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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CITY OF PLACENTIA,

Plaintiff,

v.

WOODRUFF, SPRADLIN & SMART  
et al.,

Defendants and Respondents;

KFM ENGINEERING, INC.,

Movant and Respondent;

RICK AUGUSTINI,

Objector and Appellant.

G046322

(Super. Ct. No. 30-2010-00367949)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Nancy  
Wieben Stock, Judge. Affirmed.

Law Office of Rick Augustini and Rick Augustini for Objector and Appellant.

No appearance for Plaintiff.

Nemecek & Cole, Jonathan B. Cole and Jon D. Robinson for Defendants and Respondents Woodruff, Spradlin & Smart and Thomas F. Nixon.

Bremer, Whyte, Brown & O'Meara, Keith G. Bremer, Jeremy S. Johnson and Michael H. Shen for Movant and Respondent.

\* \* \*

Objector and appellant Rick Augustini appeals from an order disqualifying him from representing plaintiff City of Placentia (City) in this action based on an order disqualifying Augustini from representing the City in a related action. The trial court concluded that allowing Augustini to remain the City's attorney would defeat the purpose of disqualifying him in the related action because the two lawsuits were consolidated for discovery and case management purposes. We affirm the trial court's decision extending Augustini's disqualification to this case because the consolidation of the two actions effectively requires Augustini to work as cocounsel with the attorney who replaced him in the related action.

## I

### FACTS AND PROCEDURAL HISTORY

#### A. *The City's Railroad "Trenching" Project and Dispute with CalTrans*

In 2000, the City formed a joint powers authority to lower or "trench" certain railroad lines running through the City. That same year, the City hired defendants and respondents Woodruff, Spradlin & Smart and Thomas F. Nixon (collectively, Woodruff) to serve as its city attorney. In 2002, the City hired movant and respondent KFM Engineering, Inc. (KFM) for "on-call engineering services" relating to the railroad trenching project.

The City received federal and state funds for the project through the California Department of Transportation (CalTrans). CalTrans began an audit of the project in 2005 and later disallowed numerous charges based on alleged conflicts of interest and improper contract procurement by KFM and other consultants. In February 2010, after lengthy negotiations with CalTrans, the City agreed to repay approximately \$5.5 million it received for the trenching project.

*B. The Malpractice and Consultant Actions*

The City hired Augustini to recover the funds it paid to CalTrans from the parties whose conduct caused CalTrans to demand reimbursement. In April 2010, Augustini filed this action on the City's behalf alleging Woodruff committed legal malpractice by failing to identify, prevent, and remedy the conflicts of interest and other misconduct that required the City to reimburse CalTrans (the Malpractice Action).<sup>1</sup>

In February 2011, Augustini filed a separate action on the City's behalf alleging claims for express and equitable indemnity against KFM and the other consultants identified in the CalTrans audit (the Consultant Action). In the Consultant Action, Augustini named Rick Kreuzer, KFM's chief executive officer, as a defendant based on allegations that Kreuzer was KFM's alter ego.

On the City's behalf, Augustini moved to consolidate the Malpractice and Consultant Actions "for all purposes, including discovery and trial." Augustini argued the two actions "involve[d] many of the same issues, arguments, documents, experts and percipient witnesses" and failure to consolidate them would create "a substantial risk of inconsistent verdicts." The trial court granted the motion in part and consolidated the actions for discovery and case management purposes only.

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<sup>1</sup> The City also alleged Woodruff overbilled the City for its legal services and Woodruff cross-complained to collect on unpaid bills from the City.

C. *The Orders Disqualifying Augustini in the Malpractice and Consultant Actions*

In August 2011, KFM moved to disqualify Augustini as the City's counsel in the Consultant Action because he previously represented KFM in negotiating and documenting a buyout of a KFM shareholder, officer, and director. According to KFM, Augustini acquired confidential information during that representation material to the City's alter ego claim and his disqualification was therefore required to prevent him from inadvertently disclosing or otherwise using the information.

The trial court agreed and disqualified Augustini from representing the City against KFM and all other defendants in the Consultant Action. In doing so, the court also explained the Consultant Action and "related" Malpractice Action "are both in the early pleading stages. It may be much more expedient and efficient, and appropriate to have Mr. Augustini disqualified as to both Actions. That issue is not presently before the Court. Defendant KFM to give Notice to parties in both related matters, so that the issue can be discussed and any additional orders proposed, if appropriate."

Based on the trial court's suggestion, KFM filed a motion to disqualify Augustini from representing the City in the Malpractice Action. KFM argued the court should disqualify Augustini to eliminate the risk he might inadvertently or intentionally disclose confidential information during discovery proceedings the court had consolidated with the Consultant Action. According to KFM, Augustini essentially would remain in the same conflicted position that led to his disqualification in the Consultant Action. His continued representation of the City in the Malpractice Action necessarily would require Augustini to work closely with the City's attorney in the Consultant Action and therefore continue to expose KFM to the risk he might disclose its confidential information.

Woodruff filed a joinder in KFM's motion, incorporating KFM's arguments and also asserting the Malpractice Action's "case-within-a-case" component required Woodruff to step into KFM's shoes on some issues and therefore Woodruff

would suffer prejudice in the same manner as KFM if Augustini continued to represent the City.

Augustini opposed the motion, arguing KFM was not a party to the Malpractice Action and the alter ego issue that led to his disqualification in the Consultant Action was not an issue in the Malpractice Action. In Augustini's view, the alter ego issue was a minor one and the trial court could avoid any potential problems by (1) ordering him not to discuss the issue with the City's new counsel in the Consultant Action and (2) excluding him from discovery and other proceedings related to the issue in the consolidated actions. Augustini emphasized that the trial court refused to consolidate the two actions for trial.

In November 2011, the trial court granted KFM's motion and ordered Augustini disqualified from representing the City in the Malpractice Action. The court explained, "The Consultant and Malpractice Actions are inextricably intertwined. As Plaintiff itself has asserted, these two Cases are related, involve the same facts, parties and issues. The case within a case scenario implicates KFM and Kr[eu]zer in both Actions as do the pleadings. [The City] itself even urged consolidation for 'all purposes.' The Actions are, in fact, consolidated for discovery purposes and case management. All of the Parties and their counsel are therefore required and expected to identify common issues, use common discovery, etc., necessarily requiring an overlap in the two Actions. . . . The Deposition of Kr[eu]zer . . . will need to be taken in regards to this Action and will be taken in the consolidated discovery in which Augustini will necessarily have to participate. [¶] The participation of Mr. Augustini in all of this and his conflicted status will have a continuing effect on these judicial processes. [¶] Mr. Augustini cannot adequately represent the City when he is restricted by some ethical limitation. The notion that Mr. Augustini would be required to dismiss himself from a deposition for some reason requires disqualification. Who is going to decide what is and is not proper for him to view, ask, or advise?"

D. *Augustini's Appeal in the Consultant Action*

Augustini separately appealed the trial court's order disqualifying him from representing the City against KFM and all other defendants in the Consultant Action. Our decision in *City of Placentia v. KFM Engineering, Inc.* (Aug. 2, 2012, G046098) (*Augustini I*) affirmed that order in full based on the relationship between Augustini's representation of KFM in negotiating and documenting the buyout of a KFM shareholder, officer, and director in 1999, and the alter ego claim Augustini asserted on the City's behalf in the Consultant Action.

*Augustini I* explained that client confidentiality is the core value at issue when an attorney successively represents two clients with potentially adverse interests, and the substantial relationship test governs on the former client's motion to disqualify the attorney from the current representation. (*Augustini I, supra*, G046098 at pp. 7-9, 17.) Under that test, if the former client establishes a substantial relationship between the two representations, the court conclusively presumes the attorney received confidential information from the former client material to the current representation and the attorney's disqualification is therefore mandatory. (*Id.* at p. 10.)

The former client is not required to prove the attorney actually received confidential information during the prior representation and, in fact, the substantial relationship standard prohibits inquiry into the actual state of the attorney's knowledge acquired during the prior representation. (*Augustini I, supra*, G046098 at pp. 11-12.) “[T]he substantial relationship test is ‘intended to protect the confidences of former clients when an attorney has been in a position to learn them.’” [Citation.]’ [Citation.]” (*Id.* at p. 9.) “[I]t proscribes the subsequent representation solely on the ground that subsequent representation, because of its substantial relationship to the former, places the attorney in a situation where he or she could breach the duty of confidentiality to the former client.’ [Citation.]” (*Id.* at p. 12.)

We concluded a substantial relationship existed between Augustini's representations of KFM regarding the buyout and the City on its alter ego claim because both representations involved issues regarding KFM's ownership, finances, structure, and operation. (*Augustini I, supra*, G046098 at pp. 12-15.) Our decision affirmed the trial court's ruling disqualifying Augustini from representing the City against KFM and all other defendants because allowing Augustini to remain as the City's counsel against the other defendants would require him to work with the new attorney the City hired to prosecute its claims against KFM. We explained Augustini's relationship with the City's new attorney would defeat the purpose of disqualifying him from representing the City against KFM because he would remain in a position to inadvertently disclose KFM's confidences. (*Id.* at pp. 21-26.)

E. *Augustini's Current Appeal*

Augustini separately appealed the trial court's order disqualifying him in the Malpractice Action, but the City did not. (*A.I. Credit Corp., Inc. v. Aguilar & Sebastinelli* (2003) 113 Cal.App.4th 1072, 1077 ["Disqualified attorneys themselves have standing to challenge orders disqualifying them"].) Instead, the City retained replacement counsel and continues to litigate both the Malpractice and Consultant Actions in the trial court.<sup>2</sup>

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<sup>2</sup> KFM moved to dismiss this appeal on mootness grounds. KFM contends the appeal is moot because (1) the City retained new counsel to represent it after the trial court disqualified Augustini and (2) the City's Administrator testified in deposition that the City did not intend to rehire Augustini if we overturn the disqualification order. The City's administrator, however, submitted a declaration in opposition to the motion stating the authority to rehire Augustini lies with the City Council alone; he may only make recommendations to the council. The City Administrator also explained that his deposition testimony meant the City would not rehire Augustini to replace its current counsel, but it would consider rehiring him to work with its current counsel. KFM therefore failed to establish this appeal is moot and we deny the motion to dismiss.

## II

### DISCUSSION

#### A. *Issue on Appeal*

The propriety of the trial court’s ruling disqualifying Augustini from representing the City against KFM and the other defendants in the Consultant Action is not at issue in this appeal. We affirmed that ruling in *Augustini I* and Augustini may not separately challenge it in this appeal. Here, the only issue presented is whether the trial court erred by extending its prior disqualification order to disqualify Augustini from representing the City in the Malpractice Action based on the commonalities between the two actions and the trial court’s order consolidating the actions for discovery and case management purposes.

#### B. *Standard of Review*

“We review a trial court’s decision on a disqualification motion for abuse of discretion. [Citation.] “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. [Citations.]’ [Citation.]” (*Orange County Water Dist. v. The Arnold Engineering Co.* (2011) 196 Cal.App.4th 1110, 1116-1117 (*OC Water*).)

“We will reverse the trial court’s ruling only where there is no reasonable basis for its action. [Citation.] However, we must also ensure that the trial court has made a reasoned judgment that complies with the applicable legal standard. [Citation.]’ [Citation.] ‘Thus, where there are no material disputed factual issues, the appellate court reviews the trial court’s determination as a question of law. [Citation.] In any event, a

disqualification motion involves concerns that justify careful review of the trial court's exercise of discretion. [Citation.]' [Citation.]" (*OC Water, supra*, 196 Cal.App.4th at p. 1117.)

C. *The Trial Court Properly Extended Augustini's Disqualification to the Malpractice Action*

The trial court disqualified Augustini from representing the City in the Malpractice Action because it found that action "inextricable intertwined" with the Consultant Action. The trial court reasoned that unless it extended the disqualification to the Malpractice Action, the consolidation of the two cases would allow Augustini to continue participating in discovery and other pretrial proceedings related to the Consultant Action despite his disqualification in that case. We agree and therefore affirm the order disqualifying Augustini in the Malpractice Action.

"It is now firmly established that where the attorney is disqualified from representation due to an ethical conflict, the disqualification extends to the entire firm [citations] at least where an effective ethical screen has not been established [citation]." (*Adams v. Aerojet-General Corp.* (2001) 86 Cal.App.4th 1324, 1333 (*Adams*); *Farris v. Fireman's Fund Ins. Co.* (2004) 119 Cal.App.4th 671, 689, fn. 17.) "Normally, an attorney's conflict is imputed to the law firm as a whole on the rationale 'that attorneys, working together and practicing law in a professional association, share each other's, and their clients', confidential information.' [Citation.]" (*City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 847-848 (*Cobra Solutions*); *People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1153-1157 (*Speedee*); *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283 (*Flatt*)).

"Therefore, once the attorney is shown to have had probable access to former client confidences, the court will impute such knowledge to the entire firm, prohibiting all

members of the firm from participating in the case.”<sup>3</sup> (*Adams*, at p. 1333; *Cobra Solutions*, at pp. 847-848; *SpeeDee*, at p. 1149; *Flatt*, at p. 283.)

This vicarious disqualification rule extends to attorneys who are not part of the same 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 v. DeMera DeMera Cameron* (2005) 135 Cal.App.4th 70, 78 (*Pound*)). In *Pound*, counsel for some of the defendants consulted with attorney Bradley regarding the issues that would eventually give rise to the underlying lawsuit. A few years later, attorney Jones filed the underlying lawsuit on the plaintiffs’ behalf and then 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. The trial court disqualified Bradley because of the substantial relationship between his consultation with the defendants’ counsel and his joint representation of the plaintiffs, but

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<sup>3</sup> In *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776 (*Kirk*), the Second District recently examined whether this vicarious disqualification rule is an absolute rule mandating disqualification of the entire firm in all cases or a rebuttable presumption the firm may overcome by showing it erected an ethical wall to screen the attorney possessing a former client’s confidential information from any involvement with, or any communication concerning, the representation of interests adverse to the former client. (*Id.* at p. 791.) The *Kirk* court explained the availability of an ethical wall to prevent vicarious firm disqualification in the private law firm context is an open question in California because the our Supreme Court has not squarely decided the issue and there are Court of Appeal decisions on both sides. (*Id.* at pp. 799-800.) The *Kirk* court concluded, “We do not doubt that vicarious disqualification is the *general* rule, and that we should presume knowledge is imputed to all members of a tainted attorney’s law firm. However, we conclude that, in the proper circumstances, the presumption is a rebuttable one, which can be refuted by evidence that ethical screening will effectively prevent the sharing of confidences in a particular case.” (*Id.* at p. 801, original italics.) We need not decide whether the presumption leading to vicarious law firm disqualification is absolute or rebuttable because the existence of any presumption is sufficient to decide this case. As explained below, Augustini did not and cannot establish an effective ethical wall between the new attorney representing the City in the Consultant Action and Augustini if he continues to represent the City in the Malpractice Action.

the trial court refused to disqualify Jones because Bradley did not provide Jones with confidential information regarding the defendants. (*Id.* at pp. 73-75.)

The *Pound* court affirmed Bradley's disqualification, but reversed the decision not to disqualify Jones. The Court of Appeal concluded 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, supra*, 135 Cal.App.4th at p. 77.) The *Pound* 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.) Based on the cocounsel relationship between Jones and Bradley, the *Pound* court disqualified Jones even though Bradley did not share with Jones any confidential information regarding the defendants. (*Id.* at p. 73.)

In *Augustini I*, we relied on *Pound* to affirm the trial court's decision to disqualify Augustini from representing the City against not only KFM but also all other defendants in the Consultant Action. We explained the substantial relationship between Augustini's representation of KFM in the buyout matter and his representation of the City on its alter ego claim gave rise to a conclusive presumption that Augustini received confidential information from KFM material to the alter ego claim. (*Augustini I, supra*, G046098 at pp. 10, 12-15.) Augustini's presumed receipt of confidential information

required the trial court to disqualify him from representing the City against KFM and all other defendants because allowing Augustini to remain the City's attorney on any claims would necessarily place him in a cocounsel relationship with the attorney representing the City against KFM. (*Id.* at p. 24.) The *Pound* decision, however, prohibits Augustini from serving as cocounsel with the attorney hired to replace him. Dividing the claims on which Augustini and the new attorney represented the City did not change the result because the attorneys still represented the same client in the same case and would necessarily have to coordinate on strategy, discovery, trial preparation, and trial. (*Augustini I*, at p. 24.)

Here, Augustini would be in the same, prohibited cocounsel position if he remained as the City's counsel in the Malpractice Action. Although Augustini filed the two cases as separate lawsuits, the trial court consolidated the Malpractice and Consultant Actions for discovery and case management purposes based on Augustini's representation that the actions "involve[d] many of the same issues, arguments, documents, experts and percipient witnesses." The practical effect of the consolidation meant that the City's counsel in the Malpractice Action and its counsel in the Consultant Action would work together during discovery and other pretrial proceedings because they would seek to discover much of the same factual information so they could support many of the same liability theories and defenses. They will necessarily share information to avoid repeating the same discovery and other efforts in the two actions. For all intents and purposes, they will be in the same prohibited cocounsel relationship as the attorneys in *Pound*. (See *Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp.* (1995) 36 Cal.App.4th 1832, 1844-1845 [court must look to consolidation's "practical effect" in deciding whether to disqualify a firm that represents the defendants in one action and its former client is the plaintiff in another action consolidated for trial purposes].)

Moreover, allowing that cocounsel relationship would defeat the purpose of disqualifying Augustini from representing the City in the Consultant Action, that is,

protecting KFM's confidential information from disclosure by eliminating the risk Augustini would inadvertently (or intentionally) disclose the information. (*Augustini I, supra*, G046098 at pp. 24-26.) Indeed, 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.* (1991) 229 Cal.App.3d 1445, 1452, italics added (*Ahmanson*); *Kirk, supra*, 183 Cal.App.4th at p. 815 ["The purpose of a disqualification order is prophylactic, not punitive"]; *Western Continental Operating Co. v. Natural Gas Corp.* (1989) 212 Cal.App.3d 752, 758-759 (*Western Continental*) [purpose behind Rule of Professional Conduct prohibiting an attorney from representing interests adverse to a former client "is to prevent dishonest conduct as well as to avoid placing the honest practitioner in a position where he may be forced to choose between conflicting duties or interests"].)

If Augustini remained the City's attorney in the Malpractice Action, the conflict of interest that required his disqualification in the Consolidated Action also would remain. Augustini still would have the ongoing duty to preserve KFM's confidences at every peril to himself (see *SpeeDee, supra*, 20 Cal.4th at p. 1146) and the conflicting duty to zealously advocate on the City's behalf (see *Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP* (2010) 184 Cal.App.4th 313, 359). Disqualifying Augustini only in the Consultant Action fails to completely eliminate that conflict because he would remain one of the City's attorneys in the consolidated actions where the City is pursuing the alter ego claim. Similarly, the trial court's refusal to consolidate the Malpractice and Consultant Actions for trial fails to eliminate the conflict because the consolidation of discovery and other pretrial proceedings provide ample opportunity for Augustini to inadvertently disclose KFM's confidential information to his cocounsel.

Accordingly, we conclude the trial court properly disqualified Augustini from representing the City in the Malpractice Action.

D. *Augustini's Challenges to the Court's Ruling*

Augustini asserts the trial court erred for several reasons when it disqualified him in the Malpractice Action. His arguments, however, rest on a misunderstanding of the governing legal standards and the basis for his disqualification.

First, he contends his prior representation of KFM cannot provide a basis for disqualifying him because KFM is not a party to the Malpractice Action and the alter ego issue requiring his disqualification in the Consultant Action is not an issue in the Malpractice Action. The trial court, however, did not disqualify Augustini in the Malpractice Action based on a relationship between his prior representation of KFM and the issues in the Malpractice Action. Rather, the trial court disqualified Augustini based on the relationship he would necessarily have as the City's attorney in the Malpractice Action with the City's attorney in the Consultant Action. The relationship between Augustini's representation of KFM in the buyout matter and his representation of the City on the alter ego claim required his disqualification in the Consultant Action. The cocounsel relationship he would have with the attorney representing the City on the alter ego claim is what required his disqualification in the Malpractice Action, as explained above.

Second, Augustini contends the trial court applied an erroneous legal standard to disqualify him because its decision relied "solely" on the "appearance of impropriety" arising from his prior representation of KFM and his current representation of the City. According to Augustini, California has rejected the "appearance of impropriety" as a permissible ground for disqualifying an attorney. This argument misconstrues the basis for the trial court's ruling.

As explained above, the trial court disqualified Augustini because allowing him to remain the City's attorney in the Malpractice Action created the risk he could potentially breach the duty of confidentiality he owed KFM. Consequently, the governing conflict of interest rules required his disqualification to protect KFM's

confidences from the possibility of inadvertent disclosure. (See *Pound, supra*, 135 Cal.App.4th at p. 78.) The trial court's minute order made clear the court based its ruling on the Malpractice and Consultant Actions being "inextricably intertwined" and the combined discovery and pretrial proceedings resulting from the order consolidating the two actions.

Augustini bases this argument on comments the trial court made during the hearing on KFM's motion to disqualify. Specifically, Augustini relies on comments expressing concern for how his former client would "feel" if Augustini remained involved in the consolidated proceedings and explaining, "It's all about the appearances and maintaining the integrity of the system. That's really one of the fundamental concerns that needs to be considered here." Augustini takes these comments out of context.

The court made the comments in response to Augustini's argument that the court could not disqualify him because the alter ego issue that gave rise to his disqualification in the Consultant Action was not an issue in the Malpractice Action. The court's comments, however, were not a statement of its ruling and they did not provide the "sole[]" basis for the court's ruling as Augustini contends. Moreover, "a judge's comments in oral argument may never be used to impeach the final order, however valuable to illustrate the court's theory they might be under some circumstances." (*Jespersen v. Zubiata-Beauchamp* (2003) 114 Cal.App.4th 624, 633; see also *Rental Equipment, Inc. v. McDaniel Builders, Inc.* (2001) 91 Cal.App.4th 445, 450 [oral comments a trial court makes that are not incorporated into its final ruling lack "legal significance"].)

Third, Augustini contends the trial court's consolidation of the Malpractice and Consultant Actions does not require his disqualification because (1) he has an ethical duty not to disclose any confidential information regarding KFM to the attorney representing the City against KFM and (2) the trial court could order Augustini not to

disclose any confidential information and not to participate in any discovery or other pretrial proceedings relating to the alter ego issue. This contention fails to recognize the purpose behind the controlling disqualification rules and how those rules operate.

As explained above, the purpose of Augustini's disqualification was to protect KFM's confidential information from inadvertent (or intentional) disclosure by removing Augustini from a situation where he could potentially disclose the information. (*Ahmanson, supra*, 229 Cal.App.3d at p. 1452; *Kirk, supra*, 183 Cal.App.4th at p. 815; *Western Continental, supra*, 212 Cal.App.3d at pp. 758-759.) Allowing Augustini to remain the City's attorney in the Malpractice Action would risk the potential disclosure of KFM's confidential information. His ethical duty to maintain KFM's confidence does not eliminate the risk of inadvertent or intentional disclosure. The attorneys in *Pound* had the same ethical duties and they were disqualified even though there had been no disclosure. (*Pound, supra*, 135 Cal.App.4th at p. 73.) Similarly, an order directing Augustini not to disclose the information and not to participate in certain proceedings still leaves him in the position of potentially disclosing KFM's confidential information while serving as cocounsel with the attorney representing the City against KFM.

In limited circumstances, an ethical wall or screen may be employed to allow a *firm* to represent interests adverse to one of its attorneys' former clients if the attorney possessing the former client's confidential information is isolated from the firm's other attorneys and employees. To be effective, an ethical wall must screen the attorney possessing the former client's confidential information from having “*any* involvement with the litigation, or *any* communication with attorneys or [e]mployees concerning the litigation, that would support a reasonable inference that the information has been used or disclosed.” [Fn. omitted.] [Citation.]” (*Kirk, supra*, 183 Cal.App.4th at p. 810, italics added.) The ethical screen must be imposed when the conflict arises. “It is not sufficient to wait until the trial court imposes screening measures as part of its order on the disqualification motion.” (*Id.* at p. 810.)

An ethical wall does not allow the attorney possessing the former client's confidential information to have any involvement in representing interests adverse to the former client, but rather completely screens the attorney from the firm's representation of those adverse interests. Accordingly, we reject Augustini's suggestion that he may continue representing the City in the Malpractice Action as long as he excludes himself from any discovery or other pretrial proceedings related to the alter ego issue and does not share KFM's confidential information with the City's other attorney.

Fourth, Augustini argues he should not have been disqualified because he did not receive confidential information from KFM. In *Augustini I*, however, we explained the substantial relationship between his representations of KFM and the City required his disqualification in the Consultant Action and KFM did not have to prove that he actually received confidential information. (*Augustini I, supra*, G046098 at pp. 10, 12.) Augustini may not revisit that issue on this appeal. The only issue here is whether his disqualification in the Consultant Action also required his disqualification in the Malpractice Action.

Finally, Augustini contends he should not have been disqualified because his disqualification significantly prejudiced the City. Any prejudice to the City, however, fails to provide a basis for reversing the trial court's ruling. We recognize courts must be cognizant of the financial burden disqualification can impose on the client forced to hire new counsel and the possibility that disqualification is sought for improper tactical reasons. (*SpeeDee, supra*, 20 Cal.4th at p. 1145.) Nonetheless, "[t]he court does not engage in a 'balancing of equities' between the former and current clients. The rights and interests of the former client will prevail."<sup>4</sup> (*Ahmanson, supra*, 229 Cal.App.3d at

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<sup>4</sup> Augustini does not contend KFM unreasonably delayed its motions to disqualify him as the City's attorney. (See, e.g., *Liberty National Enterprises, L.P. v. Chicago Title Ins. Co.* (2011) 194 Cal.App.4th 839, 844-845 [former client may waive right to disqualify attorney by delaying motion to disqualify for an extreme or unreasonable amount of time].)

p. 1451; *SpeeDee, supra*, 20 Cal.4th at p. 1146 [“the need to protect the first client’s confidential information requires that the attorney be disqualified from the second representation”].) Accordingly, KFM’s right to have Augustini protect its confidential information prevails over the City’s right to counsel of its choice. (*SpeeDee, supra*, 20 Cal.4th at pp. 1145-1146; *Flatt, supra*, 9 Cal.4th at p. 283.)

### III

#### DISPOSITION

The order is affirmed. KFM and Woodruff shall recover their costs on appeal.

ARONSON, J.

WE CONCUR:

O’LEARY, P. J.

RYLAARSDAM, J.