

COURT OF APPEAL
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

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and return

COPY

PAULA FISCAL, LARRY P. BARSETTI, REBECCA KIDDER,
DANA K. DRENKOSKI, JOHN CANDIDO, ALAN BYARD,
ANDREW SIRKIS, NATIONAL RIFLE ASSOCIATION, SECOND
AMENDMENT FOUNDATION, CALIFORNIA ASSOCIATION OF
FIREARM RETAILERS, LAW ENFORCEMENT ALLIANCE OF
AMERICA, SAN FRANCISCO VETERAN POLICE OFFICERS
ASSOCIATION

No.: A115018

Plaintiffs-Respondents,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, SAN FRANCISCO
POLICE CHIEF HEATHER FONG in her official capacity, SAN
FRANCISCO POLICE DEPARTMENT

Defendants-Appellants.

County of San Francisco Case No.: CPF05505960
The Honorable James Warren

FILED

JUN 18 2007

Court of Appeal - First App. Dist.
DIANA HERBERT

By _____
DEPUTY

RESPONDENTS' OPPOSITION TO LCAV'S REQUEST FOR
RECONSIDERATION OF ORDER DENYING APPLICATION FOR
PERMISSION TO FILE AMICUS CURIAE BRIEF

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INTRODUCTION

The Legal Community Against Violence (“LCAV”) asks this court to reconsider its June 13, 2007 Order denying the LCAV’s application to file an amicus brief on two grounds: (1) that Respondents failed to serve the LCAV with its Opposition to the application and (2) that the LCAV is not a real party in interest under Code of Civil Procedure section 367.

Neither reason is sufficient for this court to reverse its earlier decision. The failure to serve was inadvertent and not prejudicial. And, as Respondents said plainly in their Opposition but which LCAV’s Request does not address, even if LCAV is not a “real party in interest” but instead retained legal counsel (co-counsel) for the City (as seems more accurate, particularly in light of the attached retention letter we recently obtained from the City), either way LCAV does not qualify as a mere “friend of the court.”

ARGUMENT

A. Respondents’ Failure to Serve its Opposition on the LCAV Was Inadvertent and Was Not Prejudicial

Although Respondents could and should have, as a professional courtesy, served a would-be amicus curie, there is no rule requiring it.¹

¹ California Rule of Court 8.54 (a)(1) provides that “a *party* wanting to make a motion in a reviewing court must serve and file a written motion.”

Nonetheless, ordinarily we would extend that professional courtesy automatically. Respondent's failure to serve LCAV was inadvertent -- caused by our failure to update the proof of service form after LCAV filed its brief.

But the failure to serve the LCAV was not prejudicial. The LCAV argues that because it was not served with Respondents' Opposition and "because the Court ruled on LCAV's application prior to LCAV submitting a reply," the court should reconsider its order. But LCAV had no right to file a reply in the first place. Although Rule 8.54 provides for the filing of motions and oppositions to motions in the appellate courts, the Rule makes no mention of reply briefs.

B. Co-counsel for the City is Also Not a Proper Amicus Curie

To determine more precisely what the LCAV's relationship is to the City, we submitted another Public Records Act request asking for any retention letter that would document that relationship. We received the

(Emphasis added.) Rule of Court 8.54 (a)(3) simply provides that "[a]ny opposition must be served and filed within 15 days after the motion is filed." LCAV's position is that it is not a party to this litigation. If this is so, then Rule 8.54, by its own terms, does not apply to this situation. Moreover, nowhere does Rule 8.54 specify that an opposition must be served on a would-be amicus curiae, as opposed to the parties to the litigation.

letter attached as Exhibit A in response.

As the letter makes clear, LCAV was “retained,” albeit on a *pro bono* basis, to provide legal advice to the City on this case. Apparently, LCAV then recruited Farella, Braun & Martel, LLP to provide that legal advice to the City, although other LCAV-associated attorneys may have also given the City legal advice. It would seem then that *both* the LCAV “public law center” and the private law firm of Farella, Braun & Martell, LLP (directly or through LCAV) are serving as “retained” legal counsel to the City. As such, they stand in the same shoes as the City Attorney’s office itself. Both “firms” enjoy all the attendant attorney-client privileges and have all the responsibilities that go along with being the City’s lawyers. Those responsibilities include zealously advocating on behalf of *the client’s* i.e., the City’s, interests.

As the City’s lawyers, they have a direct interest in the outcome of the litigation vis-a-vie their client, unlike a true amicus curie. Just as the City Attorney’s office itself could not represent an amicus curie and the City simultaneously, neither can co-counsel for the City.

DATED: June 15, 2007

TRUTANICH • MICHEL, LLP

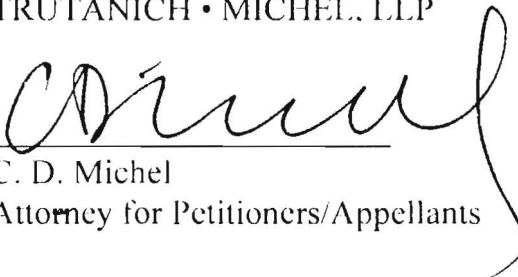

C. D. Michel
Attorney for Petitioners/Appellants

EXHIBIT A

Office of the Mayor
City & County of San Francisco



Gravin Newsom

June 13, 2007

Tim Sutherland
Trutanich-Michel, LLP
180 Occan Boulevard, Suite 200
Long Beach, CA 90802

Re: Public Records Act Request

Dear Mr. Sutherland:

Enclosed is our response to your request for correspondence documenting the retention of the Legal Community Against Violence as a consultant in matters relating to the litigation of Prop H by the City of San Francisco.

Sincerely,

A handwritten signature in black ink, appearing to read "Joe Arellano".

Joe Arellano
Deputy Communications Director
Mayor's Office of Communications

CITY AND COUNTY OF SAN FRANCISCO

OFFICE OF THE CITY ATTORNEY



DENNIS J. HERRERA
City Attorney

WAYNE SNODGRASS
Deputy City Attorney

DIRECT DIAL: (415) 554-4675
E-MAIL: wayne.snodgrass@sfgov.org

February 7, 2005

VIA ELECTRONIC MAIL

Sue Ann L. Schiff
Executive Director, Legal Community Against Violence
268 Bush Street, Suite 555
San Francisco, CA 94104

Re: Retention of LCAV As Pro-Bono Litigation Consultant

Dear Sue Ann:

This letter is to confirm that the San Francisco City Attorney's Office, acting on behalf of the City and County of San Francisco, has retained Legal Community Against Violence ("LCAV") as a pro-bono consultant in connection with anticipated litigation concerning the proposed initiative ordinance that was filed with the San Francisco Department of Elections on December 14, 2004 ("the Proposed Initiative"). LCAV will provide its consulting services to the City in this matter on a mutually agreeable and as-needed basis, and without compensation or remuneration of any kind.

Without limiting any other privileges or protections that may apply, this will also confirm our agreement that any documents, written analyses, or other work product generated by LCAV in connection with its consulting services on this matter shall be absolutely protected by the work-product doctrine. The City Attorney's Office and LCAV will each treat such materials accordingly. However, neither the contents of this letter, nor LCAV's status as a consultant as discussed herein, shall limit the advice or services that LCAV may provide to any entities or persons in connection with any proposed or adopted legislation, regulations, or laws.

To confirm that the above is acceptable to LCAV, please sign and date below and return a copy of this letter to me by fax at (415) 554-4699. Thanks.

Very truly yours,

DENNIS J. HERRERA
City Attorney

Wayne Snodgrass
Deputy City Attorney

Agreed: Sue Ann L. Schiff

Dated: February 7, 2005

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

I, Claudia Ayala, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Blvd., Suite 200 Long Beach, CA 90802.

On June 15, 2007, I served the foregoing document(s) described as

RESPONDENTS' OPPOSITION TO LCAV'S REQUEST FOR RECONSIDERATION OF ORDER DENYING APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

on the interested parties in this action by placing

the original

a true and correct copy

thereof enclosed in sealed envelope(s) addressed as follows:

"SEE ATTACHED SERVICE LIST"

X (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.

Executed on June 15, 2007, at Long Beach, California.

X (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



CLAUDIA AYALA

PAULA FISCAL et al.,
v.
CITY AND COUNTY OF SAN FRANCISCO et al.,
CASE NO.: A115018

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400 McAllister St.
San Francisco, CA 94102

San Francisco County Superior
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Attorney for Amicus Legal
Community Against Violence

