

1 This choice is not to be set aside lightly. On the other hand, the exercise of prosecutorial
2 authority must be done fairly, impartially and professionally. When that impartiality is
3 cast into genuine doubt, the courts are asked to step in.

4 Maintaining this balance is fundamental to our concepts of ordered liberty
5 protected by the due process clause. (*People v. Conner* (1983) 34 C3d 141, 146.)
6 Essentially, the establishment of a criminal justice system constitutes a compact between
7 government and its citizens in which the citizens agree not to resort to vigilante justice in
8 return for government’s promise to administer criminal justice fairly and impartially.
9 (see, *People v. Superior Court (Greer)* (1977) 19 C3d 255, 266-267.) This puts unique
10 demands on a public prosecutor. As both the California and United States Supreme
11 Courts have noted,

12 In all his activities, his duties are conditioned by the fact that he “is
13 the representative not of any ordinary party to a controversy, but of a
14 sovereignty whose obligation to govern impartially is as compelling
15 as its obligation to govern at all” (*People v. Superior Court
(Greer)* supra, at 266, quoting *Berger v. United States* (1935) 295
16 U.S. 78, 88.)

16 Furthermore,

17 The importance, to the public as well as to individuals suspected or
18 accused of crimes, that these discretionary functions be exercised
19 “with the highest degree of integrity and impartiality, and with the
20 appearance thereof” cannot easily be overstated. (*People v. Eubanks*
21 (1996) 14 C4th 580, 589, quoting *People v. Superior Court (Greer)*,
22 supra at 267.)

23 Two things must be shown to force a recusal under section 1424. First, there must
24 be a conflict of interest, either real or apparent. (*People v. Conner* (1983), supra at 147.)
25 A “conflict” exists “whenever the circumstances of a case evidence a reasonable
26 possibility that the [prosecutor’s] office may not exercise its discretionary function in an
27 evenhanded manner.” (*People v. Conner*, supra at 148.) Second, the conflict must lead to
28 a real likelihood that the defendant will not receive a fair trial. (*People v. Conner*, supra
at 147-148; *People v. Eubanks*, supra at 592.) Impartiality is essential in any and all
phases of a prosecution, from investigation, through charging decisions, to the full range

1 of tactical decisions at and following a trial. (*People v. Vasquez* (2006) 39 C4th 47, 56.)
2 But “[t]he preservation of prosecutorial impartiality is perhaps most important during the
3 charging process, the phase of a criminal proceeding when the prosecutor’s discretion is
4 most apparent.” (*People v. Superior Court (Greer)*, supra at 267.)
5

6 **THE BACKGROUND**

7 At the heart of this motion is the fact that the San Diego City Attorney’s Office is
8 simultaneously pursuing a civil suit and a criminal prosecution arising out of an
9 intertwined set of facts. The evidence shows that Defendant, Tom Story, was a long-time
10 City employee who worked with the City’s Development Services Department (DSD)
11 and then for the Mayor. The allegations in the criminal complaint filed by the City
12 Attorney, as amplified in the affidavit in support of a search warrant, allege as follows:
13 Story worked on a development project while a City employee; that project, over time,
14 evolved into the Sunroad Centrum project; after leaving City employment and before the
15 passage of one full year, Story worked for Sunroad lobbying the City on permitting
16 matters leading to construction of the building now in controversy. This is charged in
17 multiple counts as a violation of Municipal Code section 27.3550. The allegations in the
18 civil suit filed by the City Attorney are that the building in question has been found by
19 the FAA to be a hazard to air navigation and is thus a nuisance which must be abated by
20 deconstruction. Sunroad has filed a cross complaint alleging equitable estoppel and
21 inverse condemnation and seeking \$40 million dollars or more in damages.

22 These cases are tied together at their roots. The connection was succinctly stated
23 by the City Attorney himself, Michael Aguirre, in an NBC interview where he said, “Not
24 only did he [Story] lobby the City, but it resulted in a building going up that’s created a
25 potential multi-million dollar liability for the city.” (Notice of Lodgment to Defendant’s
26 Reply, Ex. E.) In another published interview, he again tied the cases together saying,
27 “And it was through that exercise of the influence that he got these city officials to allow
28 him to build the building over the height limit.” (Notice of Lodgment to Defendant’s

1 Reply, Ex. B.) It is thus the City Attorney’s position that Defendant’s criminal acts are
2 the direct cause of the danger the civil suit seeks to abate. As these separate cases branch
3 out into investigation and court proceedings, they continue to be tied together by
4 coordination between the Criminal and Civil Divisions of the City Attorney’s Office and
5 the intense personal involvement of the head of the office, Mr. Aguirre.

6 It is important to note that the substantive issues presented by the two cases are not
7 at issue here. While there will, no doubt, be vigorous debate on these issues at the proper
8 time, that time is not now.

9
10 **IS THERE A CONFLICT OF INTEREST?**

11 There can be little doubt that the City Attorney has a conflict of interest in
12 pursuing both of these actions. Even before the passage of section 1424, in addressing
13 the court’s power to recuse a prosecutor, the California Supreme Court observed,
14 “Undeniably there are circumstances in which the participation of a [particular
15 prosecutor] in a criminal trial as prosecutor would be improper.” In citing obvious
16 examples, the court included, “Nor should a prosecutor try a defendant with whom he is
17 embroiled in civil litigation.” (*People v. Superior Court (Greer)*, supra at 261.)² The
18 reasons for this are fundamental. “A public prosecutor must not be in a position of
19 ‘attempting at once to serve two masters,’ . . .” (*People v. Eubanks*, supra at 596, quoting
20 *Ganger v. Peyton* (4th Cir. 1967) 379 F.2d 709, 714.)

21 The conflict manifests itself in a variety of ways. First, and most directly, is the
22 way that Mr. Aguirre clearly invokes it in his public comments on the merits of the two
23 cases. Sunroad’s primary defense to the civil suit is evident in its cross complaint – that
24 the building in question had been fully permitted by the City, which should not now be
25 heard to complain about the project it formally approved. Sunroad seeks equitable relief
26 on these grounds. In light of Mr. Aguirre’s comments, it is clear that the City’s position
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² While section 1424 ultimately narrowed the standard for recusal originally set out in *Greer*, nothing in the statute or subsequent cases calls the quoted language into question.

1 must be that Sunroad is barred from seeking this equitable relief since it comes into court
2 with “unclean hands,” having achieved the permits through illegal lobbying. This is
3 made even more clear through the affidavit in support of the search warrant for Sunroad’s
4 offices. There, the City Attorney’s express theory is that Story, as Vice President of
5 Sunroad, entered into a criminal conspiracy with City employees to violate the Municipal
6 Ethics Ordinance by illegally using his influence to obtain the permits. (See, Notice of
7 Lodgment to Defendant’s Motion, Ex. 9.)

8 Consequently, the City’s factual position in the criminal case is identical to its
9 factual position on the cross-complaint to the civil case – that Defendant Story illegally
10 lobbied the City to get the permits. This presents the City Attorney with powerful
11 motives to prosecute and conduct a criminal investigation that go well beyond the simple
12 desire to see the City’s ordinances enforced. The conflict becomes clearer and more
13 concrete on examination of the number of ways in which the criminal case, and its
14 processes, can be and have been used in service of the civil case.

15 To begin with, the entire investigation and presentation of the criminal case
16 prepares and prepackages the essence of the City’s defense to the \$40 million cross-
17 complaint. In this effort, the City Attorney, as prosecutor, has at his disposal a variety of
18 tools unavailable to the ordinary civil practitioner. For example, the search warrant
19 process pursued in this case permits a force, breadth, speed, simplicity and drama that is
20 breathtaking compared to the civil discovery process. Although the warrant was not
21 ultimately served, the City Attorney made every effort to do so and appears to have been
22 thwarted only by the uniform refusal of law enforcement to execute it. Further, the threat
23 of its service was used by Mr. Aguirre himself, as leverage to obtain a “voluntary”
24 surrender of documents.

25 In addition, only a prosecutor can offer immunity from prosecution in return for
26 testimony under Penal Code sections 1324 and 1324.1. This gives the City Attorney the
27 power to approach witnesses who have information in both cases and offer immunity in
28 exchange for cooperation. The City Attorney has repeatedly made those offers in this

1 case. This offer of immunity simultaneously offers the potential witness shelter from
2 criminal liability and implies that he may well need it. This is an extremely potent
3 combination of carrot and stick that is completely unavailable to the civil practitioner.
4 To the extent the immunized witnesses' testimony benefits the civil case rather than the
5 criminal case, legitimate questions are raised about the abuse of prosecutorial authority.

6 Finally, in one of the most stark examples of the conflict, the City Attorney's
7 Office, Criminal Division sent letters (one mailed, one hand delivered) to Sunroad
8 officials threatening prosecution if Sunroad did not take exactly the steps demanded by
9 the Civil Division in the civil complaint – to lower the building to 160 feet. These were
10 sent at a time when the City Attorney's Office was aware that Sunroad was represented
11 by counsel in the matter. On the same day the letter was hand delivered, this threat was
12 expressly repeated by Mr. Aguirre personally, in a published interview with the *San*
13 *Diego Union-Tribune*. (See, Notice of Lodgment to Defendant's Motion, Ex. 3.)³ This
14 threat of prosecution was an open and direct use of criminal powers expressly in service
15 to the ends of the civil suit.

16 The City Attorney counters that there is no conflict because findings in the
17 criminal case will not operate as either res judicata or collateral estoppel in the civil case,
18 pointing out that the named parties in the civil actions and criminal action are completely
19 different. This argument misses the point entirely. For the purposes of assessing the
20 presence of a conflict under section 1424, the court must look at the human reality of the
21 situation and is not bound by the captions on the complaints. The unavoidable reality is
22 that the criminal and civil actions arise out of a common set of circumstances and are
23 inextricably bound together like two sides of the same coin. Mr. Aguirre himself
24 demonstrates this point repeatedly in his public comments on the two cases.

25 The Court notes that the City has hired separate private counsel to defend the City
26 in the Cross Complaint. The uncontested testimony was that this was done for reasons
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28 ³ Defendant notes that the California Rules of Professional Conduct, Rule 5-100 prohibits an attorney from threatening criminal charges "to obtain an advantage in a civil dispute."

1 having nothing to do with the criminal case. Nonetheless, the hiring of separate counsel
2 to defend the cross claim does not neutralize the conflict. The dueling civil claims are so
3 intertwined that the City Attorney is unavoidably influenced by his interest in protecting
4 the City from what he has publicly characterized as “a potential multi-million dollar
5 liability.”

6
7 **IS A FAIR TRIAL UNLIKELY?**

8 The “Ethical Wall”

9 A conflict by itself, however, is insufficient to warrant recusal. In addition, it must
10 be shown that the conflict results in a genuine likelihood that defendant will not receive a
11 fair trial. (*People v. Conner*, supra at 147-148; *People v Eubanks*, supra at 592.)

12 The City Attorney contends that his prosecutorial impartiality has not been
13 compromised because of an “ethical wall” between the Criminal and Civil Divisions. He
14 correctly notes that dual function offices are not uncommon and do not necessarily create
15 conflicts. Further, when conflicts actually arise, they can often be neutralized through the
16 maintenance of such “ethical walls.” (see, e.g. *People v. Christian* (1996) 41 CA4th 986.)

17 In this case, the declaration of Christopher Morris, Assistant City Attorney in
18 charge of the Criminal Division, describes the “ethical wall” as follows: “[t]he two
19 divisions maintain separate attorneys, supervisors, and support staff, and do not share
20 information regarding cases.” (People’s Response, Ex. 8.) The conflicts policy
21 established by former City Attorney John Witt in 1980 is also offered with the
22 representation that it is still the office policy. (People’s Response, Ex. 8.)

23 Unfortunately, the testimony presented by both sides at the hearing demonstrates
24 that no such strict policy was implemented in this case. The testimony uniformly
25 established that for an extended period of time, at least up until early 2007, there were
26 multiple joint meetings of the Criminal and Civil Divisions, presided over by Mr. Aguirre
27 personally. The purpose of these meetings was to share information, coordinate efforts
28 and make decisions whether to proceed criminally and/or civilly and against whom. The

1 testimony established that the office policy actually permits joint meetings until criminal
2 charges are filed. Once charges are filed, the Criminal Division may not share
3 information with the Civil Division, but the Civil Division may share information with
4 the Criminal Division. (Testimony of Christopher Morris, David Miller, Barry Bruins,
5 Kimberly Urie, Carmen Brock and Diane Silva-Martinez.)

6 This “ethical wall” has significant holes. The biggest one is that initially, during
7 the period of the investigation and deliberations on the decision to charge, it does not
8 exist at all. To whatever extent it ultimately arises, it does not do so until after the
9 charging decision is made. The California Supreme Court has made it clear that fairness
10 and impartiality during the investigation and charging phases of a prosecution are at least
11 as important as (*People v. Vasquez*, supra at 56), if not more important than (*People v.*
12 *Superior Court (Greer)*, supra at 267), the trial and post trial phases. It is a weak wall
13 that is erected only after the bulk of the information has passed and cross influence has
14 already been exerted, and even then only bars the flow of information in one direction.

15 In any event, no “ethical wall” can be effective if the head of the office straddles it
16 and directs efforts on both sides. In the public media, Mr. Aguirre has repeatedly argued
17 the merits of the civil suit and has taken personal responsibility for the decision to file it.
18 (Mr. Aguirre’s Personal Web Log, January 26, 2007; *Voice of San Diego* interview,
19 January 26, 2007, see Notice of Lodgment to Defendant’s Motion, Ex. 7.) In the same
20 vein, Mr. Aguirre has publicly threatened to prosecute Sunroad if it fails to comply with
21 the demands of his civil suit and publicly called for a criminal investigation of Sunroad
22 by the U.S. Attorney’s Office. He has also repeatedly argued the merits of the criminal
23 case in the media. (*Voice of San Diego* interview, January 26, 2007, supra; see also,
24 additional media interviews, Notice of Lodgment to Defendant’s Reply, Exhibits B and
25 E.)

26 In addition to his media commentary on both cases, Mr. Aguirre personally
27 presided over the meetings between the Criminal and Civil Divisions in which the
28 evidence for both cases was reviewed and options for action were discussed. Therefore,

1 to whatever extent there is an “ethical wall” at work in this case, it was rendered
2 meaningless by Mr. Aguirre’s activities on both sides of it.

3 Personal Embroilment

4 Mr. Aguirre’s personal involvement in these cases is further illuminated by the
5 testimony of former Deputy City Attorney David Miller, who was primary legal advisor
6 to DSD. He testified that when the FAA declared the Sunroad building to be a hazard, he
7 became involved in efforts to resolve the issue to the FAA’s satisfaction short of trial.
8 Miller testified that when he told Mr. Aguirre about the efforts, Mr. Aguirre “told me he
9 didn’t want to hear anything like that, he had already decided what he wanted to do, and
10 he would have rather heard from me that I would take a chainsaw and go up to the
11 building and cut it down myself.” Miller testified that Mr. Aguirre personally directed
12 the filing of the lawsuit and said that “there was no way that he was going to settle for
13 anything less than that building being taken down.” This testimony was not contradicted
14 by Mr. Aguirre during his own testimony.

15 Mr. Aguirre’s role in these cases did not stop with public statements, filing
16 decisions, and active joint supervision of the two divisions. It is uncontested that he
17 personally assumed line-level duties. For example, he personally sent a letter to
18 Defendant Thomas Story in Story’s capacity as an officer of Sunroad. This occurred at a
19 time when Mr. Aguirre was aware that Sunroad was represented by counsel in the civil
20 case. The letter addressed a demand related to the stop-work order on the building which
21 is the subject of the civil case. He wrote the letter March 20, 2007, the same day his
22 criminal deputies were making contact with the Police Department to serve a search
23 warrant on Sunroad offices. (Notice of Lodgment to Defendant’s Motion, Ex. 9.)

24 It is also uncontested that Mr. Aguirre himself took on the investigation of the
25 cases, personally interviewing witnesses and personally offering them immunity for their
26 testimony. These witness contacts repeatedly blurred any distinction between the
27 criminal and civil cases. For example, he telephoned George Williams, a consultant to
28 Sunroad on FAA issues and asked if he had helped Sunroad “deceive the FAA,” an issue

1 more clearly relevant to the civil case than the criminal one. He asked Williams if he
2 would “cooperate” and advised him to seek counsel. The next day a criminal subpoena
3 was directed to Mr. Williams by the Criminal Division. Mr. Aguirre also spoke to Steve
4 Laub, a planning consultant for Sunroad, asking if he would talk about Sunroad and
5 offering him immunity from prosecution. Laub asked to see the immunity in writing and
6 Mr. Aguirre agreed. No immunity letter was sent. After a criminal subpoena was served
7 on him Laub, spoke to Kimberly Urie of the Criminal Division who angrily told him he
8 did not need immunity. Mr. Aguirre was also personally present when Assistant City
9 Attorney Christopher Morris offered immunity to DSD employees Kelly Broughton and
10 Maria Escobar-Eck who appear to be clients of the Civil Division.

11 Finally, Mr. Aguirre personally argued the recusal motion notwithstanding the fact
12 his own bias and overreaching were at issue and notwithstanding the fact he had actually
13 been a witness in the case, forcing him to vouch for his own credibility.

14 In summary, the evidence clearly establishes that Mr. Aguirre personally is
15 conflicted between his obligations as a prosecutor and his obligations to protect the City
16 from what he has characterized as a “potential multi-million dollar liability.” The
17 gravity of the conflict is demonstrated in a variety of ways. Chief among them are: his
18 use of his prosecutorial authority to threaten criminal charges and to offer immunity from
19 prosecution to gain advantage in the civil case; his extensive personal embroilment in
20 both cases; and his fatal weakening of what should have been a protective “ethical wall”
21 between the Criminal and Civil Divisions. Many of these factors individually would be
22 sufficient to warrant recusal. Taken together, they demonstrate clearly that the conflict is
23 so significant that it is unlikely the defendant will receive a fair trial if the City Attorney
24 prosecutes.

25 When the head of the office is personally conflicted, the entire office must be
26 recused. Under such circumstances, it is unreasonable to imagine that the attorneys hired,
27 fired and reviewed by the head of the office can operate free of the same conflict. This
28 reality is especially clear in the evidence of this case. (*San Francisco v. Cobra Solutions*

1 (2006) 38 C4th 839, 853-854; *People v. Choi* (2000) 80 CA4th 476, 483; *People v. Lepe*
2 (1985) 164 CA3d 685, 689.)

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4 **ORDER**

5 It is ordered that the San Diego City Attorney's Office be recused from this case.
6 The parties are ordered to appear in Department 55 at 1:30 p.m. on Wednesday, May 9,
7 for a status conference.

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9 Dated: May ____, 2007

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11 MICHAEL D. WELLINGTON
12 Judge of the Superior Court
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