

Date of Hearing: June 24, 2014

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING

Paul Fong, Chair

SB 952 (Torres) – As Amended: June 17, 2014

SENATE VOTE: 37-0

SUBJECT: Prohibited financial interests: aiding and abetting.

SUMMARY: Prohibits an individual from aiding or abetting a violation of Government Code section 1090 (section 1090), and related laws. Specifically, this bill:

- 1) Prohibits an individual from aiding or abetting a Member of the Legislature or a state, county, district, judicial district, or city officer or employee in either of the following crimes:
 - a) Being financially interested in a contract made by the member, officer, or employee in his or her official capacity, or by any body or board on which the member, officer, or employee is a member; or,
 - b) Being purchasers at any sale or vendors at any purchase made by the member or officer in his or her official capacity.
- 2) Prohibits an individual from aiding or abetting a Treasurer, Controller, city or county officer, or their deputy or clerk, in purchasing or selling, or in any manner receiving for their own or any other person's use or benefit, any state, county, or city warrants, scrip, orders, demands, claims, or other evidences of indebtedness against the state, or any county or city thereof. Provides that this provision does not apply to evidences of indebtedness issued to or held by an officer, deputy, or clerk for services rendered by them, nor to evidences of the funded indebtedness of the state, county, or city.
- 3) Provides that a person who willfully violates this bill is punishable by a fine of not more than \$1,000, or by imprisonment in the state prison, and is forever disqualified from holding any office in this state.

EXISTING LAW:

- 1) Prohibits members of the Legislature and state, county, district, judicial district, and city officers or employees, pursuant to section 1090, from being financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Prohibits state, county, district, judicial district, and city officers or employees from being purchasers at any sale made by them in their official capacity, or from being vendors at any purchase made by them in their official capacity.
- 2) Prohibits, pursuant to Government Code section 1093 (section 1093), the Treasurer and Controller, county and city officers, and their deputies and clerks from purchasing or selling, or in any manner receiving for their own or any other person's use or benefit, any state, county, or city warrants, scrip, orders, demands, claims, or other evidences of indebtedness

against the state, or any county or city thereof.

- 3) Provides that a person who willfully violates section 1090 or 1093 is punishable by a fine of not more than \$1,000 or by imprisonment in the state prison, and is forever disqualified from holding any office in the state.
- 4) Provides that a contract made in violation of section 1090 may be voided by any party to the contract, except for the officer who had an interest in the contract in violation of section 1090.
- 5) Provides, in general, that all persons who aid and abet in the commission of a crime are principals in any crime so committed.

FISCAL EFFECT: According to the Senate Appropriations Committee, potential increase in state costs for prison terms for aiding or abetting a public officer. To the extent three or four individuals are sentenced to state prison under the provisions of this bill, annual costs would be in the range of \$90,000 to \$125,000 (General Fund) assuming an average in-state contract bed cost of \$31,000.

COMMENTS:

- 1) **Purpose of the Bill:** According to the author:

Senate Bill 952 prohibits an individual from aiding or abetting a public officer or public employee in entering into unlawful contracts, and expands penalties to also apply to those individuals who violate those provisions.

California's bribery laws are in need of updating. California residents are entitled to equip prosecutors with all necessary charging tools to prevent, pursue and prosecute the theft of public funds or bribery of public officials.

While current law prohibits government officials from entering into unlawful contracts (Govt. Code 1090), the law is not clear on whether individuals with a financial interest in a contract who aid and abet those government officials are prohibited from doing so and criminally liable.

On May 9, 2011 a special grand jury in San Bernardino County issued a 29 count indictment against members and staff of the San Bernardino County Board of Supervisors (Board) and Colonies Partners, L.P. (Colonies). The indictment (The People of the State of California v. Paul Biane, et al (2011) FSB 1102102) alleges that Colonies conspired to bribe public officials in return for their votes to approve a settlement between Colonies and the County of San Bernardino (County) for \$102 million.

The Colonies case is being prosecuted jointly by California Attorney General Kamala Harris and San Bernardino County District Attorney Mike Ramos.

The defense has filed several legal challenges at the trial court and appellate level since the indictment was filed in 2011. Those challenges over the course of four years have stymied the prosecution's efforts to bring the case to a jury trial.

Several legal challenges reached the California State Supreme Court and were decided in favor of the prosecution in December 2013. SB 952 clarifies that a private individual is prohibited and can be held criminally liable for aiding and abetting government officials in entering unlawful contracts under Govt. Code 1090.

SB 952 will strengthen the laws governing bribery of public officials and help bolster public trust in government.

- 2) Overview of Section 1090: Section 1090 generally prohibits a public official or employee from making a contract in his or her official capacity in which he or she has a financial interest. In addition, a public body or board is prohibited from making a contract in which any member of the body or board has a financial interest, even if that member does not participate in the making of the contract. Violation of this provision is punishable by a fine of up to \$1,000 or imprisonment in the state prison, and any violator is forever disqualified from holding any office in the state. The prohibitions against public officers being financially interested in contracts that are contained section 1090 date back to the second session of the California Legislature (Chapter 136, Statutes of 1851).

Various provisions of state law provide exceptions to, or limitations on, section 1090. Among other provisions, state law provides that an officer shall not be deemed to be financially interested in a contract if the officer has only a "remote interest" in the contract and if certain other conditions are met. Similarly, another section of state law provides that an officer or employee is not deemed to be interested in a contract if his or her financial interest meets one of a number of different enumerated conditions.

- 3) Aider and Abettor Liability and Government Code Section 1090: As noted above, under California law, a person who aids and abets in the commission of a crime generally can be found guilty of the underlying crime if certain conditions are met. Notwithstanding this fact, courts have held that there is no aider and abettor liability under section 1090. In D'Amato v. Superior Court (2008) 167 Cal. App. 4th 861, the Court of Appeal for the Fourth Appellate District, Division Three, suggested that the separation of powers doctrine precludes criminal prosecutions of public officials for aiding and abetting a violation of section 1090, absent clear legislative intent to permit such prosecutions. In its decision, the court wrote:

Assessing criminal liability against a public official for aiding and abetting a violation of section 1090 necessarily requires inquiry into the public official's subjective motivations when the prosecution is based on the official's legislative acts. Specifically, Penal Code section 31 provides: "All persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, . . . are principals in any crime so committed." To be criminally liable, an aider and abettor must "act with knowledge of the criminal purpose of the perpetrator *and with an intent or purpose* either of committing, or

of encouraging or facilitating commission of, the offense." (*People v. Beeman* (1984) 35 Cal.3d 547, 560 [199 Cal. Rptr. 60, 674 P.2d 1318], italics added.) Thus, to obtain a conviction under an aider and abettor theory, it is not sufficient to demonstrate merely that the defendant assisted the perpetrator with knowledge of the perpetrator's unlawful purpose; the prosecutor also must prove the defendant's "*fundamental purpose, motive and intent* [was] to aid and assist the perpetrator in the latter's commission of the crime." (*Id.* at p. 556, italics added.)

The court did not conclude that the Legislature was prohibited from making it a crime to aid and abet a violation of section 1090. Instead, the court noted that "the 'common-law principles of legislative and judicial immunity...should not be abrogated absent clear legislative intent to do so,'" and the court concluded that the language of section 1090 suggested that the Legislature had not intended to provide for aider and abettor liability for violations of section 1090. The court wrote:

[T]he Legislature's wording of section 1090 evinces the intent to exclude aider and abettor liability. Specifically, "where the Legislature has dealt with crimes which necessarily involve the joint action of two or more persons, and where no punishment at all is provided for the conduct, or misconduct, of one of the participants, the party whose participation is not denounced by statute cannot be charged with criminal conduct on either a conspiracy or aiding and abetting theory. [Citation.] So, although generally a defendant may be liable to prosecution for conspiracy as an aider and abettor to commit a crime even though he or she is incapable of committing the crime itself, the rule does not apply where the statute defining the substantive offense discloses an affirmative legislative policy the conduct of one of the parties shall go unpunished. [Citation.]" [Citation.] (*Id.* at 873; *see also In re Meagan R.* (1996) 42 Cal.App.4th 17, 24.)

- 4) Previous Legislation: AB 1090 (Fong), Chapter 650, Statutes of 2013, authorizes the Fair Political Practices Commission (FPPC) to bring civil and administrative enforcement actions for violations of Section 1090, and requires the FPPC to provide opinions and advice with respect to Section 1090.

AB 850 (De La Torre) of 2009, would have provided that no person shall knowingly induce or participate in or conspire with a public official to violate Section 1090. AB 850 was held on the Assembly Appropriations Committee's suspense file.

REGISTERED SUPPORT / OPPOSITION:

Support

California District Attorneys Association
California Police Chiefs Association

Opposition

None on file.

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