



Alerts

No Harm, No Foul: Disqualification Not Warranted When City Attorney Obtained Privileged, But Irrelevant, Communications During Internal Affairs Investigation

January 25, 2019

Lawyers for the Profession®

City of San Diego v. The Superior Court of San Diego County, D073961 (Cal. Ct. App. 4th Dist. Modified Jan. 7, 2019)

Brief Summary

During an internal affairs investigation concerning the leak of a confidential police report, the Police Department of the City of San Diego (the "City") questioned a police detective about communications she had with an attorney who was representing her in a harassment and retaliation lawsuit against the city. Under the threat of discipline and termination, the detective invoked the attorney-client privilege. After the detective was informed the City Attorney had determined the privilege did not apply, the detective disclosed the privileged communications during a second interview with the Department and the City Attorney. The appellate court found that the City Attorney violated the attorney-client privilege and the rule of professional conduct prohibiting an attorney from communicating with a represented party about a pending matter. However, as disqualification is a drastic remedy meant to be prophylactic and not punitive, the appellate court reversed the trial court's order disqualifying the City Attorney, determining that disqualification was not warranted because the transcript of the interview established there was no genuine likelihood that the City's misconduct would provide it with an unfair advantage or in any other way affect the outcome of the proceedings before the court.

Complete Summary

In June 2015, Dana Hoover, a detective with the San Diego Police Department ("Department"), sued the City alleging harassment and retaliation. In late 2017, Hoover's attorney (Gilleon) brought a separate claim against the City on behalf of a different client, alleging the Department failed to properly investigate a sexual assault. In March 2018, a local news organization reporting on the sexual assault claim published an article containing information obtained from a confidential police investigation report. The Department suspected that Hoover had given the report to Gilleon.

Service Areas

Lawyers for the Profession®



During an internal affairs investigation regarding the unauthorized disclosure of the confidential police report, the Department questioned Hoover regarding the content of communications between Hoover and her counsel, Gilleon. The Department threatened Hoover that she would be subject to discipline and/or termination if she did not answer questions about the privileged communications. After Hoover's union representative made two objections based on the attorney-client privilege, the investigators took a break and contacted their supervisor.

Later that day, a Department sergeant told Hoover that the City Attorney's office had determined the attorney-client privilege did not preclude questions about her conversations with Gilleon, because they related to a different matter. She was ordered to return for a second interview. Upon learning of the internal affairs investigation, Gilleon gave notice to the City Attorney that he would take immediate legal action if the Department proceeded to question Hoover about their conversations. During the second interview, Hoover was represented by a police officers' association attorney (Pinckard). A deputy city attorney (Milligan) observed the interview and discussed with Pinckard legal issues concerning the privilege. Over Pinckard's objection, internal affairs elicited answers from Hoover about her privileged conversation with Gilleon.

Hoover filed a motion to disqualify the City Attorney in her harassment and retaliation action, contending that the internal affairs interview violated both the attorney-client privilege and former Rule of Professional Conduct, Rule 2-100 (now Rule 4.2(a)), which prohibits an attorney from contacting a represented party without consent of that party's attorney. Rejecting the City's argument that the privileged communications did not relate to the lawsuit, the trial court granted the motion, finding that the City Attorney forced Hoover to reveal confidential attorney-client communications, and the City Attorney communicated with Hoover "about the subject matter of the litigation without her counsel's consent." The City sought a writ of mandate.

As a threshold matter, the appellate court found that the attorney-client privilege was violated and criticized the Department and the City Attorney for determining unilaterally that the privilege did not apply. "Procedurally, when the attorney-client privilege is invoked, questions concerning the applicability of the privilege require a hearing *by the court* before the allegedly confidential communication is disclosed to the opposing party. (See *Titmas v. Superior Court* (2001) 87 Cal.App.4th 738, 740.)" (emphasis in original). The Department and the City Attorney should have sought the trial court's guidance *via* the *ex parte* calendar before questioning resumed in the second interview.

The City argued that the subject of the sexual assault investigation was not intended to be confidential, because Hoover had been included on a group text about the matter. The appellate court rejected this argument, however, finding that although the group text initiated by Gilleon itself was not privileged, the subject of the improper questioning was a call initiated by Hoover to Gilleon to discuss something other than the sexual assault case. The court cautioned that although it was unclear whether the sexual assault investigation was connected to Hoover's claim against the City, the fact that it "plausibly *could be*" (emphasis in original) was sufficient. Citing to Evidence Code §915(a), the court stated: "In deciding whether a communication is privileged, it is well settled that we do not require disclosure of the assertedly privileged statements."

The appellate court also found that "[t]he Rules of Professional Conduct precluded the City Attorney from directly questioning Hoover during the interview without the consent of attorney Gilleon." Although Milligan was introduced only as an "observer" to the interview, she asked Hoover several questions during the course of the interview. The court noted that although the Department was within its rights to question Hoover about the disclosure of the confidential police report, Mulligan was prohibited from communicating with Hoover about "anything having to do with her lawsuit against the City" without consent from attorney Gilleon.

The court then turned to whether the violations of the attorney-client privilege and former Rule 2-100 required disqualification of the City Attorney's office. Citing to a seminal California case on disqualification (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291), the court cautioned that "disqualification usually imposes a substantial hardship on the disqualified attorney's innocent client, who must bear the monetary and other costs of finding a replacement." Additional costs are considered when "an entire governmental law office is disqualified," requiring retention of private counsel who may not have the specialized expertise of the City Attorney.

Disqualification is not meant to punish the attorney, because attorney discipline is a function of the California State Bar. Citing to *Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 55, the appellate court noted: "disqualification of counsel is a prophylactic remedy designed to mitigate the unfair advantage a party might otherwise obtain if the lawyer were allowed to



continue representing the client." Returning to *Gregori, supra*, the court added: "the prophylactic nature of the disqualification remedy means the focus of the analysis must be on 'whether there exists a genuine likelihood that the status or misconduct of the attorney in question will affect the outcome of the proceedings before the court.'"

Acknowledging that this case was unique because a sealed transcript of the entire interview was available to review, the court determined that Hoover did not reveal privileged communications that could be used advantageously against her in her lawsuit. Thus, there was no "reasonable probability" or "genuine likelihood" that the City's misconduct would "provide it with an unfair advantage" or in any other way "affect the outcome of the proceedings before the court." The appellate court thus issued a writ of mandate directing the trial court to vacate its order.

Significance of Decision

This case serves as a refresher course on California disqualification rules, with two key takeaways.

1. When a dispute arises about whether communications are privileged, a lawyer should seek the court's guidance before piercing the privilege without opposing counsel consent.
 2. Violation of opposing party's attorney-client privilege does not automatically disqualify an attorney. The court will evaluate the likelihood of whether the improperly disclosed communication is material to the proceedings.
-

For more information please contact Joanna L. Storey