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S058639

IN THE

SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent,

vs.

SPEEDEE OIL CHANGE SYSTEMS, INC.,

Appellant,

AND COMPANION CASE.

After a Decision By the Court of Appeal
Second Appellate District, Division Five
Case No. B105073 (consolidated with B100743)

OPENING BRIEF ON THE MERITS (FOR MOBIL OIL CORPORATION)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Page

Rules

Miscellaneous

Page

Miscellaneous (cont.)

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ISSUE PRESENTED

Should the rule requiring vicarious disqualification of a law firm when an associate or partner is disqualified because of a representational conflict apply equally to "of counsel" attorneys?

INTRODUCTION

This appeal is from an order denying a motion to disqualify the law firm of Shapiro, Rosenfeld & Close from further participation in this action.

Eliot G. Disner was "of counsel" with the Shapiro firm. Petitioner Mobil Oil Corporation consulted with Disner in the present litigation. Neither was aware that a group of Mobil's adversaries, the Southern California Intervenors, had already retained the Shapiro firm in the very same case.

When Mobil learned of the conflict of interest, Mobil immediately moved to disqualify the Shapiro firm from representing the Southern California Intervenors. The judge denied the motion, stating there was "no basis on which to presume" that Disner had imparted confidential information concerning the case to other attorneys in the Shapiro firm. Mobil appealed, and the Court of Appeal affirmed, holding the motion raised a factual question, which the trial judge resolved against Mobil, as to whether confidential information was shared within the firm.

This was error. If attorneys affiliated with a law firm have simultaneously represented opposing parties in the same case, it is *irrebuttably presumed* they have shared confidential information, and the entire law firm is automatically disqualified. This rule should apply equally when one of the offending attorneys is of counsel to the firm.

The of counsel designation, once reserved for semi-retired attorneys, has in recent years proliferated to the point where it is now used to describe many different types of practice arrangements between lawyers and their firms. All of counsel relationships, however, share certain characteristics. The Board of Governors of the State Bar of California defines the of counsel relationship as "close, personal, continuous, and

regular." (Rules Prof. Conduct, rule 1-400, standard no. 8 [Deering's Cal. Codes Ann. Rules (State Bar) (1988 ed., 1997 cum. supp.) p. 19] (hereafter Rule 1-400, standard no. 8).)

In *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 282-288, this court reaffirmed the rule requiring vicarious disqualification of an entire law firm when the firm's attorneys have simultaneously represented opposing parties in the same litigation. The *Flatt* opinion did not, however, address the issue whether that rule applies when one of the attorneys is *of counsel* to the firm. That question is one of first impression in the California courts, but has been addressed by many other authorities, including the State Bar of California, other state and local bar associations, the American Bar Association (ABA), federal case law, and the leading treatise on of counsel relationships. Each authority concludes that an of counsel attorney is a part of the firm for purposes of vicarious disqualification.

This court should fill the gap left by *Flatt* and bring California in line with every authority that has considered attorney disqualification within the context of the of counsel relationship. The Shapiro firm simultaneously represented opposing litigants in this case and should therefore be disqualified from representing the Southern California Intervenors.

STATEMENT OF THE CASE

A. The Underlying Lawsuit.

The People of the State of California sued SpeeDee Oil Change Systems, Inc., for alleged violations of the Franchise Investment Law (Corp. Code, §§ 31000 et seq.). A group of 45 SpeeDee franchisees, the

Southern California Intervenors, intervened in the lawsuit, represented by attorney Geordan Goebel, and brought Mobil into the action as a defendant in intervention. (Appellant's Appendix p. 153 (hereafter AA).)

B. Mobil's Consultation With Disner, Who Was Of Counsel To Shapiro, Rosenfeld & Close.

Mobil's counsel, the law firm of Cohon & Gardner, decided to seek the assistance of a California antitrust specialist. A member of the firm, Jeffrey M. Cohon, was referred to attorney Eliot G. Disner, of the law firm of Shapiro, Rosenfeld & Close. (AA pp. 73, 119, 121.)

Disner and the Shapiro firm held Disner out as "of counsel" to the firm. He was identified as of counsel on the firm's letterhead (AA p. 35), and he was listed in the Martindale-Hubbell Law Directory as of counsel to the firm. (Martindale-Hubbell Law Directory (1996) p. CAA1166B.)[1/]

On July 12, 1996, Cohon and Disner spoke by telephone and discussed the present case, including its procedural status, the substantive allegations and Mobil's theories. They arranged to meet four days later. (AA pp. 119-120.)

On July 16, 1996, Disner met personally with Cohon and two other Cohon & Gardner attorneys. The meeting lasted at least an hour. Mobil's counsel disclosed to Disner the background and status of the case, Mobil's theories and discovery strategy, Mobil's experts and consultants, and an

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1/ Disner's business card and resume suggested an even closer association by including the firm's name but no of counsel designation. (AA pp. 20, 29.)

analysis of procedural, factual and substantive issues. All this information was confidential and work product. (AA pp. 17, 73, 120.)

At the end of the meeting, Disner and one of the Cohon & Gardner attorneys, Steven H. Gardner, agreed that a formal consultant retention document would be prepared, and in the meantime Disner would check on statutory and case law applicable to some of the issues discussed. (AA pp. 17, 120.) Later that afternoon, Gardner telephoned Disner, who reported the results of his research. (AA pp. 17-18.)

C. The Shapiro Firm's Simultaneous Representation Of Mobil's Adversaries.

The next day, July 17, 1996, Mobil's counsel received in the mail a copy of a document associating the Shapiro firm with Geordan Goebel as counsel of record for Mobil's adversaries, the Southern California Intervenors. (AA pp. 18, 30.) Goebel had sought the assistance of a franchise specialist, and, unbeknownst to Mobil, had been consulting with the Shapiro firm regarding case strategy since June 22, 1996. The association of counsel was signed by partner Mitchell S. Shapiro on July 12 (the same day Disner spoke by telephone with Cohon & Gardner) and was filed with the court on July 16 (the same day Disner met with Cohon & Gardner). (AA pp. 70-71, 75; see also AA p. 30.)

Until July 17, neither Disner nor anyone at Cohon & Gardner had been aware of the Shapiro firm's involvement in the case. (AA pp. 17, 73.) Likewise, the Shapiro firm had been unaware of Disner's representation of Mobil. (AA p. 76.) Disner had not checked with his firm to see if there was any potential for conflicting representation. (AA pp. 73-74.)

D. Mobil's Objection To The Representational Conflict And Motion To Disqualify The Shapiro Firm.

Mobil's counsel immediately wrote to Disner, Mitchell S. Shapiro and Goebel, objecting to the Shapiro firm's further participation in the case because of the conflict of interest. (AA pp. 18, 34, 76.) The Shapiro firm responded that it would not withdraw and intended to appear at depositions on behalf of the Southern California Intervenors the following week. (AA pp. 18, 35-36, 76.)

On July 22, 1996, Mobil moved to disqualify the Shapiro firm from representing the Southern California Intervenors. (AA pp. 5, 83.)

E. The Judge's Denial Of Mobil's Motion To Disqualify.

The judge denied Mobil's disqualification motion. (AA p. 148.) In a minute order, the judge explained his ruling as follows:

> "The court finds that there is no basis on which to presume that Eliot Disner, Esq., who is of counsel to the Law Firm of Shapiro, Rosenfeld & Close, imparted any confidential information to the Law Firm of Shapiro, Rosenfeld & Close ('SRC'), as concerns this case. Disner and 'SRC' were initially unaware of each other's involvement in this case and Disner was not retained by MOBIL nor is he presently involved in this case." (AA p. 148.)

F. Affirmance By The Court Of Appeal.

Mobil appealed, and the Court of Appeal affirmed the order denying disqualification. Despite the trial judge's express finding that Disner was of counsel to the Shapiro firm (AA p. 148), the Court of Appeal asserted there was substantial evidence to support an implied factual finding by the judge that "in reality" Disner did not have a close, personal, continuous, and regular relationship with his firm. The court relied on evidence that Disner and the firm would "occasionally" associate with each other "on specific cases" but had staff and clients who were paid and billed separately. (Court of Appeal typed opn. pp. 7-8 (hereafter Opn.); see AA p. 77.)

The court also said there was substantial evidence that Disner "did not impart any confidential information" to the Shapiro firm. (Opn. p. 8.) The court relied on Disner's own declaration in which he stated he had not discussed "the merits" of this action with any other attorneys at his firm. (Opn. p. 4; see AA p. 72.)

G. The Shapiro Firm's Subsequent Litigation Tactics And The Current Status Of The Litigation.

Events following Disner's consultation with Mobil's attorneys suggest that the Shapiro firm has in fact attempted to exploit confidential information obtained from Mobil. Shortly after the Shapiro firm learned of Disner's consultation, the firm moved to file a fifth amended complaint in intervention on behalf of the Southern California Intervenors asserting new causes of action against Mobil. (AA p. 153.) The judge denied the motion. (AA p. 270.) Later, some eight months after expiration of the

cut-off date for written discovery, but only ten weeks after Disner consulted with Mobil, the firm sought leave to serve Mobil with a new request for production of documents. (See Declaration of Jeffrey M. Cohon, accompanying motion in Court of Appeal for calendar preference.)[2/]

The Shapiro firm has since steadfastly refused to withdraw, and continues to act as lead attorneys for the Southern California Intervenors, participating in all aspects of the claims against Mobil. Trial was set to begin in June of 1997. After this court granted review on April 23, 1997, the Shapiro firm expressed its intent to remain in the case. The trial judge, fearing the need for a retrial should this court reverse the Court of Appeal's judgment, postponed the trial date for all parties until January 5, 1998.

2/ Due to the confidential nature of the information Mobil imparted during the consultation with Disner, Mobil would be damaged by elaborating on the connection between these events and the consultation. (See *post*, at p. 23.)

LEGAL DISCUSSION

I.

A LAW FIRM'S SIMULTANEOUS REPRESENTATION OF OPPOSING PARTIES IN THE SAME LITIGATION AUTOMATICALLY DISQUALIFIES THE FIRM FROM THE LAWSUIT.

A. No Attorney May Simultaneously Represent Opposing Litigants.

This case implicates a special kind of representational conflict by counsel — the worst kind.

There are four types of representational conflicts, each of which is prohibited by rule 3-310(C) of the Rules of Professional Conduct:

- Successive representation of a former client and a current client who have adverse interests in different litigation. (See *Rosenfeld Construction Co. v. Superior Court* (1991) 235 Cal.App.3d 566, 569-570, 577.)

- Successive representation of a former client and a current client who are opposing parties in the same litigation. (See *Henriksen v. Great American Savings & Loan* (1992) 11 Cal.App.4th 109, 111-112, 114; *Dill v. Superior Court* (1984) 158 Cal.App.3d 301, 303, 306.)

- Simultaneous representation of clients who have adverse interests in different litigation. (See *Flatt v. Superior Court, supra,* 9 Cal.4th at pp. 279-280, 284-285.)

- Simultaneous representation of clients who are opposing parties in the same litigation. (See *id.* at pp. 282-283, 284, fn. 3.)

Of the types of conflicts prohibited by rule 3-310(C), this court has said that "perhaps the most egregious example" of the rule's violation is "simultaneously representing opposing parties in the same litigation." (*Flatt v. Superior Court, supra,* 9 Cal.4th at pp. 282-283.) The *Flatt* opinion described this conflict as "roundly condemned by courts and commentators alike" and "patently improper." (*Id.* at p. 284, fn. 3.) This "most egregious" of representational conflicts is precisely what occurred here.

In virtually *all instances* of simultaneous representation of opposing parties, attorney disqualification is *automatic*. (*Id.* at p. 284.) There are two reasons for this.

First, whenever there is conflicting representation in the same or substantially related matters, it is *irrebuttably presumed* that confidential information was exchanged. (*Henriksen v. Great American Savings & Loan, supra,* 11 Cal.App.4th at p. 114; *Rosenfeld Construction Co. v. Superior Court, supra,* 235 Cal.App.3d at pp. 575, 577; *Atasi Corp. v. Seagate Technology* (Fed.Cir. 1988) 847 F.2d 826, 829.) The aggrieved client need not show an *actual* exchange of confidential information, for that would compel the very disclosure that the rule against conflicting representation is intended to protect against. (*Atasi Corp. v. Seagate*

Technology, supra, 847 F.2d at p. 829; *Trone v. Smith* (9th Cir. 1980) 621 F.2d 994, 999; *Elan Transdermal v. Cygnus Therapeutic Systems* (N.D. Cal. 1992) 809 F.Supp. 1383, 1388; *T.C. Theatre Corp. v. Warner Bros. Pictures* (S.D.N.Y. 1953) 113 F.Supp. 265, 269, cited in *Flatt v. Superior Court, supra,* 9 Cal.4th at p. 284.)

Second, simultaneous opposing representation compromises counsel's loyalty to the client. (*Flatt v. Superior Court, supra,* 9 Cal.4th at p. 284.) The breach of loyalty makes this type of conflict especially egregious. "A client who learns that his or her lawyer is also representing a litigation adversary . . . cannot long be expected to sustain the level of confidence and trust in counsel that is one of the foundations of the professional relationship." (*Id.* at p. 285.)

There are no exceptions to the rule of automatic disqualification. For example, a conflict cannot be cured by withdrawing from one of the representations. (*Id.* at p. 288; *Truck Ins. Exchange v. Fireman's Fund Ins. Co.* (1992) 6 Cal.App.4th 1050, 1057.) "So inviolate is the duty of loyalty to an existing client that not even by withdrawing from the relationship can an attorney evade it." (*Flatt v. Superior Court, supra,* 9 Cal.4th at p. 288.)

B. A Disqualified Attorney Is Presumed To Have Shared Confidences With Others In The Firm, Requiring Vicarious Disqualification Of The Firm.

The disqualification of an attorney because of a representational conflict is *vicarious.* It extends to an attorney's *entire law firm.* (*Henriksen v. Great American Savings & Loan, supra,* 11 Cal.App.4th at pp. 114-117; see also *Flatt v. Superior Court, supra,* 9 Cal.4th at p. 283;

Klein v. Superior Court (1988) 198 Cal.App.3d 894, 911-913.) This is especially true in cases of opposing representations in the same lawsuit. (*Henriksen v. Great American Savings & Loan, supra,* 11 Cal.App.4th at p. 115; see also *Klein v. Superior Court, supra,* 198 Cal.App.3d at p. 912.)

The reason for vicarious disqualification is that, "When attorneys work together, they are presumed to share confidences. The threat that confidential information may be disclosed warrants the application of an irrebuttable presumption." (Wren & Glascock, The Of Counsel Agreement (1991) p. 52.)[3/]

It is thus irrelevant whether confidential information was *actually* exchanged. "Confidential information possessed by one attorney may or may not have been shared with other members of the firm, but the firm as a whole is disqualified whether or not its other members were actually exposed to the information." (*Trone v. Smith, supra,* 621 F.2d at p. 999, cited in *Dill v. Superior Court, supra,* 158 Cal.App.3d at p. 306; accord, *Atasi Corp. v. Seagate Technology, supra,* 847 F.2d at p. 829.)[4/]

3/ Secondary materials and bar association ethics opinions cited in this brief are collected in an "Appendix Of Cited Authorities Not Commonly Available" filed in the Court of Appeal in this case.

4/ An early case commented that automatic vicarious disqualification "can be harsh and unfair" and the issue should be decided on a case-by-case basis (*William H. Raley Co. v. Superior Court* (1983) 149 Cal.App.3d 1042, 1049), but that comment was superseded by this court's reaffirmation of the rule of vicarious disqualification in *Flatt v. Superior Court, supra,* 9 Cal.4th at page 283.

II.

THE RULE OF VICARIOUS DISQUALIFICATION SHOULD APPLY TO AN OF COUNSEL RELATIONSHIP, WHICH BY DEFINITION IS "CLOSE, PERSONAL, CONTINUOUS, AND REGULAR."

The of counsel designation has proliferated tremendously in recent years. The 1996 Martindale-Hubbell Law Directory contains listings for 1,821 of counsel attorneys in California. Those attorneys are practicing law with many thousands of law firm colleagues.

The designation is now used to describe many different types of relationships between attorney and law firm. An attorney who is of counsel might be a permanent full-time practitioner who is not on a partnership track, a part-time affiliate who has other professional or personal commitments, or a probationary partner-to-be who has come to the firm laterally. (See Buchholz, *Of Counsel: It's not just for retiring, anymore* (Oct. 1995) ABA Journal, at pp. 70-74; ABA Committee on Prof. Ethics, formal opn. No. 90-357 (1990) p. 3; Cal. Compendium on Prof. Responsibility, pt. IIA, State Bar Formal Ethics Opn. No. 1993-129, pp. 1-2.)

All of counsel relationships, however, share certain characteristics. The Board of Governors of the State Bar of California has adopted the rule that the relationship must be "close, personal, continuous, and regular." (Rule 1-400, standard no. 8, *supra.*) If those characteristics are not present, a statement that an attorney is of counsel with a law firm is a violation of rule 1-400(D) of the Rules of Professional Conduct, which prohibits various forms of false "communication" by State Bar members.

The State Bar of California, other state and local bar associations, the American Bar Association, federal case law and common sense all tell us unequivocally that an of counsel attorney, because of the "close, personal, continuous, and regular" relationship with the firm, *is a part of the firm for purposes of vicarious disqualification.*

The State Bar of California reached this conclusion in a formal ethics opinion in 1993, stating that disqualification of an of counsel attorney extends to the entire firm:

> "[T]o the extent the relationship between a principal member [of the State Bar] or law firm and another member or law firm is sufficiently 'close, personal, regular and continuous,' such that one is held out to the public as 'of counsel' for the other, the principal and 'of counsel' relationship must be considered a single, de facto firm for purposes of rule 3-310. Accordingly, if the 'of counsel' is precluded from a representation by reason of rule 3-310 of the California Rules of Professional Conduct, the principal is presumptively precluded as well, and vice-versa." (Cal. Compendium on Prof. Responsibility, pt. IIA, *supra*, p. 5.)

Other state and local bar associations (including the Bar Association of San Francisco) have uniformly agreed that vicarious disqualification includes of counsel attorneys. (Georgia State Bar Ethics Opn. No. 33 (1983); Maryland State Bar Ethics Opn. No. 87-37 (1987); Michigan State Bar Ethics Opn. No. CI-1071; Texas State Bar Ethics Opn. No. 445 (1987); N.Y. City Bar Assn. Ethics Opn. No. 83-3 (1983); Cal. Compendium on Prof. Responsibility, pt. IIB, S.F. Informal Ethics Opn. No. 1985-1, p. 1.)

The American Bar Association (ABA) reached the same conclusion in a formal ethics opinion in 1990. There, the ABA construed Disciplinary Rule 5-105(D) of the ABA Model Code of Professional Responsibility, which states, "If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, *or any other lawyer affiliated with him or his firm*, may accept or continue such employment." (Italics added.) The ABA concluded that "the of counsel lawyer is 'affiliated' with the firm and its individual lawyers for purposes of the general attribution of disqualification under DR 5-105(D) of the Model Code." (ABA Committee on Prof. Ethics, formal opn. No. 90-357, *supra*, p. 7.)[5/]

Although the ABA Model Code itself has not been adopted in California, it "serves to guide California courts in related matters." (*Chambers v. Superior Court* (1981) 121 Cal.App.3d 893, 898, fn. 3; see Rules of Prof. Conduct, rule 1-100(A) ["rules and standards promulgated by other jurisdictions and bar associations may also be considered"].) Thus, courts in California have repeatedly cited Disciplinary Rule 5-105(D) as prescribing the rule of vicarious disqualification. (See *William H. Raley Co. v. Superior Court, supra,* 149 Cal.App.3d at pp. 1048-1049; *Chambers v. Superior Court, supra,* 121 Cal.App.3d at p. 898; see also *Klein v. Superior Court, supra,* 198 Cal.App.3d at p. 911; *In re Mortgage & Realty Trust* (C.D.Cal. 1996) 195 Bankruptcy Rptr. 740, 755 ["California case law has adopted the [vicarious disqualification] rule from

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5/ Rule 1.10(a) of the ABA Model Rules of Professional Conduct similarly states, "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so . . . ." The ABA ethics opinion concluded "[t]here can be no doubt" that an of counsel attorney is "associated in" the firm. (ABA Committee on Prof. Ethics, formal opn. No. 90-357, *supra*, p. 6.)

the ABA Model Code of Professional Responsibility"].) The ABA Model Code should guide California courts to conclude that vicarious disqualification encompasses partners, associates, and *any other lawyer affiliated with the firm* — including of counsel attorneys.

The Shapiro firm argued in the Court of Appeal that ethics opinions by bar associations are not binding on the courts. (See Respondent's Brief of Plaintiff-In-Intervention Gary and Ann Burch, et al., p. 11 (hereafter RB).) But an administrative agency's interpretation of its own regulation is nevertheless afforded substantial deference. (*Culligan Water Conditioning v. State Bd. of Equalization* (1976) 17 Cal.3d 86, 93.) "[B]ecause of the agency's expertise, its view of a statute or regulation it enforces is entitled to great weight unless clearly erroneous or unauthorized." (*Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 111; see, e.g., *Mills Land & Water Co. v. Golden West Refining Co.* (1986) 186 Cal.App.3d 116, 128 [ethics opinion by Los Angeles County Bar Association was "persuasive"].)

Common sense supports the bar associations' application of vicarious disqualification to of counsel attorneys. The reason for the irrebuttable presumption that confidential information has been exchanged — that to require a showing of actual exchange would compel the very disclosure the rule against conflicting representation is intended to protect against (see *ante*, pp. 10-11) — applies with equal force to of counsel relationships. This is why the Federal Circuit Court in *Atasi Corp. v. Seagate Technology, supra,* 847 F.2d at page 830, concluded that Disciplinary Rule 5-105(D) extends the rule of vicarious disqualification to of counsel relationships:

"[The] policy of preserving the client's confidences would be hindered if of counsel attorneys were excepted from the presumption of shared confidences. To require a showing of actual shared confidences before applying imputed or vicarious disqualification would be inconsistent and would have the same undermining effect on the policy with an of counsel attorney as it would with associates and partners. That is, it would require the very disclosure the rule is intended to protect against. In conclusion, we construe the plain language of the disciplinary rule to include of counsel attorneys." (*Id.*)

The *Atasi* court's conclusion is logical and correct. Because the of counsel relationship is close, personal, continuous, and regular, the of counsel attorney is a part of the life of the law firm, a close colleague of the other firm attorneys, having continuous and regular contact with them. It is *human nature* to share confidences with one's close professional colleagues: to seek assistance and guidance, to vent one's frustrations, or simply to chat about whatever case is currently occupying one's time and thoughts. Indeed, the Shapiro firm admitted in the Court of Appeal that Disner frequently discussed cases with his colleagues at the firm. (See RB p. 9.)

That is why there is an irrebuttable presumption of shared confidences where attorneys affiliated with the same firm have simultaneously represented adverse parties. That is why the rule of vicarious disqualification must apply to of counsel attorneys.

III.

VICARIOUS DISQUALIFICATION IS ESSENTIAL TO PRESERVE PUBLIC TRUST IN THE CIVIL JUSTICE SYSTEM.

The lay client's viewpoint reveals a more elemental reason for vicarious disqualification here.

In a different context — disqualification of a law firm which employed as of counsel a retired judge who had presided over the action and received confidential information during settlement conferences — the court held vicarious disqualification was necessary "to preserve public trust in the justice system." (*Cho v. Superior Court* (1995) 39 Cal.App.4th 113, 116.) The court did not even discuss the nature or ramifications of the of counsel relationship, in that case or generally, but instead focused on the peculiar circumstance of the former presiding judge "joining" the opposing side: "When a litigant has bared its soul in confidential settlement conferences with a judicial officer, that litigant could not help but be horrified to find that the judicial officer has resigned to join the opposing law firm — which is now pressing or defending the lawsuit against that litigant. No one could have confidence in the integrity of a legal process in which this is permitted to occur without the parties' consent." (*Id.* at p. 125, fn. omitted.)

From Mobil's perspective, the lawyers' debate over the nature and ramifications of an of counsel relationship is as beside the point as it was in *Cho*. The mere fact of Disner's connection with the firm representing Mobil's adversaries is enough to undermine Mobil's trust in the civil justice system unless the firm is disqualified. Under these circumstances, without vicarious disqualification any client "would be entitled to wonder

whether the law's sense of casuistry had gone seriously wrong." (*Flatt v. Superior Court, supra,* 9 Cal.4th at p. 290.)

A recent publication on of counsel relationships states the appropriate rule succinctly: "Where [a] conflict arises because Of Counsel and the affiliated firm are simultaneously representing clients with adverse interests, Of Counsel and the firm must both withdraw." (Wren & Glascock, The Of Counsel Agreement, *supra*, pp. 55-56.) As we next explain, that is precisely the situation here. The Shapiro firm, like Disner, must withdraw from representing clients in this litigation.

IV.

DISNER AND THE SHAPIRO FIRM SHOULD BE DISQUALIFIED BECAUSE THEY SIMULTANEOUSLY REPRESENTED OPPOSING PARTIES IN THIS LITIGATION.

A. The Shapiro Firm Has Conceded The Facts Of Simultaneous Opposing Representation And Receipt Of Confidential Information.

In a memorandum of points and authorities opposing the disqualification motion, the Shapiro firm stated, "It bears emphasis that *[the Shapiro firm] had already associated in as counsel for [the Southern California Intervenors] by the time that Mobil's attorneys met with Mr. Disner.*" (AA p. 142, original italics.) The Shapiro firm missed the point. The point is not who got which client first, but whether the opposing clients were represented simultaneously. By this statement, the Shapiro firm *conceded* there was simultaneous opposing representation, confirming that what occurred here was the worst sort of representational conflict.

The Shapiro firm likewise conceded in the Court of Appeal that Disner "possesses confidential information about Mobil." (RB p. 10.) The firm has never disputed that Mobil's counsel disclosed to Disner the background and status of this case, Mobil's theories and discovery strategy, Mobil's experts and consultants, and an analysis of procedural, factual and substantive issues.

Because Disner obtained confidential information from Mobil at the same time his firm was representing Mobil's adversaries, the firm should be automatically disqualified from representing the Southern California Intervenors. 6/

B. The Shapiro Firm Cannot Avoid Disqualification By Claiming Disner Was Not Of Counsel.

The Shapiro firm insinuated to the trial judge that Disner might not really have been of counsel after all, asserting in a memorandum of points and authorities that Disner was "affiliated with [the Shapiro firm] *in name only* . . . ." (AA p. 66, original italics.) Disner stated in a declaration that he associated with the firm in only a "few cases (perhaps 3-4 per year) . . . ." (AA p. 72.) Partner Mitchell S. Shapiro stated in a declaration that the firm and Disner "*occasionally* associate[d] with each other on specific cases." (AA p. 77, italics added.)

6/ The Shapiro firm has attempted to analogize this case to *co-counsel* situations, where there is no automatic vicarious disqualification of a firm that is co-counsel with a disqualified firm. (See *In re Airport Car Rental Antitrust Litigation* (N.D.Cal. 1979) 470 F.Supp. 495, 501-502; RB p. 10; AA pp. 66-67, 142.) This is not, however, a co-counsel situation. Disner was of counsel, not co-counsel. Because he, unlike a co-counsel, was a part of the Shapiro firm for purposes of representational conflicts, vicarious disqualification *is* automatic.

The trial judge nonetheless found Disner was of counsel to the firm, consistent with all outward indicia of their relationship. (AA p. 148.) Ultimately, in the Court of Appeal, the Shapiro firm conceded that Disner was of counsel and had the requisite relationship with his firm. (RB p. 9.)

The judge's factual determination that Disner was of counsel is conclusive under the substantial evidence rule. (See *Shadow Traffic Network v. Superior Court* (1994) 24 Cal.App.4th 1067, 1083.) Disner and the Shapiro firm indisputably held him out to their clients as of counsel, and thus should be equitably estopped to claim otherwise in litigation with one of those clients. (See *Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305; *Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 47.) In any event, the firm's concession in the Court of Appeal (RB p. 9) removes any possible doubt as to Disner's status.

C. The Shapiro Firm And Disner Created The Need For Disqualification By Not Checking For Conflicts.

The Shapiro firm has blamed its simultaneous representation of opposing parties on *Mobil*. The firm's brief in the Court of Appeal accused Mobil of "contact[ing] an attorney who is of counsel to its adversaries' retained law firm and then try[ing] to create a conflict of interest out of that contact to disqualify its adversaries." (RB pp. 1-2; see also RB p. 4, fn. 3.) That accusation is patently untrue.

When Mobil contacted Disner by telephone on July 12, 1996, Mobil *could not possibly have known* that its adversaries had already retained the Shapiro firm. As the Shapiro firm has itself conceded, it did not serve Mobil with the notice of association until three days later. (RB p. 4.)

Mobil did not *receive* the mailed notice until July 17, 1996, the day *after* Disner met personally with Mobil's counsel. (AA pp. 18, 34.)

Mobil did not create the representational conflict. The Shapiro firm and Disner created it by *failing to have any conflicts-checking system* for cases Disner took in — a failing they conceded in the Court of Appeal. (RB p. 8, fn. 4.) A conflicts-checking system is essential for a law firm to avoid conflicting representations. (See Kadushin, Cal. Practice Guide: Law Practice Management (1995) ¶¶ 21:1-21:2, p. 21-1; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (1996) ¶ 1:71, pp. 1-16 to 1-17.) Had Disner properly checked for conflicts before discussing this case substantively with Mobil's counsel, the simultaneous opposing representation would not have occurred.

D. The Shapiro Firm's Litigation Tactics Indicate It Has Attempted To Exploit Confidential Information Obtained From Mobil.

Vicarious disqualification in this case is justified by even more than the *presumption* of shared confidences: the facts suggest that confidential information was *actually* exchanged.

Shortly after Mobil's attorneys consulted with Disner, the Shapiro firm moved to file a fifth amended complaint in intervention on behalf of the Southern California Intervenors asserting new causes of action against Mobil. Then, some eight months after expiration of the cut-off date for written discovery, but only ten weeks after Disner consulted with Mobil, the Shapiro firm sought leave to serve Mobil with a new request for production of documents. The timing of the attempts to assert new causes

of action and reopen written discovery strongly suggests they were based on the firm's receipt of confidential information through Disner.

In the Court of Appeal, the Shapiro firm argued that Mobil has offered no support for this implication. (See RB pp. 17-18.) But Mobil does not and should not have to do so, for that "would require the very disclosure the rule [against conflicting representation] is intended to protect against." (*Atasi Corp. v. Seagate Technology, supra,* 847 F.2d at p. 829.) It should be enough that the Shapiro firm has conceded Disner obtained confidential information from Mobil. Based on the firm's subsequent litigation tactics, this court can draw the inference that the firm has attempted to exploit this confidential information, without requiring Mobil to make disclosures that could damage it even further.

V.

THE TRIAL JUDGE'S REASONS FOR DENYING DISQUALIFICATION ARE MERITLESS.

The trial judge gave three reasons for denying the motion to disqualify the Shapiro firm. None has any merit.

First, the judge noted that Disner was not formally retained by Mobil. (AA p. 148.) That point is inconsequential. In the July 12 telephone consultation, and at the July 16 meeting, Mobil's attorneys disclosed to Disner the background and status of this case, Mobil's theories and discovery strategy, Mobil's experts and consultants, and an analysis of procedural, factual and substantive issues. (AA pp. 17, 73, 119-120.) This created an attorney-client relationship, even though there was no formal retention agreement. (See *Miller v. Metzinger* (1979) 91 Cal.App.3d 31, 40.) "'The fiduciary relationship existing between lawyer and client extends to preliminary consultation by a prospective client with

a view to retention of the lawyer, *although actual employment does not result.*'" (*Beery v. State Bar* (1987) 43 Cal.3d 802, 811, italics added, quoting *Westinghouse Elec. Corp. v. Kerr-McGee Corp.* (7th Cir. 1978) 580 F.2d 1311, 1319, fn. omitted; see also *Shadow Traffic Network v. Superior Court, supra*, 24 Cal.App.4th at p. 1080 [communications to potential expert in retention interview are subject to protection from disclosure even if expert not thereafter retained].) Indeed, there was even more here than preliminary consultation: in the telephone conversation between Disner and Steven H. Gardner after the July 16 meeting, Disner actually gave legal advice to Gardner, reporting the results of his research on some of the issues previously discussed. (AA pp. 17-18.)

Second, the judge said "there is no basis on which to presume" that Disner "imparted any confidential information" to the firm. (AA p. 148.) But it should be *irrebuttably presumed* that confidential information was exchanged. The judge erroneously required Mobil to show an actual exchange, which violates the policy underlying the irrebuttable presumption. (See *ante*, pp. 10-11.) The judge also overlooked the breach of loyalty, which mandates automatic disqualification in cases of simultaneous representation. (See *ante*, p. 11.) Because of this breach of loyalty, Mobil found itself in the unenviable position of seeing its own former lawyer, Disner, submit a declaration on behalf of its adversaries. (AA pp. 72-74.)

Finally, the judge said Disner is not "presently involved in this case." (AA p. 148.) But Disner's withdrawal from representing Mobil could not cure the representational conflict. Once there has been simultaneous representation of adverse parties, disqualification from *both* representations is automatic. (*Flatt v. Superior Court, supra,* 9 Cal.4th at

p. 288; *Truck Ins. Exchange v. Fireman's Fund Ins. Co., supra,* 6 Cal.App.4th at p. 1057; see *ante*, p. 11.)[7/]

VI.

THE COURT OF APPEAL'S CASE-BY-CASE APPROACH TO VICARIOUS DISQUALIFICATION WOULD BE INTRUSIVE TO LAW FIRMS AND HARMFUL TO THEIR CLIENTS.

The Court of Appeal's reasons for affirming the trial judge's order denying disqualification are also meritless.

According to the Court of Appeal, this was "a classic case of conflicting evidence and inferences." (Opn. p. 7.) The court held substantial evidence (of "occasional" association and separate payment and billing of staff and clients) supported an *implied* conclusion by the trial judge that Disner did *not* "in reality" have a close, personal, continuous, and regular relationship with the Shapiro firm. (Opn. pp. 7-8.) But this reasoning is directly contrary to the trial judge's *express* factual determination in his minute order that Disner was "of counsel to the Law Firm of Shapiro, Rosenfeld & Close." (AA p. 148.) By definition, an of counsel relationship *is necessarily* "close, personal, continuous, and

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7/ After this appeal commenced, Disner left the Shapiro firm to become a partner in another law firm. Like his withdrawal from the case, his departure from the firm does not cure the firm's representational conflict or otherwise moot this appeal. His departure does not prevent his former colleagues from exploiting, in continued litigation against Mobil, confidential information Disner presumably shared with them. (See *Chambers v. Superior Court, supra,* 121 Cal.App.3d at p. 895, fn. 1; *State of Ark. v. Dean Foods Products Co., Inc.* (8th Cir. 1979) 605 F.2d 380, 385.)

regular." (Rule 1-400, standard no. 8, *supra.*) By concluding that Disner was of counsel, the judge necessarily found the existence of the requisite underlying relationship. Thus, it cannot properly be presumed on appeal that the judge found otherwise. (See *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 39 Cal.App.4th 1379, 1384 ["When the record clearly demonstrates what the trial court did, we will not presume it did something different"]; *Steuri v. Junkin* (1938) 27 Cal.App.2d 758, 760.) Indeed, the Shapiro firm conceded in the Court of Appeal that the firm's relationship with Disner *was* close, personal, continuous, and regular. (RB p. 9.)

The Court of Appeal also said there was substantial evidence that Disner "did not impart any confidential information" to the Shapiro firm. (Opn. p. 8.) But here the court perpetuated the trial judge's mistake. Once it is established that a lawyer is affiliated with a firm — as a partner, an associate, or of counsel — it should be *irrebuttably presumed* that confidential information was exchanged. The Court of Appeal's approach would make the nature of each of counsel relationship a contested fact issue, where an aggrieved client would have to conduct intrusive discovery into the time records, calendars, communications and other aspects of the working relationship between the of counsel attorney and his or her firm. With the nature of an attorney's of counsel status decided on such a case-by-case basis, no clients could ever be sure what it means for their attorney to be of counsel to a firm or what allegiance the firm owes them.

The present case shows how problematic the Court of Appeal's "substantial evidence" approach to vicarious disqualification can be. The Court of Appeal relied on written declarations by Disner and Mitchell S. Shapiro, in which Disner said he had "not discussed *the merits* of this action with any attorney or other employee" at the Shapiro firm (AA p. 72, italics added), and Mr. Shapiro said he had "not discussed this

with Mr. Disner." (AA p. 77; see Opn. p. 4.) But what did Disner mean by "the merits?" Did he tell his colleagues anything he learned from Mobil, of value to the Southern California Intervenors, that he perceived not to be on "the merits?" And even if Mr. Shapiro did not discuss the action with Disner, did any of Mr. Shapiro's partners or associates who have made appearances in this action (including Douglas L. Carden, Julie J. Bisceglia, Rhonda H. Mehlman and Lisa K. Skaist) discuss the action with Disner? We do not know, because they did not submit declarations. If Mobil must prove an actual exchange of confidential information, Mobil should have the right to explore these questions through discovery and cross-examination. It is wholly insufficient to defer, as the Court of Appeal did, to self-serving, carefully-crafted written declarations of the sort the Shapiro firm submitted.

The Court of Appeal erred in treating this appeal as "a classic case of conflicting evidence and inferences." (Opn. p. 7.) Because the trial judge found, and the Shapiro firm conceded, an of counsel relationship between Disner and the firm, the case presented a purely *legal* question of first impression, on which this court granted review: whether the rule requiring vicarious disqualification of a law firm when an associate or partner is disqualified because of a representational conflict should apply equally to of counsel attorneys. The answer should be yes.

CONCLUSION

In 1624 the poet John Donne wrote, "No man is an island, entire of itself; every man is a piece of the continent, a part of the main." (Donne, *Devotions Upon Emergent Occasions*, in John Donne (Booty edit. 1990) p. 272.) He could have been speaking of Disner. For purposes of conflicts of interest that disqualify a law firm from representing a client,

an of counsel attorney is not "an island, entire of itself" but is "a part of the main" — that is, a part of the firm.

Disner was a part of the Shapiro firm. Their simultaneous representation of opposing litigants in this case should disqualify the entire firm from representing the Southern California Intervenors. The Court of Appeal's judgment should be reversed.

Respectfully submitted,

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PROOF OF SERVICE [C.C.P. § 1013a]

I, **Diana T. Scupine**, declare as follows:

I am employed in the County of Los Angeles, State of California and over the age of eighteen years. I am not a party to the within action. I am employed by Horvitz & Levy, and my business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436. I am readily familiar with the practice of Horvitz & Levy for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, the same day I submit it for collection and processing for mailing. On **May 15, 1997** I served the within document entitled:

OPENING BRIEF ON THE MERITS (FOR MOBIL OIL CORPORATION)

on the parties in the action by placing a true copy thereof in an envelope addressed as follows:

Parties Served:

SEE ATTACHED SERVICE LIST

and, following ordinary business practices of Horvitz & Levy, by sealing said envelope and depositing the envelope for collection and mailing on the aforesaid date by placement for deposit on the same day in the United States Postal Service at 15760 Ventura Boulevard, Encino, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on **May 15, 1997** at Encino, California.

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