



# **Constructing Ethical Due Process Walls Following *Sabey & Howitt***

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## **Constructing Due Process Walls Following *Morongo* and *Sabey***

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## I. Introduction

The principle of procedural due process under the federal and California Constitutions requires a fair tribunal in the conduct of quasi-judicial proceedings.<sup>1</sup> The City Attorney, by statute or city charter, has the responsibility to provide advice and representation on all legal matters for the city council and city departments. Quasi-judicial proceedings in cities may require the City Attorney's office to provide legal representation in several capacities, including a factfinding/investigation function, an adversarial/prosecutorial function and an advisory/evaluative function.

This paper addresses the use of due process walls to create an internal separation of attorneys in the city attorney's office when the attorneys play multiple roles in the same quasi-judicial matter. This paper also discusses the recent appellate court decision, *Sabey v. City of Pomona*<sup>2</sup>, which held that a law firm partnership may not have multiple partners serve in different roles in the same administrative proceeding involving a disciplinary appeal. The *Sabey* decision raises questions about the ability of private law firms serving as the city attorney and staff to use due process walls and reflects that some courts may apply fair hearing principles differently to private law firms than in public law offices.

The companion paper to this section contains an overview of due process principles and requirements applicable to quasi-judicial proceedings. Due process walls and fair hearing requirements in quasi-judicial proceedings have also been discussed in several prior papers from the City Attorneys' Department.<sup>3</sup>

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<sup>1</sup> *Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4<sup>th</sup> 731, 737. The Fourteenth Amendment to the U.S. Constitution and Article I, Section 7 of the California Constitution provide that the government may not deprive any person of life, liberty or property without due process of law. The Fourteenth Amendment of the U.S. Constitution states "...nor shall any state deprive any person of life, liberty, or property, without due process of law". Article I, § 7, subd. (a), of the California Constitution provides that "A person may not be deprived of life, liberty, or property without due process of law . . . ." The California Supreme Court also recognizes an individual's due process liberty interest to be free from arbitrary adjudicative procedures. See *People v. Ramirez* (1979) 25 Cal.3d 260, 263-264; *Saleeby v. State Bar* (1985) 39 Cal.3d 547, 565; Cal. Code Civ. Proc. § 1094.5(b).

<sup>2</sup> (2013) 215 Cal.App.4<sup>th</sup> 489.

<sup>3</sup> See 2009 *Ad Hoc Due Process Committee Report On the Separation of the Advocacy/Prosecutorial Function From the Decision Making Function in Administrative Hearings*, City Attorneys' Department, League of Cities Annual Conference (September 2009); Manuela Albuquerque, *Due Process In Local Administrative hearings After the California Supreme Court's Opinion in Morongo Band of Mission Indians v. California State Water Resources Control Bd., 45 Cal.4th 731 (2009)*, City Attorneys' Department, League of California Cities Spring Conference (May 2009); *Report of the Department's Ad-Hoc Due Process Committee on the Commingling of Functions in Quasi-Judicial Proceedings in the Wake of Nightlife Partners and Quintero*, City Attorneys' Department, League of Cities Annual Conference (October 2005); and Manuela Albuquerque, *Procedural Due Process Limitations on the Municipal Lawyer Combining Quasi-Judicial and Prosecutorial or Investigatory Functions*, City Attorneys' Department, League of California Cities Spring Conference (May 2004).

## II. Due Process Requires an Unbiased and Impartial Decisionmaker

In a quasi-judicial proceeding or hearing, principles of due process and a fair hearing require a city to provide the interested parties with notice and an opportunity to be heard before an impartial decision maker.<sup>4</sup>

An unbiased and impartial decision-maker is a critical element of procedural due process<sup>5</sup>, which requires both actual fairness and the appearance of fairness.<sup>6</sup> A decisionmaker's financial interest in a quasi-judicial proceeding constitutes actual bias which requires his/her disqualification.<sup>7</sup> In the absence of financial interest in the outcome, an adjudicator is presumed to be impartial.<sup>8</sup> Even without a financial interest, disqualifying bias may exist if the decisionmaker is personally embroiled in the subject matter of the proceeding, or has prejudged its outcome.<sup>9</sup> A decisionmaker may also be disqualified when "experience teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable."<sup>10</sup>

## III. The Role of the City Attorneys in Quasi-Judicial Hearings

A city attorney may be appointed by the city council pursuant to the general laws of California<sup>11</sup>, a city charter,<sup>12</sup> or pursuant to an election of the voters.<sup>13</sup> A city attorney and his/her staff may be city employees, or the city council may contract with a private law firm for legal services.<sup>14</sup>

The legal services provided by the city attorney's office generally fall into three areas – advice, representation of a city in civil litigation and internal and external administrative proceedings in which the city is a party, and criminal prosecutions. Under State law, a city

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<sup>4</sup> *Morongo*, 45 Cal.4th 731, 737.

<sup>5</sup> *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, cert. denied (1997) 520 U.S. 1167.

<sup>6</sup> *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 90.

<sup>7</sup> *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017.

<sup>8</sup> See *Morongo*, 45 Cal.4th 731, 737; *Haas*, 27 Cal.4th at 1025; *Withrow v. Larkin* (1975) 421 U.S. 35, 47.

<sup>9</sup> *Nasha L.L.C. v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 483-484.

<sup>10</sup> *Morongo*, 45 Cal.4th 731, 737 (citing *Withrow*, 421 U.S. at 47).

<sup>11</sup> See Cal. Gov. Code § 36505 and §§ 41801-41805.

<sup>12</sup> See e.g., Albany Charter, Chapter III, Section 3.01; Irvine Charter, Article VII, Section 701; Monterey Charter, Article 4, Section 4.5.

<sup>13</sup> Charter cities in California with elected city attorneys include Compton, Huntington Beach, Oakland, Los Angeles, San Francisco, San Diego, San Bernardino, Long Beach, Redondo Beach, San Rafael, and Chula Vista.

<sup>14</sup> See Cal. Gov. Code §37103 (providing "The legislative body may contract with any specially trained and experienced person, firm, or corporation for special services and advice in financial, economic, accounting, engineering, legal, or administrative matters); and Cal. Gov. Code §53060 (providing "The legislative body of any public or municipal corporation or district may contract with and employ any persons for the furnishing to the corporation or district special services and advice in financial, economic, accounting, engineering, legal, or administrative matters if such persons are specially trained and experienced and competent to perform the special services required"). As of 1984, approximately 78% of California cities used private law firms for legal services. See Philip D. Kahn, *Privatizing Municipal Legal Services* (May/June 1984) 10 Local Government Studies, no. 3 at p. 2.

attorney's duties include advising city officials on all matters pertaining to city business, framing ordinances and resolutions required by the legislative body, performing other legal services required by the legislative body and, with the consent of the district attorney, prosecuting misdemeanors committed within the city.<sup>15</sup> The city attorney's office generally provides legal advice and representation for all levels of city government. City charters typically contain similar provisions.<sup>16</sup>

Cities that appoint a private attorney as their city attorney seek representation from the law firm in the same manner provided by an in-house city attorney in a public law office. When cities contract with a private firm, one attorney from the firm will be appointed city attorney, and other attorneys in the firm provide legal services to departments, boards and commissions based on their legal expertise.

Cities use quasi-judicial hearings or proceedings in a variety of contexts, such as permit and license applications and revocations, disciplinary appeals, grievances, and nuisance abatement. The decisionmaker in a quasi-judicial proceeding may be the city council, a board or commission, a city employee, or an outside hearing officer. The scope of the legal services provided by city attorneys and their staff sometimes requires that multiple attorneys serve in different roles in quasi-judicial proceedings. The city attorney's office may assist in factfinding and investigation into a dispute, the prosecution of a matter, or provide staff and/or the decisionmaker with an evaluation and analysis of applicable ordinances and/or statutes.

#### IV. Separation of Functions by a Due Process Wall is Required in Adversarial Quasi-Judicial Hearings

When a city uses an *adversarial* quasi-judicial hearing or proceeding to resolve a matter, a different city attorney must undertake the prosecutorial/advocacy role than the attorney advising the decisionmaker. A city attorney cannot concurrently serve in the same contested matter as both the advocate/prosecutor and the legal advisor to the decisionmaker<sup>17</sup> because commingling these functions violates due process. An advocate is a "partisan for a particular client or point of view"<sup>18</sup>, and the role of advocate/prosecutor role is "inconsistent with true objectivity, a constitutionally necessary characteristic of an adjudicator."<sup>19</sup> Allowing an advocate for one party to also act as

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<sup>15</sup> Cal. Gov. Code §§ 41801 - 41805.

<sup>16</sup> For example, Section 703 of Article VII of the Pomona City Charter authorizes the Pomona City Council to appoint a city attorney. Section 703 provides that "The City Attorney shall serve as the chief legal advisor to the Council, the City Manager, *and all City departments and appointed bodies*, and shall have the authority to represent the City in all civil and criminal matters, and shall perform such other duties as prescribed by this Charter, by ordinance or resolution, or as requested by the Council or City Manager." (Emphasis added.)

San Diego City Charter Article V, Section 40 provides "The City Attorney shall be the chief legal adviser of, and attorney *for the City and all Departments and offices thereof in matters relating to their official powers and duties*, except in the case of the Ethics Commission, which shall have its own legal counsel independent of the City Attorney." (Emphasis added.)

<sup>17</sup> *Nightlife Partners*, 108 Cal.App.4th 81. See also *Department of Alcoholic Beverage Control v. Alcohol Beverage Control Board* (2006) 40 Cal.4th 1, 11.

<sup>18</sup> *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, 1584.

<sup>19</sup> *Ibid.*

counsel for the decision-maker “creates the substantial risk that the advice given to the decision-maker, ‘perhaps unconsciously’ ... will be skewed.”<sup>20</sup>

For example, in an early case, *Midstate Theaters, Inc. v. County of Stanislaus*<sup>21</sup>, the appellate court ruled that the county violated property owners’ due process rights in appeal hearings on property tax assessments when a county counsel examined witnesses and argued the case for the assessor and concurrently advised the board of equalization on evidentiary rulings and procedural matters and the board viewed the county counsel as their attorney.<sup>22</sup>

In *Nightlife Partners, Ltd. v. City of Beverly Hills*<sup>23</sup>, another court of appeal held that the city violated due process because the same assistant city attorney who advised staff in reaching its decision to deny renewal of an adult cabaret permit also advised the hearing officer on a subsequent appeal by the cabaret.<sup>24</sup> The court concluded that the city’s permit process was an adversarial process, and that the city commingled the prosecutorial and advisory functions in violation of due process. Because the assistant city attorney played an “active and significant role” in a contested process, by serving as a prosecutor or advocate for city staff<sup>25</sup>, when the attorney subsequently served in an advisory capacity in the administrative appeal, his actions violated the business’ right to due process.<sup>26</sup>

While the same attorney may not serve in both a prosecutorial/adversarial role and advisory role in the same quasi-judicial matter, different attorneys from the same city attorney’s office may serve in both roles in the same proceeding if those attorneys are separated from each other by a due process wall – a figurative internal screen established between the attorneys, their staff and work so that the attorneys cannot consult with each other on the disputed matter or access each other’s work on the same matter.

The concept of a due process wall was addressed in *Howitt v. Superior Court*.<sup>27</sup>, in which the appellate court evaluated an adversarial proceeding established by a county to review personnel complaints by employees in the sheriff’s department. A deputy sheriff was transferred and suspended without pay, and he sought an administrative hearing before the county’s employment appeals board. Under the county’s procedures, the sheriff’s department would be represented by a deputy county counsel and the county counsel himself would advise the board and prepare the board’s written decision.

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<sup>20</sup> *Id.* at 1585.

<sup>21</sup> (1976) 55 Cal.App.3d 864.

<sup>22</sup> *Id.*, at 870-871, 873.

<sup>23</sup> 108 Cal.App.4<sup>th</sup> 81.

<sup>24</sup> In *Nightlife*, the court found that the assistant city attorney advised staff on whether the renewal application was complete, and wrote letters to the business setting forth the staff’s position that the renewal application was incomplete. The city’s finance officer denied the renewal application on the grounds that it was incomplete. 108 Cal.App.4<sup>th</sup> at 84. The cabaret appealed to the city’s risk manager, who served as the administrative hearing officer under the city’s ordinance. The same assistant city attorney advised the hearing officer during the appeal, and the appeal was denied. *Id.*

<sup>25</sup> *Nightlife*, 108 Cal.App.4<sup>th</sup> 81, 90.

<sup>26</sup> *Id.*, at 94, 98.

<sup>27</sup> 3 Cal.App.4<sup>th</sup> 1575.

The deputy sheriff challenged this process after the county counsel's office refused to disqualify itself from advising the board. The court of appeal ruled that performance of both the advocacy role and advisory role in the same law office is appropriate "only if there are assurances that the advisor to the decision maker is screened from any inappropriate contact with the advocate."<sup>28</sup> In dictum, the court noted that an adequate screening procedure for due process purposes does not require the creation of functionally separate offices, and that it would be sufficient if the advisor to the board had no potential involvement in or responsibility for the preparation or presentation of the case.<sup>29</sup>

The California Supreme Court upheld the use of a due process wall in the 2009 decision of *Morongo Band of Mission Indians v. State Water Resources Control Board*.<sup>30</sup> The Supreme Court ruled 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<sup>31</sup>, and that proof of actual bias must be shown if the attorneys are properly screened from each other through an internal separation of functions by a due process wall.

*Morongo* involved a challenge to the procedures for revocation of water licenses by the State Water Resources Control Board. The Board issued a notice of proposed revocation of the water license of an Indian Tribe on the grounds that the licensee or prior holders of the license failed to beneficially use the water for an extended period and had violated license terms by using the water for unauthorized purposes. The licensee argued that the Board's procedures violated due process because the attorney prosecuting the license revocation matter before the Board simultaneously served as an advisor to the Board on an unrelated matter, and that the entire enforcement team should be disqualified.

The Supreme Court rejected the licensee's arguments. The court concluded there was no evidence that the attorney or any other staff attorney ever acted in both advisory and prosecutorial capacities in the subject proceeding or any other adjudicative proceeding, or that the board ever regarded the attorney as its sole or primary legal adviser; the attorney had advised the board in only one matter, which was unrelated to the subject license revocation proceeding; and the attorney was just one of a group of staff attorneys from whom the board obtained legal advice.<sup>32</sup> The Supreme Court held:

"In the absence of financial or other personal interest, and when rules mandating an agency's internal separation of functions and prohibiting ex parte communications are observed, the presumption of impartiality can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias. Unless such evidence is produced, we remain confident that state administrative agency adjudicators will evaluate factual and

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<sup>28</sup> *Howitt*, 3 Cal.App.4<sup>th</sup> 1575, 1586. The appellate court remanded the case to the superior court to allow the county to demonstrate that the board's advisor was adequately screened. *Id.*, at 1587.

<sup>29</sup> *Id.*, at 1587, fn. 4.

<sup>30</sup> 45 Cal.4<sup>th</sup> 731, 737.

<sup>31</sup> *Id.*

<sup>32</sup> *Morongo*, 45 Cal.4<sup>th</sup> 731, 740-741.

legal arguments on their merits, applying the law to the evidence in the record to reach fair and reasonable decisions.”<sup>33</sup>

The due process wall established by the board included screening agency employees assigned to the enforcement team from inappropriate contact with board members and other agency staff through strict application of the state Administrative Procedure Act's rules governing ex parte communications.<sup>34</sup> There was also physical separation of offices, support staff, computers, printers, telephones, facsimile machines, copying machines, and restrooms between the hearing officer and the enforcement team.<sup>35</sup>

In *Morongo*, the licensee cited a recent case, *Quintero v. City of Santa Ana*,<sup>36</sup> in which a fired police officer argued that his due process rights were violated during his administrative hearing before the city's personnel board. The assistant city attorney that represented the city before the personnel board concurrently acted as counsel for the board on other unrelated civil matters. The appellate court in *Quintero* ruled that the city failed to demonstrate that the city adviser for the decision maker was screened from any inappropriate contact with the advocate, as provided in *Howitt*.<sup>37</sup> Although there was no evidence that the attorney acted as both the board's legal adviser and in a prosecutory function in the case, the court found that the attorney's other interactions with the board gave “the appearance of bias and unfairness and suggest the probability of his influence on the Board.”<sup>38</sup> While *Quintero*'s administrative appeal was pending, the assistant city attorney appeared before the board on several other disciplinary appeals, represented the board in civil litigation arising out of those administrative proceedings; advised the board on rules amendments; and was listed as the board's attorney. The appellate court ruled that these facts were sufficient “to show the probability of actual bias”, concluding that “[i]t would only be natural for the Board members, who have looked to [the attorney] for advice and guidance, to give more credence to his arguments when deciding plaintiff's case. Whether or not they actually did is irrelevant; the appearance of unfairness is sufficient to invalidate the hearing.”<sup>39</sup>

In *Morongo*, the Supreme Court overruled *Quintero* in part, rejecting any per se rule barring agency attorneys from simultaneously exercising advisory and prosecutorial functions, even in unrelated proceedings.<sup>40</sup> The court also distinguished *Quintero* on its facts, finding that there was no evidence that the prosecuting attorney or any other agency staff attorney, ever acted in both advisory and prosecutorial capacities in the licensee's proceeding or any other single adjudicative proceeding, or that the board regarded the prosecuting attorney as its sole or primary legal adviser.<sup>41</sup>

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<sup>33</sup> 45 Cal.4<sup>th</sup> 731, 741-742.

<sup>34</sup> See Cal. Gov. Code § 11430.10 et seq.

<sup>35</sup> *Morongo*, 45 Cal.4<sup>th</sup> at 735-736.

<sup>36</sup> *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4<sup>th</sup> 810, disapproved in part by *Morongo*, 45 Cal.4<sup>th</sup> 731, 740.

<sup>37</sup> 114 Cal.App.4<sup>th</sup> at 813.

<sup>38</sup> *Id.*, at 814.

<sup>39</sup> *Id.*, at 816 (citing *Nightlife*, 108 Cal.App.4<sup>th</sup> 81, 94.).

<sup>40</sup> *Morongo*, 45 Cal.4<sup>th</sup> 731, 740, fn. 2.

<sup>41</sup> *Id.*, at 740.

## V. Separation of Functions Is Not Required When an Attorney Serves in an Evaluative Role

Although a due process wall may be required to separate advocates from attorneys advising decisionmakers, separation of functions is not required when an attorney serves in an evaluative or advisory role, and the same attorney may serve as advisor to both staff and the decisionmaker.

This concept is demonstrated by the case of *Witt Home Ranch, Inc. v. County of Sonoma*.<sup>42</sup> In *Witt Home Ranch*, a property owner sued to compel the county to issue certificates of compliance for antiquated subdivisions, on the grounds that its due process rights were violated because a deputy county counsel improperly advised the board after acting as an advocate for the staff<sup>43</sup>. The property owner alleged that the attorney's dual roles resulted in unconstitutional bias when the property owner appealed staff's denial of the application to the board of supervisors.<sup>44</sup> The property owner cited *Howitt* and *Nightlife Partners* in support of its position.

The appellate court rejected the property owner's due process claim and distinguished *Howitt* and *Nightlife*, finding that the deputy county counsel, Sue Gallagher, only acted in an advisory role for both staff and the board:

“Neither case is applicable here because there is no evidence that Gallagher ever acted as an advocate in connection with the Ranch's proceeding. While Gallagher's exact role is unclear, we assume for the sake of argument that she was the attorney from the county counsel's office who was charged with advising both PRMD and the Board with respect to the interpretation of section 66499.30, in connection with the earlier appeals, and therefore was instrumental in devising the policy followed by the Board. Such a role did not place Gallagher in the role of advocate adverse to the Ranch. There is no evidence Gallagher represented the County in related preexisting litigation against the Ranch or communicated with the Ranch while acting as the County's attorney, as counsel in *Nightlife Partners* did, nor that she represented PRMD before the Board, as counsel in *Howitt* did. At the Board hearing over the Ranch's certificates, PRMD was represented by a staff member. Gallagher's role was limited to providing, at the request of a Board member, a public ‘primer on Gardner and how it applies to this particular situation.’ All of Gallagher's activities vis-à-vis the Ranch are therefore consistent with those of a legal adviser to the Board. The mere fact that she reached her conclusions and provided advice to PRMD and the Board prior to the hearing of the Ranch's appeal did not convert her from an adviser to an advocate, nor did it demonstrate bias, either on her part or the part of the Board.”<sup>45</sup>

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<sup>42</sup> (2008) 165 Cal.App.4<sup>th</sup> 543.

<sup>43</sup> The plaintiff alleged that prior to advising the board, the deputy county counsel advised the Sonoma County Permit and Resources Management Department (PRMD), which refused to issue the certificates of compliance. 165 Cal.App.4<sup>th</sup> at 549.

<sup>44</sup> *Id.* at 564, 568.

<sup>45</sup> *Witt Home Ranch*, 165 Cal.App.4<sup>th</sup> at 569.

The California Supreme Court recently acknowledged a distinction between an attorney serving in an adversarial/advocacy role and an attorney serving in an advisory/evaluative capacity, in *Today's Fresh Start, Inc. v. Los Angeles County Office of Education*<sup>46</sup>. That case involved a legal challenge brought by a charter school seeking to overturn the County Board of Education's revocation of its charter, in part on the grounds that its right to procedural due process was violated during the administrative proceedings. The school contended that the County Office and its governing board did not separate adjudicative, investigatory, and accusatory functions and that there was an unconstitutional overlapping of adversarial and advisory functions between the County Office and the County Board in two areas – (i) the superintendent recommended revocation based on the County Office's investigation, and as county superintendent she was also, by statute, the ex officio secretary and executive officer of the County Board; and (ii) Shari Kim Gale, served as general counsel for both the County Office and its governing board.<sup>47</sup>

The Supreme Court rejected the charter school's claim that it was denied a fair hearing.<sup>48</sup> The Supreme Court first ruled that the superintendent's actions did not cause any due process problems. The superintendent had a statutory duty to monitor the school and investigate its operations if concerns arose; and although she ultimately recommended revocation of Today's Fresh Start's charter, and held an ex officio title as executive officer of the County Board, the superintendent had no role in the board's adjudicative processes and did not participate in the vote on whether to revoke Today's Fresh Start's charter.<sup>49</sup>

The Supreme Court also rejected the charter school's claim that the county counsel served as “prosecutor” in the charter revocation proceedings or that the revocation process was an adversarial proceeding which resulted in an impermissible commingling of functions, and ruled that the county counsel played only an evaluative or advisory role:

“Statutorily, the County Office and County Board had no agenda, no stake in one outcome or the other. . . There was no prosecutor here. Gale presented no evidence, examined no witnesses, and made no argument in favor of revocation. Instead, Gale's role was to advise the County Board on its duties in deciding whether to direct charter revocation, just as she had previously advised County Office staff as to their powers and responsibilities when conducting an investigation of Today's Fresh Start. In neither capacity was she charged with being an advocate or an adjudicator.”<sup>50</sup>

*Today's Fresh Start* affirms the principle that no due process violation occurs when a public agency attorney serves in an advisory/evaluative role for both staff and the decisionmaker.

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<sup>46</sup> (2013) 57 Cal.4<sup>th</sup> 197.

<sup>47</sup> *Id.*, 57 Cal.App.4<sup>th</sup> at 222.

<sup>48</sup> In evaluating the school's arguments, the Supreme Court assumed that the school had a property interest in the continued operation of its school. *Id.*, at 213.

<sup>49</sup> *Today's Fresh Start*, 57 Cal.4<sup>th</sup> 197, 222. The court distinguished *Nightlife*, *Howitt* and *Quintero*. *Id.*, at 223-224.

<sup>50</sup> *Today's Fresh Start*, 57 Cal.4<sup>th</sup> at 223. The court also emphasized comments made by the general counsel to the board during the hearing, in which she explained that she and staff served as technical advisors to the board in its role to authorize, or revoke, a school charter. *Id.*, at 225-226.

## VI. Sabey v. City of Pomona

The recent appellate decision of *Sabey v. City of Pomona*<sup>51</sup> has ramifications for the use of due process roles by several attorneys from the same law firm on the same quasi-judicial matter.

### A. *The Facts*

Glenn Sabey was employed as a police officer with the Pomona Police Department. After an internal affairs investigation, the City Manager terminated Sabey based on findings that Sabey engaged in a lewd act in public, and violated numerous police department rules. Sabey appealed to advisory arbitration. The arbitrator issued an advisory decision sustaining all charges but the lewd act charge, and recommended that Sabey be reinstated to his position as a police officer without back pay. When the appeal was submitted to the City Council, the City Council adopted the factual findings of the hearing officer, 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 §§ 1094.6 and 1085. Sabey contended that his rights to due process and a fair hearing were violated by the City's use of two attorneys from the same law firm partnership to serve as an advocate and advisor in the quasi-judicial proceedings leading to his termination.<sup>52</sup> During the arbitration, one partner represented the police department. Another partner, who had previously been engaged to act as a labor negotiator for the City, was asked by the City Council to advise them during their review of the arbitrator's decision. The firm then implemented an ethical wall between the two partners. They did not talk to each other about the Sabey matter, and they were prevented from accessing each other's files.<sup>53</sup>

The Superior Court denied the petition of writ of mandate. The court of appeal reversed and ruled in Sabey's favor, finding that his rights to due process and a fair hearing were violated and ordered the case remanded to the City Council. The court ruled that on remand the City Council had to review the arbitration record based on independent legal advice, or if it failed to do so, the advisory opinion and award would become final.<sup>54</sup>

### B. *The Ruling*

The court of appeal held that agencies are barred from using a partner as an advocate in a contested matter and another partner from the same law firm as an advisor to the decisionmaker on the same matter.<sup>55</sup> The court held that there are fiduciary duties of loyalty and care between

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<sup>51</sup> *Sabey v. City of Pomona* (2013) 215 Cal.App.4<sup>th</sup> 489, review denied 2013 Cal. LEXIS 5749 (7/10/13).

<sup>52</sup> Sabey argued that his due process and fair hearing rights were violated because "[he] was terminated by a decision making body that received legal advice regarding this matter prior to deciding whether to review the [arbitrator's decision] from the law partner of the attorney who represented the Department prior to and at the [arbitration]." *Sabey*, 215 Cal.App.4<sup>th</sup> 489, 495.

<sup>53</sup> *Id.*, at 494.

<sup>54</sup> *Id.*, at 499.

<sup>55</sup> *Id.*, at 497.

partners which prohibit one partner from reviewing the work of another partner in the same law firm:<sup>56</sup>

“As a partner in LCW, Brown owed both Bray and LCW the fiduciary duties of loyalty and care... Consequently, when Brown advised the City Council, he was in the position of reviewing the result achieved by his fiduciary. In our view, this creates an appearance of unfairness and bias. (*Nightlife, supra*, 108 Cal.App.4th at p. 94.) As a result, under *Morongo*, the risk of Brown providing the City Council with biased advice and thereby tainting its decisionmaking process was too high to be acceptable under constitutional principles.”<sup>57</sup>

The appellate court then held that the *Howitt* rule, which allows the performance of advocacy and advisory roles by two attorneys from the same office, is inapplicable to partners in the same law firm because partners must be treated differently from government lawyers.<sup>58</sup>

“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 adviser to the decision maker will try to promote the result desired by the advocate. Because they are fiduciaries, the same cannot be said of partners in a private law firm. Also, partners in a law firm have incentive to build the reputation of their firm so that it will be profitable in the future by obtaining new and repeat business. It is therefore logical to presume that a partner would want to make another partner look good by seeking—consciously or unconsciously—to validate the job done by that partner. Government lawyers do not have the same considerations. Thus, there is good reason not to apply *Howitt*.”<sup>59</sup>

Even though there was no evidence of actual bias, the court found an impermissible appearance of bias and unfairness because of the potential that the advisory attorney “could have couched his advice in many different ways, and he could have brought various considerations to bear.”<sup>60</sup>

**C. *Sabey* Ignores the Ethical Duties of Law Firm Partners to Diligently and Correctly Advise their City Client**

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

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<sup>56</sup> *Ibid.*

<sup>57</sup> *Id.*, 215 Cal.App.4th at 497.

<sup>58</sup> The appellate court erroneously concluded that *Howitt* has only been applied to governmental lawyers, not private lawyers. *Id.* The court’s conclusion is incorrect. *Nightlife* involved an attorney from a private law firm serving as Assistant City Attorney. See *Nightlife*, 108 Cal.App.4th 81, 84, fn. 2.

<sup>59</sup> *Sabey*, 215 Cal.App.4th at 497.

<sup>60</sup> *Id.*

even to the potential detriment of the client and the public. The court characterized the partner advising the City Council as serving “two masters with conflicting interests.”<sup>61</sup>

Significantly, the *Sabey* opinion fails to mention an attorney’s fiduciary duty to the client. The relationship between an attorney and client is a fiduciary relationship of the very highest character.<sup>62</sup> The Supreme Court has held that the duty to the client is paramount, and cannot be trumped by a duty to another person, including another attorney.<sup>63</sup> For example, in *Beck v. Wecht*, the Supreme Court ruled 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”.<sup>64</sup> 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.”<sup>65</sup> In *Beck*, the Supreme Court rejected this cynical view:

“Beck’s effort to distinguish his case on the facts raises a fundamental question. Should this issue--whether co-counsel owe one another a fiduciary duty to conduct their joint representation in a manner that does not diminish or eliminate the fees each expects to collect--be decided on a case-by-case basis? We think not. The better approach, *we conclude, is a bright-line rule refusing to recognize such a fiduciary duty.*”<sup>66</sup>

*Sabey* undercuts the important principle articulated in *Beck* by incorrectly holding that law partners have a fiduciary duty to maximize profit to their law partnership that supersedes their ethical duties owed to their client – the city -- to provide advice untainted by the economic interests of the firm.

The *Sabey* opinion cites to Witkin’s *Summary of California Law* for the proposition that partners owe each other duties of “loyalty and care.”<sup>67</sup> But, an argument may also be made that a partner’s 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. California Corporations Code § 16404, which addresses a partner’s fiduciary duties, provides that a partner’s duty of loyalty includes 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

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<sup>61</sup> *Id.*

<sup>62</sup> See *Cox v. Delmas* (1893) 99 Cal.104, 123.

<sup>63</sup> See *Beck v. Wecht* (2002) 28 Cal.4<sup>th</sup> 289, 297.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*, at 298 (emphasis added).

<sup>67</sup> 215 Cal.App.4<sup>th</sup> 489, 498.

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. . .”<sup>68</sup>

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. These fiduciary duties *do 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.”<sup>69</sup> A partner does not violate a duty or obligation “merely because the partner’s conduct *furtheres the partner’s own interest.*”<sup>70</sup>

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 does not violate 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 law firm partner.

The *Sabey* opinion’s discussion of the duties of loyalty and care between partners appears to be premised upon an incorrect overstatement of partnership law, because the duties of law firm partners do not include a fiduciary obligation to maximize the partnership’s economic interests at the expense of the partners’ ethical obligations to the client. The decision also ignores the Supreme Court’s holding in *Beck* that rejected the existence of a fiduciary duty between co-counsel to maximize each other’s profit.

*Sabey* places law firm partners in an untenable position. If *Sabey* is a correct statement of law, law firm partners in California will not be able to follow the bright line rule of undivided loyalty to their clients. *Sabey* will force them to consider whether their fiduciary duty to their partners and the partnership requires their advice to their client be skewed to protect their partners and the firm’s economic interests.

The impact of the *Sabey* decision on other types of law firms is also unclear. An argument may be made that no such fiduciary duty exists between shareholders of a professional corporation

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<sup>68</sup> Cal. Corp. Code § 16404(b).

<sup>69</sup> Cal. Corp. Code § 16404(c).

<sup>70</sup> Cal. Corp. Code § 16404(e) (emphasis added).

or attorneys who are employees of a partnership or professional corporation.<sup>71</sup> Co-counsel associated in a case do not have fiduciary duties to each other.<sup>72</sup> *Sabey* also does not address the role of associates in law firm partnerships, including any alleged fiduciary duty to partners or to each other. *Sabey* could lead 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 another lawyer to serve as an advisor to a decisionmaker on appeal will depend on the firm's corporate form.

***D. Sabey Will Result in Excessive and Burdensome Legal Costs for Cities 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 firms to perform the role of the City Attorney's Office.<sup>73</sup> Undoubtedly, a significant number of these cities are served by law firms organized as partnerships.

Cities often choose to use contract city attorneys due to financial considerations. Contract city attorneys may result in substantial cost savings because the city attorney and his/her staff are not city employees and do not receive salary or benefits that they would be entitled to as public employees.<sup>74</sup>

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."<sup>75</sup> Using contract city attorneys enables cities to retain attorneys with experience in many areas of law without sacrificing quality due to limitations on the size of in-house staff. When a city contracts with a law firm, "benefits often accrue by virtue of the number of attorneys available to perform services and the breadth and depth of their experience and expertise."<sup>76</sup>

*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

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<sup>71</sup> See *Persson v. Smart Inventions* (2005) 125 Cal.App.4<sup>th</sup> 1141, 1159 (shareholders do not acquire fiduciary duties to each other unless there is a reincorporation agreement to assume such duties or there is evidence that the corporate form was disregarded).

<sup>72</sup> See *Beck*, 28 Cal.4<sup>th</sup> 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).

<sup>73</sup> Kahn, at p. 2.

<sup>74</sup> Kahn, at p. 2.

<sup>75</sup> 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.

<sup>76</sup> Kahn, at pp. 2-3.

fills the position of a contract city attorney. Yet, attorneys directly employed by the city, or potentially attorneys employed by a professional law corporation, will be able to fill those same roles.

## VII. Recommendations

When establishing due process walls, both a public law office and private law firm must ensure that attorneys undertaking multiple roles on the same quasi-judicial matter are screened from each other. The specific procedures selected will depend on the size of the law office, number of attorneys, and type of matter at issue. Suggested procedures for due process walls may include the following:

- Written procedures, while not required, will help demonstrate that the city attorney's office established the due process wall in the event of any legal challenge.
- The due process wall should be effective to preclude the attorneys from discussing the merits of the quasi-judicial matter, either with each other, or through supervisors, secretaries, or other members of the law office.
- The law office should clearly identify the role of each attorney in the quasi-judicial matter, and also identify the support staff that will provide legal, clerical and administrative assistance to the attorney. The attorney should communicate the parameters of the due process wall to each member of the support staff.
- The City staff and officials who will provide support or points of contact for each attorney should also be identified; and the attorney should communicate the elements of the due process wall to City staff.
- The due process wall should be structured so that the attorneys do not have access to each other's files and records. Access to all records and files of each attorney (including both paper records and electronic files), must be limited to the attorney, his/her support staff and any other subordinate attorneys providing assistance to the primary attorney. Hard copies of records should be physically separated. Computerized records should be maintained in a manner to prevent an attorney and his/her support staff from accessing the other attorney's records. In private firms, separate billing records should also be maintained if legal advice is reflected in the records, and the attorneys should not review each other's billing records.
- The quasi-judicial matter should not be discussed in staff meetings where both attorneys or their support staff are present.

A city and its city attorney's office should also evaluate its quasi-judicial hearing procedures in light of *Sabey*. On July 10, 2013, the California Supreme Court denied a request to depublish *Sabey*, and also denied review. Consequently, for now, *Sabey* remains good law. The 2009 Ad Hoc Committee Report on Due Process contained recommendations for handling quasi-judicial

proceedings and commingling of functions.<sup>77</sup> That list is included as Appendix B to this paper. Cities and city attorney firms should review that list, and also consider some of the following ideas when handling quasi-judicial proceedings:

- Both the city and city attorney's office should evaluate the types of quasi-judicial proceedings used in the city, and the anticipated functions needed from the city attorney's office in providing investigatory, evaluative/advisory and/or advocacy/prosecutorial services, in determining staffing and lawyer assignments.
- Since concerns about the commingling of functions arise only when an attorney serves in an advocacy role and not when an attorney serves in an evaluative/advisory role, a city should consider adopting a resolution or other written procedures that specify when a proceeding is adversarial.
- Based on *Sabey*, a law firm partnership is precluded from providing multiple attorneys to serve in several roles in an adversarial personnel appeal. Whether the decision applies to adversarial proceedings in other contexts, or to other types of law firm entities, is not clear.
- If a city decides to use more than one law firm in a quasi-judicial matter, careful consideration should be given as to which role the city attorney should undertake, and which role should be provided by outside counsel from the other law firm.
- *Sabey* does not appear to have any impact on the use of city attorneys from private law firms when a city attorney acts in an evaluative or advisory role, such as when considering the initial granting of a land use application or other permits and entitlements.
- It is not clear whether *Sabey* applies to preclude associates from law firm partnerships serving in multiple roles in a quasi-judicial proceeding. If several associates from the same law firm serve in multiple roles, the internal due process wall should be documented.
- Cities may consider use of pooling or reciprocal arrangements with each other, including a flat fee, to avoid any alleged bias in assigning attorneys to work on quasi-judicial matters.

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<sup>77</sup> See 2009 *Ad Hoc Due Process Committee Report On the Separation of the Advocacy/Prosecutorial Function From the Decision Making Function in Administrative Hearings*, City Attorneys' Department, League of Cities Annual Conference (September 2009).

APPENDIX A

*Sabey v. City of Pomona* (2013) 215 Cal.App.4<sup>th</sup> 487



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As of: September 5, 2013 5:20 PM EDT

## Sabey v. City of Pomona

Court of Appeal of California, Second Appellate District, Division Two  
April 16, 2013, Opinion Filed  
B239916

**Reporter:** 215 Cal. App. 4th 489; 155 Cal. Rptr. 3d 452; 2013 Cal. App. LEXIS 291; 35 I.E.R. Cas. (BNA) 671; 2013 WL 1613618

GLENN SABEY, Plaintiff and Appellant, v. CITY OF POMONA, Defendant and Respondent.

**Subsequent History:** Review denied by, Request denied by *Sabey v. City of Pomona*, 2013 Cal. LEXIS 5749 (Cal., July 10, 2013)

**Prior History:** [\*\*\*1] APPEAL from a judgment of the Superior Court of Los Angeles County, No. BS129042, James C. Chalfant, Judge.

**Disposition:** Reversed and remanded with directions.

### Core Terms

city council, partner, decision maker, terminate, bias, law firm, advice, arbitrate, advisory opinion, private law firm, legal advice, advisory, due process, arbitrator's, unfairness, recommend, fiduciary duty, actual bias, jacuzzi, owe

### Case Summary

#### Procedural Posture

Appellant municipal employee sought review of a judgment from the Superior Court of Los Angeles County (California), which denied his writ petition asserting a due process challenge to respondent city's rejection of an award in an advisory arbitration reinstating the employee after he had been terminated for misconduct.

#### Overview

The arbitrator sustained some of the findings of misconduct and recommended converting the employee's termination into a suspension. After obtaining advice from a partner in the same private law firm as the attorney who had represented the city at the arbitration, the city council rejected the arbitrator's recommendation and made the employee's termination final. The court held that the advisory partner's involvement violated the employee's federal constitutional due process right to a fair tribunal because the advisory partner had fiduciary duties both to the advocate partner and to the firm. Thus,

the advisory partner was reviewing his fiduciary's performance, which created an appearance of unfairness and bias. The court noted that although lawyers from the same government law office could perform both advocacy and advisory roles when properly screened from each other, this rule could not constitutionally be applied to partners from a private law firm because of their fiduciary duties and their financial incentive to build the firm's reputation. Absent evidence that the city council was incapable of proceeding in a fair manner, remanding to the city council was appropriate.

#### Outcome

The court reversed and remanded with directions to the trial court to refer the matter back to the city council for further consideration in light of independent legal advice.

### LexisNexis® Headnotes

Administrative Law > ... > Hearings > Right to Hearing > Due Process  
Administrative Law > ... > Statutory Rights > Impartial Decision-maker > General Overview  
Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

**HN1** When an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law requires a fair tribunal. A tribunal is not fair unless the judge or other decision maker is free of bias for or against a party. Absent a financial interest in the outcome, an adjudicator in an administrative proceeding is presumed impartial. To show a violation of the due process guarantee, a party must prove either actual bias or that the situation is one in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.

Administrative Law > ... > Hearings > Right to Hearing > Due Process  
Civil Procedure > Appeals > Standards of Review > General Overview

**HN2** We independently review whether the facts support the trial court's conclusion of law that the hearing was

fair.

Administrative Law > ... > Hearings > Right to Hearing > Due Process  
 Administrative Law > ... > Statutory Rights > Impartial Decision-maker > Participation in Prosecution  
 Business & Corporate Law > ... > Management Duties & Liabilities > Fiduciary Duties > Duty of Good Faith & Loyalty

**HN3** Case law establishes that an attorney cannot act as both an advocate for an agency and then as an advisor to the decision maker who reviews the result that the advocate achieved. The due process rule of overlapping functions in administrative disciplinary proceedings applies to prevent the participant from being in the position of reviewing his or her own decision or adjudging a person whom he or she has either charged or investigated. In contrast, performance of both roles by the same law office is appropriate, with regard to government lawyers, if there are assurances that the adviser for the decision maker is screened from any inappropriate contact with the advocate. The burden of providing the assurances rests with the law office performing the dual roles. The latter rule does not, however, apply to partners from a private law firm who are fulfilling the advocacy and advisory roles of government lawyers on a particular case. A partner owes both the other attorney and the firm the fiduciary duties of loyalty and care. Consequently, a partner in an advisory role is in the position of reviewing the result achieved by the partner's fiduciary. This creates an appearance of unfairness and bias.

Administrative Law > ... > Hearings > Right to Hearing > Due Process  
 Administrative Law > ... > Statutory Rights > Impartial Decision-maker > Participation in Prosecution  
 Business & Corporate Law > ... > Management Duties & Liabilities > Fiduciary Duties > Duty of Good Faith & Loyalty

**HN4** 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 of partners in a private law firm. Also, partners in a law firm have incentive to build the reputation of their firm so that it will be profitable in the future by obtaining new and repeat business. It is therefore logical to presume that a partner would want to make another partner look good by seeking—consciously or unconsciously—to validate the job done by that partner. Government lawyers do not have the same considerations. Thus, there is good reason not to allow partners from a private law firm to serve in the advocacy and advisory roles of government lawyers on the same case.

Administrative Law > ... > Hearings > Right to Hearing > Due Process  
 Administrative Law > ... > Statutory Rights > Impartial Decision-maker > Participation in Prosecution  
 Business & Corporate Law > ... > Management Duties & Liabilities > Fiduciary Duties > Duty of Good Faith & Loyalty

**HN5** Agencies are barred from using a partner in a law firm as an advocate in a contested matter and another partner from the same law firm as an advisor to the decision maker in the same matter. The due process rights of a participant in an administrative proceeding need not bend to the interests of a private law firm that is appearing as advocate and advisor. That would be a perverse result, and one which is antithetical to the federal Constitution.

Administrative Law > Judicial Review > Remand & Remittitur

**HN6** In general, if a party has not received a proper administrative hearing, the matter is remanded back to the agency to provide a full and fair hearing. But if the decision maker has become personally embroiled in the controversy to be decided, then the decision maker must be disqualified from further participation in the matter. In that situation, it is appropriate to allow the recommendation of an inferior decision maker to stand as the final decision.

Civil Procedure > Appeals > Appellate Briefs

**HN7** It is not a reviewing court's responsibility to develop an appellant's argument.

**Headnotes/Syllabus**

**Summary**

**CALIFORNIA OFFICIAL REPORTS SUMMARY**

The trial court denied a municipal employee's writ petition asserting a due process challenge to the city's rejection of an award in an advisory arbitration reinstating the employee after he had been terminated for misconduct. The arbitrator sustained some of the findings of misconduct and recommended converting the employee's termination into a suspension. After obtaining advice from a partner in the same private law firm as the attorney who had represented the city at the arbitration, the city council rejected the arbitrator's recommendation and made the employee's termination final. (Superior Court of Los Angeles County, No. BS129042, James C. Chalfant, Judge.)

The Court of Appeal reversed and remanded with directions to the trial court to refer the matter back to the city council for further consideration in light of independent legal advice. The court held that the advisory partner's involvement violated the employee's federal constitutional due process right to a fair tribunal because the advisory partner had fiduciary duties both to the advocate partner and to the firm. Thus, the advisory partner was reviewing his fiduciary's performance, which created an appearance of unfairness and bias. The court noted that although lawyers from the same government law office can perform both advocacy and advisory roles when properly screened from each other, this rule cannot constitutionally be applied to partners from a private

law firm because of their fiduciary duties and their financial incentive to build the firm's reputation. Absent evidence that the city council was incapable of proceeding in a fair manner, remanding to the city council was appropriate. (Opinion by Ashmann-Gerst, J., with Boren, P. J., and Ferns, J.,\* concurring.) [\*490]

**Headnotes**

**CALIFORNIA OFFICIAL REPORTS HEADNOTES**

**CA(1) (1)**

Administrative Law § 56 > Administrative Actions > Adjudication > Hearing > Constitutional Requirements > Due Process > Fair Tribunal.

When an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law requires a fair tribunal. A tribunal is not fair unless the judge or other decision maker is free of bias for or against a party. Absent a financial interest in the outcome, an adjudicator in an administrative proceeding is presumed impartial. To show a violation of the due process guarantee, a party must prove either actual bias or that the situation is one 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.

**CA(2) (2)**

Administrative Law § 56 > Administrative Actions > Adjudication > Hearing > Constitutional Requirements > Due Process > Fair Tribunal > Law Office in Advocacy and Advisory Roles > Private Law Firm Partners.

Case law establishes that an attorney cannot act as both an advocate for an agency and then as an adviser to the decision maker who reviews the result that the advocate achieved. The due process rule of overlapping functions in administrative disciplinary proceedings applies to prevent the participant from being in the position of reviewing his or her own decision or adjudging a person whom he or she has either charged or investigated. In contrast, performance of both roles by the same law office is appropriate, with regard to government lawyers, if there are assurances that the adviser for the decision maker is screened from any inappropriate contact with the advocate. The burden of providing the assurances rests with the law office performing the dual roles. The latter rule does not, however, apply to partners from a private law firm who are fulfilling the advocacy and advisory roles of government lawyers on a particular case.

**CA(3) (3)**

Administrative Law § 56 > Administrative Actions > Adjudication > Hearing > Constitutional Requirements > Due Process > Fair Tribunal > Law Office in Advocacy and Advisory Roles > Private Law Firm Partners.

A partner in a law firm owed another partner from the firm who represented a city in a civil service disciplinary matter, as well as the firm itself, the fiduciary duties of loyalty and care. Consequently, in advising the city council regarding the same civil service matter, the advisory partner was in the position of reviewing the result achieved by his fiduciary. This created an appearance of unfairness and bias. The risk [\*491] of the advisory partner providing the city council with biased advice and thereby tainting its decisionmaking process was too high to be acceptable under constitutional principles. Bias can be unwitting. Whenever a person serves two masters who have potentially conflicting interests, it is impossible to peer into the depths of that person's soul to determine the purity of his or her words and actions. Thus, the advisory partner's role in presenting to the city council on the civil service matter had the unavoidable consequence of destroying the appearance of a fair proceeding.

[Cal. Forms of Pleading and Practice (2013) ch. 470A, Due Process Restrictions on Public Agencies, § 470A.46; 9 Witkin, Summary of Cal. Law (10th ed. 2005) Partnership, § 30.]

**CA(4) (4)**

Administrative Law § 56 > Administrative Actions > Adjudication > Hearing > Constitutional Requirements > Due Process > Fair Tribunal > Law Office in Advocacy and Advisory Roles > Private Law Firm Partners.

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 of partners in a private law firm. Also, partners in a law firm have incentive to build the reputation of their firm so that it will be profitable in the future by obtaining new and repeat business. It is therefore logical to presume that a partner would want to make another partner look good by seeking—consciously or unconsciously—to validate the job done by that partner. Government lawyers do not have the same considerations. Thus, there is good reason not to allow partners from a private law firm to serve in the advocacy and advisory roles of government lawyers on the same case.

**CA(5) (5)**

Administrative Law § 56 > Administrative Actions > Adjudication > Hearing > Constitutional Requirements > Due Process > Fair Tribunal > Law Office in Advocacy and Advisory Roles > Private Law Firm Partners.

Agencies are barred from using a partner in a law firm as an advocate in a contested matter and another partner from the same law firm as an advisor to the decision

\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

215 Cal. App. 4th 489, \*491; 155 Cal. Rptr. 3d 452, \*\*452; 2013 Cal. App. LEXIS 291, \*\*\*1

maker in the same matter. The due process rights of a participant in an administrative proceeding need not bend to the interests of a private law firm that is appearing as advocate and advisor. That would be a perverse result, and one which is antithetical to the federal Constitution.

**CA(6) (6)**

Administrative Law § 135 > Judicial Review and Relief > Decision on Review > Remedy for Improper Administrative Hearing > Remand or Disqualification.

In general, if a party has not received a proper administrative hearing, the matter is remanded back to the agency to provide a full and fair hearing. But if the decision maker has become personally embroiled in the controversy to be decided, then the decision maker must be disqualified from further participation in the matter. In that situation, it is appropriate to allow the recommendation of an inferior decision maker to stand as the final decision.

**CA(7) (7)**

Appellate Review § 109 > Briefs > Form and Requirements > Argument and Authority > Failure to Provide.

It is not a reviewing court's responsibility to develop an appellant's argument.

**Counsel:** Lackie, Dammeier & McGill and Michael A. Morguess for Plaintiff and Appellant.

McCune & Harber and Kristine J. Exton for Defendant and Respondent.

**Judges:** Opinion by Ashmann-Gerst, J., with Boren, P. J., and Ferns, J.,\* concurring.

**Opinion by:** Ashmann-Gerst, J.

**Opinion**

[\*\*453] **ASHMANN-GERST, J.**—We hold that when a partner in a law firm represents a department within a city at an advisory arbitration regarding a personnel matter, and when the city's decisionmaking body later reviews that arbitrator's award for confirmation or rejection, the principles of due process prohibit the decision maker from being advised on the matter by a different partner from the same law firm. Because the law partners owe each other fiduciary duties the adviser partner is in the position of reviewing the efficacy of the advocate partner's work, there is "a clear appearance of unfairness and bias" (*Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 94 [133 Cal. Rptr. 2d 234] [\*\*\*2] (*Nightlife*)) rendering the risk of ac-

tual bias too high to be constitutionally tolerable within the meaning of *Morongo Band of Mission Indians v. State Water Resources Control Bd.*, (2009) 45 Cal.4th 731, 737 [88 Cal. Rptr. 3d 610, 199 P.3d 1142] (*Morongo*). Accordingly, we reverse the trial court's decision denying the writ petition of appellant Glenn Sabey (Sabey)—a police officer who is fighting his termination from employment—in which he asserts a due process challenge to the decision of the City Council (City Council) of [\*\*454] the City of Pomona (City) rejecting an arbitrator's award reinstating Sabey to his job. [\*493]

**FACTS**

**Sabey's misconduct**

Sabey dated Caroline Atarian (Atarian) for about a year. She was living in a condominium complex in Corona. It had a pool and Jacuzzi secured by a fence and a locked gate. Their relationship ended in 2000 or 2001. They had off-and-on contact for many years. In 2008, she saw him in the Jacuzzi and told him that he was trespassing. Atarian said she would call the police if she ever saw him in the complex again. He returned on five or 10 occasions and illegally used the Jacuzzi. To gain access to the Jacuzzi, he had to jump over the fence.

On April 1, 2008, Atarian saw Sabey by the pool and she called [\*\*\*3] the Corona Police Department. When a responding Corona police officer asked for identification, Sabey appeared to be irritated. He said that his girlfriend lived in the complex, and implied he did not understand why the police had been called. Sabey acted as though he belonged at the complex. At one point, Sabey said he had an appointment with Atarian to cut his hair. Soon after, he left.

Subsequently, a Corona police officer spoke to a resident at the complex named Cathy Lariviere. She said that in March she saw a man masturbating in the Jacuzzi. Lariviere identified the man as Sabey.

Sabey did not inform his watch commander of the incident or his contact with the Corona police.

Between April 2005 and December 2007, Sabey conducted unauthorized inquiries on his own name with the National Crime Information Center (NCIC) in violation of justice data interface controller (JDIC) rules. Sabey said he made the inquiries as a demonstration for trainee officers.

*Internal affairs findings*

The Pomona Police Department (Department) internal af-

\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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fairs office investigated Sabey and found that he violated various provisions of the Department's policies and procedures by trespassing in violation of Penal Code section 602; [\*\*\*4] by committing a lewd act in public in violation of Penal Code section 647, subdivision (a); by committing two misdemeanors and thereby impacting the way the public and another agency view the Department and law enforcement; by engaging in conduct that is unbecoming of a member of the Department, and which tends to reflect unfavorably upon the Department or its members; by failing to report activities that may result in criminal [\*494] prosecution; by failing to report activities that have resulted in official contact by another law enforcement agency; and by violating JDIC rules by making inquiries on his own name with the NCIC.

*Notice of intent to terminate Sabey's employment; termination*

Sabey was sent notice of intent to terminate his employment due to violations of the Department's policies and procedures. After two prediscipline *Skelly* hearings (see *Skelly v. State Personnel Bd.*, (1975) 15 Cal.3d 194 [124 Cal. Rptr. 14, 539 P.2d 774]), the chief of the Department, David Keetle, recommended that the city manager terminate Sabey's employment. The city manager followed Chief Keetle's recommendation.

*Advisory arbitration*

Pursuant to the memorandum of understanding between the City and the City of Pomona Police Officers' Association, [\*\*\*5] Sabey [\*\*455] requested an advisory arbitration to determine whether he was properly discharged by the Department for cause. The City was represented at the advisory arbitration by Debra L. Bray (Bray) from Liebert Cassidy Whitmore (LCW). In his advisory opinion and award, the arbitrator sustained all of the findings made by internal affairs except as to lewd conduct. The award provided that Sabey's termination should be converted into a suspension without pay or benefits.

*The City Council's response to the advisory opinion and award*

In July 2010, Peter Brown (Brown) of LCW was the City's chief labor negotiator. As a result, he regularly met with the City Council in closed session at City Council meetings. After the City Council received the arbitrator's advisory opinion and award, it asked Brown to be the City Council's legal adviser. At that point, LCW implemented an ethical wall between Bray and Brown. They did not talk to each other about the Sabey matter, and they were prevented from accessing each other's files.

On July 19, 2010, Brown met with the City Council in closed session. He presented on the Sabey matter. Through

counsel, Sabey objected to attorneys from the same firm acting as [\*\*\*6] advocates for the Department and as legal advisers to the City Council. On August 2, 2010, the City Council rendered a decision that adopted the arbitrator's factual findings but rejected the recommendation that Sabey's termination be converted into a suspension without pay or benefits. As a result, Sabey's termination from employment was made final. [\*495]

*The writ petition; the motion*

Sabey filed a petition pursuant to Code of Civil Procedure sections 1094.5 and 1085. According to Sabey, he was denied due process of law and a fair hearing because, inter alia, "[he] was terminated by a decision making body that received legal advice regarding this matter prior to deciding whether to review the [arbitrator's decision] from the law partner of the attorney who represented the Department prior to and at the [arbitration]."

In his followup motion, Sabey additionally argued that the penalty of termination was an abuse of discretion.

The petition for writ of mandate was denied.

This timely appeal followed.

## DISCUSSION

### I. *The Principles of Due Process; Standard of Review.*

**HN1 CA(1)** (1) When "an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law requires a fair [\*\*\*7] tribunal." (*Morongo, supra*, 45 Cal.4th at p. 737.) A tribunal is not fair unless "the judge or other decision maker is free of bias for or against a party. [Citations.]" (*Ibid.*) Absent a financial interest in the outcome, an adjudicator in an administrative proceeding is presumed impartial. (*Ibid.*) To show a "[v]iolation of [the] due process guarantee," a party must prove either actual bias or that the situation is one "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." [Citation.]" (*Ibid.*)

**HN2** We independently review whether the facts support the trial court's conclusion of law that the hearing was fair. (*Nightlife, supra*, 108 Cal.App.4th at p. 87.)

[\*\*456] **II. *Brown's Role as an Adviser to the City Council Violated Sabey's Right to Due Process.***

**HN3 CA(2)** (2) Case law establishes that an attorney cannot act as both an advocate for an agency and then as an adviser to the decision maker who reviews the result that the advocate achieved. (*Midstate Theatres, Inc. v. County of Stanislaus* (1976) 55 Cal.App.3d 864 [128 Cal.

Rptr. 54] [the same lawyer cannot represent the county assessor and advise the board of equalization in the same proceeding].) [\*\*\*8] In *Nightlife*, for example, the court held that the due [496] process rights of a permit applicant were violated when the same attorney who advised the city that the application was insufficient later advised the hearing officer at the ensuing administrative appeal. [497] (*Nightlife, supra*, 108 Cal.App.4th at pp. 84–85.) The court noted that “[t]he due process rule of overlapping functions in administrative disciplinary proceedings applies to prevent the participant from being in the position of reviewing his or her own decision or adjudging a person whom he or she has either charged or investigated.” [Citation.]” (*Id.* at p. 92.) In *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810 [7 Cal. Rptr. 3d 896] (*Quintero*), disapproved in part by *Morongo, supra*, 45 Cal.4th at p. 740, the court held that a hearing before a city’s personnel board was unfair because the deputy city attorney representing the city in a discharge case concurrently represented the board on civil matters and otherwise had an ongoing relationship with it. In the *Quintero* court’s view, the deputy city attorney’s “other interactions with the Board [gave] the appearance of bias and unfairness and suggest the probability of his influence on the Board.” [\*\*\*9] (*Quintero, supra*, at p. 814.)

In contrast, “[p]erformance of both roles by the same law office is appropriate ... if there are assurances that the adviser for the decision maker is screened from any inappropriate contact with the advocate.” (*Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, 1586 [5 Cal. Rptr. 2d 196] (*Howitt*) [applying the rule to two lawyers from the same county counsel’s office].) The burden of providing the assurances rests with the law office performing the dual roles. (*Id.* at pp. 1586–1587.)

To our knowledge, the *Howitt* rule has been applied only to government lawyers. The question presented is whether the *Howitt* rule applies to partners from a private law firm who are fulfilling the advocacy and advisory roles of government lawyers on a particular case. The answer is no.

**CA(3)** (3) As a partner in LCW, Brown owed both Bray and LCW the fiduciary duties of loyalty and care. (9 Witkin, Summary of Cal. Law (10th ed. 2005) Partnership, § 30, pp. 604–606.) Consequently, when Brown ad-

vised the City Council, he was in the position of reviewing the result achieved by his fiduciary.<sup>1</sup> In our view, this creates [457] an appearance of unfairness and bias. (*Nightlife, supra*, 108 Cal.App.4th at p. 94.) As a result, [10] under *Morongo*, the risk of Brown providing the City Council with biased advice and thereby tainting its decisionmaking process was too high to be acceptable under constitutional principles. By so holding, we do not suggest that Brown intentionally skewed his advice to promote the position Bray advocated at the arbitration. Rather, we acknowledge that bias can be unwitting. We also acknowledge that whenever a person serves two masters who have potentially conflicting interests, it is impossible to peer into the depths of that person’s soul to determine the purity of his or her words and actions. Thus, Brown’s role in presenting to the City Council on the Sabey matter had the unavoidable consequence of destroying the appearance of a fair proceeding.

**CA(4)** (4) The City contends that the *Howitt* rule should apply because, in the context of this case, there is no difference between government lawyers and partners from a private law firm acting as government lawyers. We disagree. **HN4** 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 adviser to the decision maker will try to promote the result desired by the advocate. Because they are fiduciaries, the same cannot be said of partners [12] in a private law firm. Also, partners in a law firm have incentive to build the reputation of their firm so that it will be profitable in the future by obtaining new and repeat business. It is therefore logical to presume that a partner would want to make another partner look good by seeking—consciously or unconsciously—to validate the job done by that partner. Government lawyers do not have the same considerations. Thus, there is good reason not to apply *Howitt*.

According to the City, it is a fallacy to suggest that Brown would choose to support the result sought by Bray rather than give appropriate legal advice. There are several problems with this assertion. First, the City Council was vested with discretion in deciding whether to adopt or reject, in whole or in part, the arbitrator’s advisory opinion and award. Due to the City Council’s discretionary power, Brown could have couched his advice in many different ways, and he could have brought various

<sup>1</sup> Below, the parties and the trial court assumed that Brown gave the City Council substantive advice. In his declaration, Brown stated that the “[City Council] had me present” on the Sabey matter. He provided no detail. The trial court sustained an attorney-client privilege objection to an e-mail in which Brown identified the specific advice that he actually gave. Thus, we have no admissible evidence regarding the contents of the advice that [11] Brown provided. On appeal, the parties proceed as though Brown gave substantive advice that impacted the City Council’s decision on the merits of Sabey’s termination. We accept the parties’ assumption as an accurate reflection of what transpired. (*DeRose v. Carswell* (1987) 196 Cal.App.3d 1011, 1019, fn. 3 [242 Cal. Rptr. 368] [briefs and arguments are “reliable indications of a party’s position on the facts as well as the law, and a reviewing court may make use of statements therein as admissions against the party”].) Too, the City cannot hide behind the attorney-client privilege and disclaim that Brown provided substantive advice on the merits during the City Council’s closed session meeting.

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considerations to bear. Because this is not a situation in which there was one right answer and therefore one right piece of advice, there is a likelihood that if Brown's advice had been biased, that bias would have been masked. In other [\*\*\*13] words, the bias would not [\*498] necessarily appear on the face of the advice. This is all the more reason why the situation at bar does not satisfy the dictates of due process. Second, the City is wrong insofar as it suggests that we must examine Brown's actual motives. Our holding is premised solely on the appearance of unfairness and bias.

**CA(5)** (5) Finally, the City suggests it would be bad law to limit *Howitt* to government lawyers because (1) it would create confusion over the different rules applicable to government attorneys and private attorneys and (2) it would prohibit the growth of law firms and terminate existing client relationships. We do not perceive a risk of confusion. The rule we announce is [\*\*458] simple. **HN5** Agencies are barred from using a partner in a law firm as an advocate in a contested matter and another partner from the same law firm as an adviser to the decision maker in the same matter. It is true that agencies and law firms will have to adjust to the rule we announce today, but that is the cost of due process. We cannot accept the City's suggestion that the due process rights of a participant in an administrative proceeding must bend to the interests of a private law firm that is [\*\*\*14] appearing as advocate and adviser. That would be a perverse result, and one which is antithetical to the federal Constitution.

### III. *The Remedy.*

**HN6 CA(6)** (6) In general, if a party has not received a proper administrative hearing, the matter is remanded back to the agency to provide "a full and fair hearing." (*English v. City of Long Beach* (1950) 35 Cal.2d 155, 160 [217 P.2d 22]; see *National Auto. & Cas. Ins. Co. v. Downey* (1950) 98 Cal.App.2d 586, 594 [220 P.2d 962] ["Where an administrative agency has not conducted a hearing properly, or has committed error of law, or if the evidence is insufficient to support the findings, and it is still possible under the circumstances for the agency to exercise its discretion, the court should remand the matter to the agency for further consideration."].) But if the decision maker "has become personally 'embroiled' in the controversy to be decided," then the decision maker must be disqualified from further participation in the matter. (*Mennig v. City Council* (1978) 86 Cal.App.3d 341, 351 [150 Cal. Rptr. 207].) In that situation, it is appropriate to allow the recommendation of an inferior decision maker to stand as the final decision. (*Id.* at pp. 351–352 [because the city council was personally embroiled in the [\*\*\*15] termination of the chief of police, the recommendation of the civil service commission converting the termination into a 60-day suspension was affirmed as the final decision].) [\*499]

The question here is whether the City Council can exercise its discretion without being influenced by Brown's advice. Sabey argues that it cannot, and that the advisory opinion and award must be confirmed as the final administrative decision. But there is no evidence that the City Council is personally embroiled in the termination of Sabey's employment, or that it is otherwise incapable of proceeding in a fair manner. We conclude that the matter should be remanded back to the City Council for further consideration with the proviso that it must obtain independent legal advice to eliminate the taint of Brown's involvement. If the City Council does not obtain independent legal advice and review the arbitration in light of that new advice, then the advisory opinion and award shall become final.

**CA(7)** (7) Sabey suggests that the advisory opinion and award should automatically become the final decision because the City Council failed to conduct a proper review of it within the 45 days allotted by the memorandum of understanding. [\*\*\*16] We disagree. The City Council completed its review and rendered a decision in a timely manner. Sabey is the one who wishes to undo what was already done. He cannot be heard to complain that that time has expired on the City Council's right to make a decision. Notably, he cited no law in support of this contention. We deem the argument waived because **HN7** "[i]t is not our responsibility to develop an appellant's argument." (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1206, fn. 11 [122 Cal. Rptr. 2d 890].)

In the alternative, Sabey argues that the City Council should be disqualified from hearing the matter and that it [\*459] should be remanded to a different adjudicatory body. But he failed to identify a different adjudicatory body that has the power to act in the City Council's stead. This argument is waived, too.

All other issues raised by the parties are moot.

### DISPOSITION

The judgment is reversed and remanded with directions to the trial court to refer the matter back to the City Council for further consideration in light of independent legal advice. For this purpose, the clock is reset under the memorandum of understanding. Thus, the City Council shall have the time allowed under the memorandum of [\*\*\*17] understanding for issuing a decision. If [\*500] the City Council declines to review the arbitration record in light of independent legal advice and render a decision within the prescribed time, the advisory opinion and award shall become final. Sabey shall recover his costs on appeal.

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Boren, P. J., and Ferns, J.,\* concurred.

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

## APPENDIX B

### RECOMMENDATIONS FROM 2009 DUE PROCESS PAPER<sup>78</sup>

- A. Avoid creating “adversary” administrative proceedings with the city as a “party” represented by counsel.
- B. Adopt procedures that disavow any intention to create an adversarial administrative structure in general or in selected proceedings.
- C. Internal separation of functions is required only in those proceedings for which a lawyer or staff member in the City can be said to be acting as an advocate, or when the proceeding is adversarial rather than evaluative in nature
- D. A lawyer who has had active and significant involvement in advising staff who act as advocates at the administrative hearing may not advise the decision maker. Similarly, a lawyer who has had such active and significant involvement in fashioning the staff decision on appeal, may not advise the decision maker in the appeal hearing and appear before or advise the city in an adjudicatory proceeding.
- E. Due process wall: The lawyer playing an advocacy/prosecutorial role should not communicate about the merits of the proceeding with a lawyer playing an adjudicative role.
- F. Switching lawyers’ roles from case to case before the same tribunal is permissible with certain exceptions.
- G. Advising successive adjudicatory tribunals is not a commingling of functions.
- H. If outside counsel needs to be retained, such outside counsel is best used in a prosecutorial role.
- I. Use of outside hearing officers can avoid commingling problems.
- J. The advisory attorney or a third attorney should handle the writ if the city attorney’s office wants to avoid the risk of commingling advisory and prosecutorial functions in the event of a remand.
- K. The advisory lawyer can file enforcement actions once the decision is final or where a civil enforcement action is pursued as an alternative to administrative enforcement.
- L. Pay close attention to the varying degrees of risk associated with assigning or allowing the same lawyer to represent the city in litigation and appear before or advise the city in an adjudicatory proceeding.

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<sup>78</sup> *2009 Ad Hoc Due Process Committee Report On the Separation of the Advocacy/Prosecutorial Function From the Decision Making Function in Administrative Hearings*, League of California Cities, City Attorneys Department (Annual Conference 2009).