

IN THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO, APPELLATE DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff and Appellant,

v.

THOMAS STORY
Defendant and Respondent.

RESPONDENT'S BRIEF

Appeal from the Judgment of the Superior Court
San Diego Judicial District
The Honorable Michael D. Wellington, Judge of the Superior Court
Case No. M014519

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"The Greatest Dangers to Liberty Lurk in the Insidious Encroachment by Men of Zeal."
- Justice Louis D. Brandeis

I.
STATEMENT OF THE CASE

The City Attorney, who personally intertwined his civil litigation against Sunroad Enterprises with Mr. Story's criminal case, has an insurmountable conflict of interest. Judge Wellington concluded from the evidence that the City Attorney has denied, and would continue to deny, Mr. Story fair process because of this conflict. The City Attorney cannot absolve himself of this conflict by claiming he merely acted in the "public interest." Since the City Attorney has not and cannot fairly and impartially perform his duties, justice requires recusal of the entire City Attorney's office from these proceedings.

II.
STATEMENT OF FACTS

On or about December 15, 2006, the City Attorney filed a civil nuisance lawsuit against Sunroad Enterprises ("Sunroad") alleging that Sunroad's Centrum office building exceeded Federal Aviation Administration ("FAA") regulations. Story Reply to Motion to Disqualify Notice of Lodgment ("NOL 2"), Ex. A. On or about February 9, 2007, Sunroad cross-claimed against the City of San Diego seeking approximately \$40 million in damages on takings and estoppel grounds. Story Motion to Disqualify Notice of Lodgment ("NOL 1"), Ex. 1. Mr. Story, who worked for former Mayor Murphy, is the current Vice President of Development for Sunroad. *See* Declaration of Thomas Story ("Story Decl.") ¶ 1.

On or about April 3, 2007, the City Attorney filed nine misdemeanor charges alleging violations of the City's anti-lobbying ordinance. *See* the People's Complaint. On or about April 6, 2007, Mr. Story filed a motion to disqualify the City Attorney's office. *See* Story's Motion to Disqualify. The City Attorney opposed the motion alleging that the two cases are unrelated and that there was an ethical wall between the civil and criminal divisions which prohibited the sharing of information or strategy. The People's Opp., at 10:2 – 13:28.¹ The Head of the Criminal

¹ For example, page 12, lines 11-15 of the People's Opposition reads:

Division, Christopher Morris swore, "[t]he two divisions maintain separate attorneys, supervisors, and support staff, and **do not share information regarding cases.**" *See* Declaration of Christopher Morris ("Morris Decl.") ¶¶ 1-4.

At the evidentiary hearing, the defense called former Deputy City Attorney David Miller, he testified that shortly before the filing of the civil lawsuit, the City Attorney formed a "Sunroad Task Force"² of civil and criminal city attorneys and investigators to share information and to strategize how to require Sunroad to tear down its building through civil and criminal action. Engrossed Settled Statement ("ESS") 138:20 – 140:14; 146:3 - 154:22. After Mr. Miller testified, other deputy city attorneys, who previously claimed there was an ethical wall between the divisions, suddenly changed their testimony and acknowledged the existence of the Sunroad Task Force.³

A. Sunroad Task Force

Throughout the initial Sunroad Task Force meetings and even after the City Attorney filed criminal charges against Mr. Story, the civil and criminal departments coordinated strategy and shared witnesses, documents and information.⁴ *See* ESS 146:3 - 154:22; Hearing Exs. F-M, Q; Appendix Exs. 1 - 8, 10 - 12.⁵ The divisions specifically coordinated their efforts at the

It is the policy of the City Attorney to maintain a strict barrier between the Criminal and Civil Divisions, that criminal and civil matters are handled by separate attorneys in separate offices, and that the Criminal Division attorneys who filed the charges against Defendant and who are prosecuting Defendant are completely unaware of any activity conducted by the Civil Division.

² The Sunroad Task Force was also referred to as the Montgomery Field Team.

³ *See, e.g.*, ESS 204:18 - 210:7; 213:16 - 219:27; 234:3 - 10; 236:3 - 244:16; 249:12 - 251:19; 255:15 - 258:1; 260:17 - 27; 266:6 - 270:6; 306:18 - 309:23; 358:3 – 359:9; 405:8 - 406:27; 413:4 - 414:24.

⁴ The City Attorney formed the Sunroad Task Force in violation of an office policy requiring strict separation of the divisions because of conflict of interest concerns. *See* the People's Opp., Ex. 8; *see generally* Declaration of Robert Abel ("Abel Decl.").

⁵ Pursuant to California Rules of Court 204(d), Respondent herein attaches to the appendix certain exhibits submitted at the evidentiary hearing and Ethics Opinions referenced in this brief.

Despite receiving subpoenas and a court order to produce all notes of the Sunroad Task force meetings, neither the City Attorney nor his deputies produced any notes. Counsel for Mr. Story made repeated objections to this insufficient production. ESS 302:15 – 21; 305:6 – 24. Mr. Story is entitled to an adverse inference due to the insufficient production. *See, e.g.*, California Penal Code § 10545:5(b) ("the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure."); *see also* JC Cal. Crim. Jury Inst. 306.

instruction of the City Attorney. ESS 146:3 – 148:8; 150:6 – 152:17; Hearing Ex. Q; Appendix Ex. 1. Members from the criminal and civil departments jointly interviewed witnesses. Hearing Exs. E, L, Q, Appendix Exs. 2, 5; ESS 249:12 – 251:25. Civil division investigators shared their notes and impressions of witnesses with the criminal division. Hearing Ex. Q; Appendix Ex. 3, 4; ESS 206:18 – 207:2; 208:27 – 209:14; 213:16 – 216:26. Both divisions shared and simultaneously reviewed documents. Hearing Ex. M, G, Q; Appendix Exs. 5-7; ESS 138:23 – 139:25. The criminal division sought and obtained much information about Mr. Story from the civil division, indeed, the civil division did much of the criminal division's investigatory work. Hearing Exs. F, H; Appendix Exs. 5-8; ESS 217:12 – 219:27.⁶

At the Sunroad Task Force meetings, the City Attorney repeatedly stated that he would not settle for "anything less than that building being taken down." ESS 144:13 - 16. When deputy city attorney David Miller approached the City Attorney about a possible settlement, Miller testified that the City Attorney "told me he didn't want to hear anything like that, he had already decided what he wanted to do, and he would rather have heard from me that I would take a chainsaw and go up to the building and cut it down myself." ESS 145:17 - 21.

The attorneys at the Sunroad Task Force meetings discussed possible criminal charges to be brought against Sunroad and its officers,⁷ as well as against employees from the Development Services Department ("DSD"), the city department which approved Sunroad's building permits. ESS 150:14 - 152:8. DSD, **which is the City Attorney's client** and was at the time the City approved the Sunroad building permits, received privileged information and advice from the civil division. ESS 135:10 - 137:14; NOL 1, Ex. 17. However, once the City Attorney took the position that the building is a nuisance, he acted adversely against DSD employees and ordered them to turn

⁶ For example, in an email to deputy city attorneys and investigators in the **civil** division, deputy city attorney Kimberly Urie from the **criminal** division asked for information pertaining to Mr. Story's work on the Sunroad project, the DSD approval process for the City's permit, and instructed a **civil** investigator to obtain information from the Franchise Tax Board regarding Mr. Story. Hearing Ex. M; *see also* Appendix Ex. 13 which designates deputy city attorneys and investigators by their division.

⁷ Interestingly, deputy city attorney Kimberly Urie, who was in charge of the criminal investigation of Mr. Story, testified that she did not attend Sunroad Task Force meetings until January 2007 and then only focused on Mr. Story. ESS 255:25 - 256:15. Conversely, the City Attorney and deputy city attorneys David Miller and Diane Silva-Martinez all testified that Ms. Urie was at the Task Force meetings at least two months earlier. ESS 146:43- 151:3; 304:12 - 305:4; 307:26 - 309:23; 413:20 - 414:24.

over privileged communications. The City Attorney himself turned over volumes of privileged DSD documents regarding the Sunroad project to news reporter David Hasemyer after Deputy City Attorney David Miller refused to do so. ESS 155:11 - 159:18.⁸ In addition, deputy city attorneys in the civil division threatened DSD employees with criminal prosecution if they did not cooperate with the City Attorney's investigation. Hearing Ex. K, Q; Appendix Ex. 9.

B. Public Statements and Threatening Letters

Shortly after filing a civil complaint against Sunroad, the City Attorney began making statements in the press accusing Sunroad of corruption and insinuating that a criminal investigation was warranted. On or about January 23 and 24, 2007, the City Attorney publicly announced that he had asked federal prosecutors to open a criminal investigation into Sunroad. NOL 1, Ex. 4; ESS 311:14 - 313:20. Around this same time, the City Attorney began publicly accusing Sunroad executives and DSD officials of "corruption." NOL 1, Exs. 7-8; ESS 314:20 - 316:8. In spite of his entreaties and the widespread publicity, no investigations, proceedings, or charges have been initiated by state or federal prosecutors. Story Decl. ¶ 4; ESS 313:18 - 20.

In response to the City Attorney's attacks, Mr. Story wrote an editorial defending Sunroad which appeared in the Union-Tribune on January 26, 2007. NOL 1, Ex. 5. The City Attorney immediately posted a vitriolic response to the editorial on his web log (blog) associating Mr. Story with the former Mayor Dick Murphy, a political figure who the City Attorney has accused of corruption and sought to criminally charge. NOL 1, Ex. 6, Declaration of Rupert Linley, ("Linley Decl.") ¶ 8; NOL 2, Ex. F (After Mr. Story filed his motion to recuse, an ethics expert opined in the news that the postings were unethical. The City Attorney removed the entries after learning of the

⁸ The City Attorney must preserve the City's confidential information as mandated by California Business & Professions Code § 6068(e) ("It is the duty of an attorney . . . [t]o maintain inviolate the confidence and at every peril to himself or herself to preserve the secrets of his or her client.") The City, including DSD, is the "client" to which the duty is owed. California Rule of Professional Conduct 3-600. The City Council is the body to determine, expressly or by implication, whether release of confidential information is in the best interests of the city. *Id.* ("[T]he client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.") Thus, contrary to the City Attorney's testimony, only the City Council can waive the attorney-client privilege for city department documents. The City Council never waived the privilege as to DSD documents.

opinion.⁹) ESS 323:18 – 23; 329:15 – 24; 341:11 – 342:12. Immediately after Mr. Story published the editorial defending Sunroad, he became a target of the City Attorney's investigation. ESS 264:21 – 265:14; Hearing Exs. I, Q; Appendix, Exs. 2, 5, 8.

At precisely the same time the City Attorney began investigating Mr. Story, the City Attorney instructed Ms. Urie of the criminal division to fax and then personally serve a letter on Sunroad's CEO, Aaron Feldman, threatening criminal charges if Sunroad did not immediately lower the height of its building, the same relief sought in the **civil case**. NOL 1, Ex. 3. The City Attorney instructed his staff to personally serve the Sunroad CEO even though his deputy city attorneys informed him that Sunroad was represented by counsel **and** provided the counsel's contact information.¹⁰ Hearing Ex. Q; Appendix Exs. 10, 11.¹¹ In an interview with the Union-Tribune, City Attorney publicly announced the letter and its threat of criminal prosecution the same day the letter was served on Mr. Feldman. NOL 1, Ex. 3.

Approximately 20 news articles were introduced at the evidentiary hearing concerning the Sunroad matter. Nearly all of this press coverage was initiated by the City Attorney. *See generally* NOL 1; NOL 2; Hearing Exs.

In addition, on March 20, 2007, the City Attorney personally sent a stop work order to Mr. Story despite the fact that he had no authority to issue such an order. San Diego Municipal Code ("SDMC") § 121.0309(a); Appendix Ex. 14. This letter, written on civil division stationery, specifically references the ongoing civil litigation. NOL 2, Ex. I.¹² The City Attorney personally sent this letter to Mr. Story **the same day** the criminal division informed the Police Department that it intended to execute a search warrant for documents related to Mr. Story on Sunroad.

⁹ Respondent was unable to find any other case where a prosecutor actually maintained a blog discussing an ongoing criminal investigation.

¹⁰ Even though the City Attorney appeared as a sender or recipient on emails, he failed to produce any himself despite a subpoena and court order.

¹¹ The email string referenced also includes an instruction from the City Attorney to criminal and civil investigators to interview Mr. Story.

¹² Recently, Sunroad agreed to lower the building 20 feet after the city refused to issue a certificate of occupancy. The parties continue to litigate Sunroad's cross claims for monetary damages.

Hearing Ex. D. The San Diego Police Chief refused to execute the warrant two days later due to legal insufficiency. *Id.*

Immediately after filing criminal charges, the City Attorney clearly linked the two cases by proclaiming: "[Thomas Story] attempted to lobby the City. Not only did he lobby the city, but it resulted in a building going up that's created a potential multi-dollar liability for the city." NOL 2, Ex. E (Michael Aguirre, NBC 7/39, March 29, 2007); *see also* NOL 2, Ex. B (Michael Aguirre, KPBS, March 30, 2007.)¹³ In the face of these statements, the City Attorney nevertheless argued throughout the Motion to Disqualify that the two cases were completely separate and unrelated. The People's Opp., at 12:3 – 13:28; ESS 495:9 – 20; 497:2 – 10.

In fact, in direct contradiction to this statement and similar statements made in Appellant's brief alleging that Mr. Story lobbied the city to get the office building built (*see* Appellant Brief, at 7-9), Ms. Silva-Martinez testified that Mr. Story's alleged lobbying concerned a separate residential development on adjacent property, **not** the office building. ESS 409:7 – 410:1. Thus, Appellant's allegations in his appeal brief, that the tall office building was "created through illegal lobbying," are contradicted by the sworn testimony of his own attorneys.

C. Search Warrant

Around March 18, 2007, the City Attorney, without any input from the Police Department, drafted an extensive search warrant for Sunroad's documents, many of them privileged, citing as a basis alleged felonies by Mr. Story of obstruction of justice and conspiracy to obstruct justice as a basis. NOL 1, Ex. 9; Hearing Ex. D. The City Attorney's theory, as stated in the affidavit supporting the search warrant, was that Mr. Story criminally conspired with city employees to

¹³ In this interview, the City Attorney stated:

[T]here is a prohibition on Mr. Story who was the chief of staff to former Mayor Murphy and then [sic] before that was in charge of all land use for Mayor Murphy. But there was a prohibition of one year before he could start lobbying the city. He went to work for Sunroad in October of 2005. . . . And he starting lobbying . . . **.And it was through that exercise of influence that he got these city officials to allow him to build the building over the height limit."**

violate the City's Ethics Ordinance by illegally using his influence to obtain the building permits. The City Attorney has no authority to prosecute felony charges. ESS 16:4 – 20.

On March 22, 2007 at approximately 4:30 p.m., Chief of Police William Lansdowne, after conferring with District Attorney Bonnie Dumanis, who has primary jurisdiction over felonies, and Deputy Attorney General Gary Schons, refused to execute the search warrant and "put the warrant down" because he deemed it to be "legally insufficient." Hearing Ex. D; NOL 1, Ex. 13. Eighteen minutes later or at approximately 4:48 p.m., the City Attorney officially withdrew his request that the San Diego Police Department serve the warrant. Hearing Ex. D. The City Attorney also approached Dumanis and Schons about executing the warrant, both refused on the similar grounds. NOL 1, Ex. ¶¶ 13, 14.

At sometime after 5:30 p.m. on March 22, 2007, **after** the Police Department refused to execute the warrant and the City Attorney had officially withdrawn his request for execution, the City Attorney falsely represented to Sunroad's counsel that the warrant would be executed the following day. Declaration of Michael Attanasio ("Attanasio Decl.") ¶¶ 7-8. Under the impression that the warrant was to be immediately executed and fearing undue media attention¹⁴ and exposure of a vast amount of privileged documents, Sunroad's counsel agreed to voluntarily produce documents. Attanasio Decl. ¶¶ 3-9.

On the following day, March 23, 2007, at approximately 7:15 a.m., the City Attorney **again** telephoned Sunroad's counsel and falsely stated that the search warrant would be executed that morning.¹⁵ Attanasio Decl. ¶¶ 10-11. After further negotiations, Sunroad agreed to produce records in exchange for the City Attorney's agreement not to deploy police officers. *Id.* ¶ 14, Ex. B. At no time on March 22 or 23 did the City Attorney's office inform Sunroad's counsel that

¹⁴ Notably, Sunroad learned of the search warrant from a news reporter. Attanasio Decl. ¶¶ 3-4, Ex. A. The evidence presented shows that the Police Department could not have been the source of the leak. Union-Tribune reporter, David Hasemeyer, informed Sunroad's counsel of the warrant at approximately 11:30 a.m. on March 22. The Police Department did not review the warrant until 1:30 p.m. (at the earliest) that same day. Hearing Ex. D; Attanasio Decl. ¶ 3. It is likely the leak came from the City Attorney's office, which had the most to gain from the media coverage. Moreover, the City Attorney has continuously provided substantial documents and information regarding the Sunroad case to Hasemeyer. *See, e.g.*, ESS 157:12 – 159:18.

¹⁵ The City Attorney was scheduled to meet with Mayor Sanders and Chief of Police Lansdowne on Friday, March 23 at 7:30 a.m., the same time he telephoned Sunroad's counsel. The City Attorney did not show up to the scheduled meeting with the Mayor. Hearing Ex. D.

the warrant could not be executed. *Id.* ¶¶ 9, 13. Shortly after the search warrant debacle, District Attorney Dumanis revoked any and all powers the City Attorney had to file "wobblers" as misdemeanors and re-affirmed the District Attorney's original jurisdiction over all felonies in San Diego county. NOL 1, Ex. 15.

D. Threatening Civil Witnesses with Criminal Process

The City Attorney also used his criminal powers to threaten and intimidate witnesses. For example, on or about April 10, 2007, the City Attorney personally telephoned George Williams, an aviation consultant hired by Sunroad to advise it on FAA guidelines. Declaration of George D. Williams ("Williams Decl.") ¶ 5. Mr. Williams played **no** role in the city permit approval process, had **no** contact with city employees, and never observed any conversations between Mr. Story and city officials. *Id.* ¶ 4. Thus, Mr. Williams did not have any information relevant to the criminal case; rather, his knowledge relates to the civil case only. During the phone conversation, the City Attorney accused Mr. Williams of conspiring with Sunroad to "deceive the FAA." Williams Decl. ¶ 5. At no point during the conversation did the City Attorney mention the criminal investigation of Mr. Story, to the contrary, he did not mention Mr. Story at all. *Id.* ¶ 6. Shortly after their phone conversation, the City Attorney tried to served Mr. Williams with a criminal subpoena by falsely representing that a non-lawyer advisor for Mr. Williams had agreed to accept service on his behalf. *Id.* ¶ 7, Ex. A.

Similarly, on or about April 18, 2007, the City Attorney himself telephoned Steven Laub, a planning consultant for Sunroad, and offered him "immunity" if Mr. Laub would come to the City Attorney's office and discuss Sunroad. ESS 174:7 – 175:19. At no point did the City Attorney explain why Mr. Laub needed immunity, what type of immunity the City Attorney's office could grant him, whether he would be immunized from felonies and/ or misdemeanors, or whether the interview would pertain to the civil or the criminal case. ESS 175:20 - 176:20. The City Attorney agreed to send a written offer letter of immunity to Mr. Laub but never did. Instead, he faxed him a criminal subpoena. *Id.* 176:1 – 181:3.

When Mr. Laub later telephoned the City Attorney's office to further inquire as to the immunity agreement so that his lawyer could review it, Ms. Urie screamed at Mr. Laub and

informed him there was no need for the immunity agreement to be in place, or for his lawyer to review it, before their interview. ESS 181:5 – 186:11. In spite of these representations, Ms. Urie later informed Mr. Laub that he was a potential target of the criminal investigation. ESS 186:12 – 187:19. The City Attorney also made similar immunity offers to DSD employees, who ironically, are his clients. ESS 123:16 – 128:13.

E. Plea Agreement

Shortly after the City Attorney filed criminal charges, his office made a plea offer to Mr. Story for a nolo contendere plea to one count of violating the city's anti-lobbying laws. The terms of the plea also included: no contact with the city for three years, no fine, and no opposition to expungement after one year. ESS 427:12 - 22. This offer was made at the same time the City Attorney served a deposition notice on Mr. Story in the civil case. NOL 1, Ex. 12. Thus, from the City Attorney's standpoint, the criminal case would essentially (a) prevent Mr. Story from having further contacts with city employees if he accepted the plea offer, clearly a "civil remedy", or (b) neutralize Mr. Story as a potentially favorable witness for Sunroad in the civil matter. The city attorney's office offered the plea agreement in exchange for Mr. Story's cooperation against Sunroad executives and DSD employees. ESS 414:25 - 416:7; 429:10 - 430:3. Mr. Story refused this plea agreement because he is innocent.

After Mr. Story filed his motion to disqualify, the City Attorney filed two amended complaints, adding **nine** additional counts alleging instances of illegal lobbying after July 29, 2006. Deputy city attorneys were aware that Mr. Story's blackout period ended on or about July 29, 2006 and the fact that any lobbying he did after that date was lawful. *See* Appendix Ex. 5. These amended complaints raise the specter of improper retaliation in and of itself grounds for recusal.

In addition, the City Attorney initiated a fishing expedition by serving at least thirteen¹⁶ criminal subpoenas on third parties many of whom, like Mr. Williams, had **no** information relating to Mr. Story's alleged Municipal Code violations. Story's Motion to Quash Subpoenas, Ex. B. The

¹⁶ Mr. Story cannot ascertain the exact number of subpoenas the City Attorney issued to third parties because the City Attorney has not served Mr. Story with any of the subpoenas. It is likely that the City Attorney has served similar requests on other third parties unknown to Mr. Story. After motions to quash were filed, the court stayed production of all subpoenaed documents pending the outcome of this appeal.

subpoenas sought production of documents which greatly exceed the scope of the charges at issue. Indeed, while on a television morning talk show, the City Attorney lamented the fact that he does not have authority to conduct grand jury investigations and must file criminal charges first before he is able to investigate using subpoena powers. NOL 2, Ex. J.

After Judge Wellington issued the recusal order, the City Attorney made disparaging comments about the Judge on a morning talk show and called for voters to vote against him in the next election. Michael Aguirre, on KUSI May 17, 2007.¹⁷

III. **STANDARD OF REVIEW**

In determining whether a ruling on a motion to recuse was proper, the reviewing court applies the abuse of discretion standard. *People v. Vasquez*, 39 Cal. 4th 47, 56 (2006); *People v. Hamilton*, 46 Cal. 3d 123, 140 (1988). The trial court's findings of fact are reviewed under the deferential substantial evidence test. *Id.*; *People v. Municipal Court (Byars)*, 77 Cal. App. 3d 294, 297 (1978) (The evidence is reviewed "in the light most favorable to the ruling court."). This is so "[b]ecause the decision whether or not to disqualify is within the discretion of the [trial] court" *Hamilton*, 46 Cal. 3d at 140. While the burden of proof at the trial level is on the party seeking recusal, "the burden of appeal is on the party complaining of the ruling." *Id.*

¹⁷ Below is an excerpt from the City Attorney's May 17, 2007 interview on KUSI:

This is what the people are starting to feel, the UT [Union-Tribune] put an editorial gun to the Judge's head and I think everybody knows that. This Judge, Judge Wellington has a right to make independent decisions but he's up for re-election in 2008 and he has to look at the politics of the situation and I'm not suggesting that influenced his decision but **I am suggesting that the public may think that it influenced his decision and I'm concerned about that because of the things people ask about in the paper today is how far does the corruption go?**

<http://www.kusi.com/>; see also City Attorney interview with Voice of San Diego, May 18, 2007. The City Attorney accused Judge Wellington of being part of "an old boy establishment," which he alleges influences the judge's decisions. "There is an establishment in San Diego that for a long time has named the judges, has been instrumental in putting people into political office, and putting people on the mayor's charter commission." Available at <http://www.voiceofsandiego.org/articles/2007/05/22/government/734aguirre051807.txt>.

IV. ARGUMENT

A. Prosecutors Are Subject to High Ethical and Legal Standards

This motion is not about whether the Sunroad Centrum Building is a public nuisance or how it came to be constructed. It is about the City Attorney's failure to fairly prosecute Mr. Story.

As Judge Wellington noted, our criminal justice system demands that the prosecutorial powers bestowed on public attorneys be fairly, impartially, and professionally exercised.

Statement of Decision ("SOD"), at 2:1 - 2. As a government attorney who has discretion to file criminal charges, this power cannot be abused:

The importance, to the public as well as to individuals suspected or accused of crimes, that these discretionary functions be exercised "with the highest degree of integrity and impartiality, and with the appearance thereof" [citation omitted] cannot easily be overstated. The public prosecutor "is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."

People v. Eubanks, 14 Cal. 4th 580, 589 (1996) (quoting *People v. Superior Court (Greer)*, 19 Cal. 3d 255, 265 (1977) and *Berger v. United States*, 295 U.S. 78, 88 (1996)).

The public attorney may be a zealous advocate, however, "both the accused and the public have a legitimate expectation that his zeal . . . will be born of objective and impartial consideration of each individual case." *Eubanks*, 14 Cal. 4th at 590. The preservation of prosecutorial impartiality is most important during the charging process. *Greer*, 19 Cal. 3d at 267 n. 8. When a prosecutor cannot fairly execute his duties, courts must step in. *Id.* at 265.

B. Substantial Evidence Supports the Court's Finding that the City Attorney has a Conflict

Under California Penal Code section 1424(b)(1), a court must disqualify a city attorney if: (1) there is a conflict of interest and (2) such conflict "would render it unlikely that the defendant would receive a fair trial." *People v. Conner*, 34 Cal. 3d 141, 147 (1983). The statute contemplates either "actual" or "apparent" conflict "**whenever the circumstances of a case evidence a reasonable possibility that the [prosecutor's] office may not exercise its**

discretionary function in an even-handed manner." *Id.* at 148; *Eubanks*, 14 Cal. 4th at 594 (disqualifying conflict when victim paid investigatory costs); *People v. Choi*, 80 Cal. App. 4th 476, 480 (2000) (entire office disqualified when district attorney in effect "serv[ed] two masters," attempting to seek justice for the death of a friend and prosecuting the defendant on an unrelated crime).

Contrary to Appellant's attempt to limit the types of conflict which result in disqualification (e.g., financial interest, emotional involvement), **the California Supreme Court concluded section 1424 contains no such limitation:**

The Attorney General fails to persuade us any legal principle restricts the concept of a conflicting interest to a district attorney's personal financial or emotional stake in the prosecution. The cited cases in which recusal *has* been based on a prosecutor's personal involvement are not authority for a limiting rule. As the Court of Appeal in the present case explained, "[p]ersonal interest or emotional involvement will have a particularly strong tendency to imply extraneous motivation. But it does not follow that *only* evidence of personal interest or emotional involvement will support a conclusion that there is 'a reasonable possibility that the [district attorney's] office may not exercise its discretionary function in an evenhanded manner.'

Section 1424, on its face, allows recusal on a showing of any conflict of interest that renders fair treatment unlikely, and our decisions interpreting the statute have not further restricted the concept of a conflicting interest.

Eubanks, 14 Cal. 4th at 595. (emphasis in the original).¹⁸

The California Supreme Court has held: "a prosecutor shall not try a defendant with whom he is embroiled in civil litigation." *Greer*, 19 Cal. 3d at 261. Moreover, "any threat to use the criminal justice system to gain leverage in a civil dispute subverts the integrity of the judicial process and should be prohibited." Cal. State Bar Formal Op. No. 1989-106; see Appendix Ex. 15.

¹⁸ When broadly defining conflict under section 1424, *Eubanks* expressly considered, and declined to hold that *People v. Superior Court (Martin)*, 98 Cal. App. 3d 515, 521 (1979) designates all categories of conflict. *Id.* at 521 n.7. Instead, *Eubanks* limited the holding in *Martin* to the fact that the defendant did not present any evidence of a conflict which would operate to his detriment. *Id.*

The other cases Appellant cites also declined to categorize the types of conflict which require recusal. See *People v. Parmar*, 86 Cal. App. 4th 781, 796 (2001) ("In each case, the trial court must consider **the entire complex set of facts surrounding the conflict** to determine whether the conflict makes fair and impartial treatment of the defendant unlikely.") (citing *Eubanks*); *Hambarian v. Superior Court*, 27 Cal. 4th 826, 834 (2002) ("no one factor will compel disqualification in all cases; 'the entire complex of facts' must be reviewed . . .")

In *Young v. United States*, 481 U.S. 787 (1987), the United States Supreme Court ruled that a specially appointed prosecutor, who represented a clothing manufacturer in a civil trademark infringement case, could not fairly prosecute the same defendants in criminal contempt proceedings because of the likelihood that the civil case would influence the attorney's decisions in the criminal case. The court noted that the special prosecutor's decisions regarding targeting, indicting or offering immunity to potential defendants could be influenced by the availability of damages under a liquidated damages provision in the civil injunction order. *Id.* at 805-06. In addition, the court recognized that the criminal case could be used to gather information for other pending civil suits,¹⁹ while the civil suits could serve as "bargaining leverage in obtaining pleas in the criminal prosecution." *Id.* at 806. Noting the broad powers of discretion afforded to criminal prosecutors when targeting and charging defendants, the Supreme Court held that concerns of improper motives were not quelled by the fact that the prosecutor was appointed by a federal court. *Id.* at 807.

Similarly, in *State v. Eldridge*, 951 S.W.2d 775 (Tenn. Cr. App. 1997), the appeals court reversed and remanded a trial conviction when special prosecutors who represented the victim in civil proceedings criminally prosecuted the same defendant. The court concluded the prosecutor's actions were influenced by the civil proceedings since a conviction would prove facts essential to the civil trial and make punitive damages more readily available. *Id.* at 783. In reaching its decision, the court considered evidence that the prosecutors discussed a lighter criminal sentence in exchange for a greater settlement sum in the civil case. *Id.*; see also *Ganger v. Peyton*, 379 F.2d

¹⁹ The Supreme Court in *Young* described the potential for abuse as follows:

Prosecutors 'have available a terrible array of coercive methods to obtain information' such as 'police investigation and interrogation, warrants, informers and agents whose activities are immunized, authorized wiretapping, civil investigatory demands [and] enhanced subpoena power.' . . . The misuse of those methods 'would unfairly harass citizens, give unfair advantage to [the prosecutor's personal interests], and impair public willingness to accept the legitimate use of these powers. *Young*, 481 U.S. at 811.

709 (4th Cir. 1967) (prosecutor who represented defendant's wife in divorce proceedings, could not exercise "fair-minded" judgment); *Sinclair v. State of Maryland*, 363 A.2d 468 (Md. 1976).²⁰

Judge Wellington found that "[t]here can be little doubt that the City Attorney has a conflict of interest in pursuing both actions" for the "unavoidable reality is that the criminal and civil actions arise out of a common set of circumstances and are inextricably bound together like two sides of the same coin." SOD, at 4:11-12; 6:21-23. As Judge Wellington explained, the City Attorney's position in the criminal case, that Mr. Story illegally lobbied the city to obtain building permits on behalf of Sunroad, is the same as his position on the cross-complaint, that Sunroad is barred from seeking equitable relief because it achieved the building permits through illegal lobbying. SOD, at 4-5. Thus, the City's defense to a potential \$40 million liability rides on the criminal case.

The record decisively supports Judge Wellington's conclusion that the cases are intertwined. As discussed above, the City Attorney himself has repeatedly acknowledged that the cases are inextricably tied together. NOL 1, Ex. 9; NOL 2, Ex. B, E. Indeed, contrary to his original position at closing argument that no conflict existed because the two cases were completely separate, (*see, e.g.*, ESS 495:16 – 497:26; 502:26 – 503:7), the City Attorney now readily admits the cases are related. Appellant's Brief, at 7:15 - 18; 8:22 – 24; 10:18 - 19. Thus, the City Attorney's interests in the civil case present him with powerful political motives that go beyond simply enforcing the City's anti-lobbying laws, which are at issue here.

The conflict that arises manifests itself in the ways the City Attorney has used his criminal tools, unavailable to civil litigants, to service the civil case. In the cases discussed above, the courts found conflicts based on the potential for abuse of the criminal process to serve the prosecutor's motives in the civil case. *See, e.g., Young*, 482 U.S. at 811; *Eldridge*, 951 S.W.2d at

²⁰ *Young, Eldridge, Ganger, and Sinclair* have all been cited by California courts. *See, e.g., Eubanks*, 14 Cal. 4th at 596 (quoting *Ganger*); *Greer*, 19 Cal. 3d at 261 (citing *Sinclair* and *Ganger* for holding that "a prosecutor should not try a defendant with whom he is embroiled in civil litigation"); *Vasquez*, 39 Cal. 4th at 61 -62, 65 (discussing *Young* and *Eldridge*). To the extent that *Vasquez* may distinguish these cases, it is on the grounds that a trial court's error in denying a recusal motion does not result in a due process violation unless there is actual prejudice. *Vasquez* cites *Eldridge* and *Ganger* as examples of more egregious forms of conflict, which could amount to due process violations. *Id.* at 385.

783; *Ganger*, 379 F.2d at 713. Here, the City Attorney has in fact used the criminal process to his advantage in the civil case.

For example, the City Attorney exceeded his authority by seeking to execute an extensive search warrant on Sunroad, which no law enforcement authority would execute. NOL 1, Exs. 14; Hearing Ex. D. Unlike civil discovery, search warrants permit "a force, breadth, speed, simplicity, and drama that is breathtaking to the civil discovery process." SOD, at 5:18-20. Had the warrant been executed, the City Attorney would have immediately gained access to a large volume of Sunroad's privileged documents relevant to the civil litigation. Attanasio Decl. ¶¶ 3-7.

Moreover, search warrants are highly intimidating and humiliating to an opponent, particularly when they are subject of media fodder, as was the case here. *Id.* ¶ 3. Indeed, even after all law enforcement representatives refused to execute the warrant, the City Attorney was able to obtain documents from Sunroad by falsely threatening that the warrant would be executed. *Id.* ¶¶ 6-11, Ex. B.

Substantial and uncontradicted evidence was also presented that the City Attorney attempted to use the threat of criminal prosecution and the offer of immunity to force witness cooperation in the civil case. *See* Williams Decl. ¶¶ 5-7; ESS 174:22 – 177:6. Appellant argues there is nothing wrong with interviewing witnesses because this is how a case unfolds. However, Appellant missing the point for in trying to extract information from these witnesses, the City Attorney used tools only available in the criminal context to obtain information relevant to the civil case. ESS 176:27 – 176:20; Williams Decl. ¶ 4. These examples aptly demonstrate the City Attorney's conflict and how his motives in the civil case improperly influenced his actions in the criminal case.

Appellant asserts there was "no evidence of any threat to prosecute criminally" and cites a declaration which was **never presented** or reviewed by the trial court, served on Respondent, or made part of the record on appeal.²¹ Moreover, the evidence is to the contrary, Mr. Laub's sworn testimony was that Ms. Urie informed him he was a target in the criminal investigation after he

²¹ Respondent herein files evidentiary objections to the Declaration of Michael Aguirre as referenced in Appellant's Brief, at 12:19-20.

refused to discuss Sunroad with the City Attorney without reviewing the offered immunity letter. ESS 186:7 – 187:19.

Another stark example of the conflict is the January 30 and 31 letters the City Attorney sent directly to Sunroad's CEO, Aaron Feldman, threatening criminal prosecution. NOL 1, Ex. 3. The letters explicitly threaten charging Sunroad with misdemeanor violations if Sunroad did not immediately remove the top 20 feet of the building, the same remedy the City Attorney seeks in the civil case. *Id.*, NOL 2, Ex. A. Substantial, uncontroverted evidence also supports the Court's finding that the letter was sent to intimidate Sunroad. The letter, sent on criminal division stationery, was signed by Ms. Urie, a criminal deputy city attorney in the Public Integrity Division and the lead attorney originally assigned Mr. Story's lobbying investigation. It was **not** signed by Ms. Silva-Martinez, the Head Deputy of the Code Enforcement Division. ESS 401:22 - 402:7. If the letter was truly intended to be notice of a code violation, it would have been issued by Ms. Silva-Martinez.

In addition, the City Attorney's statements to the press, both preceding and following the issuance of the letter, confirm he had other motives for issuing the letter other than mere code enforcement. Only several days earlier (January 23, 24) the City Attorney announced to the media that he had asked federal and state prosecutors to criminally investigate Sunroad and city officials. NOL 1, Ex. 4. Again, on January 26, the City Attorney lambasted Sunroad on his own personal web blog. NOL 1, Ex. 6. Moreover, the City Attorney publicly announced the letter and Sunroad's alleged criminal liability the same day the letter was personally served. NOL 1, Ex. 3. The fact that the City Attorney himself ordered the letter served on Sunroad's CEO even though he knew Sunroad was represented by counsel at this time **and** had their contact information, further supports the Court's finding. Hearing Ex. Q; Appendix Ex. 10 - 11.

The City Attorney's conflict is also evidenced by the plea agreement offered to Mr. Story. Ms. Urie offered the terms of nolo contendere plea to one count and no fine in exchange for his cooperation against Sunroad executives. ESS 414:25 - 416:7. The only action which involves Sunroad is the civil case. Courts have specifically found that such arrangements, i.e., concessions in a criminal case for cooperation in a related civil case, even if later withdrawn or not officially

made, are explicit evidence of a disqualifying conflict. *See Young*, 481 U.S. at 806 (noting potential problem that criminal target could be offered a plea bargain in exchange for his testimony in civil case); *Eldridge*, 951 S.W.2d at 783 (conflict when prosecutors "discussed the possibility of settlement" in civil case being conditional on a recommendation for a lesser sentence); *Ganger*, 379 F.2d at 711 (prosecutor offered to drop the assault charge if he would make a favorable property settlement in the divorce case). In addition, as discussed more fully below, offers to dismiss a criminal action, in exchange for a concession in civil case, violate Rule of Conduct 5-100. *See* Cal. State Bar Formal Op. No. 1989-106 (Appendix Ex. 15).

C. The City Attorney's Claim that He Acted in the "Public Interest" Does Not Avoid the Conflict

Appellant argues that no disqualifying conflict exists because at all times he was serving the public interest. He relies on four cases, none of which holds a public attorney may use criminal proceedings to his advantage in a civil case so long both cases are in "the public interest." First, it is not disputed that public attorney offices have criminal and civil powers and may proceed with both criminal and civil cases. The problem arises when a public attorney uses one forum to gain a result in the other, or his decisions and actions in the one forum are motivated by a result he wishes to obtain in the other.

People v. Byars, 77 Cal. App. 3d 294 (1978) expressly recognizes this distinction. In *Byars*, a **criminal** defendant initiated a civil suit against the city after the city attorney filed a misdemeanor complaint against him. The appeals court reversed the trial court's recusal order holding that when there is no evidence "that prosecution of the criminal action is being utilized to aid the defense of the claim against the city or its agents," disqualification based **solely** on the office's dual function is improper. *Id.* at 297. The court emphasized that the record was "barren of any evidence supporting the inference or implication that the criminal prosecution is in fact being utilized to reduce the city's civil liability exposure." *Id.* at 300. The holding in *Byars* is to prevent a criminal defendant from "creating" a conflict by merely filing a civil lawsuit. This is not the case here for the City Attorney initiated the civil lawsuit and then began a criminal investigation.

Even *Byars* recognized that the City Attorney's duty to serve as an advocate in a criminal case is subordinate to the requirement that he act impartially:

The prosecutor as an advocate in the criminal proceeding has a normal advocate's interest in its result. The interest is one which he must subordinate to the demands of prosecutorial impartiality. . . .
The prosecutor who takes advantage of his position to seek an advantage in related civil litigation is not likely to recognize the demand for impartiality in the first place.

Id. at 301. Thus, *Byars* recognizes that disqualifying conflicts can indeed result when a public attorney pursues related actions, particularly when the criminal case is used to service the civil.

Similarly, in *People v. Martin*, 98 Cal. App. 3d 515 (1979) the court held that the prosecutor, who charged the defendant and represented the defendant's child in ward dependency proceedings, should not be disqualified solely on the grounds of the office's dual functions when the defendant himself conceded that no conflict existed. *Id.* at 520. The *Martin* court conceded that a conflict could result when the prosecutor has an "intense personal involvement" in his duties" or where, citing *Byars*, "the prosecutor is improperly utilizing the criminal proceeding as a vehicle to aid" his interests. *Id.* at 521. As Judge Wellington found, it is the City Attorney's intense personal interest and involvement in both cases and his abuse of the criminal tools available to him which require his disqualification, not merely the dual civil and criminal functions of City Attorney's office.

People v. Parmar, 86 Cal. App. 4th 781 (2001) is not on point. In *Parmar*, the district attorney received funds from an agency sponsored by the City and County of Sacramento to pursue nuisance actions. However, the district attorney retained sole discretion to file charges. Prior to filing criminal charges, the district attorney informally met with the defendants' attorney and city officials to discuss demolition of the buildings. After charges were filed and the defendants filed for bankruptcy, the district attorney informally met with the bankruptcy trustee, who was considering whether to proceed under Chapter 11 (reorganization) or Chapter 7 (liquidation). The trustee ultimately decided to proceed under Chapter 7, against the district attorney's recommendation. *Id.* at 791, 808.

The court concluded that no disqualifying conflict existed because the funds were from a public agency, as opposed to private party, and were specifically set aside for the purpose of addressing nuisances in blighted communities. *Id.* at 803-804. In addition, the court concluded

that the district attorney's involvement with early negotiations and discussions with the bankruptcy lawyer did not conflict with her prosecuting the criminal case. *Id.* at 807-08.

Parmar holds that a prosecutor's receipt of funds from a state agency to aid in prosecutions in which the prosecutor retains discretionary powers, does not constitute improper influence from a third party. It does not hold, as Appellant argues, that as long as the district attorney claims he is proceeding in the public interest, there is no conflict. In *Parmar*, there was absolutely no evidence that the district attorney improperly used her criminal powers to influence civil proceedings or that her interests in a civil case motivated her actions in the criminal case, on the contrary, **the district attorney was not involved in any civil suit** so there was no conflict. The fact that a public attorney may proceed criminally or civilly in nuisances cases, which is not in dispute, also does not absolve the City Attorney's conflict. *Byars* and *Martin* hold that problems do not arise solely because an office has a dual function; rather, problems arise when a prosecutor uses one forum to improperly influence the results in the other. Moreover, the City Attorney's argument that his actions are in "aid or auxiliary" to his primary purpose is also disingenuous. The City Attorney charged Mr. Story with violating city anti-lobbying laws, not with criminal nuisance.²²

Appellant states there is no conflict because the city's liability was caused by (1) Sunroad's illegal acts and (2) Sunroad's cross complaint. He argues there is no conflict because he is merely serving the public interest by zealously pursuing deconstruction of the building. Appellant Brief, at 8:1 - 6. This confuses the issue. This motion is not about Sunroad, it is about the City Attorney's inability to serve as a fair and impartial prosecutor. As discussed above and shown by the record,

²² Appellant also cites *Hambarian v. Superior Court*, 27 Cal. 4th 826 (2002), which is distinguishable. In *Hambarian*, the city civilly sued and settled a case with a garbage collector over improper charging. The district attorney filed criminal charges against one of the defendants. The accountant used by the DA was originally hired and paid for by the city. The court concluded there was no conflict because the city, whose case had settled, had no interest in the criminal proceedings and the conflicted accountant had no control over the "critical prosecutorial decisions." *Id.* at 736. The court in *Hambarian* also affirmed the duties imposed on prosecutors to proceed impartially, and expressly declined to hold that a conflict of interest could not result in the context of government entities:

This is not to say, however, that the interplay among government entities can never create a disabling conflict (citing *Parmar*) and **we do not intend here to shield all interagency conduct from conflict of interest principles.**

Id. at 837. Notably, the court concluded that a conflict existed as between the City and DA resulting from the accountant's participation; disqualification was not warranted because unfair process was unlikely. *Id.* at 833.

he cannot do so because his actions in the criminal case are motivated by his desires to avoid potential civil liability and to force Sunroad to capitulate to his demands in the civil case. What justice is served if a public prosecutor can freely file charges and use his powers against a civil opponent all in the name of the "public interest?"

The City Attorney's argument that Sunroad should be barred from arguing that a conflict exists because it filed a cross-complaint is silly. First, Sunroad is not arguing anything here since it is not a party to the criminal case. Second, Sunroad filed its cross-complaint seeking monetary damages several months **before** the City Attorney filed criminal charges against Mr. Story. NOL 1, Ex. 1; First Criminal Complaint. The City Attorney can hardly argue that Sunroad preemptively filed its cross-complaint because its crystal ball told it do so. Second, Sunroad's cross-complaint, which arises out of the same transaction and occurrence as the City's complaint, the construction of the Centrum building, is compulsory. *See* Cal. Civ. Proc. § 426.10(c). If Sunroad did not bring its compulsory cross-claims in the current action, it would have been barred from later litigating them. Cal. Civ. Proc. § 426.30(a).

D. The Court Properly Determined that Mr. Story Cannot Receive A Fair Trial

Under the second prong of California Penal Code section 1424, recusal is necessary if the conflict results in a genuine likelihood that the defendant will not receive a fair trial. *Conner*, 34 Cal. 3d at 147-48. The statute requires a showing of real potential for unfair treatment that rises to "a level of likely unfairness" during "all portions of criminal proceedings." *Vasquez*, 39 Cal. 4th at 56.

Appellant contends that Judge Wellington failed to make the required finding that it was unlikely Mr. Story would receive a fair trial. On the contrary, Judge Wellington found that the conflict was apparent in the City Attorney's use of prosecutorial authority to gain an advantage in the civil case, his fatal weakening of the ethical wall, and his intense personal embroilment in both cases. SOD, at 10:14 – 24.

1. Use of Criminal Process to Achieve Civil Ends

The second prong of section 1424 only requires a showing of the "potential" for unfair treatment. In addition to the abuses discussed above, the City Attorney used his powers to threaten

and intimidate Mr. Story personally, with the intention of forcing him to testify against Sunroad. The City Attorney personally sent Mr. Story a stop work order on civil division stationery, despite the fact that he had no authority to issue such an order. NOL 2, Ex. I; SDMC § 121.0309(a). On this same day, the criminal division informed the Police Department that it would seek to execute a search warrant on Sunroad relating to Mr. Story. Hearing Ex. D. After the City Attorney failed to obtain access to Sunroad's documents, the City Attorney filed criminal charges against Mr. Story and issued numerous criminal subpoenas, initiating his very own grand jury type of investigation of Sunroad. Story's Motion to Quash Subpoenas, Ex. B; NOL 2, Ex. J. Shortly thereafter, deputy city attorneys offered Mr. Story a plea agreement, in exchange for his testimony against Sunroad, which was only a **civil** litigant.²³ ESS 414:25 – 416:7; 427:12 – 22; 429:10 – 430:3. These events make clear the City Attorney's scheme to threaten and intimidate Mr. Story to achieve civil ends.²⁴

2. The Ethereal Ethical Wall

While in some cases, an ethical wall may be constructed to address a conflict which arises when the same public entity pursues related criminal and civil cases, *see, e.g., People v. Christian*, 41 Cal. App. 4th 986 (1996), the evidence overwhelmingly shows that no such wall was constructed here.²⁵

Rather than operate as separate and autonomous divisions, consistent with the City Attorney's office written policy, *see generally* Abel Decl., the People's Opp. Ex. 8, the evidence

²³ *People v. Neely*, 70 Cal. App. 4th 767 (1999), the case upon which Appellant relies, is distinguishable. In *Neely*, the trial court recused a newly elected district attorney who had campaigned to seek the death penalty in the case if elected. The appeals court reversed because the trial court ignored the section 1424 standard. *Id.* At 778. The plea agreement in *Neely*, which offered a life sentence, indicated that the district attorney was still able to act impartially after his political statements. In contrast, the plea agreement here, like those offered in *Eldridge* and *Ganger*, demonstrates the City Attorney's inability to proceed impartially for the agreement was offered in exchange for cooperation against Sunroad in the civil case, demonstrating the City Attorney's conflicted motives.

²⁴ Indeed, as evidenced in the proceedings, Mr. Story has absolute defenses to the lobbying allegations, including the fact that he did not work on the Sunroad building project as a city employee and the alleged lobbying contacts took place **after** the one-year mandatory blackout period had lapsed. *See* NOL 1, Ex. 9 (exhibit D Mr. Story's SEI form listing departure date as July 29, 2005); Hearing Ex. P; ESS 542:8 – 27.

²⁵ *See, e.g.,* ESS 204:18 - 210:7; 213:16 - 219:27; 234:3 - 10; 236:3 - 244:17; 249:12 - 251:19; 255:15 - 258:1; 260:17 - 27; 266:6 - 270:6; 306:18 - 309:23; 358:3 - 359:6; 405:8 - 406:27; 413:4 - 414:24. Hearing Exs. F-M, Q; Appendix Exs. 1-8, 10-12.

To be effective, an ethical wall must be established when the conflict arises. *Love v. Superior Court*, 111 Cal. App. 3d 367 (1980) (recusal justified when district attorney's office failed to establish an ethical wall when it should have been reasonably aware that a conflict existed.)

shows that the two divisions worked closely together to attain the City Attorney's objectives in relation to Sunroad. The exhibits and testimony revealed that civil and criminal attorneys and investigators shared documents, information, witness statements, and strategy. This collaboration between the criminal and civil divisions would have continued throughout the criminal proceedings had Mr. Story not sought the City Attorney's recusal. Given this arrangement, it is inconceivable that the criminal division could impartially carry out its duties or provide Mr. Story with fair process.

Appellant argues that the communications between civil and criminal were proper because the criminal case was in "aid or auxiliary to" his primary purpose in pursuing the nuisance suit. This is exactly the problem. Neither *Parmar* nor any of the other cases cited hold that it is acceptable for the criminal division to work with the civil division, which is already involved in civil litigation with the defendant, in determining whether to file charges. Such collaboration removes any notion of impartiality.

3. Personal Embroilment

When the head of a public office is conflicted, the entire office must be disqualified, regardless of ethical walls. *City and County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839, 854 (2006); *see also Choi*, 80 Cal. App. 4th at 483.

Judge Wellington properly dismissed the entire City Attorney's office because its leader, who is personally embroiled in both cases, is conflicted. The City Attorney declared he would stop at nothing until the building was torn down. ESS 144:13 – 16; 145:17 - 21. The City Attorney himself has made numerous statements in the media about the merits of both cases and has claimed responsibility for initiating both suits. NOL 1, Exs. 6, 7, 8; NOL 2, Exs. B, G, H, J. The City Attorney publicly threatened criminal prosecution of Sunroad if it did not immediately implement the remedy he sought in the civil case. NOL 1, Exs. 3,4.

The City Attorney also assumed a front line position in both actions. He presided over all of the "Sunroad Task Force" meetings. ESS 146:8 – 152:17. The City Attorney himself signed the stop work letter sent to Mr. Story personally at the same time he sought to have the search warrant executed. NOL 2, Ex. I; Hearing Ex. D. He personally called Sunroad's counsel and falsely

represented that law enforcement was coming. Attanasio Decl. ¶¶ 7, 10. Similarly, the City Attorney ordered the nuisance letter threatening Sunroad's CEO with criminal liability, knowing full well he was represented by counsel. Appendix Exs. 10, 11. The City Attorney also personally called witnesses and issued veiled threats and offers of immunity. Williams Decl. ¶ 5; ESS 174:7 – 175:19. Lastly, the City Attorney's intense personal involvement led him to argue the recusal motion even though his own bias and overreaching were at issue.²⁶ ESS 494:26 – 538:12.

Appellant also argues there was no evidence of bias. However, as discussed throughout, his conflict prevents him from being impartial.²⁷ Appellant also claims that by carrying out both criminal and civil proceedings, he was merely fulfilling his duty to be a zealous advocate. While it is true a public attorney has an interest in prosecuting vigorously, this "interest is one which he must subordinate to the demands of prosecutorial impartiality." *Byars*, 77 Cal. App. 3d at 300; *see also Conner*, 34 Cal. 3d at 146. As Judge Wellington concluded, and as the evidence presented decisively shows, the City Attorney cannot fulfill this duty or provide Mr. Story with the fair process to which he is entitled.

E. The City Attorney Has Committed Numerous Ethical Violations

All attorneys must abide by an ethical code established so they cannot use their power for improper purposes. This code places "a heavier ethical duty, not a lesser one, upon government counsel." Cal. State Bar Formal Op. No. 1989-106. (Appendix Ex. 15). Attorneys who violate these rules may be disbarred or subject to civil and/or criminal liability. *See Flatley v. Mauro*, 39 Cal. 4th 299, 330-332 (2006). The City Attorney's conduct not only warrants his recusal but amounts to ethical violations. In particular, the City Attorney has violated at least three ethical rules, California Rules of Professional Conduct 5-100, 5-120, and 2-100.

²⁶ Appellant argues that a court cannot consider who argued a motion, yet fails to cite any authority holding so.

²⁷ In addition, evidence was presented at the hearing regarding the City Attorney's hatred of the former Mayor Murphy and his association of Mr. Story with the former Mayor. *See* Linley Decl. ¶ 8; NOL 1, Ex. 6 (referring to Mr. Story only by his relationship with the former mayor); NOL 2, Ex. F.

1. Rule 5-100: Threatening Criminal Action to Obtain an Advantage in a Civil Suit

Rule 5-100 provides that "a member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute. " This rule is designed to "promote the public policy of allowing free and open access to civil courts without fear that the criminal, administrative, or disciplinary process will be used to coerce the resolution of private controversies." Cal. State Bar Formal Op. No. 1989-106. (Appendix Ex. 15). Attorneys must be mindful of the distinctions between the criminal and civil processes and to keep them on independent courses:

The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting his legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

Id. at *2 (citing ABA Ethical Consideration 7-21). This problem is exemplified in the case: Mr. Story's deposition in the civil case was noticed at the same time the City Attorney criminally charged him. NOL 1, Ex. 12. This could force Mr. Story to assert Fifth Amendment privileges at deposition, nullifying Mr. Story as a useful witness for Sunroad in the civil case.

Furthermore, the California Bar has held that an offer to dismiss a criminal prosecution in exchange for a concession in a related civil case violates Rule 5-100. Cal. State Bar Formal Op. 1989-106; *see also Marquette v. State Bar of California*, 44 Cal. 3d 253 (1988); *Libarian v. State Bar of California*, 38 Cal. 2d 328 (1952); *Kinnamon v. Staitman & Snyder*, 66 Cal. App. 3d 983 (1977). The threat need not be explicit but may be implied from the circumstances in which the offending statement is made. *Crane v. State Farm of California*, 30 Cal. 3d 117 (1981) is on point. In *Crane*, the attorney was suspended for one year after he contacted an opposing party directly, knowing they were represented by counsel. *Id.* at 122-23. The attorney sent the parties a letter stating that if certain information was not received within five days, a suit would be instituted and the prosecuting authorities would be notified. *Id.* at 121. A notation on the letter indicated that the Attorney General and the Department of Savings and Loan received copies. The court concluded

that such an implicit threat violated the predecessor of Rule 5-100. *Id.* at 123; *see also* Los Angeles County Bar Ass'n Formal Op. No. 469 (1993). (Appendix Ex. 16). A threat made to a witness in a civil dispute also violates Rule 5-100. *In re Madsen*, 370 N.E.2d 199, 481-82 (Ill. 1977).

As discussed throughout, the City Attorney has repeatedly violated this rule by (1) explicitly threatening criminal action against Mr. Story and Sunroad if they did not immediately comply with his demands, NOL 1, Ex. 3, NOL 2, Ex. I, (2) falsely threatening Sunroad's counsel with the execution of a search warrant if it did not voluntarily turn over documents, Attanasio Decl., Hearing Ex. D, (3) publicly threatening criminal investigation of Sunroad and city officials by federal and state authorities, NOL 1, Ex. 4, and (4) threatening criminal prosecution of witnesses to the civil case if they did not cooperate. Williams Decl.; ESS 186:12 – 187:19.

Appellant argues that he merely sent the letters because he was required to do so under nuisance abatement law, however, as discussed above, internal correspondence and the City Attorney's own public statements belie this contention. Appendix Ex. 10, 11; NOL 1, Ex. 3-4. Moreover, even when a prosecutor is entitled to give notice of criminal prosecution, the notice constitutes an improper threat when the criminal action is predicated on a civil remedy. 63 Op. Att'y. Gen. 861 (1980) (notice of prosecution was improper when coupled with a demand for restitution.) (Appendix Ex. 17.) Rule 5-100's broad definition of "civil suit" undermines any contention by Appellant that the Sunroad case is not a civil suit.²⁸

2. Rule 5-120 Trial Publicity

Pursuant to Rule 5-120 an attorney may not make incriminating statements about a pending case in the press "that a reasonable person would expect to be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."

²⁸ Rule 5-100C defines civil suit as "a controversy or potential controversy over the rights and duties of two or more parties under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state or local governmental entity."

Inappropriate comments to the media about evidence, testimony, and the defendants' character and credibility, among other things, led to the disbarment of Durham County District Attorney Michael Nifong. *See, e.g.*, NOL 2, Ex. D. As the numerous news articles submitted show, the City Attorney has repeatedly accused Sunroad, Mr. Story, and city officials of corruption. NOL 1, Ex. 4, 6, 7, 8, 14; NOL 2, Ex. B, C, E, G, H, J. Not only has the City Attorney made these statements directly to reporters and on news talk shows, he has posted inflammatory statements against Sunroad and Mr. Story on his own web(log) blog, which he removed after an expert opined they were improper. NOL 1, Ex. 6; NOL 2, Ex. G; ESS 323:18 – 23; 329: 15 -24; 341:11 – 342:12. There is a substantial likelihood that the pervasiveness and vitriol of these comments would materially prejudice any jury selected in Mr. Story's trial.²⁹

3. Rule 2-100: Improper Communication

Under Rule 2-100, an attorney cannot communicate directly or indirectly about the subject of representation with the party if he knows the party is represented by another lawyer. *See also Crane*, 30 Cal. 3d at 122-23. Contrary to Appellant's contention, prosecutors are not immune from this rule during the pre-indictment phases of an investigation. *United States v. Talao*, 222 F.3d 1133, 1139 (9th Cir. 2000) (declining to announce a categorical rule excusing all pre-indictment communications by prosecutors to represented parties from Rule 2-100 inquiry, adopting instead a case-by-case basis).

As discussed above, the City Attorney deliberately sent threatening letters to Sunroad and Mr. Story even though he knew they were represented by counsel, his office had been in contact with Sunroad's attorneys, and that he intended to execute a search warrant. These direct contacts by the City Attorney with Sunroad's officers were meant to intimidate Sunroad into capitulating with his demands in the civil suit. Such conduct not only violates Rule 5-100 but Rule 2-100.

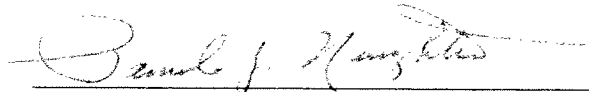
²⁹ As discussed above, the City Attorney also made inflammatory statements about Judge Wellington after he issued the recusal order. An unjustified attack on the character or integrity of a judge is grounds for disbarment. *See* Cal. Bus. & Profs. Code section 6108 (it is the duty of all attorneys "[t]o maintain the respect due to the courts of justice and judicial officers."); *In re Graves*, 64 Cal. App. 176 (1923) (An unjustified assault upon the character or official conduct of a judge, consisting of the publication of charges which, if true, constituted misuse of judicial office or misconduct in office, was "moral turpitude"); *In re Humphrey*, 174 Cal. 290 (1917) (Publication by attorney of circular falsely assailing judge's integrity constituted moral turpitude justifying disbarment).

V.
CONCLUSION

The City Attorney's conduct goes far beyond zealous advocacy. Not only did he cross the line, he leaped over the wall. Judge Wellington had more than enough evidence to recuse the City Attorney's office. His order should be affirmed.

Dated: September 13, 2007

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