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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LAURA ZIZZO,
Petitioner,

v.

THE SUPERIOR COURT OF SAN
DIEGO COUNTY,
Respondent;

CITY OF SAN DIEGO,
Real Party in Interest.

STACEE BOTSFORD,
Petitioner,

v.

THE SUPERIOR COURT OF SAN
DIEGO COUNTY,
Respondent;

CITY OF SAN DIEGO,
Real Party in Interest.

D062255

(San Diego County
Super. Ct. No. 37-2012-00090446-
CU-OE-CTL)

D062467

(San Diego County
Super. Ct. No. 37-2011-00099876-
CU-OE-CTL)

Consolidated proceedings in mandate after the superior court disqualified counsel. Joel M. Pressman, Steven R. Denton, Judges. Petitions denied.

In these consolidated petitions for writ of mandate, petitioners Laura Zizzo and Stacey Botsford, both detectives for the San Diego Police Department (Department), contend the superior court abused its discretion by disqualifying their attorneys, former San Diego deputy city attorneys who had previously represented Department in employment-related litigation. One of the attorneys, Carol Leimbach, had gone on to work for Department as its equal employment opportunity (EEO) program manager for an approximately five-year period, and the other, Mark Stiffler, had associated in as Leimbach's cocounsel for purposes of petitioners' present superior court law suits. In part, petitioners maintain the information obtained by Leimbach and Stiffler during their prior representation of Department was not material to petitioners' claims in the present litigation that the chief of police and real party in interest, City of San Diego (City), failed to take all reasonable steps to prevent sexual harassment in the workplace from occurring (Gov. Code,¹ § 12940, subds. (k), (j)(1)) and City did not show sufficient similarity in factual and legal elements between the past and present representations to warrant their disqualification.

We conclude City's showing warrants attorney Leimbach's disqualification in both actions. We further conclude that attorney Stiffler is vicariously disqualified due to his association as Leimbach's cocounsel. Accordingly, we deny the writ petitions.

¹ All statutory references are to the Government Code unless otherwise stated.

FACTUAL AND PROCEDURAL BACKGROUND

In late 2011 and early 2012, Botsford and Zizzo separately filed verified complaints alleging, among other causes of action,² that City and then Chief of Police William Landsdowne failed to take all reasonable steps to prevent sexual harassment in the workplace from occurring. Zizzo and Botsford were represented by Leimbach of the Law Offices of Carol Liembach.

In both cases, City moved to disqualify Leimbach and Stiffler on grounds that as former deputy city attorneys who had handled sexual harassment and discrimination claims brought against Department, they had a prior relationship with City on matters having a substantial relationship to those for which they represented petitioners. Specifically, City argued that due to petitioners' claims that City had failed to take reasonable steps to prevent harassment under section 12940, subdivisions (j) and (k), they could not be represented by Leimbach, who had been Department's EEO program manager and the "architect" of Department's EEO policies and procedures, or any other attorney who had regularly defended Department in discrimination cases, because those attorneys had analyzed what Department did to prevent discrimination and harassment from occurring. According to City, the legal issues involved in the attorneys' prior

² Zizzo additionally set forth causes of action for hostile work environment/sexual harassment, gender discrimination and retaliation. Botsford set forth those causes of action as well as causes of action for sexual orientation harassment and intentional infliction of emotional distress.

representation were identical. It asserted that because Leimbach was an expert on Department's policies, personally advised and trained on those policies, and also possessed insider information about Department's " 'strengths, weaknesses, or strategy' " in that area, she was disqualified from representing Zizzo despite the 10-year passage of time from her prior representation. It argued Stiffler was likewise disqualified by virtue of his having "necessarily consulted with management as to the defense of taking reasonable steps" and having similar insider information concerning the policies and their strengths, weaknesses or strategy.

City accompanied its motions with Leimbach's declaration on an unrelated issue in the *Botsford* action, in which Leimbach stated she was a deputy city attorney for City from 1985 to 1994, had handled "numerous" employment litigation cases brought against Department including sexual harassment and discrimination cases, and had served as Department's EEO Manager between 1996 and 2001. Leimbach asserted she "established a comprehensive employment discrimination training and harassment prevention program while employed with the [Department]" but had not worked with City in any capacity for over 10 years, did not take any confidential information with her when she left Department, and was not in possession of any confidential information obtained during the course and scope of her employment with City. Leimbach averred that Stiffler was a deputy city attorney for City from 1986 to 2007 and also handled numerous employment litigation cases including sexual harassment and discrimination cases against Department. She averred that Stiffler worked on a temporary basis for the criminal division of the city attorney's office in 2011, but did not work in the civil litigation division nor was involved

in any civil matters. Leimbach stated she was "informed and believe that Mr. Stiffler is not in possession of any confidential information obtained during the course and scope of his employment with City."

City also submitted the declaration of Assistant Police Chief Boyd Long, whose duties included directly supervising Department's EEO managers for each area command, and who served as the police chief's hearing officer on discipline appeals, including for EEO violations. He stated that from 1998 to 2000, while a detective sergeant assigned to Department's EEO unit, he was responsible for conducting EEO training for Department staff, officers and recruits; formal and informal investigations into allegations of violations of Department's EEO policies and procedures; and mediations between employees. In that role, he worked closely with Leimbach, who was a Department manager; a civilian position that was the "functional equivalent of a Commanding Officer." According to Long, Leimbach did a "major overhaul" of Department's EEO policies and procedures, and could "fairly be considered the 'architect' or 'creator' " of the majority of those policies and procedures. Long stated the "vast majority" of the current EEO policies and procedures were in effect during the period covered by the allegations of the Zizzo and Botsford complaints and were prepared by Leimbach. Long also stated that Leimbach was instrumental in the formulation of Department policies and strategies for taking all reasonable steps to prevent discrimination and harassment, and during her tenure supervised Department investigators who dealt with all Department employee discrimination, harassment, and retaliation claims. He averred, "In addition to that, Ms. Leimbach was often involved in the defense of claims of that nature brought against

[Department] employees. [¶] . . . Virtually anything I did to ensure that the Department was taking all reasonable steps to prevent discrimination and harassment from occurring I did in consultation with, or under the supervision of, Carol Leimbach. And the whole idea behind the EEO policies she instituted and supervised was to ensure that the [D]epartment did all that it could to prevent discrimination and harassment." Long stated he considered his conversations with Leimbach to be confidential and protected by the attorney-client privilege, and believed she was given her job because Department relied on her skill and experience as an attorney.

In opposition, petitioners argued the disputed issues in their cases were merely whether City had violated section 12940, and whether Department "*followed* [its] policies and procedures designed to prevent and remedy harassment." They pointed out the policies themselves were not confidential, and asserted further that City had not identified any confidential information Leimbach possessed or demonstrated how any information would prejudice its defense. In a sworn declaration, Leimbach admitted that as EEO manager, she had "instructed [Department] employees, including management, in the nuances of EEO law." However, Leimbach stated she was not hired by Department as an attorney, did not act as a legal advisor to Department, had not rendered legal advice or decisions on specific employment cases, and had been on inactive status with the California State Bar while EEO manager. Leimbach stated that "[a]s EEO manager, I always consulted with 'Police Legal Advisors' when legal issues were identified during the course of my duties" and "[i]n turn, the legal advisors rendered any legal decisions in the defense of claims brought against [Department] employees." According to Leimbach,

she had merely updated the EEO policies to conform to state and federal law. She stated she did not know Zizzo or Botsford while she was EEO manager and was not involved in any of the substantive issues or privy to any confidential information relevant to their cases.

In the *Botsford* action, Stiffler opposed City's disqualification motion with a declaration stating he did not believe he was involved with any lawsuit having claims of sexual harassment brought against Department or any of Department's employees. He denied ever defending Department or its employees in any lawsuit involving an allegation of failure to prevent harassment or discrimination. He stated he had never met nor spoken with Chief Landsdowne. In *Botsford*, Leimbach added in her declaration that it was her "understanding" that since she left Department, the organization had "totally restructured the handling of EEO claims," and she was never a part of that restructuring. City objected and moved to strike Leimbach's statement on numerous grounds, including lack of foundation and personal knowledge. It also objected to Stiffler's declaration, asserting it was untimely filed, contradicted Leimbach's prior judicial admissions, and was contrary to judicially noticeable facts showing Stiffler was identified as counsel of record for Department in two different discrimination lawsuits.

The trial court in Zizzo's action (Hon. Joel M. Pressman) heard argument on the matter and granted City's motion. It ruled Leimbach's and Stiffler's disqualification as Zizzo's counsel of record was warranted under its "discretionary power." The order states in part: "The evidence shows that a substantial relationship exists in that both Ms. Leimbach and Mr. Stiffler handled numerous employment litigation cases, including

sexual harassment and discrimination cases brought against [Department] . . . where they addressed the steps the [Department] took as part of its policies and procedures to prevent harassment and discrimination from occurring. The Court concludes that no exception to the substantial relationship test applies, and counsel is precluded from continuing in the representation." The court found the legal issues were identical. Citing *Brand v. 20th Century Ins. Co.* (2004) 124 Cal.App.4th 594 (*Brand*), it further stated: "When an attorney, such as Ms. Leimbach and Mark Stiffler, acts as a subject matter expert in a particular area, the rule prohibits disclosure even after the passage of a significant amount of time."

In Botsford's action, the trial court (Hon. Steven R. Denton) likewise granted City's motion. In part, it ruled: "Attorney Leimbach's representation of [Botsford] relates directly to [Leimbach's] work as the Equal Opportunity Program Manager for [Department]. She was intimately involved in drafting and advising [Department] on the development of the discrimination and sexual harassment policies that are the subject of the second cause of action. This is a substantial relationship such that the access to confidential information is presumed." Rejecting the credibility of attorney Stiffler's declaration, the court ruled Stiffler was vicariously disqualified due to his cocounsel relationship with Leimbach.

Zizzo unsuccessfully moved for reconsideration of the trial court's ruling as to attorney Stiffler. Both she and Botsford thereafter filed the writ petitions at issue. We issued an order to show cause and an order consolidating the writ petitions.

DISCUSSION

I. *Propriety of Relief by Writ of Mandate*

A court has authority to issue a writ of mandate to an inferior court "to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by that inferior tribunal" (Code Civ. Proc., § 1085, subd. (a).) An order granting an attorney disqualification motion is both directly appealable and reviewable by writ petition in the reviewing court's discretion. (*Sharp v. Next Entertainment* (2008) 163 Cal.App.4th 410, 424; *Apple Computer, Inc. v. Superior Court* (2005) 126 Cal.App.4th 1253, 1263-1264.) Because the trial court's order deprives petitioners of the important right to counsel of their choice (see *People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145 (*Speedee Oil*)), mandate is an appropriate remedy to restore the right if the disqualification is improper. "The specter of disqualification of counsel should not be allowed to hover over the proceedings for an extended period of time for an appeal." (*Apple Computer*, at p. 1264.)

II. *Standard of Review*

In general, appellate courts review for abuse of discretion a trial court's decision on a motion to disqualify counsel. (*City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 848 (*Cobra Solutions*); *Speedee Oil, supra*, 20 Cal.4th at p. 1143.) "If the trial court resolved disputed factual issues, the reviewing court should not substitute its judgment for the trial court's express or implied findings

supported by substantial evidence. [Citations.] When substantial evidence supports the trial court's factual findings, the appellate court reviews the conclusions based on those findings for abuse of discretion.' " (*Cobra Solutions*, at p. 848, quoting *SpeeDee Oil*, at pp. 1143-1144; *In re Charlisse C.* (2008) 45 Cal.4th 145, 159.)

Our assessment of the evidence presented in support of and opposition to City's disqualification motion is governed by basic appellate principles: " ' "In viewing the evidence, we look only to the evidence supporting the prevailing party. [Citation.] We discard evidence unfavorable to the prevailing party as not having sufficient verity to be accepted by the trier of fact. [Citation.] Where the trial court has drawn reasonable inferences from the evidence, we have no power to draw different inferences, even though different inferences may also be reasonable." [Citations.] We presume the trial court found for the prevailing party on all disputed factual issues.' " (*Orange County Water Dist. v. The Arnold Engineering Co.* (2011) 196 Cal.App.4th 1110, 1116-1117; see *Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197, 1203; *Ochoa v. Fordel* (2007) 146 Cal.App.4th 898, 906 [resolution of factual issues arising from competing declarations is conclusive on the reviewing court, and conflicts in the declarations are resolved in favor of the prevailing party].) "[W]here there are no material disputed factual issues, the appellate court reviews the trial court's determination as a question of law." (*Cobra Solutions, supra*, 38 Cal.4th at p. 848.)

The trial court's exercise of its discretion is subject to reversal when there is no reasonable basis for the action or fails to comply with applicable legal standards. (*Orange County Water Dist. v. The Arnold Engineering Co., supra*, 196 Cal.App.4th at p.

1117; *In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, 585.) For example, when the court's exercise of discretion is based on a legal error, i.e., a determination that a conflict of interest existed when the circumstances did not constitute a conflict of interest, the court's order is not entitled to deference. (*Baker Manock & Jensen v. Superior Court* (2009) 175 Cal.App.4th 1414, 1420.) " In any event, a disqualification motion involves concerns that justify careful review of the trial court's exercise of discretion." (*Orange County Water Dist.*, at p. 1117.)

III. *Legal Principles Relating to Disqualification*

A. *Court's Inherent Power to Disqualify Counsel*

Every court is granted the inherent authority to disqualify an attorney " '[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it' " (*Speedee Oil, supra*, 20 Cal.4th at p. 1145, citing Code Civ. Proc., § 128, subd. (a)(5).)

A judge's inherent power in this respect " 'is frequently exercised on a showing that disqualification is required under professional standards governing avoidance of conflicts of interest or potential adverse use of confidential information.' [Citation.] [¶] 'Motions to disqualify counsel present competing policy considerations. On the one hand, a court must not hesitate to disqualify an attorney when it is satisfactorily established that he or she wrongfully acquired an unfair advantage that undermines the integrity of the judicial process and will have a continuing effect on the proceedings before the court. [Citations.] On the other hand, it must be kept in mind that disqualification usually imposes a substantial hardship on the disqualified attorney's

innocent client, who must bear the monetary and other costs of finding a replacement. A client deprived of the attorney of his [or her] choice suffers a particularly heavy penalty where . . . his [or her] attorney is highly skilled in the relevant area of the law.'

[Citation.] [¶] 'The paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process.' " (*Oaks Management Corp. v. Superior Court* (2006) 145 Cal.App.4th 453, 462-463 (*Oaks Management*).)

Under these principles, "disqualification *may* be proper when . . . an attorney-client relationship is not at issue. . . . 'Professional responsibilities do not turn on whether a member of the State Bar acts as a lawyer. "One who is licensed to practice as an attorney in this state must conform to the professional standards in whatever capacity he [or she] may be acting in a particular matter." ' " (*Oaks Management Corporation v. Superior Court, supra*, 145 Cal.App.4th at p. 464; see *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft* (1999) 69 Cal.App.4th 223, 232-233 [as a general proposition, an attorney's receipt of confidential information from a nonclient may lead to the attorney's disqualification].)

B. "*Substantial Relationship*" Test for Successive Attorney-Client Representations under the California Rules of Professional Conduct

An attorney "shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential

information material to the employment." (Rules Prof. Conduct, rule 3-310(E) (hereafter rule 3-310(E)); *SpeeDee Oil, supra*, 20 Cal.4th at p. 1146.) This rule, and the rules of professional conduct generally, govern disqualification where the party seeking to disqualify counsel establishes that it was " ' "represented" ' " by that counsel in a manner giving rise to an attorney-client relationship. (*Oaks Management, supra*, 145 Cal.App.4th at p. 465; *Med-Trans Corp., Inc. v. City of California City* (2007) 156 Cal.App.4th 655, 668, fn. 8; *Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 729.)³

In addressing principles pertaining to disqualification of counsel for alleged successive representation of clients with claimed adverse interests, the California Supreme Court has explained: "Protecting the confidentiality of communications between attorney and client is fundamental to our legal system. The attorney-client privilege is a hallmark of our jurisprudence that furthers the public policy of ensuring ' "the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have

³ In *Oaks Management, supra*, 145 Cal.App.4th 453, we distinguished cases decided under former California Rules of Professional Conduct, rule 5-102(B) (in particular, *William H. Raley Co., Inc. v. Superior Court* (1983) 149 Cal.App.3d 1042), which became part of rule 3-310 following the California Supreme Court's adoption of the revised Rules of Professional Conduct. (*Oaks Management*, at p. 465.) We stated, "[u]nlike former rule 5-102, rule 3-310 controls conflicts of interest and disqualification motions *only in the context of attorney-client relationships.*" (*Ibid.*) Thus, *Oaks Management* suggests the party seeking disqualification under the rules of professional conduct must establish that such a party was or is " ' " 'represented' " by the attorney "in a manner giving rise to an attorney-client relationship[.]" ' " (*Ibid.*, quoting *In re Lee G.* (1991) 1 Cal.App.4th 17, 27.)

adequate advice and a proper defense." [Citation.] [Citation.] To this end, a basic obligation of every attorney is "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." (*SpeeDee Oil, supra*, 20 Cal.4th at p. 1146.) This duty of confidentiality survives termination of the attorney's representation. (*Cobra Solutions, supra*, 38 Cal.4th at p. 846.)

"Th[e] enduring duty to preserve client confidences precludes an attorney from later agreeing to represent an adversary of the attorney's former client unless the former client provides an 'informed written consent' waiving the conflict. [Citation.] If the attorney fails to obtain such consent and undertakes to represent the adversary, the former client may disqualify the attorney by showing a "substantial relationship" between the subjects of the prior and the current representations. [Citation.] To determine whether there is a substantial relationship between successive representations, a court must first determine whether the attorney had a direct professional relationship with the former client in which the attorney personally provided legal advice and services on a legal issue that is closely related to the legal issue in the present representation. [Citation.] If the former representation involved such a direct relationship with the client, the former client need not prove that the attorney possesses actual confidential information. [Citation.] Instead, the attorney is presumed to possess confidential information if the subject of the prior representation put the attorney in a position in which confidences material to the current representation would normally have been imparted to counsel. [Citations.] When the attorney's contact with the prior client was not direct, then the court examines both the attorney's relationship to the prior client and the relationship between the prior and

the present representation. If the subjects of the prior representation are such as to 'make it likely the attorney acquired confidential information' that is relevant and material to the present representation, then the two representations are substantially related. [Citations.] When a substantial relationship between the two representations is established, the attorney is automatically disqualified from representing the second client." (*Cobra Solutions, supra*, 38 Cal.4th at p. 846.)

Thus, "a 'substantial relationship' exists whenever the 'subjects' of the prior and the current representations are linked in some rational manner." (*Jessen v. Hartford Casualty Inc. Co.* (2003) 111 Cal.App.4th 698, 711.) "[S]uccessive representations will be 'substantially related' when the evidence before the trial court supports a rational conclusion that information material to the evaluation, prosecution, settlement or accomplishment of the former representation given its factual and legal issues is also material to the evaluation, prosecution, settlement or accomplishment of the current representation given its factual and legal issues." (*Id.* at p. 712; see also *Fremont Indem. Co. v. Fremont General Corp.* (2006) 143 Cal.App.4th 50, 68, 69.) Materiality is essential: the information acquired from the first representation "must be found to be directly at issue in, or have some critical importance" in the second representation. (*Fremont Indem. Co.*, at p. 69.) But "the substantial relationship test is broad and not limited to the 'strict facts, claims and issues involved in a particular action.'" (*Knight v. Ferguson* (2007) 149 Cal.App.4th 1207, 1213.)

"The 'substantial relationship' test mediates between two interests that are in tension in such a context—the freedom of the subsequent client to counsel of choice, on

the one hand, and the interest of the former client in ensuring the permanent confidentiality of matters disclosed to the attorney in the course of the prior representation, on the other. Where the requisite substantial relationship between the subjects of the prior and the current representations can be demonstrated, access to confidential information by the attorney in the course of the first representation (relevant, by definition, to the second representation) is *presumed* and disqualification of the attorney's representation of the second client is mandatory; indeed, the disqualification extends vicariously to the entire firm." (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283-284.) "The presumption of knowledge is a "rule by necessity" as the former client would be at a loss to prove what is in the mind of the attorney. Neither should the attorney be forced to evaluate the extent to which he [or she] acquired relevant information and his [or her] actual use of that knowledge in the current representation.' " (*Shandralina G. v. Homonchuk* (2007) 147 Cal.App.4th 395, 407-408.)

The Court of Appeal applied the substantial relationship test in *Brand, supra*, 124 Cal.App.4th 594. There, an attorney, Zalma, and his law firm represented an insurance company for three years, providing coverage opinions in connection with coverage and bad faith claims under the insurer's insurance policies, some of which involved moisture intrusion, rot and fungal infestation under its homeowner policies. (*Id.* at p. 599.) It was undisputed in that case that Zalma had received confidential information while he was coverage counsel: information concerning the company's claims handling policies and procedures, litigation strategies, and business practices concerning the insurer's handling of litigation arising from mold infestation claims. (*Ibid.*) Zalma also formed a training

school for insurance adjusters and lawyers, which the insurer engaged to train its adjusters concerning that insurer's claims handling practices and procedures. (*Ibid.*) In preparing for this training, Zalma consulted with the insurer concerning its policies and procedures, spent two or three days analyzing its homeowner's policy line by line, and critiqued the company regarding its claims handling practices. (*Id.* at pp. 599-600.)

Twelve years later, an insured, Brand, sued the insurer for breach of contract and bad faith arising out of her claim for water damage to her home, and designated Zalma as an expert to testify about the insurer's handling of her claims. (*Brand, supra*, 124 Cal.App.4th at p. 600.) The insurer moved to disqualify Zalma, but the trial court denied the motion, ruling a substantial relationship could not be established based on the amount of time between the two engagements, and because the training school seminar was a "general course" that could not form the basis of any claim of attorney-client privilege supporting disqualification. (*Id.* at p. 601.)

On the insurer's appeal, the Court of Appeal reversed, holding the requisite "substantial relationship" was met on the undisputed facts presented with respect to Zalma's engagements. (*Brand, supra*, 124 Cal.App.4th at p. 605.) The appellate court observed Zalma's involvement was direct and personal: Zalma had both "personally represent[ed]" the insurer as its attorney and supervised associates representing the company. (*Ibid.*) It *presumed* Zalma's knowledge of confidential information merely by virtue of the nature of Zalma's representation, because such confidential information "would normally have been imparted to [him]." (*Id.* at p. 606.) The court further observed Zalma's representation concerned matters substantially related to the issues in

Brand's case, namely, coverage under the insurer's policies on claims including moisture intrusion, and defense of the insurer in coverage and bad faith actions by policyholders challenging the insurer's claims handling. (*Id.* at pp. 605-606.) Both the cases Zalma handled on behalf of the insurer and Brand's case arose from claims on a homeowner's policy for moisture intrusion and mold. (*Id.* at p. 606.) Accordingly, "from both a factual and legal perspective, the two engagements must be deemed substantially related, presenting a substantial risk ' "that representation of the present client will involve the use of information acquired in the course of representing the former client" ' [Citation.] Since, in these circumstances, 'confidences *could have* been exchanged between the lawyer and the client, courts will conclusively presume they *were* exchanged, and disqualification will be required.' " (*Id.* at pp. 606-607.)

The Court of Appeal held that given Zalma's direct and personal relationship, "[t]he passage of 12 years between the two engagements did not neutralize Zalma's representation in the first case." (*Brand, supra*, 124 Cal.App.4th at p. 607.) It explained the conclusive presumption was not overcome by either Zalma's professed failure to recall any confidential information obtained during his representation of the insurer or the passage of 12 years since his direct representation of the insurer, reasoning that to hold otherwise would risk Zalma employing confidential information to testify against his former client: " 'Where the factual presentations of the parties stray into the prohibited world covered by the conclusive presumption, the dispute effectively becomes a "subtle evaluation of the extent to which [the attorney] acquired relevant information in the first representation and of the actual use of that knowledge and information in the subsequent

representation." [Citation.] When this occurs, the base purpose of the conclusive presumption is subverted by what in reality is an "inquiry into the actual state of the lawyer's knowledge" and, as a result, the client's confidences are in danger of disclosure, however inadvertent.' " (*Ibid.*)

IV. *Section 12940 Cause of Action for Failure to Take Reasonable Steps to Prevent Harassment and Discrimination*

The sole cause of action on which City focused in its disqualification motions, and that the trial courts found triggered the disqualifying conflict, were petitioners' claims under section 12940, subdivisions (j)(1) and (k) that defendants City and Landsdowne failed to take all reasonable steps necessary to prevent discrimination and harassment from occurring.⁴ Because the substantial relationship test can entail an assessment of the legal and factual issues involved in prior and successive representations, it is useful to provide a short overview of such a claim.

The California Supreme Court explains that California's Fair Employment and Housing Act "makes it a separate unlawful employment practice" for an employer to

⁴ Section 12940, subdivision (k) makes it an unlawful employment practice "[f]or an employer . . . to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." Section 12940, subdivision (j) provides in part: "Harassment of an employee . . . by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees . . . where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. . . . An entity shall take all reasonable steps to prevent harassment from occurring." (§ 12940, subd. (j)(1).)

violate section 12940, subdivision (k). (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1040.) This court has suggested the provision creates a tort made actionable by statute with the usual elements of duty of care, breach of duty, causation and damages. (See *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 286-287 [addressing former subdivision (i) of section 12940].) "The employer's duty to prevent harassment and discrimination is affirmative and mandatory." (*Northrop Grumman Corp. v. Workers' Comp. Appeals Bd.* (2002) 103 Cal.App.4th 1021, 1035.)

Appellate courts have identified some of the steps that an employer might take to meet this duty. One reasonable step required to ensure a discrimination or harassment-free workplace is a "prompt investigation" of the discrimination claim. (*California Fair Employment Housing Com. v. Gemini Aluminum Corp.* (2004) 122 Cal.App.4th 1004, 1024; *Northrop Grumman Corp. v. Workers' Comp. Appeals Bd.*, *supra*, 103 Cal.App.4th at pp. 1035-1036, disagreed with on unrelated grounds in *Loggins v. Kaiser Permanente Intern.* (2007) 151 Cal.App.4th 1102, 1111-1112.) "Other reasonable steps an employer might take include the establishment and promulgation of antidiscrimination policies and the implementation of effective procedures to handle complaints and grievances regarding discrimination." (*Gemini Aluminum*, at p. 1025.) In *Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, the appellate court found summary judgment was precluded on an employee's section 12940, subdivision (k) claim by evidence that the employer failed to comply with requirements under section 12950, subdivisions (b) and (e) that it display posters on the illegality of sexual harassment in the workplace and

distribute information sheets to employees with specified information concerning their legal remedies, among other things. (*Myers*, at pp. 1425-1426.)

In the context of a claim under subdivision (j)(1) of section 12940, which requires an entity to "take all reasonable steps to prevent harassment from occurring," the Fifth District Court of Appeal explained, "Once an employer is informed of . . . harassment, the employer must take adequate remedial measures. The measures need to include immediate corrective action that is reasonably calculated to (1) end the current harassment and (2) to deter future harassment. [Citation.] The employer's obligation to take prompt corrective action requires (1) that temporary steps be taken to deal with the situation while the employer determines whether the complaint is justified and (2) that permanent remedial steps be implemented by the employer to prevent future harassment once the investigation is completed. [Citation.] An employer has wide discretion in choosing how to minimize contact between the two employees, so long as it acts to stop the harassment. [Citation.] '[T]he reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment.'" (*Bradley v. California Department of Corrections and Rehabilitation* (2008) 158 Cal.App.4th 1612, 1630.)⁵

⁵ For example, it is not enough for a party to "rest on [a] complex investigation process since the statute mandates remedial action designed to *end* the harassment." (*Bradley v. California Department of Corrections and Rehabilitation*, *supra*, 158 Cal.App.4th at p. 1634.) Telling an employee to stop the behavior that generates harassment from others is not sufficiently corrective. (See, e.g., *Turman v. Turning Point of Cent. California, Inc.* (2010) 191 Cal.App.4th 53, 60 [Court of Appeal reversed a jury's special verdict finding that an employer, a halfway house, did not fail to take

V. Analysis

A. Disqualification as to Attorney Leimbach

Petitioners did not address in their writ petitions whether Leimbach's prior relationship with Department was that of attorney and client, or whether it was sufficiently direct and personal to presume her receipt of confidential information under the substantial relationship test. Rather, petitioners presumed application of rule 3-310(E) and argued there was no substantial relationship between Leimbach's previous representation of Department on the one hand, and her representation of petitioners on the other. Specifically, Botsford argued "any information acquired by [Leimbach] during the first representation, even if confidential, is not material to the current representation" Zizzo likewise challenged the materiality of the information acquired by Leimbach.

Following oral argument in the matter, we asked the parties to address whether (1) Leimbach represented Department within the meaning of rule 3-310(E) in her prior employment with Department, (2) whether Leimbach acquired confidential information in her prior representation of Department or as EEO manager such that she owed a duty of fidelity to Department; and (3) whether substantial evidence supports an implied trial court finding that Leimbach's employment with Department constituted prior representation for purposes of applying a conflict of interest analysis. In part, Leimbach

immediate and corrective action where the evidence showed that in response to the female employee's complaints of abuse, her supervisor told her she should issue fewer disciplinary citations to the residents so they would not continue to be mad at her; this did not amount to corrective action to alleviate the abuse].)

maintained she did not represent Department because she was hired not as an attorney but as a manager and did not provide Department with legal advice.

As we have stated, our rule on review is to " 'discard evidence unfavorable to the prevailing party as not having sufficient verity to be accepted by the trier of fact.' "

(*Kennedy v. Eldridge, supra*, 201 Cal.App.4th at p. 1203.) City's evidence demonstrated that Leimbach had personally consulted and interacted with Department representatives, including Long and Department investigators, by virtue of her five-year employment as Department's EEO program manager. In that capacity, she established Department's employment discrimination training and harassment prevention program, and supervised its internal investigations of discrimination, harassment or retaliation complaints.

Leimbach admits having instructed Department employees and management in the "nuances" of EEO law and consulting with police legal advisors handling the defense of claims brought against Department employees when legal issues arose. She was "often" involved in the defense of harassment and discrimination claims against Department employees. Though Leimbach denies giving legal advice, and she was on inactive status with the California bar at the time she worked as Department's EEO manager, Long explained in his declaration that everyone knew Leimbach, who had previously represented Department in employment discrimination and harassment litigation as a deputy city attorney, was an attorney and he always considered his discussions with her to be confidential and protected by the attorney-client privilege. Long stated that virtually all of his efforts to ensure Department took reasonable steps to prevent harassment and discrimination were done with Leimbach's consultation or supervision.

There is no evidence demonstrating or suggesting anyone at Department knew Leimbach was on inactive status. Further, in her opposing declarations Leimbach denied giving legal advice or making legal decisions only with respect to "specific employment cases," leaving open an inference, supported by Leimbach's admissions and Long's declaration, that she gave general legal advice to Long and other Department representatives or legal advisors on what Department must reasonably do (or need not do) to investigate and/or prevent harassment and discrimination.

Though we look to the totality of the circumstances, as well as the parties' conduct, to determine the presence of an implied attorney-client relationship, one of the most important facts is " 'the expectation of the client based on how the situation appears to a reasonable person in the client's position.' " (*Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1732-1733, quoting Friedman, *The Creation of the Attorney-Client Relationship: An Emerging View* (1986) 22 Cal. Western L.Rev. 209, 231; *Strasbourgger Pearson Tulcin Wolff Inc. v. Wiz Technology, Inc.* (1999) 69 Cal.App.4th 1399, 1404.) A client's reasonable belief that the person with whom he is consulting is an attorney will create a relationship sufficient to justify application of the attorney-client privilege, no retainer agreement is required and that person need not be licensed to practice in the jurisdiction. (Evid. Code, § 950 [defining "lawyer" as "a person . . . reasonably believed by the client to be authorized, to practice law"] & Cal. Law Revision Com. com., 29B Pt. 3A (2009 ed.) foll. Evid. Code, § 950, p. 301; see also *Speedee Oil, supra*, 20 Cal.4th at p. 1148 [absence of a fee agreement does not prevent an attorney-client relationship from arising and "a formal retainer agreement is not

required before attorneys acquire fiduciary obligations of loyalty and confidentiality, which begin when attorney-client discussions proceed beyond initial or peripheral contacts"].) Based on Leimbach's own admissions and Long's declaration, the trial courts reasonably concluded that Department established, either directly or by reasonable inference, that Leimbach's management position involved her provision of legal services (including training Department investigators and others in EEO law) if not actual legal advice. " " "When a party seeking legal advice consults an attorney at law and secures that advice, the relation of attorney and client is established *prima facie*." " " (*SpeeDee Oil, supra*, 20 Cal.4th at p. 1148.)⁶

⁶ Even absent a formal attorney-client relationship between Department and Leimbach in connection with her employment as Department's EEO manager, the evidence of Leimbach's managerial responsibilities and duties recited above permitted the trial courts to find that Leimbach's position was such that she was exposed to confidential information (including Department's internal practices and strategies in investigating and handling discrimination and harassment complaints by virtue of training and supervising Department investigators dealing with such complaints as well as formulating Department policy) and Department would reasonably expect she owed it both fiduciary duties and a duty to maintain those confidences. (See *Dino v. Pelayo* (2006) 145 Cal.App.4th 347, 353 [confidential or fiduciary relationship must have existed before a party is entitled to prevail on a motion to disqualify counsel predicated on potential disclosure of confidential information in absence of attorney-client relationship; existence of such a confidential relationship is a question of fact]; *DCH Health Services Corp. v. Waite* (2002) 95 Cal.App.4th 829, 832 [standing to bring disqualification motion "arises from a breach of the duty of confidentiality owed to the complaining party, regardless of whether a lawyer-client relationship existed"].) The evidence amply demonstrates that Leimbach had the sort of relationship with Department in which it is inherent that "confidential information 'would normally have been imparted' " to her. (*Jessen v. Hartford Casualty Inc. Co., supra*, 111 Cal.App.4th at p. 709; see also *H.F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1454.) Though in such a case, mere exposure to an adversary's confidences does not by itself warrant disqualification (*Oaks Management, supra*, 145 Cal.App.4th at p. 467; *Kennedy v. Eldridge, supra*, 201 Cal.App.4th at p. 1205), disqualification is properly considered

Having found sufficient evidence to support implied findings that Leimbach represented Department within the meaning of rule 3-310(E), we further conclude that under a substantial relationship analysis, both trial courts properly found her and Department's relationship was sufficiently direct and personal to permit a *presumption* she acquired confidential information related to the current litigation. Leimbach's employment relationship with Department was not preliminary, peripheral or attenuated. (See *Orange County Water Dist. v. The Arnold Engineering Co.*, *supra*, 196 Cal.App.4th at pp. 1116-1117 [reviewing court implies factual findings that are supported by substantial evidence]; *Med-Trans Corp., Inc. v. City of California City* (2007) 156 Cal.App.4th 655, 665, 668 [peripheral or attenuated relationship between party seeking disqualification and attorney requires application of a modified substantial relationship test to demonstrate, directly or by reasonable inference, attorney's acquisition of confidential information]; *Faughn v. Perez* (2006) 145 Cal.App.4th 592, 603; *Ochoa v.*

where " 'there exists a genuine likelihood that the status or misconduct of the attorney in question will affect the outcome of the proceedings before the court. Thus, disqualification is proper where, as a result of a prior representation . . . , there is a reasonable probability counsel has obtained information the court believes would likely be used advantageously against an adverse party during the course of the litigation.' " (*Oaks Management*, at p. 467; *Kennedy v. Eldridge*, at p. 1205; but see *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft*, *supra*, 69 Cal.App.4th at p. 234 [holding in a nonclient context where the law firm obtained confidential information about party in connection with its representation of party's underwriters, the proper standard in assessing disqualification is not the "loose, 'may appear to be useful' test," but rather the "substantial relationship" test ordinarily applied in successive representations cases].) As we explain below, the type of information with which Leimbach dealt during her tenure as EEO manager is squarely implicated in Zizzo and Botsford's claims of Department's failure to prevent harassment and discrimination. Thus, the trial courts properly ordered disqualification regardless of the existence of a formal attorney-client relationship based on their inherent authority to preserve public trust in the administration of justice and the integrity of the bar. (*SpeeDee Oil*, *supra*, 20 Cal.4th at p. 1145.)

Fordel, supra, 146 Cal.App.4th at pp. 907-908; *In re Marriage of Zimmerman* (1993) 16 Cal.App.4th 556, 564-565.) Substantial evidence supports the lower courts' implied factual findings that Leimbach had a direct and personal relationship with Department.

Faced with a direct professional relationship between Department and Leimbach, we are not to inquire into the specifics of her communications with Department representatives in an effort to show she did or did not obtain confidential information during the course of her relationship. (*Brand, supra*, 124 Cal.App.4th at p. 607; see also *Faughn v. Perez, supra*, 145 Cal.App.4th at p. 602; *Farris v. Fireman's Fund Ins. Co.* (2004) 119 Cal.App.4th 671, 683, fn. 10, 688 [asking a party insurance company to reveal the specific confidential information that its former attorney had in his possession that could be used to the insurer's disadvantage in the successive representation is a prohibited inquiry]; *Jessen v. Hartford Casualty Inc. Co., supra*, 111 Cal.App.4th at pp. 706, 710, 711 [if court determines attorney's former representation was direct and personal, "the only remaining question is whether there is a connection between the two successive representations, a study that may not include an 'inquiry into the actual state of the lawyer's knowledge' acquired during the lawyer's representation of the former client"]; *Global Van Lines, Inc. v. Superior Court* (1983) 144 Cal.App.3d 483, 489.) Rather, as stated above, finding a substantial relationship depends on the strength of the similarities between the legal problem involved in the former and current representations. (*Cobra Solutions*, 38 Cal.4th at p. 846; *Farris*, at p. 679.) When an attorney has a direct relationship with the client in the first representation, "the . . . evaluation of whether the two representations are substantially related centers precisely upon the factual and legal

similarities of the two representations." (*Farris*, at p. 679.) Or, as the California Supreme Court in *Cobra Solutions* put it, we assess whether Leimbach's personal advice or services to Department were on a legal issue or issues that are "closely related to the legal issue [or issues] in the present representation." (*Cobra Solutions*, at p. 847.)

Drawing all reasonable inferences in favor of the orders disqualifying counsel (*Orange County Water Dist. v. The Arnold Engineering Co.*, *supra*, 196 Cal.App.4th at pp. 1116-1117), we conclude there is sufficient relation or overlap between the factual and legal issues involved in Leimbach's prior employment with Department and the present actions challenging City's failure to prevent harassment and discrimination. The present actions involve not only the question of whether Department *followed* its established EEO policies and procedures, but whether Department's established policies and procedures, and the type and nature of corrective actions it took in the face of a discrimination and harassment complaint, were *reasonable and adequate* to ensure a workplace free of discrimination and harassment. The FEHA imposes a duty on Department to *put into place* adequate policies and procedures to stem discrimination and harassment, raising the question of whether the policies and program that Leimbach herself designed, implemented, and supervised were sufficient in that respect. Assistant Police Chief Long explained that Leimbach was instrumental in instituting Department strategies and policies, and supervised Department investigators. Based on this evidence as well as Leimbach's own admissions, it is reasonable to infer that, by the very nature of her prior work as Department's EEO Manager and personal establishment of Department's training and prevention program, Leimbach was exposed to not only

litigation strategies, but Departmental strategies as to what methods were or were not sufficiently adequate; that she knew which methods or procedures were considered but not included in Department's policies and practices; that she participated in Department's internal decisionmaking as to how it would construe and apply its policies; and that she decided whether particular procedures or methods would be sufficient corrective or remedial action following an actual complaint of harassment or discrimination.

In our view, the evidence as to Leimbach's prior relationship with Department is akin to that of attorney Zalma in *Brand, supra*, 124 Cal.App.4th 594, and the former general counsel in *Global Van Lines, Inc. v. Superior Court, supra*, 144 Cal.App.3d 483, in which the appellate court issued a peremptory writ ordering the superior court to disqualify counsel where the attorney, Global Van Lines' prior general counsel for 16 years, had direct or indirect involvement in both stock acquisitions as well as the defendant's standard agency agreement, which was at issue in the present breach of contract litigation. (*Global Van Lines*, at pp. 485-486, 490.) According to the moving defendant's evidence, the general counsel had been the " 'chief legal officer . . . responsible for overseeing all legal matters on behalf of the corporation and its various subsidiaries and related companies' " and had " 'handled, to a major extent' " the defendant's acquisition of the stock of another company alleged by the plaintiff to have been the defendant's alter ego in the case. (*Id.* at p. 486.) The defendant presented evidence that the attorney "was 'aware of [defendant's] policy concerning agency relations and was fully conversant with [defendant's] standard Agency Agreement.' " (*Ibid.*) Under those circumstances, the appellate court found it reasonable to infer the

attorney would have been aware of legal problems arising from defendant's handling of the agency agreement, and that a substantial relationship existed between the two representations warranting disqualification because he had "acquired substantial knowledge of the policies, attitudes and practices of Global's management in respect to its entering into and carrying out its agency agreements." (*Id.* at pp. 488-489.)

Further, the similarity of issues in past and present representations is like that in *Farris v. Fireman's Fund Ins. Co.*, *supra*, 119 Cal.App.4th 671, in which the moving party insurance company established a connection between its internal policies and procedures applied to the insured's claim by showing the attorney was "instrumental in formulating those strategies and philosophies," participated in training the company's senior claims personnel in California about how to handle and decide coverage questions, and provided advice the company relied on to "develop, modify and interpret [its] practices, policies and procedures related to coverage questions and disputes." (*Id.* at pp. 684-685.) Here, petitioners' evidence does not contradict Long's sworn assertion that the "vast majority" of Department's current EEO policies and procedures were in effect during the period covered by Zizzo's complaint.⁷ Both representations have the common issues of whether Department's written policies—the very policies created and

⁷ As for Leimbach's assertion in *Botsford* that it was her "understanding" the organization "totally restructured the handling of EEO claims," we conclude City's foundation and personal knowledge objections have merit, and imply in favor of the trial court's order that it disregarded Leimbach's declaration in that respect. In any event, Leimbach's declaration does not contradict Long's statement about the similarity of the policies and procedures in place at the time of Leimbach's employment as EEO manager and Department's present policies and procedures.

implemented by Leimbach during her tenure as Department's EEO manager—are reasonable and adequate to prevent harassment and discrimination from occurring, whether there were other measures Department could have taken but elected to forego for strategic purposes, and whether the actual steps Department took, including through its own interpretation and application of those written policies, were effective and sufficient to alleviate the misbehavior.

It is of no moment that Leimbach in her prior representation acted as an EEO manager, but seeks presently to act as Zizzo's attorney. For "it is not the services performed by the attorney that determines whether disqualification is required, it is 'the similarities between the legal problem involved in the former representation and the legal problem involved in the current representation.' [Citation.] The test has never been the identity of the specific tasks the attorney was asked to perform in either representation." (*Farris v. Fireman's Fund Ins. Co.*, *supra*, 119 Cal.App.4th at p. 681; see, e.g., *Brand*, *supra*, 124 Cal.App.4th 594 [attorney acted as coverage counsel in first representation and as an expert witness in second representation].)

Petitioners maintain City has not demonstrated "how counsels' knowledge acquired through the former representation of [Department] policies and practices and litigation strategies would provide any insight whatsoever into how the [Department] would react in the current matter." They maintain it is not enough to show mere similarity in legal issues implicated in the past and present representations, citing *Faughn v. Perez*, *supra*, 145 Cal.App.4th 592. *Faughn* involved an attorney, Silberberg, who had represented a hospital in five prior cases involving birth injuries and had been associated

in as trial counsel to a plaintiff in a birth injury case. (*Id.* at pp. 595-596.) The appellate court found the hospital had not met its burden on its disqualification motion: it relied too heavily on inferences about facts that were within its control and that could have been disclosed without relying on confidential information. (*Id.* at pp. 596, 610.) Importantly, the hospital had presented no "direct evidence helpful in determining if the procedures and practices used in the prior matters involving Attorney Silberberg overlap (in whole or in part) with the procedures and practices that [would] be used in plaintiffs' case" or a showing that the information was material to the present litigation. (*Id.* at p. 608.) Here, to the contrary, City presented direct evidence of such overlap via Long's declaration, which the trial court credited, and materiality is established by the nature of petitioners' claims involving Department's harassment prevention practices, strategies and implementation of the very policies and program created by Leimbach. Any further inquiry into the actual confidential information imparted to Leimbach by virtue of her prior representation of or work with Department is prohibited.

B. Disqualification of Attorney Stiffler

As for attorney Stiffler, the sole evidence in the record is that he worked as a deputy city attorney for about 21 years, from 1986 to 2007, and handled employment litigation cases, including harassment and discrimination cases, against Department, and also worked in the criminal division of the city attorney's office in 2011.⁸ These facts do

⁸ Because we conclude Stiffler's cocounsel association with Leimbach warrants his vicarious disqualification, his assertion he never represented Department in a sexual harassment or section 12940 "failure to prevent harassment and discrimination" lawsuit

not necessarily establish that attorney Stiffler had the same direct or personal relationship with Department as did Leimbach, and thus we cannot presume his possession of confidential information. Further, there is no evidence attorney Stiffler was privy to information concerning Department's practices and strategies for investigating or taking steps to prevent discrimination and harassment. It is not enough to show the former and current representations involve the same general subject matter. (*Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal.App.4th 689, 711.)

City does not, however, limit its ground for disqualification on Stiffler's presumed possession of confidential information. It argues Stiffler is vicariously disqualified due to his association with Leimbach, and that Leimbach's conflict is therefore imputed to Stiffler as if he were "of counsel." For this proposition, City relies on *Pound v. DeMera DeMera Cameron* (2005) 135 Cal.App.4th 70 and *Klein v. Superior Court* (1998) 198 Cal.App.3d 894.

City's vicarious disqualification argument has merit. As the California Supreme Court has explained, vicarious disqualification rules are a product of decisional law. (*Cobra Solutions, supra*, 38 Cal.4th at p. 847.) In *Pound*, the court applied the rules to attorneys who are not members of the same law firm but associate together as counsel to represent the same party when one of the associated attorneys previously represented an adverse party in a substantially related matter. *Pound* involved a corporate defendant's attorney who had agreed to search for personal legal counsel on behalf of two individual

does not require reversal of the trial court's disqualification order. We observe that City's evidence, which the trial court credited, does not show that the two cases in which Stiffler was identified as counsel contained a claim under section 12940, subdivisions (j) or (k).

defendants, and consulted with another attorney, Peter Bradley, regarding issues that would eventually give rise to the underlying lawsuit. (*Pound v. DeMera DeMera Cameron, supra*, 135 Cal.App.4th at p. 74.) Three years later, attorney Andrew Jones filed the underlying lawsuit on the plaintiffs' behalf and associated Bradley as cocounsel. (*Id.* at pp. 73-74.) The defendants moved to disqualify both Bradley and Jones based on Bradley's prior consultation with the defendants' counsel, and in connection with that motion, Jones denied receiving any confidential information from Bradley regarding the defendants. (*Id.* at pp. 74-75.) The trial court disqualified Bradley because of the substantial relationship between his consultation with defendants' counsel and his joint representation of the plaintiffs, but refused to disqualify Jones. (*Id.* at pp. 73-75.)

The appellate court in *Pound* affirmed Bradley's disqualification, but reversed the decision not to disqualify Jones, holding that once the trial court had determined Bradley received confidential information concerning defendants, Jones's disqualification was necessarily required. (*Pound v. DeMera DeMera Cameron, supra*, 135 Cal.App.4th at pp. 73, 76-77.) It reasoned there was "no logical or substantive manner to distinguish" between attorneys who work together in a firm and independent attorneys who associate together to jointly represent the same client in a single matter. (*Pound*, at p. 77.) The court explained, "[T]he need to maintain client confidences requires disqualification of a firm when one of the attorneys in the firm has confidential information of the adverse party. The need to maintain client confidences, as well as our obligation to maintain public confidence in the legal profession and the judiciary, would be defeated if we permitted Jones's continued representation of plaintiffs after his having hired Bradley to

assist in a case where Bradley previously represented defendants and, in the course of this representation, obtained confidential information. The distinction between hiring Bradley as an associate or partner, on the one hand, and associating him as counsel, on the other hand, does not change the need to protect defendants' confidences. The only effective method to protect defendants' confidences from the possibility of inadvertent disclosure is also to disqualify Jones." (*Id.* at p. 78.) The Court of Appeal in *Pound* disqualified Jones even though there was no evidence his cocounsel Bradley shared with him confidential information regarding the defendants. (*Id.* at p. 73.)

In this case, allowing cocounsel Stiffler to maintain his relationship with petitioners would defeat the purpose of disqualifying Leimbach from representing petitioners in their underlying actions, that is, protecting Department's confidential information from disclosure by eliminating the risk that Stiffler would inadvertently or intentionally disclose the information.⁹ The purpose of any order disqualifying an attorney in a successive representation case is to remove the attorney from a "situation where he or she *could* breach the duty of confidentiality to the former client." (*H.F. Ahmanson & Co. v. Salomon Brothers, Inc., supra*, 229 Cal.App.3d at p. 1452, italics

⁹ In the private law firm context, there are conflicting appellate court decisions on whether a firm may use an ethical wall to screen the attorney possessing the former client's information and thereby prevent vicarious disqualification. (See *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776, 799-800.) Acknowledged the open question, *Kirk* held the presumption of vicarious disqualification is rebuttable and can be "refuted by evidence that ethical screening will effectively prevent the sharing of confidences in a particular case." (*Id.* at p. 801.) In this cocounsel context, Stiffler has not attempted to make, nor can he make, any showing of an effective ethical wall between Leimbach and Stiffler if Stiffler continues to represent petitioners in their actions.

added; *Western Continental Operating Co. v. Natural Gas Corp.* (1989) 212 Cal.App.3d 752, 758-759 [purpose behind professional rules prohibiting an attorney from representing interests adverse to a former client is not only to prevent dishonest conduct, but also to avoid putting an honest practitioner in a position where he or she may be forced to choose between conflicting duties or interests].)

DISPOSITION

The petitions for writ of mandate are denied. The stay orders issued by this court on July 24, 2012 and August 22, 2012, are vacated. Real party in interest shall recover costs incurred in these writ proceedings.

O'ROURKE, J.

I CONCUR:

McINTYRE, Acting P. J.

Aaron, J., dissenting:

The majority's conclusion that Carol Leimbach "represented" the San Diego Police Department in her capacity as its equal employment opportunity manager is not supported by the evidence

" ' "Before an attorney may be disqualified from representing a party in litigation because his representation of that party is adverse to the interest of a current or former client, it must first be established that the party seeking the attorney's disqualification was or is 'represented' by the attorney in a manner giving rise to an attorney-client relationship. [Citations.]" ' . . . "The burden is on the party seeking disqualification to establish the attorney-client relationship. [Citation.]' [Citation.]" (*Shen v. Miller* (2012) 212 Cal.App.4th 48, 56 (*Shen*)).

The majority's analysis of the disqualification issue in this case as one of "successive representation" by an attorney, governed by Rules of Professional Conduct, rule 3-310(E),¹ misses the mark because the evidence does not establish that an attorney-client relationship existed between Attorney Carol Leimbach and the San Diego Police Department (Department) while Leimbach was employed by the Department as its equal employment opportunity (EEO) manager.² Rule 3-310(E), which addresses successive representations by an attorney, provides, "A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, *by reason of the representation of the client or former client*, the

¹ All rule references are to the Rules of Professional Conduct.

² It is undisputed that the position of EEO manager does not require a law degree.

member has obtained confidential information material to the employment." (Italics added.) As the majority notes, this rule governs disqualification of an attorney where, *but only where*, the party seeking disqualification "establishes that it was ' 'represented' " ' by that counsel in a manner giving rise to an attorney-client relationship. [Citation.]" (Maj. opn. at p. 13; see *Oaks Management Corporation v. Superior Court* (2006) 145 Cal.App.4th 453, 465 (*Oaks Management*) citing *In re Lee G.* (1991) 1 Cal.App.4th 17, 27 ["[R]ule 3-310(E) controls conflicts of interest and disqualification *only in the context of attorney-client relationships.*" "[R]ule 3-310(E) 'never becomes applicable where the party seeking the attorney's disqualification fails to establish that the such party was or is " 'represented' " by the attorney in a manner giving rise to an attorney-client relationship.' ""

The evidence presented in the trial court on this issue does not support the conclusion that an attorney-client relationship existed between Leimbach and the Department while Leimbach was employed as the Department's EEO manager. The Department's evidence demonstrates that as EEO manager, Leimbach established the Department's employment discrimination training and harassment prevention program, and supervised internal investigations of discrimination, harassment and retaliation complaints. The evidence further shows that in her capacity as EEO manager, Leimbach instructed Department employees concerning EEO law, and consulted with police legal advisors who defended claims brought against Department employees.

In concluding that Leimbach "represented" the Department within the meaning of rule 3-310(E), the majority places great weight on Assistant Police Chief Boyd Long's

relation of attorney and client is established *prima facie*.⁴ [Citation.] (Maj. opn. at p. 25, quoting *People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1148.) The majority observes that in determining whether an attorney-client relationship existed, "one of the most important facts is 'the expectation of the client based on how the situation appears to a reasonable person in the client's position,'" (maj. opn. at p. 24, quoting *Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1733), and notes that "[a] client's reasonable belief that the person with whom he is consulting is an attorney will create a relationship sufficient to justify application of the attorney-client privilege" (Maj. opn. at p. 24.)

Assistant Chief Long's consulting with the Department's EEO manager about internal claims of harassment is not analogous to a potential client "consulting an attorney" for legal advice. The fact that Leimbach, as the Department's EEO manager, happened to have a license to practice law—which was on inactive status the entire time that she was employed by the Department—does not convert the nature of the relationship between Long and Leimbach from that of one-supervisor-to-another⁴ to that of attorney-client. Leimbach was an *employee* of the Department at all relevant times, not its attorney, and during the course of her employment as EEO manager never "represented" the Department as its attorney in any legal matters. Long's asserted subjective belief that Leimbach was "representing" the Department as its attorney in her capacity as the Department's EEO manager is simply not a reasonable one, under the

⁴ As the majority notes, Assistant Chief Long described Leimbach's position as EEO manager as "the functional equivalent of a Commanding Officer."

circumstances, and thus cannot provide a sufficient basis for finding that an implied attorney-client relationship existed. While Long may have reasonably believed that Leimbach was an attorney, that belief is not sufficient to convert their relationship to one of attorney-client.

The court in *Shen* cautioned against an overly simplistic interpretation and application of the principles that govern the formation of an attorney-client relationship. Specifically, the *Shen* court noted that because a motion to disqualify a party's counsel may implicate several important interests, " 'judges must examine these motions carefully to ensure that literalism does not deny the parties substantial justice.' [Citation.]" (*Shen, supra*, 212 Cal.App.4th at p. 55, italics added.) The majority's conclusion that an attorney-client relationship existed between Leimbach and the Department is, in my view, based on precisely the type of literal application against which the *Shen* court warned, and constitutes an unwarranted expansion of the circumstances under which an attorney-client relationship may be found.

The Department has not established that in her capacity as EEO manager, Leimbach obtained confidential information that could be prejudicial to the Department in this litigation

Disqualification of an attorney *may* be proper even where there has been no prior attorney-client relationship. (*Oaks Management, supra*, 145 Cal.App.4th at p. 464.) However, where no attorney-client relationship exists, " '[m]ere exposure to the confidences of an adversary does not, standing alone, warrant disqualification [of an attorney].' " (*Id.* at p. 467, quoting *In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, 589.) Rather, the " 'key factor is the attorney's receipt of confidential

information' " from the party seeking the attorney's disqualification," 'and the risk of using that information to gain an advantage of [*sic*] his adversary.' " (*Oaks Management, supra*, at p. 461.) " [S]ince the purpose of a disqualification order must be prophylactic, not punitive, the significant question is whether there exists *a genuine likelihood that the status or misconduct of the attorney in question will affect the outcome of the proceedings before the court . . .* , [i.e., whether] there is a reasonable probability counsel has obtained information the court believes would likely *be used advantageously against an adverse party during the course of the litigation. . . .* " (*Id.* at p. 467, quoting *Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 308-309 (*Gregori*).)

The party seeking disqualification of an attorney must show actual prejudice, in the form of potential harm to that party. Speculative contentions concerning such harm are insufficient to justify disqualification. (*Oaks Management, supra*, 145 Cal.App.4th at p. 471.) Instead, " "[s]pecific facts must point to a marked danger that the perceived evil . . . will result." " (*Ibid.*, quoting *Gregori, supra*, 207 Cal.App.3d at p. 308.)

Where there has not been a prior representation, cases in which courts have concluded that an attorney must be disqualified have turned on findings of a clear, specific conflict, such as a finding that "the attorney's positions with the bank placed his firm on both sides of the lawsuit" (*Oaks Management, supra*, 145 Cal.App.4th at p. 464, citing *William H. Raley Co. v. Superior Court* (1983) 149 Cal.App.3d 1042, 1044-1045); that the attorney "supplied [the firm] with just the kind of confidential data that it would have furnished a lawyer that it had retained" (*Analytica, Inc. v. NPD Research, Inc.* (7th Cir. 1983) 708 F.2d 1263, 1269); or that the opposing attorney and his firm had

represented the insurance underwriter of the parent corporation of the moving party, a wholly owned subsidiary, and were "deeply involved" in all aspects of the litigation of the moving party's cases (*Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft* (1999) 69 Cal.App.4th 223, 235-236). The Department's contentions concerning Leimbach's possession and potential use in this litigation of relevant confidential information from the Department are, in contrast, stated in the most general and speculative terms. The Department's contentions in this regard are, in essence, merely assertions that Leimbach formulated the Department's anti-discrimination policies, and that those policies remain in effect and might become relevant in the trial of the underlying cases.⁵

Despite the lack of any specific facts concerning what kinds of confidential information Leimbach might possess, the majority asserts that "it is reasonable to *infer* that, by the very nature of her prior work as Department's EEO [m]anager and personal establishment of Department's training and prevention program, Leimbach was exposed to not only litigation strategies, but Departmental strategies as to what methods were or were not sufficiently adequate" (Maj. opn. at pp. 28-29, italics added.) The majority proceeds to conclude that the relationship between Leimbach and the Department was sufficiently direct and personal to permit the *presumption* that Leimbach acquired confidential information related to the current litigation, thus dispensing with

⁵ It is undisputed that the Department's EEO policies are in the public domain.

the need to inquire whether the evidence was sufficient to establish that Leimbach in fact possessed such information.

It is not sufficient to *infer* that Leimbach must have obtained confidential information from the Department in her capacity as its EEO manager, and to disqualify her based on such inferences. As noted, " ' ' '[s]peculative contentions of conflict of interest cannot justify disqualification of counsel." [Citation.]' "; *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 302.) Rather, as the *Oaks Management* court held, " ' '[s]pecific facts must point to a marked danger that the perceived evil . . . will result." ' ' " (*Oaks Management, supra*, 145 Cal.App.4th at p. 471, quoting *Gregori, supra*, 207 Cal.App.3d at p. 308.)

In the absence of an attorney-client relationship, in order to disqualify Attorney Leimbach in the current litigation based on her prior employment as the Department's EEO manager, the Department, as the party seeking disqualification on the ground that Leimbach possesses confidential information that she obtained in her role as the EEO manager, had the burden to present concrete evidence that she possesses such information and that her possession of this information presents a potential harm to the Department *in this litigation*. In my view, in offering only general, conclusory and speculative arguments on this point, the Department has not carried its burden.

I DISSENT:

AARON, J.