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## LEGAL ALERT

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From: Olivarez Madruga Lemieux O'Neill, LLP

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Subject: California Supreme Court Ruling Regarding Independent Contractor Criminal Liability Under Government Code Section 1090

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On June 26, 2017, the California Supreme Court issued an opinion in the matter of *People v. Superior Court (Sahlolbei)*, holding that independent contractors may be found liable for violating Government Code section 1090 ("section 1090"), if the independent contractor has duties to engage in or advise on public contracting. Section 1090 prohibits public officers and employees acting in their official capacity from making contracts in which they have a financial interest.

This matter arises from a trial court's dismissal of a section 1090 count against an independent contractor. The trial court based its decision on *People v. Christiansen*, which held that independent contractors cannot be held criminally liable under section 1090. The California Supreme Court ("Court") granted review to the Court of Appeal's decision, which upheld the trial court's holding.

In this case, Dr. Hossain Sahlolbei ("Sahlolbei") was a surgeon at Palo Verde Hospital ("Hospital"), a public entity under California law. Sahlolbei was an independent contractor, who was never previously considered to be an employee of the Hospital. Sahlolbei's duties included: providing medical services under his position as the Hospital's codirector of surgery, and served on the Hospital's medical executive committee ("Committee"). The Committee operated independently from the Hospital, charged with advising the board of governors of the Hospital ("Board") on Hospital operations, including physician hiring.

The Prosecution (Riverside County District Attorney's Office) charged Sahlolbei with grand theft and violating section 1090. The Prosecution alleged that in 2009, Sahlolbei recruited an anesthesiologist, Dr. Brad Barth ("Barth"), to work at the Hospital. Sahlolbei allegedly pressured

the Board to hire Barth, paying Barth \$48,000 a month with a one-time relocation fee of \$40,000 as well as a directorship position for \$3,000. Unbeknownst to the Board, Sahlolbei entered an employment agreement with Barth, agreeing to pay Barth \$36,000 a month with a one-time relocation fee of \$10,000. Sahlolbei instructed Barth to deposit his paychecks directly into Sahlolbei's account. Sahlolbei would in return pay Barth \$36,000. Once the Board discovered that Sahlolbei was profiting off Barth's employment, they renegotiated their deal with Barth directly.

Ultimately, the Court reversed the Court of Appeals decision, holding that the legislature did not intend to exclude outside advisors of public entities from liability under section 1090 solely because they are independent contractors at common law.<sup>1</sup> This decision overruled *People v. Christiansen*, which held that independent contractors cannot be held liable under section 1090.<sup>2</sup>

### **GOVERNMENT CODE SECTION 1090:**

Section 1090 is intended to bar public officials from maintaining a personal financial interest in contracts that they form in their official capacities. This rule was implemented to protect the actual and perceived integrity of the public fisc. Therefore, both civil and criminal liability may result from actions **without actual fraud, dishonesty, unfairness or loss to the governmental entity**. The Courts ruling is significant as it demonstrates how broadly section 1090 liability has extended to protect the general public.

### **ACTIONS COVERED:**

Courts focus on the substance of the disputed transaction, not the technical relationships of the people involved. Under section 1090, the making of a contract includes **planning, preliminary discussions, compromises, drawing of plans and specifications, and solicitation of bids, not just the moment of signing the contract**. Officials make contracts in their official capacity if their positions afford them the ability to influence either directly or indirectly contracts to promote their personal interest and they take advantage of the opportunity. Personal and financial interests include indirect interests and future expectations of profit or loss, unless the financial interest is excluded under Government Code sections 1091 and 1091.5. The fact that an official's written duties does not include contracting is irrelevant if the official is in fact involved in procuring a public contract, and exploited said contract for personal gain. Thus, officials may be held liable if they had the opportunity to directly or indirectly influence the execution of a contract for their personal interests.

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<sup>1</sup> The Court conducted a statutory and historical analysis in determining the Legislature's intentions. Outside of Tort cases, courts look to the history and fundamental purpose of a statute to determine the Legislature's intentions in enacting a statute.

<sup>2</sup> Before *Christiansen* was decided, there were multiple cases which held that independent contractors may be held liable under section 1090. Because Sahlolbei's action occurred before *Christiansen* was decided, it was clear to the Court that independent contractors can be held liable. The Court expressed no view on whether an independent contractor can be held criminally liable under section 1090.

**IMPACT ON PUBLIC OFFICIALS:**

Ultimately, not all independent contractors are covered by section 1090. **Section 1090 liability extends only to independent contractors who have been entrusted with transacting on behalf of the government.** Public officials are not required to have sole or undivided loyalty to the public entity. Rather, section 1090 ensures that to the extent an official is tasked with advising on how public money should be spent, the official's dealings must be kept separate from his or her personal financial interest.

Generally, an independent contractor who is tasked with engaging in or advising on public contracting on the government's behalf is expected to subordinate his or her personal financial interest to those of the public, just like a permanent officer or common law employee tasked with the same duties. This rule might not apply where a contractor reasonably believed he or she was not expected to subordinate his or her financial interest to the public's.

Although a criminal defendant must have fair notice of what conduct is prohibited, Courts require citizens to educate themselves on the statutory language, legislative history, subsequent judicial construction, and underlying legislative purposes. Therefore, public officials must be diligent and careful when working with public contracts. Violation of section 1090 is punishable by a fine of not more than one thousand dollars, or by imprisonment in the state prison, and the public official is forever disqualified from holding any office in this state.

We are happy to discuss this matter further with you. Please feel free to contact our office with any questions.