

PROFESSIONAL LIABILITY UPDATE

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DISQUALIFICATION

California Law

By Jennifer A. Becker

***City and County of San Francisco v. Cobra Solutions, Inc.*** (2006) 38 Cal.4<sup>th</sup> 839

*The California Supreme Court disqualifies a City Attorney and his entire office from representing the City Attorney's former client due to concerns over the effectiveness of ethical screening and the public perception of unethical conduct.*

An investigation by San Francisco City Attorney Louise Renne revealed irregularities in payments made to a city employee. Dennis Herrera then replaced Renne as City Attorney.

The City's investigators discovered that the employee had received funds from Cobra Solutions. Prior to his election, Herrera's law firm had represented Cobra Solutions in connection with its contract with San Francisco. Herrera took measures to screen himself from the case to the extent that it could involve Cobra. San Francisco then amended its complaint to name Cobra Solutions.

Cobra filed a motion to disqualify Herrera and the City Attorney's Office. Cobra submitted a bill showing Herrera had devoted a portion of an hour to San Francisco – Cobra Contracts and Cobra asserted that it had disclosed confidential information. The trial court granted the disqualification motion because Herrera had personally represented Cobra and had obtained confidential information. The disqualification was imputed to the

entire City Attorney's office because each of Herrera's deputy City Attorneys serves at his pleasure and are subject to his oversight and influence. The Court of Appeal upheld the trial court's decision.

The Supreme Court noted that in the context of disqualification based on successive representation of clients with adverse interests, the trial court must balance the current client's right to choice of counsel against the former client's right to preclude use of confidential information.

The duty to preserve client confidences survives the termination of the attorney's representation. If an attorney later represents an adversary of the former client, the former client may disqualify the attorney by showing a substantial relationship between the subjects of the prior and the current representations. If the former representation involved a direct relationship with the client, the former client need not prove that the attorney possesses actual confidential

information, it is presumed if the prior representation would normally involve confidences material to the current representation.

When the attorney's contact with the prior client was not direct, then the court examines both the attorney's relationship to the prior client and the relationship between the prior and the present representation. There is a substantial relationship between the two representations if the subject of the prior representation makes it likely the attorney acquired information relevant and material to the present representation. Disqualification is automatic if a substantial relationship is established.

Rules concerning imputation of a conflict to an attorney's firm are not addressed in the California Rules of Professional Conduct. Case law establishes that imputation is found where attorneys practicing law together share each others', and their clients', confidential information. The court considered the application of this principle in the government attorney context.

Case law has established that no conflict arises when separate law units under a single governmental umbrella operate as separate law firms independent of parallel units also sheltered under that umbrella. However, an entire District Attorney's office was disqualified even though a high-ranking deputy district attorney was screened from making crucial decisions about his former criminal defendant-client's case. The attorney's prominent position included formulating prosecutorial policies that could impact the prosecution of cases. In addition, the attorney's appraisal and

promotion of deputies required him to evaluate the performance of deputies prosecuting his firm's former clients. At the very least public perception of the prosecutor's integrity and impartiality would be at risk. This decision was later abrogated by the legislature by the enactment of Penal Code § 1424, which requires disqualification only on an evidentiary showing that conflicts of interest would compromise a fair trial. The Supreme Court noted that Penal Code § 1424 is inapplicable in the civil context, and the concerns expressed in the earlier case were still relevant.

There is a societal interest in preserving high ethical standards for attorneys. Because the head of a public law office possesses broad discretion, he or she should discharge all duties with the highest degree of integrity and impartiality, and preserve the appearance of integrity and impartiality as well.

Current clients have a right to chosen counsel and will bear a financial burden if their counsel is disqualified, but former clients have an overwhelming interest in preserving their confidential information. In the public attorney context, the government bears the financial burden, suffers litigation delay, and may lose expertise when an entire government law office is disqualified.

Although California case law upholds ethical screening of government attorneys to preclude the disqualification of an entire government attorney office by imputation, no case had considered an attorney who heads a government office and under whom other government attorneys serve.

The court was not persuaded that disallowing ethical screening of the head

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of a government office to preclude office-wide disqualification would discourage attorneys in private practice from seeking government office. If disqualification concerns become a campaign issue the taxpayers can take that into consideration. As a practical matter, government law offices litigate many cases, and office-wide disqualification from one case would not be likely to impair the office's overall operations.

The head of a government law office makes policy decisions allocating the office's resources and efforts. An attorney serving the head of a government law office cannot be insulated from policy decisions or from subordinates' real or perceived concerns about what their employer wants. A former client legitimately questions whether its confidential information is being used in substantially related litigation.

Public perception that a city attorney and his deputies might be influenced by the city attorney's previous representation of the client, at the expense of the best interests of the city, would insidiously undermine public confidence in the integrity of municipal government and its city attorney's office.

Thus, the Court upheld the trial court's disqualification of Herrera and the entire City Attorney's office.

*Comment:* The Court was unwilling to craft an ethical screening rule for the head of a government law office due to overriding concerns about the effectiveness of screening and the public perception of unethical conduct. However, in a footnote, the court said that the opinion did not apply to a senior

supervising attorney in a government office. In that context the trial court should conduct a factual inquiry into the actual duties of the conflicted attorney with respect to those attorneys who will be ethically screened, and into the attorney's responsibility for setting policies that might bear on the subordinate attorneys' handling of the litigation. The trial court should also consider possible public perception of unethical conduct.

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