitious business entities, and in April 2003 the City added Cobra as a defendant in the GCSI lawsuit.

Cobra moved to disqualify Herrera and the entire City Attorney's Office. It argued that Herrera's previous representation, in matters substantially related to the current lawsuit, barred both Herrera and the City Attorney's Office representing the City against Cobra. The City Attorney's Office responded that it had immediately instituted an ethical screen upon discovering Cobra's alleged involvement in the kickback scheme. All responsibilities for decisions concerning the matter were passed from Herrera to his chief deputy, and Herrera had no further involvement in the case. It also argued that Herrera's prior representation

of Cobra was not substantially related to the current litigation, and that disqualification was therefore unnecessary. The trial court granted the motion to disqualify Herrera and the City Attorney's Office.

The First District Appellate Court recognized its ruling was one of first impression. All reported California civil cases have dealt with migration from private office to private office, from public office to private office, or from public office to public office. None had addressed the fourth possibility: migration from private office to public office.

Where an attorney seeks to represent a new client against a former client in the private context the chief fiduciary value jeopardized is that of client confidentiality. An attorney's duty to maintain client confidences prevents the attorney from representing an adverse party without the former client's consent. If the moving party can demonstrate a "substantial relationship" between the subjects of the prior and the current representations, access to confidential information by the attorney in the course of the first representation is presumed. Disqualification of both the attorney and his or her firm is mandatory.

In the public sector vicarious disqualification is not automatically required. Vicarious disqualification impinges on a client's ability to retain the counsel of her choice; might unduly limit a former government lawyer's employment prospects because the lawyer carries the taint of the prior work; and hampers government recruiting efforts as able lawyers elect not to do work that would later limit their

employment prospects. Vicarious disqualification can significantly increase the cost of prosecution and the susceptibility to tactical abuse as a defendant who threatens or obtains vicarious disqualification may avoid prosecution entirely. Disqualification of public sector attorneys may potentially deprive the client of an attorney highly skilled in a particular area of the law, especially when the public law office has a unit with extensive experience in handling a particular sort of public law case.

The court considered what measures must be employed when a private attorney joins a public law office that subsequently initiates substantially related litigation against the attorney's former client. There are concerns not adequately addressed by an ethical screen when the disqualified attorney is the head of a public law office. Prior case law mandated disqualification because the head of a public law firm had continued involvement in prosecutorial policies that could potentially affect how his former clients were prosecuted. The disqualified attorney had the power to review the performance of subordinates prosecuting his former clients, which could affect the prosecution. An ethical screen would not prevent inevitable public suspicion regarding how the disqualified attorney's presence might influence the treatment of his former clients.

The Court concluded that where the conflict rests with the head of a public office, preservation of the public trust in the scrupulous administration of justice and the integrity of the bar must be the paramount concern. There should not be a question whether the chief prosecutor is vigorously representing the public

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interest, maintaining professional objectivity, and keeping inviolate former clients confidences. Although reasons exist to support a narrower disqualification rule in public sector cases, they are insufficient when the City Attorney is the disqualified attorney. Vicarious disqualification of the entire public law office is required in matters substantially related to the prior representation.

Comment: The Supreme Court will resolve the question of whether an ethical screen is a sufficient safeguard to allow a public law office to prosecute the former client of the head of that office in matters substantially related to the prior representation.