

PROFESSIONAL LIABILITY UPDATE

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By Jennifer A. Becker

Chapman v. Superior Court (Malcolm) (2005) 130 Cal.App.4th 261

The Fourth District holds that due to conflicting facts and inferences it could not determine the existence or non-existence of an attorney-client relationship between a public agency attorney and one of its board members as a matter of law. However, public policy precluded recovery against the attorney where the putative client alleged that the attorney's advice led him to commit a crime.

David Chapman was in-house legal counsel for a Port District that entered into a memorandum of understanding (MOU) under which the Port District would purchase the South Bay Power Plant on property under the Port District's jurisdiction, and Duke Energy Power Services would lease and operate the plant for ten years and pay the costs of decommissioning the plant at the end of the lease term.

Port District board member David Malcolm told Chapman he planned to enter into a personal business relationship with Duke. Chapman advised Malcolm that he must abstain from voting on any Port District issue involving Duke and disclose any income from Duke on his conflict of interest forms. Chapman did not tell Malcolm about Government Code § 1090 that prohibits an officeholder from having a financial interest in any contract made by the public agency of which he or she

is a member; that he was not providing Malcolm with legal advice; that Malcolm should consult another attorney; or that Chapman needed to see any contract Malcolm entered into with Duke.

Duke and Malcolm entered into a written contract requiring Duke to pay Malcolm and his company \$20,000 per month for Malcolm's services concerning modernization plans for the South Bay Power Plant and similar generating facilities throughout the country. Duke paid a one-time bonus for any funding Malcolm secured on Duke's behalf for the construction of a modernized plant in the South Bay. This contract noted Malcolm's experience and knowledge with respect to political and local issues relevant to the South Bay plant and precluded Malcolm from advising or assisting competitors, including the Port District. When Malcolm told Chapman about the terms of this arrangement

Chapman told Malcolm he was required to divulge payments from Duke and abstain from voting on any Port District matter involving Duke.

Malcolm advised Duke to focus on the South Bay Plant, which was in a potential expanded “Enterprise Zone.” He solicited political support to expand the Enterprise Zone from officials in San Diego and Chula Vista. The Port District’s executive director wrote a memorandum recommending the City of Chula Vista contribute significant funds to develop the expanded Enterprise Zone, noting the presence of the South Bay Power Plant in the expanded Enterprise Zone. The Port District Board approved a MOU with the City of Chula Vista regarding the Port District’s provision of funds for the expansion of the Enterprise Zone, and the minutes noted Malcolm was present but excused from the vote.

Subsequently Chapman wrote a memorandum to the Board regarding the contract between Duke and Malcolm, stating his opinion that Malcolm’s arrangement with Duke did not violate any conflict of interest law. He opined that the law only required that certain interests be disclosed and that a public official not participate in matters where he or she may have a conflict of interest.

Malcolm resigned from the Board after the *San Diego Union-Tribune* wrote that Malcolm was being paid \$20,000 a month by Duke under a contract that required him to put Duke’s interests ahead of the Port District. When Malcolm learned the San Diego County District Attorney was contemplating multiple charges against him, including § 1090 violations, he negotiated a deal that he would plead guilty to one count

of violating § 1090, a felony, in exchange for an agreement to not pursue other charges. Malcolm stipulated that he should have resigned from the Board before it voted on supporting the Enterprise Zone expansion.

Malcolm sued Chapman and his principal, the Port District, for legal malpractice alleging Chapman failed to advise Malcolm of § 1090, and that his arrangement with Duke required him to resign from the Board rather than merely disclose income from Duke and abstain from voting on Port District matters involving Duke.

The Port District and Chapman moved for summary judgment arguing Chapman had no attorney-client relationship with Malcolm as a matter of law, and that maintenance of the cause of action violates public policy as § 1090 is intended to protect public agencies from officeholders’ self-dealing. The trial court denied the motion concluding there were triable issues of fact regarding whether Chapman and Malcolm had an attorney-client relationship and rejecting the public policy argument.

The Court of Appeal agreed with Malcolm that the issue of whether there was an attorney-client relationship could not be resolved as a matter of law. The court found that precedent holding that a public attorney’s duty is solely to the agency was not directly on point. Factual issues included Chapman’s deposition testimony that the Port District expected him to be available to individual commissioners to give them assistance in addressing conflict of interest issues and Malcolm’s evidence that Chapman encouraged commissioners to come to him with any

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conflict of interest questions. Malcolm submitted a declaration that he approached Chapman numerous times with various conflict of interest issues, and Chapman regularly provided advice to him, including advice about his relationship with Duke. Chapman never told Malcolm he was not providing legal advice, or that Malcolm should not rely on his advice or consult another attorney. There was also evidence Chapman knew Malcolm was following his advice.

The Court instead focused on the public policy argument and denied Malcolm the right to maintain his lawsuit.

Government Code § 1090 is a general prohibition against an officeholder's financial interest in a contract and prohibits any public officers or employers from having any financial interest, direct or indirect, in any contract made by them in their official capacity or by any board or commission of which they are a member. "Contract" is interpreted broadly and includes the negotiations, discussions, reasoning, planning, and give and take prior to a decision.

Section 1090 is an absolute bar to a board or commission entering into the prohibited contract. It is intended to insure absolute loyalty and undivided allegiance to the best interest of the governmental agency and to remove all direct and indirect influence of an interested officer as well as to discourage deliberate dishonesty. The statute is intended to avoid even the appearance of impropriety. A public officer cannot escape liability merely by abstaining from voting or participating in discussions or negotiations.

Membership on the board or council establishes the presumption that the

officer participated in the forbidden transaction or influenced other members of the council. Reliance on legal counsel's advice is not a defense to a violation. A willful violation is punishable by a fine and the officer is forever disqualified from holding any office in the state. "Willfully" means "the official must purposefully make a contract in which he is financially interested."

For public policy reasons, courts may preclude particular types of actions. The Court could find no analogous case in California and relied on Texas authority that precluded a legal malpractice case predicated on advice that led to a conviction of bank fraud. The Plaintiffs were precluded from maintaining the malpractice action because public policy bars recovery for injuries arising from a knowing and willful crime. Punishment for crime is intended to be personal and absolute and therefore the person should not even entertain the hope of indemnity for the offense committed.

Malcolm pleaded guilty to willfully violating § 1090, demonstrating knowledge that when the Port District voted to expand the Enterprise Zone, he knew it would likely benefit him financially. The court criticized Chapman's questionable advice but found it was immaterial, as Malcolm could not obtain indemnity for his willful criminal wrongdoing. Because § 1090 is a disincentive for officers who may be tempted to take personal advantage of public office, recoupment of losses attributable to a violation of the statute would undermine that salutary purpose.

Malcolm sought recovery from the public entity that § 1090 is designed to

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protect. Allowing Malcolm to recoup from the public entity losses he incurred as a result of his self-dealing despite any negligent advice from Chapman would shock the public conscience, engender disrespect for courts and generally discredit the administration of justice. A court should not encourage others to commit illegal acts upon their lawyer's advice by allowing the perpetrators to believe that a suit against the attorney will allow them to obtain relief from any damage they might suffer if caught.

The court was unpersuaded by Malcolm's argument that Chapman gave him expert advice on a complex legal issue, and he could not fairly be charged with knowledge that he was committing an unlawful or even a morally wrong act. Malcolm simultaneously represented the Port District and Duke, and to promote his own financial interests he expressly contracted to hold Duke's interests paramount to the Port District's interests. He remained on the Board instead of relinquishing his seat. The average person would readily regard it as improper notwithstanding Chapman's inexplicable disclose and recuse advice.

Comment: This case provides support for the argument that it is a question of fact whether a private or public entity's attorney simultaneously represents both the entity and its officers or directors in their individual capacity. Entity attorneys should not assume their relationship will be viewed as being solely with the entity. They are well advised to avoid providing individual advice and to inform officers and board members frequently and clearly that the relationship is with the entity, not the individuals as there are numerous contexts where attorney advice could lead to losses for individual officers or

board members.

Secondly, this case offers protection to attorneys providing advice about matters that could result in criminal convictions of their clients as public policy precludes such actions.

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