

SUPREME COURT
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The Honorable Chief Justice Tani Cantil-Sakauye
The Honorable Associate Justices
Supreme Court of California
350 McAllister Street
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Re: Request for Depublication
***Sabey v. City of Pomona*, 215 Cal. App. 4th 489**
Supreme Court Case No. S210974, Court of Appeal Case No. B239916
(Super. Ct. Case No. BS129042)

Dear Honorable Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to the California Rules of Court, Rule 8.1125(a), the League of California Cities and the law firm of Richards, Watson & Gershon respectfully request that this Court depublish the Second District Court of Appeal's opinion in *Sabey v. City of Pomona* (2013) 215 Cal.App.4th 489 (*Sabey*). The opinion misstates California law by creating a fiduciary duty among partners that competes with a lawyer's ethical duty to a client, undercuts this Court's established precedent in *Beck v. Wecht* (2002) 28 Cal.4th 289, creates an ethical quandary for all law firm partnerships in California, leads to unexpected and illogical results, and significantly impacts the rights of local governments to manage their legal affairs. For any one of these reasons, let alone for all of these reasons, the Court should order the *Sabey* opinion depublished.

The League of California Cities is an association of 469 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

Richards, Watson & Gershon is a law firm formed as a professional corporation, which functions as the City Attorney's office for 29 cities and whose attorneys frequently advise and advocate for cities and other public entities in

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connection with quasi-judicial and other administrative proceedings. Approximately 78% of California cities use private law firms to perform the role of the City Attorney's Office (see Philip D. Kahn, *Privatizing Municipal Legal Services* (May/June 1984) 10 *Local Government Studies*, no. 3 at p. 2)¹.

The *Sabey* decision significantly limits the rights of cities to choose the law firm that they believe will best meet the needs of their constituents by restricting the ability of one type of law firm, a partnership, to provide city attorney services. Both the League of California Cities and Richards, Watson and Gershon have an interest in preserving the rights of cities to seek counsel of their choice.

I. Factual and Procedural Background

Glenn Sabey was employed as a police officer with the Pomona Police Department ("the Department"). After an internal affairs investigation, the City Manager terminated Sabey. Sabey appealed to an advisory arbitrator. The advisory arbitrator issued an advisory decision recommending that Sabey be reinstated to his position as a police officer without back pay. Sabey appealed the arbitrator's decision to the City Council. The City Council adopted the factual findings of the arbitrator, but sustained Sabey's termination from employment.

Sabey then filed a petition for writ of traditional and administrative mandamus under California Code of Civil Procedure §§ 1085 and 1094.6. Sabey contended that his rights to due process and a fair hearing were violated by the City's use of two partners from the same law firm, Liebert Cassidy Whitmore ("LCW"), to provide legal services in connection with his matter. More specifically, he objected to one attorney from LCW serving as an advocate before the arbitrator and, with a due process wall between them, another attorney from LCW advising the City Council in connection with the appeal of the arbitrator's decision.

The trial court denied the petition for writ of mandate. The Court of Appeal reversed and ruled in Sabey's favor, finding that his rights to due process and a fair

¹ This article is available from Taylor & Francis Online Customer Services, at <http://www.tandfonline.com>.

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hearing were violated, and ordered the City Council to retain new and different counsel for the purpose of advising it regarding the appeal of the termination.

II. The Supreme Court has Established that Attorneys from the Same Law Office May Undertake Advocacy and Advisory Roles in Quasi-Judicial Proceedings So Long as the Attorneys are Screened by a Due Process Wall

It is undisputed that when an administrative agency conducts adjudicative proceedings, due process of law requires a fair tribunal. *Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731, 737. Violation of due process may be demonstrated by actual proof of bias, as well as by “showing a situation ‘in which experience teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable.’” *Id.*, at 737 (citing *Withrow v. Larkin* (1975) 421 U.S. 35, 47). The Supreme Court already has held, in *Morongo*, *supra*, that, by itself, the combination of investigative, prosecutorial and adjudicative functions within a single administrative agency law office does not create an unacceptable risk of bias (*ibid*), and that proof of actual bias must be shown if the attorneys are properly screened from each other through internal separation of functions by a due process wall. *Morongo* thus reaffirmed the principles announced in earlier cases; *see Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, 1586-1587, holding that the same law office may perform both advocacy and advisory roles if there are assurances that the advisor for the decision maker is screened from any inappropriate contact with the advocate; *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 94, 97-98, opining that a due process violation would have been cured had the city assigned different lawyers from the same law office to serve as advocate for staff and advisor to the appellate body.

III. Sabey Misstates California Partnership Law to Distinguish *Morongo*, *Howitt*, and *Nightlife*, and Undercuts This Court’s Holding in *Beck v. Wecht* (2002) 28 Cal.4th 289

The *Sabey* opinion acknowledges the rule in *Morongo* and *Howitt*, but then attempts to distinguish *Morongo* by holding that law partners have a fiduciary duty to

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protect each other to the detriment of the client and the public. “Two government lawyers do not owe each other fiduciary duties. If they are properly screened from each other, there is no reason to suspect that the advisor to the decision maker will try to promote the result desired by the advocate. Because they are fiduciaries, the same cannot be said for partners in a private law firm.” *Sabey, supra*, 215 Cal.App.4th at 497. The court characterized the LCW partner advising the City Council as serving “two masters with conflicting interests.” (*ibid.*)

California law is very clear, however, that a law firm partner who is advising his client has only one master – the client. *Sabey* confuses this important ethical rule for all lawyers. This Court has held that the duty to the client is paramount, and cannot be trumped by a duty to another person, including another attorney; see *Beck v. Wecht* (2002) 28 Cal.4th 289, 297 (2002) (holding that there is no fiduciary duty among co-counsel to conduct their joint representation in a manner that does not diminish or eliminate fees, because “[t]o avoid any detriment to the jointly represented client, it is imperative that no collateral duties arise to interfere with the duty of ‘undivided loyalty and total devotion’ owed to the client”). Indeed, the “most cynical views of the legal profession would be confirmed by recognition of a fiduciary duty on the part of co-counsel to maximize one another’s fees.” *Id. Sabey* adopts this cynical view and undercuts the important principle articulated in *Beck* by incorrectly holding that law partners have fiduciary duties that compete with the duty owed to the client. This Court should not allow *Sabey* to compromise the ethical principle that the obligation to the client is paramount.

Significantly, the *Sabey* opinion fails to mention even once an attorney’s fiduciary duty to the client. The relationship between an attorney and client is a fiduciary relationship of the very highest character. See *Cox v. Delmas* (1893) 99 Cal.104, 123. Willful failure by an attorney to perform legal services for which he or she was retained in itself warrants disciplinary action because it constitutes a breach of the good faith and fiduciary duty owed by the attorney to his clients. See *Lester v. State Bar of California* (1976) 17 Cal.3d 547, 551.

No conflicting fiduciary duty exists among law partners. The *Sabey* opinion cites to Witkin’s summary of California law for the proposition that partners owe each other duties of “loyalty and care.” 215 Cal.App.4th 489, 498. But, a partner’s

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duty of loyalty to a fellow partner does not require a lawyer to choose between the client and his law partner. A partner's duty of loyalty under California law is far narrower and is set forth in California Corporations Code § 16404. It includes only the following:

- (1) "To account to the partnership and hold as trustee for it any property, profit or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property or information, including the appropriation of a partnership opportunity.
- (2) To refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership.
- (3) To refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership."

Cal. Corp. Code § 16404(b)

In short, the Corporations Code sets forth a duty to account to the partnership for the use of its property and information, and to avoid competing with or representing parties adverse to the partnership. The fiduciary duty does *not* include any obligation that requires a law partner to shade advice to the client or that creates an intolerable risk that a partner would do so.

The duty of care among partners is similarly narrow: "A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct or a knowing violation of law." *Cal. Corp. Code § 16404(c)*. A partner does not violate a duty or obligation "merely because the partner's conduct **furthers the partner's own interest.**" (*Cal. Corp. Code § 16404(e)* (*emphasis added*).

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If a partner does not violate the duties of care and loyalty to a fellow partner by pursuing the partner's own interests, then surely the partner is not violating the duty of care and loyalty by furthering the client's interests or the interests of due process and fair hearing, even if furthering those interests may adversely reflect on a partner.

The *Sabey* opinion's discussion of the duties of loyalty and care between partners is premised upon an incorrect overstatement of the law. The duties do not include an obligation that conflicts with a lawyer's primary ethical responsibility to the client. There is no fiduciary duty among law partners that creates an intolerable risk of biased advice by a law partner.

IV. The *Sabey* Opinion Creates a Quandary for All Law Firm Partners Throughout California

If the *Sabey* opinion remains published law in California, law firm partners throughout California no longer will be able to follow the bright line rule of undivided loyalty to their clients. Instead, *Sabey* will force them to consider whether their fiduciary duty to their partners requires that their advice to the client be skewed to protect their partners.

Under current law, it is clear that the incorrect and overstated duty assumed in *Sabey* does not exist among law partners. However, if this case stands as precedent, law partners will not be able to ignore the basic premise underlying the *Sabey* opinion: the fiduciary duties to a law partner include the duty to consider the personal interests of one's partner when giving advice to one's client. This is the premise upon which the entire opinion is based. There is no alternative premise offered in the opinion for distinguishing between the roles of the in house government lawyers approved in *Morongo* and *Howitt* and the roles of the law partners in *Sabey*.

As noted above, this premise is incorrect. If it were correct, a law partnership would be antithetical to the most fundamental principles of the Rules of Professional Conduct. That is not, and cannot, be the rule of law in California. The *Sabey* decision leads down this path, which is not a path that the Supreme Court should sanction.

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If the opinion remains published, the impacts of the opinion potentially expand beyond the narrow facts of the *Sabey* decision. If the *Sabey* court finds intolerable the likelihood of bias when a law partner advises a local government appellate body after his or her law partner advocated on the same issue to an arbitrator, then what bias must be imputed to a law partner advising a corporate board regarding the statutory rights of employees who are being terminated based on the advice or advocacy of a law partner? A law partner advising a corporate board must provide advice free of bias, even if he or she may contradict the advice of a law partner.

Under the reasoning of *Sabey*, must a law partner also be prohibited from representing a defendant on appeal from a criminal conviction if the defendant was represented by another law partner at the trial? Must it be assumed that the actions of the law partner on appeal will be skewed to protect the personal or reputational interests of the partner who lost at the trial level? Therefore, will the criminal defendant be deprived of his or her constitutional right to adequate representation on appeal? Allowing the *Sabey* decision to remain published will lead needlessly down a path of litigation that will challenge our fundamental understanding of the ethical obligations of law partners in California. This is simply unnecessary because there is no need to treat law partners differently than other attorneys under the decisions of *Morongo* and *Howitt*.²

V. The *Sabey* Decision Leads to the Illogical Result that a Fair Hearing is Dependent on the Corporate Form of the Private Law Firm Advising the Client

As explained above, the *Sabey* opinion rests entirely on an expansive and incorrect presumption regarding the breadth of the fiduciary duties of loyalty and care owed between partners under California law. Even if these duties were as stated in *Sabey*, no such duties exist between shareholders of a professional corporation or attorneys who are employees of a partnership or professional corporation.

² The *Sabey* opinion also ignores its potential impact on partnerships other than law partnerships. To what extent must all partners now conform their conduct to protect the interests of their partners?

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Corporate shareholders do not have fiduciary duties towards each other or to the corporation. See *Persson v. Smart Inventions* (2005) 125 Cal.App.4th 1141, 1159 (shareholders do not acquire fiduciary duties to each other unless there is a preincorporation agreement to assume such duties or there is evidence that the corporate form was disregarded). Co-counsel associated in a case do not have fiduciary duties to each other. See *Beck, supra*, 28 Cal.4th 289, 297 (there is no fiduciary duty among co-counsel to conduct their joint representation in a manner that does not diminish or eliminate fees). Similarly, employees do not owe a fiduciary duty to fellow employees.

Thus, *Sabey* leads to the illogical result that the ability of a law firm to provide a city with both a lawyer to serve as an advocate before an arbitrator and a lawyer to serve as an advisor to a decision maker on appeal will depend on the firm's corporate form. If that law firm is a professional corporation, then there will be no restrictions on the law firm. If that law firm is a partnership, then the two lawyers serving the city cannot be partners. But, based on the reasoning of the *Sabey* opinion, the two lawyers could be associates of the partnership because the associates do not owe a fiduciary duty to each other and therefore their relationship would be no different than the relationship approved in *Morongo* and *Howitt*.

Finally, the ultimate absurdity would be that the two partners, theoretically biased by their supposed fiduciary duty, could reorganize their law firm as a professional corporation and, as shareholders, play the same roles that were prohibited to them as partners.

This "fiduciary duty among partners" basis for departing from the rule articulated in *Morongo* and *Howitt* elevates form over substance in a manner that exposes its fundamental flaws.

VI. *Sabey* Will Result in Excessive and Burdensome Legal Costs for Public Entities and Impair Cities' Ability to Manage Their Budgets and Select Legal Representation of their Choice

The impact of *Sabey* on cities is also more fundamental than was recognized by the Court of Appeal. Approximately 78% of California cities use private law

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firms to perform the role of the City Attorney's Office (see Kahn, *supra*, at p. 2). Undoubtedly, a significant number of these cities are served by law firms organized as partnerships. Those law firms function as the City Attorney's Office. An attorney from the law firm is appointed as the City Attorney. Other attorneys, some partners and some associates, will play the roles of other attorneys in the City Attorney's Office.

“[C]ontrolling law vests wide latitude in city councils to define and control the duties of their city attorneys. This result is consistent with the general principle that an attorney's duties are ordinarily defined and controlled by his client.” *Montgomery v Superior Court* (1975) 46 Cal.App.3d 657, 670.

Cities often choose to use contract city attorneys due to financial considerations. The use of a contract city attorney can result in substantial cost savings for small cities and others that do not have the legal needs to warrant a full time staff of attorneys.

Using contract city attorneys also enables cities to retain attorneys with experience in many areas of law that might not be otherwise available due to limitations on the size of in-house staff. “Value includes not only the absolute cost, but also the quality of service. At its most basic level, the decision to outsource government attorneys is not so different from the ‘make-or-buy’ decision that corporations face with respect to the size of their in-house legal departments.” Patrick McFadden, Note, *The First Thing We Do, Let's Outsource All the Lawyers: An Essay*, 33 Pub. Cont. L.J. 443 (2004), at pp. 444-445.

Sabey limits the ability of cities to choose their preferred form of receiving city attorney services. Cities will not be able to contract with law partnerships for the full range of legal services provided by an in-house city attorney because the *Sabey* decision establishes new ethical rules for certain lawyers hired by contract. As explained above, without justification under California law, these ethical rules will limit the roles that can be played by two partners in a law firm when that firm fills the position of a contract city attorney. Yet, attorneys employed by the city (or employed by a professional law corporation) will be able to fill those same roles.

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VII. Conclusion

The California Bar has never promulgated different ethical rules for attorneys based on the form of the law firm's organization, nor is there any basis for doing so. The ethical obligations of California lawyers should not be fundamentally altered by the opinion in *Sabey*.

The due process and fair hearing rights of California residents already are adequately protected by the Supreme Court decision in *Morongo*. The *Sabey* decision cannot be reconciled with *Morongo* unless there is a fundamental, unwarranted creation of new fiduciary duties among law partners such that a law partnership inherently creates an intolerable risk of biased advice on the part of a law partner. There is no need for such a profound shift in well-established California law. *Sabey* does not contribute to the development of California law, but instead confuses it.

In light of these significant adverse consequences, the League of California Cities and the law firm of Richards, Watson & Gershon respectfully request that the Court depublish *Sabey*.

Very truly yours,



Patrick Whitnell, General Counsel
League of California Cities



Amy Greyson
Richards, Watson & Gershon

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Proof of Service Attached

PROOF OF SERVICE

I, Irina Berman, declare:

I am a resident of the state of California and over the age of eighteen years and not a party to the within action. My business address is 44 Montgomery Street, Suite 3800, San Francisco, California 94104-4811. On **June 13, 2013** I served the within document(s) described as:

Letter Requesting Depublication of *Sabey v. City of Pomona* (2013) 215 Cal. App. 4th 489, California Supreme Court Case No. Case No. S210974, Court of Appeal Case No. B239916 (Super. Ct. Case No. BS129042)

on the interested parties in this action as stated below:

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(BY MAIL) By placing a true copy of the foregoing document(s) in a sealed envelope addressed as set forth above. I placed each such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Brea, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **June 13, 2013**, at San Francisco, California.

Irina Berman

Irina Berman