PEOPLE V. SUPERIOR COURT (SAHLOLBEI)
A LONG-OVERDUE SUPREME COURT DECISION FINALLY PUTS TEETH IN THE CONFLICT-OF-INTEREST LAWS
By Gregory Rolen, California Political News and Views, 9/21/17

Gregory Rolen is a Partner in Haight Brown & Bonesteel's San Francisco office. He is a member of the firm's Public Entity and Employment & Labor practices.., Exclusive to the California Political News and Views, 9/21/17

On June 26, 2017, the California Supreme Court in People v. Superior Court (Sahlolbei) (citation) held that independent contractors who enter into contracts on the public's behalf can be held criminally responsible for conflict of interest under Government Code §1090 (§1090). This monumental holding made public entities feel as though the Supreme Court took a sledgehammer to their preconceived notions of public conflict laws.

The ever growing pressure to streamline public payroll combined with the increasing popularity and perplexity of public-private partnerships has begot a growing dependence on for profit-motivated consultants in the areas requiring specialized expertise such as construction management and legal services. So why are we shocked that private contractors are held to the same standards as public officials? To answer these and other questions, we must examine the Sahlolbei holding and the Court's reasoning, and in so doing we will likely reach the humbling conclusion that we probably should have seen this coming.

HOSSEIN SAHLOLBEI – THE FACE OF CONFLICT

Sahlolbei was a surgeon at a public hospital. He was not an employee, but performed surgery and served on the hospital's executive committee as an independent contractor. As an executive committee member, he exercised influence over hospital policy. Sahlolbei negotiated a contract whereby an anesthesiologist would receive $36,000 per month salary and a $10,000 relocation fee. Sahlolbei then pressured the Board to hire his anesthesiologist for $48,000 per month, a $40,000 relocation fee and a $3,000 bonus. Sahlolbei directed the anesthesiologist to deposit his salary directly into Sahlolbei's account from which he paid the anesthesiologist the agreed-upon $36,000 per month. Sahlolbei, an independent contractor with a fiduciary duty to the hospital, acted for his own financial interest instead of for the hospital's benefit.

The DA charged him with a violation of §1090(a) which provides: "Members of the Legislature, state, county, district…city officers or employees shall not be financially interested in any contract made by them in their official capacity or by anybody or board of which they are members." A willful and knowing violation of §1090 is punishable by a fine of up to $1,000 or imprisonment. (Government Code §1097(a)) The trial court dismissed the §1090 count relying on People v. Christianson (2013) 216 Cal.App.4th 1181, which held that independent contractors cannot be held criminally liable under §1090. The Court of Appeal upheld Sahlolbei's dismissal. The Supreme Court granted review to determine whether independent contractors were subject to criminal sanctions under §1090.

PEOPLE V. CHRISTIANSON – THE OUTLIER

The Supreme Court felt the trial court and appellate court's reliance on Christianson was badly misplaced. In Christianson, the defendant was initially employed as a school district Planning Director. The defendant advised the District to enter into contracts with the company named Johnson Controls. Simultaneously, Christianson's consulting business was advising Johnson Controls on how to obtain District contracts. As Director, the defendant advised the District on a bond measure, and later advised the District to retain her consulting company to perform project management on bond funded projects.

Christianson was convicted of violating §1090. The Court of Appeal reversed reasoning that since §1090 did not define "employee," the common-law definition of employee should be applied to §1090. (See Reynolds v. Bennett (2005) 36 Cal.4th 1075 [where a statute refer[s] to employees without defining the term, courts have generally applied the common-law test of employment].) The Sahlolbei court criticized Christianson's reliance on Reynolds as overly rigid, instead opting to rely on the history and purpose of §1090 to determine the legislative intent. All too often in the law we are accused of elevating form over substance. Here, the Supreme Court did the opposite.

THE SAHLOLBEI COURT – SUBSTANCE OVER FORM

In 1924, Spreckels v. Graham (1924) 194 Cal. 516, 530 created a formulaic definition of "public officer" involving permanence and the delegation of sovereign governmental functions. However, in Schaefer v. Bernstein (1956) 140 Cal.App.2d. 198 the court expanded that definition concluding that an outside attorney hired by the City could be liable under §1090. Schaefer held that "statutes prohibiting personal interest of public officers in public contracts are strictly enforced," and what mattered was that the attorney was hired to advise on contracting. (Schaefer at 291)

In 1963, the Legislature revised §1090, relying on the Schaefer holding. The Assembly Interim Committee on Governmental Organization's Advisory Position repeated Schaefer's holding verbatim that "a contract may be contrary to public policy where an official in a position to advise or influence officials making a contract has a personal interest in the contract. A person is in an advisory position to the city is affected by the conflict-of-interest rule." In light of the Legislature's reliance on Schaefer, it is clear that §1090's reference to "officers" applies to outside advisers with contracting responsibilities. Only two years later, the California Attorney General observed that Schaefer applied, "the policy, if not the letter of §1090" to outside advisers. (46 Ops. Cal. Atty. Gen. 74, 79 (1965) The Attorney General opined that independent contractors who serve the public temporarily should serve the public at the same "fealty" as those who do so permanently.

The court went on to explain its analysis in the context of other public ethics statutes. The court explained that §1090 and the Political Reform Act of 1974 (§81000, et seq.) are the primary statutes preventing conflicts of interest by public officials and employees. "As such, the courts have stated that they will be interpreted in unison and will 'incorporate congruent principles' so as to render consistent applications of laws governing government contracts." (Lexin v. Superior

Court (2010) 47 Cal.4th 1050, 1072) Section 82048 defines a "public official" to include any "officer, employee, or consultant of a State or local government agency." Thus, to the extent the two statutes can be read consistently, independent contractors are included among, "members of the Legislature…officers or employees" under §1090.

Most importantly, the court justified its conclusion as giving effect to the intent of §1090. Section 1090 codified a long-standing common law rule that barred public officials from being personally and financially interested in contracts they formed in their official capacities (Lexin, at 1072). Because even the most well-meaning person's judgment can be impaired when their personal financial interest is affected by business they transact on the government's behalf, conflict-of-interest laws are directed not only at dishonor, but conduct that tempts dishonor. (United States v. Mississippi Valley Co. (1961) 364 U.S. 520, 549) Section 1090 is designed to ensure the public has the official's "absolute loyalty and undivided allegiance." (Stigall v. City of Taft (1962) 58 Cal.2d 565, 569) Accordingly, the focus is on the substance, not the form of the challenged transaction, "disregarding the technical relationships of the parties and looking behind the veil which enshrouds their activities." (People v. Watson (1971) 15 Cal.App.3d 28, 37) Thus, the focus is on whether one had the opportunity to influence a public for contract to promote their personal interest, not their job title.

THE HUMBLING TRUTH – THE SURPRISE IS NOT SO SURPRISING

So, the obvious question is, why are we surprised by this decision? In light of a virtually unbroken line of cases expanding §1090 liability to independent contractors, why do we still labor under the misconception that only government officials can commit conflicts of interest? Is it Christianson? Christianson is a relatively new decision with limited precedential value. The Court's unanimous opinion makes it abundantly clear that Christianson is an outlier which required judicial correction. The court rejected the argument of Sahlolbei, and other shortsighted opportunists, who would have ascribed to the "perverse consequences" of Christianson by universally excluding independent contractors from criminal responsibility for §1090 violations. Then what is it? Since 1956, the court was on a clear trajectory to eliminate self-dealing regardless of title, but stopped just short of finding independent consultants criminally liable. But now in an era where the line between public and private is becoming increasingly blurred, the Court made it clear that if you exercise any influence over the public fisc, self-dealing is at your own risk. Clearly, the risk had become worth it. Like Willie Sutton explained when asked why he robbed banks, "because that's where the money is." Government contracting is big business. The difference between Willie Sutton and Sahlolbei, is that while Willie Sutton used a Thompson submachine gun to steal the peoples' money, Sahlolbei used public influence. Somehow, Willie Sutton's conduct is considered more criminal.

Perhaps this odd hypocrisy explains our surprise. In the past, "it's only business," has justified morally questionable conduct, while public employees are castigated and shamed for similar trespasses. The Court finally recognized that the victims are the same, regardless of the perpetrator – the taxpayer. It's time we reevaluate this hypocrisy while at the same time reevaluating public consultancy contracts in light of the Sahlolbei decision. Now more than ever, good government requires rejecting passive acceptance and business as usual.