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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

CITY AND COUNTY OF SAN FRANCISCO et al., Plaintiffs and Appellants, v. COBRA SOLUTIONS, INC., et al., Defendants and Respondents.	A103479 (San Francisco County Super. Ct. No. 417218)

Does the City Attorney's prior representation of the target of a public investigation in matters substantially related to that investigation require vicarious disqualification of the entire City Attorney's Office? We hold that it does. Public confidence in the administration of justice and the integrity of the bar requires that both the City Attorney and his office be disqualified.[1]

We expressly limit our holding to cases in which the conflicted civil attorney is the head of a public law office. There are sound reasons why automatic disqualification might be inappropriate when the conflicted attorney is anyone else, and why imposition of an assiduously observed ethical screen might suffice to accommodate the weighty competing public and private concerns at stake. We are not called on here to decide, and we do not decide, whether automatic disqualification is required in such cases.

[1] By this holding, we imply no criticism of City Attorney Herrerra's conduct in this matter.

FACTUAL AND PROCEDURAL BACKGROUND

For purposes of this appeal, the material facts are undisputed. In September 2000, Dennis Herrera (Herrera), San Francisco's City Attorney, was still in private practice. Cobra Solutions, Inc. (Cobra) approached him and retained him and his firm to represent it in a range of business matters, including dealings with the City of San Francisco (City) and an ongoing dispute with the City's Department of Building Inspections.

In November 2001, Herrera was elected San Francisco City Attorney and shortly thereafter left private practice.

In September 2001, under Herrera's predecessor, Louise Renne, the San Francisco City Attorney's Office (City Attorney's Office) began an investigation of the City's technology contracting. The investigation turned up evidence that Marcus Armstrong, the head of the City's Department of Building Inspections, had authorized prepayments on a city contract with Government Computer Sales, Inc. (GCSI) in violation of City law, and that GCSI had failed to fulfill the contract. On February 10, 2003, the City sued GCSI, Armstrong, and others, alleging that GCSI paid Armstrong kickbacks through various fictitious business entities in order to have him select GCSI for the contract and authorize illegal prepayments.[2]

In March 2003, further investigation uncovered evidence of payments by Cobra, another City contractor, to Armstrong's fictitious business entities, and in April 2003 the City added Cobra as a defendant in the GCSI lawsuit.

One month later, Cobra moved to disqualify Herrera and the entire City Attorney's Office. It argued that Herrera had previously represented it in matters substantially related to the current lawsuit, and that consequently both Herrera and the City Attorney's Office were barred from representing the City against Cobra. The City Attorney's Office responded that it had instituted an ethical screen immediately upon discovering Cobra's

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[2] Armstrong was subsequently indicted and pleaded guilty to federal mail fraud, wire fraud, and obstruction of justice charges.

alleged involvement in the kickback scheme.[3] All responsibilities for decisions concerning the matter were passed from Herrera to his chief deputy, Jesse Smith, and Herrera had no further involvement in the case. It also argued that Herrera's prior representation of Cobra was not substantially related to the current litigation, and that disqualification was therefore unnecessary.

The trial court granted the motion to disqualify Herrera and the City Attorney's Office. Critically important to our analysis are the trial court findings that Herrera had personally represented Cobra, that he had obtained confidential information from Cobra, and that the subject of the prior representation was substantially related to the current lawsuit. The trial court held that as a matter of law disqualification of both Herrera and the City Attorney's Office was required. On appeal, we granted the Attorney General, County of Santa Clara, California State Association of Counties, and League of California Cities leave to appear as amici curiae to address the disqualification standards that should apply to private attorneys who join public law offices.

DISCUSSION

I. *Standard of Review*

An order disqualifying an attorney is immediately appealable. (*State Water Resources Control Bd. v. Superior Court* (2002) 97 Cal.App.4th 907, 913.) The parties disagree over the applicable standard of review. Under the circumstances of this appeal, we review de novo the trial court's order disqualifying the City Attorney's Office.

In general, "a trial court's decision on a disqualification motion is reviewed for abuse of discretion." (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143 (*SpeeDee Oil*).) This entails deferring to the

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[3] In the case before us, the effectiveness of the screen was not tested in the trial court. (See *LaSalle Nat. Bank v. Lake* County (7th Cir. 1983) 703 F.2d 252 [effectiveness of screen must be capable of evaluation by objective and verifiable evidence at the trial court level].) We make no assumptions about its effectiveness. We note that for 16 months while the City's technology contracting was being investigated, Herrera was the head of the office and no specific institutional mechanisms were in place.

trial court's factual findings whenever supported by substantial evidence. (*Id.* at pp. 1143-1144.) Here, despite some initial protestations, the City Attorney's Office concedes that it is not challenging the trial court's factual findings, and concedes that they are supported by substantial evidence. Thus, we take those findings as a given and ask whether as a matter of law they support vicarious disqualification here. (*Id.* at p. 1144; *Cho v. Superior Court* (1995) 39 Cal.App.4th 113, 119.) In doing so, we are mindful of our Supreme Court's warning that "A motion to disqualify a party's counsel may implicate several important interests. Consequently, judges must examine these motions carefully to ensure that literalism does not deny the parties substantial justice." (*SpeeDee Oil*, at p. 1144.)

II. *Where the Head of a Public Law Office Has a Conflict Arising from an Earlier Private Representation, Vicarious Disqualification Is Required*

A. *The Duties of Loyalty and Confidentiality*

Professional ethics demand that an attorney avoid conflicts of interest in which duties owed to different clients are in opposition. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 282 & fn. 2 (*Flatt*); Rules Prof. Conduct, rule 3-310(C).[4]) A conflict of interest may arise from an attorney's simultaneous or successive representation of clients with adverse interests. (*Flatt,* at pp. 283-284.) These two situations implicate distinct ethical concerns and public policies. (*Ibid.*)

Concurrent representation of clients with adverse interests compromises an attorney's duty of loyalty. "Attorneys have a duty to maintain undivided loyalty to their clients to avoid undermining public confidence in the legal profession and the judicial

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[4] Rule 3-310(C) provides: "A member shall not, without the informed written consent of each client: [¶] (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or [¶] (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or [¶] (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter."

All rule references are to the Rules of Professional Conduct.

process. [Citation.] The effective functioning of the fiduciary relationship between attorney and client depends on the client's trust and confidence in counsel. [Citation.]" (*SpeeDee Oil, supra,* 20 Cal.4th at p. 1146.) In order to maintain undivided loyalty to clients and preserve public confidence in the legal profession, an attorney must not concurrently represent clients with adverse interests, whether or not the matters are related. (*Id.* at pp. 1146-1147; *Flatt, supra,* 9 Cal.4th at p. 284; Rule 3-310(C)(3).) "A client who learns that his or her lawyer is also representing a litigation adversary, even with respect to a matter wholly unrelated to the one for which counsel was retained, cannot long be expected to sustain the level of confidence and trust in counsel that is one of the foundations of the professional relationship." (*Flatt,* at p. 285, emphasis omitted.) With few exceptions, a stringent per se disqualification rule applies to an attorney's simultaneous representation of adverse clients without the clients' consent. (*SpeeDee Oil,* at p. 1147; *Flatt,* at pp. 285-286, fn. 4; *State Farm Mutual Automobile Ins. Co. v. Federal Ins. Co.* (1999) 72 Cal.App.4th 1422, 1431-1432.)

Successive representation of clients with adverse interests raises slightly different ethical concerns. With successive representation of adversaries, "the chief fiduciary value jeopardized is that of client *confidentiality*," not loyalty. (*Flatt, supra,* 9 Cal.4th at p. 283; accord, *SpeeDee Oil, supra,* 20 Cal.4th at p. 1146.) The former client's expectation of confidentiality must be preserved to ensure " '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 adequate advice and a proper defense.' [Citation.]" (*SpeeDee Oil,* at p. 1146, quoting *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599.) The attorney must maintain those confidences inviolate and preserve them at every peril to himself or herself. (Bus. & Prof. Code, § 6068, subd. (e).) Because of this duty, an attorney in actual possession of material confidential information from a former client may not represent an adverse party without the former client's

consent. (*H. F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1452; Rule 3-310(E).)[5]

B. *Motions to Disqualify and Successive Representation in the Private Sector*

A trial court may disqualify a party's counsel to enforce these ethical standards. (*SpeeDee Oil, supra,* 20 Cal.4th at p. 1145; Code Civ. Proc., § 128, subd. (a)(5).) "A trial court's authority to disqualify an attorney derives from the power inherent in every court '[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, in every matter pertaining thereto.' [Citations.]" (*SpeeDee Oil,* at p. 1145.) A motion to disqualify an opposing party's counsel implicates the opposing party's freedom to retain counsel of choice, but that freedom must be subordinated when preservation of the duties of loyalty or confidentiality are at stake. The California Supreme Court teaches repeatedly that "[t]he 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." (*Ibid.;* see also *Comden v. Superior Court* (1978) 20 Cal.3d 906, 915.)

In successive representation cases, the "substantial relationship" test mediates between these competing interests. (*Flatt, supra,* 9 Cal.4th at p. 283.) Absent a substantial relationship between the subjects of the two representations, the current client's choice of counsel will be honored and the motion to disqualify must be denied. However, if a "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)

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5 Rule 3-310(E) 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 member has obtained confidential information material to the employment."

is *presumed* and disqualification of the attorney's representation of the second client is mandatory." (*Flatt, supra,* 9 Cal.4th at p. 283; accord, *SpeeDee Oil, supra,* 20 Cal.4th at p. 1146; see also *Rosenfeld Construction Co. v. Superior Court* (1991) 235 Cal.App.3d 566, 575 [" 'If a substantial relationship is established, the discussion should ordinarily end. The rights and interests of the former client will prevail. Conflict would be presumed; disqualification will be ordered.' "].)[6] This mandatory rule applies unless the court finds that other countervailing factors exist, such as tactical abuse underlying the disqualification motion. (*In re Marriage of Zimmerman* (1993) 16 Cal.App.4th 556, 562.)

In the private sector, disqualification extends from the affected attorney to her entire firm. The "presumption that an attorney has access to privileged and confidential matters relevant to a subsequent representation extends the attorney's disqualification vicariously to the attorney's entire firm." (*SpeeDee Oil, supra,* 20 Cal.4th at p. 1146.) Vicarious disqualification is required "to assure the preservation of [the client's] confidences and the integrity of the judicial process." (*Id.* at p. 1156.) When a client has disclosed confidences to an attorney who later becomes its litigation opponent, "[n]o amount of assurances or screening procedures, no 'cone of silence,' could ever convince the opposing party that the confidences would not be used to its disadvantage." (*Cho v. Superior Court, supra,* 39 Cal.App.4th at p. 125.) "No one could have confidence in the integrity of a legal process in which this is permitted to occur without the parties' consent." (*Ibid.*; see *Adams v. Aerojet-General Corp.* (2001) 86 Cal.App.4th 1324, 1334-1335.) The public cannot be left to believe that attorneys within a firm might discuss matters despite an ethical screen and that the law would turn a blind eye to such

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6 In its briefing and oral argument, the City emphasizes that the threshold for "substantially related" is minimal. There is no support for this proposition in the law or on the record before us. The City does not challenge the trial court finding that Herrera's prior representation of Cobra was "substantially related." The City may not imply that Herrera's prior representation was de minimis in order to argue directly or indirectly that Herrera's involvement is insufficient to create a conflict of interest imputed to his staff.

presumed disclosures. Consequently, a prophylactic vicarious disqualification rule extends to the entire law firm.

C. *Successive Representation in the Public Sector*

The foregoing general rules have been developed in the context of concurrent and subsequent representation in the private sector. Where *public* sector representation is involved, different interests are at stake, and so different rules may apply.

In *Chambers v. Superior Court* (1981) 121 Cal.App.3d 893 (*Chambers*), the leading case on subsequent representation in the private sector after working in the public sector, the court found it an abuse of discretion to impose vicarious disqualification. (*Id.* at p. 894.) *Chambers* involved a tort action against the State of California; the State moved to disqualify the plaintiffs' firm because one of its members had previously represented the State in similar matters. (*Id.* at p. 895.) The court relied heavily on 1975 ABA Formal Opinion 342, which held that vicarious disqualification of a private firm based on a member's public sector work is not required under the ABA's Code of Professional Responsibility. Instead, disqualification of the individual attorney and an ethical screen around that attorney may suffice. (*Id.* at pp. 898-899, 903.)

ABA Formal Opinion 342 and *Chambers* highlighted three reasons for allowing more limited prophylactic measures against the breach of confidences for attorneys coming from the public sector. First, vicarious disqualification impinges on a client's ability to retain the counsel of her choice (a consideration which, we note, is equally present in private sector cases). Second, vicarious disqualification might unduly limit a former government lawyer's employment prospects because she carries the taint of her prior work. Third, vicarious disqualification might hamper government recruiting efforts, as able lawyers elect not to do work that would later limit their employment prospects. (*Chambers v. Superior Court, supra,* 121 Cal.App.3d at p. 899.)[7]

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[7] The extent to which these latter considerations enumerated in *Chambers* are any more manifest in public-to-private cases than they are in private-to-private cases is unclear. Attorneys leaving private firms like attorneys leaving public offices carry with

Subsequent cases have confirmed that where migration from public service to private service is involved, vicarious disqualification is not automatically required. In *Higdon v. Superior Court* (1991) 227 Cal.App.3d 1667, a court commissioner held hearings in two divorce cases, then left public service to join a firm representing one of the parties. The trial court ordered vicarious disqualification of the firm, but the court of appeal reversed the order as an abuse of discretion. It concluded that so long as an ethical screen was observed, no vicarious disqualification was needed. (*Id.* at p. 1680.)

Cases involving migration from one public office to another public office similarly have countenanced more limited measures to protect client confidences. In *Chadwick v. Superior Court* (1980) 106 Cal.App.3d 108, a public defender joined the district attorney's office, and his former clients moved to disqualify the entire district attorney's office, notwithstanding the institution of an ethical screen. The court refused, exercising "particular caution" in declining to extend disqualification from the attorney to the office as a whole. (*Id.* at p. 115.) In particular, the court noted that the migrating attorney had no policy or personnel evaluation authority in the district attorney's office. (*Id.* at pp. 112-113, 121.) Like the court in *Chambers*, it relied on ABA Formal Opinion 342 for the proposition that vicarious disqualification does not apply to government lawyers. (*Id.* at p. 117.) It emphasized that the financial interests of government lawyers are different: because they are not dependent on each other for their compensation, there may be less incentive to disclose confidential information. It accepted the possibility that in some cases, the structure of government offices might dispel the presumption that information would flow freely. It also emphasized that prosecutors must seek justice, not just convictions. (*Ibid.*)

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them a taint for all substantially related matters in which they participated. It may well be that vicarious disqualification is an overbroad response to the problem of protecting client confidences and that it needs to be reconsidered. If so, it is not readily apparent why the disqualification is broader in private-to-private migration than in public-to-private migration or why the reasons identified in *Chambers* are sufficient by themselves to support different rules.

The City Attorney's Office points to two other reasons for applying a different rule in public sector cases: cost and specialization. First, disqualification raises the cost of a given civil or criminal prosecution, and this higher cost may warrant proceeding with caution before disqualifying public sector attorneys and accepting ethical screens as sufficient in a broader category of cases. (See *People v. Christian* (1996) 41 Cal.App.4th 986, 998.) "Disqualifications of public counsel can result in increased public expenditures for legal representation, and 'there is the potential for a substantially increased call upon an already severely strained tax base.' " (*In re Lee G.* (1991) 1 Cal.App.4th 17, 28, quoting *People v. Municipal Court (Byars*) (1978) 77 Cal.App.3d 294, 301.) This first concern goes beyond protection of the public fisc. Because disqualification can significantly raise the cost of prosecution, it changes the cost-benefit analysis of the decision whether to proceed with a given civil prosecution, and raises the possibility that defendants who threaten or obtain vicarious disqualification may avoid prosecution entirely. A broad disqualification rule for public sector attorneys is thus particularly susceptible to tactical abuse.

Second, disqualification of public sector attorneys has the potential to deprive the client of an attorney highly skilled in a particular area of the law, especially when the public law office has a unit with extensive experience in handling a particular sort of public law case. (*In re Lee, supra,* 1 Cal.App.4th at p. 28.)

D. *Application of the Disqualification Rules to a Public Head of Office*

To date, California *civil* cases have dealt exclusively with migration from private office to private office, from public office to private office, and from public office to public office. None have addressed the fourth possibility: migration from private office to public office. Thus, none of the foregoing cases answer the question debated by the parties and amici: what measures must be employed when an attorney leaves private practice to join a public law office and the public law office then initiates substantially related litigation against the attorney's former client? Cobra argues that the presumption of vicarious disqualification applicable to private-private migration should extend to

private-public migration. The City Attorney's Office, Attorney General, and local government amici argue that the allowance for ethical screens made in public-to-private and public-to-public migration cases should extend here.

To decide this case, we need not determine what the general rule should be, because this case involves a unique subset of private-public migration in which the attorney leaves private practice to become the *head* of a public law office. Where the attorney leaves private practice to become the *head* of a public law office, we hold that vicarious disqualification of the entire public law office generally is required in all matters substantially related to the head of office's earlier private representations.[8] We are not called upon to decide whether an ethical screen or some other lesser prophylactic measure might suffice when the migrating attorney assumes a subordinate position in the public law office.

When the disqualified attorney is the head of a public law office, it raises special concerns that an ethical screen cannot adequately address. *Younger v. Superior Court* (1978) 77 Cal.App.3d 892 (*Younger*) illustrates these problems well. In *Younger*, a defense attorney left private practice to become the third-highest ranking prosecutor in the Los Angeles County District Attorney's Office. (*Id.* at p. 895.) The court acknowledged that the district attorney's office had in place an effective ethical screen excluding the affected attorney from involvement in the prosecution of his former clients or those of his former firm. (*Id.* at pp. 896-897.) Nevertheless, it offered three reasons why vicarious disqualification of the entire district attorney's office was required. First, the disqualified attorney had an ongoing say in prosecutorial policies, policies that could affect (intentionally or otherwise) the manner in which his former clients were prosecuted. Second, the attorney had the power to review the performance of those below him in the office, power that might influence how his subordinates prosecuted his

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8 We qualify the rule to exclude the situation where the former client has inexcusably postponed making a motion to disqualify its former counsel, resulting in prejudice to the current client. In that situation, the trial court must have discretion to deny the motion. (*River West, Inc. v. Nickel* (1987) 188 Cal.App.3d 1297, 1309.)

former clients. Third, the court found that an ethical screen could not eliminate inevitable public suspicions about how the disqualified attorney's presence might affect the treatment of his former clients. (*Id.* at p. 897.) Consequently, despite the cost that special counsel might entail (*id.* at p. 894), the court found vicarious disqualification necessary.

Two other criminal cases premised on a head of office attorney's personal conflict of interest identify similar concerns. In *People v. Lepe* (1985) 164 Cal.App.3d 685, the district attorney, Thomas Storey, had represented the defendant in two related criminal cases. The defense attorney had informed the trial court that it planned to challenge the prior convictions on the basis that the District Attorney's prior representation was incompetent. The court of appeal upheld the trial court's vicarious disqualification of the entire office. As in *Younger*, the district attorney's residual power over the office ensured that measures short of disqualification would not suffice: "As the deputies are hired by Storey, promoted by Storey and fired by Storey, we cannot say the office can be sanitized such to assume the deputy who prosecutes the case will not be influenced by the considerations that bar Storey himself from participation in the case." (*Id.* at p. 689.) In addition to the duty to maintain a former client's confidences, the case implicates the attorney's duty not to undertake representation that is adverse to the attorney's personal interests. Given Storey's personal interest in the competency of his prior representation in combination with his position of power in the office, it strained credibility that his office would not be influenced.

In *People v. Choi* (2000) 80 Cal.App.4th 476, the defendant was charged with murder; the district attorney believed the murder was related to a second murder, that of the district attorney's close personal friend. (*Id.* at p. 478.) The trial court initially denied a motion to disqualify the district attorney's office, in light of an ethical wall barring the district attorney from participation in the case, but subsequently with the admission of additional evidence of the district attorney's emotional involvement in the case, a different judge granted the renewed motion. (*Id.* at pp. 478-480.) The court of appeal affirmed, in part because of evidence that the ethical wall was not being strictly

observed, and in part because of the recognition that "deputy district attorneys serve at the will of the district attorney." (*Id.* at p. 483.) Because they are "hired, evaluated, and promoted by the district attorney," there is an unavoidable potential for bias, notwithstanding any ethical wall. (*Ibid.*) *Choi*, like *Lepe,* implicates the district attorney's personal conflict of interest, that is, his interest in bringing his close friend's murderer to justice.

In 1980, the Legislature passed Penal Code section 1424, which significantly restricts the availability of disqualification in criminal cases.[9] Thus, *Younger* is no longer good law in the criminal context. Nevertheless, the concerns present in *Younger*, *Lepe*, and *Choi* are present to an equal degree in this civil case. As the head of the City Attorney's Office, Herrera has the power to set agency policy and to influence the prospects of those who will handle this matter.[10]

At the intersection of law and politics, where this head of office case lies, the preservation of the public trust in the scrupulous administration of justice and the integrity of the bar must be the paramount concern. In the City Attorney's prosecution of a former client for fraud, the public cannot be left to wonder whether their top civil lawyer is vigorously representing their interests, maintaining professional objectivity, and

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9 Penal Code section 1424, subdivision (a)(1) provides that a motion to recuse a district attorney "may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that defendant would receive a fair trial." (Pen. Code, § 1424, subd. (a)(1), added by Stats. 1980, ch. 780, § 1.)

10 We note that *Chadwick v. Superior Court, supra,* 106 Cal.App.3d 108, relied upon by the City Attorney's Office in its argument for allowance of an ethical screen, expressly distinguished *Younger* on the basis that the screened attorney in *Chadwick* had no "policy or personnel evaluation authority." (*Chadwick v. Superior Court, supra,* 106 Cal.App.3d at p. 121.) Here, Herrera's position makes this case analogous to *Younger*, not *Chadwick*.

Similarly, in *People v. Christian, supra,* 41 Cal.App.4th at p. 999, although the county public defender was nominally in charge of both the Public Defender Office that represented one of the defendants and the Alternate Defender Office that represented a co-defendant, the county public defender had no supervisorial or disciplinary authority over the Alternate Defender attorneys.

keeping inviolate his former clients' confidences. We can ill afford the shades of doubt about the rectitude of our elected officials and our lawyers who are behind a screen. The stakes are too high for the politician's career, for the citizens who deserve his unwavering loyalty, and for the former clients who trust him to maintain their confidences. Like the dissent, we believe that lawyers take their ethical responsibilities seriously. And, as a lawyer, the City Attorney has ethical responsibilities both to his former client and to the public.

The possibility that the City Attorney's former client might be prosecuted for civil fraud by the City Attorney's Office may test public faith in the integrity of the judicial system, raising the specter of perceptions that the former client will be treated more leniently because of its connections, or more harshly because of leaked confidences. Neither perception is consistent with the notion that the power of the state to prosecute fraud will be exercised in an even-handed and impartial manner.

We agree with the City Attorney's Office that reasons exist to support a narrower disqualification rule in public sector cases. (See *ante* Part II.C.) Those reasons are insufficient when the City Attorney himself is the disqualified attorney. An ethical screen alone cannot suffice here. The City Attorney cannot screen out all his responsibilities for setting office policy and reviewing the performance of his attorney staff.

We recognize that disqualification in the criminal and civil contexts is quite different, and that *Younger, Lepe,* and *Choi* thus are not precisely analogous. However, this point does not help the City Attorney's Office. Disqualification is much harder to obtain in criminal cases than in civil cases. (See Pen. Code, § 1424.) Since 1980, the Legislature has not enacted any civil statute paralleling Penal Code section 1424. The willingness of courts to vicariously disqualify an entire office when a higher-up or the head of the office is involved, even in the criminal context, suggests that where the head of the office has a conflict in the civil context, vicarious disqualification must follow.

We readily acknowledge that disqualification may present a hardship for the City Attorney's Office in this case, as in every case where a public law office is disqualified.[11] We do not take this concern lightly. However, the trial court's findings preclude any conclusion that the motion was filed as an abusive litigation tactic or that Cobra delayed unduly in bringing its motion. Consequently, as a matter of law it was proper to impose vicarious disqualification.

Amici express concern that a blanket rule of vicarious disqualification for private-public migration cases would hinder the ability of public law offices across the state to recruit and retain talented lawyers and effectively defend the public interest. The trial court's order adopted such a rule; we do not. It remains to be seen whether our more limited ruling, confined to the heads of public law offices, will pose any serious hardship. We reject the notion that there will be a critical disincentive to talented and experienced attorneys seeking election or appointment to positions as head of a public office. We are unwilling to assume in the absence of any evidence that the fear that a significant number of an attorney-candidate's former clients will be prosecuted by the office influences the decision of a potential candidate or the electorate. A strict rule of vicarious disqualification may well be a positive factor in the decision of an experienced private attorney to seek a position as head of a public office. Free from the potential conflicts of loyalties between former clients and the current client and relieved of the hazards of setting office litigation policy while screening out litigation substantially related to his earlier representation of former clients, the attorney-candidate can assume office less encumbered. Because vicarious disqualification remains the presumptive rule, and

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11 We cannot agree with the dissent's conclusion that to avoid the monetary cost of outside counsel, "the government would inevitably curtail enforcement of its legal interests in some circumstances, providing an incentive for the filing of motions to disqualify." First, we have no empirical data about the number of cases where the head of office is or would be disqualified. Second, although it is certainly true that there is an out-of-pocket cost to retaining outside counsel, the true cost is less than the out-of-pocket cost. The City Attorney's Office, once freed from the responsibility for the conflicted case would reassign the previously allocated attorney resources to an additional case.

because conflicts involving the head of a public law office pose problems not readily addressed by an ethical screen alone, we decline to depart from that rule in this case.[12]

DISPOSITION

The order disqualifying the City Attorney's Office is affirmed.

GEMELLO, J.

We concur.

JONES, P.J.

[12] Cobra has requested judicial notice of certain public statements made by the City Attorney's Office, and has moved to strike a City Attorney's Office declaration filed in the trial court as part of its motion to stay proceedings pending appeal. The statements and the declaration have no bearing on the issues we decide. We deny the request for judicial notice and grant the motion to strike. (See *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063.)

SIMONS, J. - Dissent

I respectfully dissent.

While in private practice, Dennis Herrera (Herrera) represented Cobra Solutions, Inc. (Cobra), in a matter that the trial court found was substantially related to this case. Thus, there is a conclusive presumption that Herrera had access to confidential information in the course of the earlier representation that is relevant to the current litigation and his disqualification is mandatory. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283.) We must decide whether his disqualification automatically extends to the entire San Francisco City and County City Attorney's Office (Office) or simply requires that the Office effectively screen Herrera from any participation in this case. To phrase the question more precisely, is the presumption that Herrera will share the confidences of his former client with others in the Office rebuttable by establishing the existence of an effective ethical screen? The majority concludes the presumption is not rebuttable and orders the Office disqualified. I disagree.

The Rules of Professional Conduct of the State Bar of California do not address the vicarious disqualification of an entire law firm when a member of that firm has a former-client conflict. For this reason, "the vicarious disqualification rules have essentially been shaped by judicial decisions." (*Henriksen v. Great American Savings & Loan* (1992) 11 Cal.App.4th 109, 114.) These intermediate appellate court decisions created a set of categories that depend upon the public or private nature of the law office to and from which the attorney migrates, and applied a discrete rule of vicarious disqualification to each category. As the majority describes, in civil cases, the challenged firm, whether public or private, may rebut the presumption if the conflicted lawyer worked for the government while representing the former client. (*Chambers v. Superior Court* (1981) 121 Cal.App.3d 893, 898-899, 903 (*Chambers*); *Higdon v. Superior Court* (1991) 227 Cal.App.3d 1667; cf. *Chadwick v. Superior Court* (1980) 106 Cal.App.3d 108, 112, 116 (*Chadwick*).) On the other hand, the presumption is conclusive when the

conflicted attorney currently works for a private firm and represented the former client while working at a different private firm. (See *Henriksen*, at pp. 114-115.) No civil case prior to this one concerned an attorney, currently working for the government, who had represented the former client while working for a private firm.

While questioning the wisdom of the current categories, the majority creates a new one, for the head of a public office, and, as a matter of law, requires vicarious disqualification whenever that individual has a former-client conflict. I would reject the categorical approach and replace it with a uniform rule, applicable whenever an attorney has a former-client conflict, regardless of the public or private nature of the attorney's current or former firm and regardless of the role the attorney currently plays in the firm. In a motion to disqualify the current law firm because of an attorney's former-client conflict, the presumption that the law firm is disqualified should be rebuttable by evidence that the conflicted attorney has been effectively screened. I would then apply this uniform rule to the present case, reverse and remand the matter to permit the trial court to evaluate the Herrera screen. Further, even if the current set of categorical rules retain their vitality, I part ways with the majority. We should not automatically disqualify an entire public law office simply because the head of that office is disqualified due to a conflict based on successive representation. Instead, that office should be entitled to rebut the presumption of shared knowledge by proving the existence of an effective ethical screen.

I. *Eliminating the Conclusive Presumption*

In *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 (*SpeeDee Oil*), our Supreme Court analyzed the important interests implicated by a motion to disqualify a law firm. These interests included "a client's right to chosen counsel, an attorney's interest in representing a client, the financial burden on a client to replace disqualified counsel, and the possibility that tactical abuse underlies the disqualification motion. [Citations]" (*Id*. at p. 1145, fn. omitted.) "Ultimately, disqualification motions involve a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional

responsibility. [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. [Citations.]" (*Id.* at p. 1145-1146.) The court concluded that these ethical considerations create a presumption that an attorney's conflict extends to the entire firm. (*Id.* at 1146.) But the court *specifically declined to decide* whether that presumption is rebuttable "by establishing that the firm imposed effective screening procedures." (*Id*. at p. 1151.) The Ninth Circuit has read *Speedy Oil* "as sending a signal that the California Supreme Court may well adopt a more flexible approach to vicarious disqualification."[1] (*In re County of Los Angeles* (9th Cir. 2000) 223 F.3d 990, 995; see *Adams v. Aerojet-General Corp.* (2001) 86 Cal.App.4th 1324, 1333, 1351.)

The current set of categorical rules that rigidly apply vicarious disqualification in certain contexts were developed decades ago. The realities of a modern law practice compel a more flexible approach. Lawyers are increasingly mobile, and mid-career shifts between the public and private sectors and within the private sector are common. "Gone are the days when attorneys (like star athletes) typically stay with one organization throughout their entire careers." (*Adams v. Aerojet-General Corp., supra,* 86 Cal.App.4th at p. 1336.) Law firm mergers, dissolutions and acquisitions of other firms' practice groups occur with regularity. International mega-firms have been formed, with offices in numerous countries, containing lawyers who are unlikely to meet, let alone

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[1] *In re County of Los Angeles* noted that *SpeeDee Oil* involved the type of case most likely to require automatic disqualification; the law firm represented adverse parties in the same litigation. Yet, *SpeeDee Oil* left open the possibility that the presumption could be rebutted. The California Supreme Court recognized that " 'discrete, successive conflicting representations in substantially related matters,' " as in our case, pose a lesser threat to the attorney-client privilege. Thus, a successive representation case creates an even more compelling occasion for allowing rebuttal of the presumption. (*In re County of Los Angeles, supra,* 223 F.3d at p. 995, citing and quoting *SpeeDee Oil, supra,* 20 Cal.4th at p. 1151.)

discuss confidential matters, even if they share a common language. (*Ibid.*) In this context, the automatic disqualification of the law firm may result in harsh consequences for the lawyer and the firm, without any compelling reason. Further, the firm's clients are likely to find their counsel of choice limited, particularly in specialized areas of the law. The rule that the presumption of shared confidences is conclusive also creates a substantial potential for abuse. A motion to disqualify is an effective litigation tactic depriving an opposing party of its counsel of choice, and, possibly, driving up its legal fees significantly. (*In re County of Los Angeles*, *supra,* 223 F.3d at p. 996.) This is particularly true in a situation where a client and the challenged law firm have a long-term relationship.

None of these problems detract from the primacy of preserving "public trust in the administration of justice and the integrity of the bar." (*SpeeDee Oil, supra,* 20 Cal.4th at p. 1145.) But, the disqualification of the conflicted lawyer's current firm is not the sole means to preserve these important values. (*In re County of Los Angeles*, *supra,* 223 F.3d at p. 996.) A client's confidences can be maintained by isolating the lawyer "from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate *under the circumstances* to protect information that the isolated lawyer is obligated to protect." (ABA Model Rules Prof. Conduct (2004 ed.) rule 1.0(k), p. 7, italics added (hereafter, ABA rule or rules).) In its comment to this subdivision, the American Bar Association (ABA) sets out specific recommendations for such a screen. ". . . The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact

with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel. [¶] . . . In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening." (ABA rule 1.0, coms. [9] & [10], p. 10.)

Vesting the trial court with the discretion to approve a screen when the head of a public law office is disqualified will permit an evaluation of all relevant circumstances. It is, of course, significant that the conflicted attorney has office-wide supervisory responsibilities, or helps in the formulation of office policy or plays a major role in the hiring, firing and promotion of subordinates.[2] But, in evaluating the effectiveness of any screen imposed, other factors should come into play. For example, the size of the office should be considered, at least to the extent it affects the number of levels of supervision, and, therefore, the ease with which another supervisor can replace the conflicted office head in the current case. Further, the trial court should consider whether the attorneys actually handling the case, and the office files they utilize, are in the same physical location as the disqualified head of the office. Whether the head of the office is personally embroiled in the current litigation is an additional factor. Cobra makes a passing reference in its briefing to the possibility that it will call Herrera as a witness in the case. If established to the trial court's satisfaction, this, along with any other fact that suggests Herrera's personal embroilment, would be a circumstance the trial court should consider. Finally, if the case is one that raises significant policy issues in the office, the trial court must decide if there is reason to doubt that a truly effective screen will be

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[2] These factors are significant whether or not the disqualified attorney is the actual head of the office or simply an office supervisor.

imposed, since such a screen might undermine the office head's role in managing the office and setting policy.[3]

Stated simply, I would reject a categorical rule in our case because, while relevant, Herrera's role should not be decisive. After *SpeeDee Oil*, we should reassess the rigid vicarious disqualification rule in successive representation cases and eliminate the conclusive presumption that the disqualified attorney will share confidences with current members of his or her firm.

II. *The Public Interest in Permitting Screening Where a Current or Former Government Lawyer is Disqualified*

Even if *SpeeDee Oil* does not lead to a uniform rule in which the presumption of shared confidences is rebuttable, we should continue to limit the conclusive presumption to private-to-private migrations and not apply it in the context of this case. Where a lawyer represents the government after serving clients at a private law firm, the relevant policies suggest that former-client conflicts should not be imputed to the other government lawyers associated with him or her, if an effective screen is in place. California law presently provides that former government lawyers who are disqualified need only be screened. (*Chambers, supra,* 121 Cal.App.3d at pp. 898-899, 903; *Chadwick, supra,* 106 Cal.App.3d at p. 118.) We should apply the same rule to current government lawyers, even to those who serve as the head of the office.

When an attorney who has migrated from one private firm to another is disqualified, we balance the protection of the former client's confidences against the current client's right to choose counsel. The realities of a public law practice add additional factors to the mix that favor screening the lawyer rather than disqualifying the firm. First, public policy is served if we encourage the recruitment of qualified attorneys by the government because this advances the public agenda of the particular

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[3] Clearly not all cases raise such concerns. For example, if Herrera's conflict had arisen in a simple contract dispute between Cobra and the City of San Francisco, it seems unlikely that important Office policies would be implicated.

governmental agency involved. (*Chambers, supra,* 121 Cal.App.3d at p. 899.) A strict rule of vicarious disqualification will discourage private firms from hiring former government lawyers and " 'act as a strong deterrent to the acceptance of Government employment by the most promising class of young lawyers.' " (*Chambers*, at p. 900.) If a current government lawyer's former-client conflict required disqualification of the public law office, the public interest would be impacted even more directly by discouraging public law offices from seeking to employ experienced private attorneys. Thus, the public is well served by allowing the screening of current as well as former government lawyers with a former-client conflict.

Second, disqualifying a public law office because one of its lawyers has a former-client conflict could significantly impact public finances. "Disqualifications of public counsel can result in increased public expenditures for legal representation, and 'there is the potential for a substantially increased call upon an already severely strained tax base.' [Citation.]" (*In re Lee G.* (1991) 1 Cal.App.4th 17, 28; accord, *People v. Christian* (1996) 41 Cal.App.4th 986, 998.) To avoid this monetary cost, the government would inevitably curtail enforcement of its legal interests in some circumstances, providing an incentive for the filing of unwarranted motions to disqualify public law offices.

The majority limits the potential negative impact on the public's finances, and on the ability to recruit qualified attorneys from private firms by applying its rule only when the disqualified attorney is the head of the public law office.[4] However, even as limited, the majority's rule will negatively impact the election (or appointment) process. The public benefits if lawyers from private firms as well as public law offices compete to be the city attorney. Frequently their strongest credential will be their prior participation in litigation or transactional work relating to city contracting. Rarely would we expect

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[4] One wonders whether the rule will remain so closely cabined. The rule rests on policy grounds that, in large offices, would seem to apply to any supervisor with authority over hiring, firing, and promotions that could be abused.

candidates to brag about their lack of any experience relevant to the position they seek. The majority result would turn this significant asset into a liability.

It is worth emphasizing that this entire array of public interests would properly be sacrificed if vicarious disqualification were the only way to protect a former client's confidences. But, it is not. (*In re County of Los Angeles*, *supra,* 223 F.3d at p. 996.) California cases have upheld the effectiveness of a well-constructed ethical screen in cases even more likely than our own to justify vicarious disqualification. In *Christian*, two criminal defendants were jointly tried for robbery. One was represented by a county public defender, while the county alternate defender represented the other. Though the same person was the head of both government law offices, *Christian* held that the joint representation, implicating the duty of loyalty, did not violate the Sixth Amendment right to conflict-free representation because of the ethical separation between the two law offices. (*People v. Christian, supra,* 41 Cal.App.4th at pp. 991-992, 998-999.) In its decision, *Christian* relied on many of the same factors listed above, distinguishing private from public law offices. "Thus, in the public sector, in light of the somewhat lessened potential for conflicts of interest and the high public price paid for disqualifying whole offices of government-funded attorneys, use of internal screening procedures or 'ethical walls' to avoid conflicts within government offices . . . have been permitted." (*Id.* at p. 998; accord, *Castro v. Los Angeles County Bd. of Supervisors* (1991) 232 Cal.App.3d 1432 [Dependency Court Legal Services, Inc., a nonprofit organization created by Los Angeles County, may properly represent three different, adverse parties in juvenile dependency proceedings because of the ethical walls separating the three different groups of lawyers in that organization.].)

Christian involved the simultaneous representation of parties with adverse interests in a conflict where the United States Constitution applied. The refusal to impose an automatic disqualification in such a case is instructive. It reflects confidence in the effectiveness of a well-constructed ethical screen and confidence in a trial court's ability to evaluate the screen. This justifiable confidence should guide our decision here.

The ABA rules, unlike our own, directly address the vicarious disqualification question.[5] It is noteworthy that the rule adopted by the majority is contrary to the approach taken by the ABA. ABA rule 1.11 provides that the disqualification of a *current* or former government employee or *officer* for a conflict based on successive representation does not require vicarious disqualification, so long as the attorney is adequately screened. This rule is derived from a formal opinion issued in 1975 by the ABA Standing Committee on Ethics and Professional Responsibility to the same effect. (See *People v. Chambers, supra,* 121 Cal.App.3d at pp. 898-899 & fn. 4.) Thus, even if we retain the conclusive presumption of shared confidences in private-to-private cases, we should not extend it to cases where there is a motion to disqualify a public law office, even if the conflicted lawyer is the head of that office. (See *U.S. v. Goot* (7th Cir. 1990) 894 F.2d 231, 232-237 [Preindictment, the defendant had been represented by the person who was currently the United States Attorney and whose office had indicted, prosecuted and obtained a conviction of his former client. Since the United States Attorney had been adequately screened from participation in the case, the motion to disqualify the entire United States Attorney's Office was properly denied.].)

The majority relies on several cases in which the court disqualified a public law office because the head of that office was disqualified: *People v. Choi* (2000) 80 Cal.App.4th 476 (*Choi*), *People v. Lepe* (1985) 164 Cal.App.3d 685 (*Lepe*) and *Younger v. Superior Court* (1978) 77 Cal.App.3d 892 (*Younger*). Each is a criminal case, and *Choi* and *Lepe* were decided after the enactment of Penal Code section 1424, which imposes a special test before a court may disqualify a prosecutor's office in a criminal case. Further, each involves either unusual facts or a unique procedural posture, or both, and provides little basis for overriding those policy factors favoring the right to rebut the presumption of shared confidences.

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[5] Though they have not been adopted in California, the ABA rules may be considered as a collateral source of proper professional conduct where, as here, there is no direct authority in California and no conflict with our state's public policy. (*State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 655-656.)

In *Choi*, two men were murdered in San Francisco in separate shootings that occurred only minutes apart. No one was ever accused in the death of one of the victims, a close personal friend of then San Francisco District Attorney Terence Hallinan. The defendant was charged with the murder of the other victim. Because Hallinan strongly believed that the two shootings were connected, the San Francisco District Attorney's Office screened him from participation in the Choi prosecution. The trial court initially approved of the arrangement and rejected a defense motion to recuse the prosecutor's office. (*People v. Choi, supra* 80 Cal.App.4th at p. 478.) Only later in the proceedings, after Hallinan's actions conclusively demonstrated his "deep emotional involvement" in the case, and the ineffectiveness of the screen, did a second trial judge reconsider the issue and grant the defense motion. (*Id.* at p. 481.) On appeal, the court concluded that the trial court did not abuse its discretion in recusing the office, because of the gravity of Hallinan's conflict,[6] the failure of the ethical wall and Hallinan's authority to hire, fire and promote the deputies who were actually handling the prosecution. (*Id*. at p. 483.) Thus, in C*hoi,* the trial court first exercised its discretion to uphold the effectiveness of the screen and deny the motion to recuse. Only after it was provided with additional information about the depth of Hallinan's emotional involvement in the case and the inadequacy of the ethical screen constructed by the office did the trial court grant the defense motion to recuse.[7]

Lepe, too, presents very different facts from our own. Thomas Storey had represented Lepe in two related criminal prosecutions involving three victims of threats

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[6] "Moreover, District Attorney Hallinan's inability to divorce himself from this case demonstrates that the conflict was so grave that it was unlikely the defendants would obtain a fair trial. District Attorney Hallinan was in effect serving two masters—attempting to seek justice for the death of [his friend] while prosecuting defendants on unrelated crimes." (*Choi, supra,* 80 Cal.App.4th at p. 483.)

[7] Hallinan was not disqualified because he possessed client confidences obtained while representing a party with adverse interests. Therefore, there was no discussion of the presumption of shared confidences or whether an effective screen rebuts that presumption.

and violence. After becoming the Imperial County District Attorney, Storey filed criminal charges against his former client, alleging a felony assault with a deadly weapon against two of the three original victims. In addition, an amended information was filed alleging a prior felony conviction stemming from one of the earlier prosecutions of Lepe, in which he was represented by Storey. The defense had informed the trial court that it planned to challenge the prior conviction on the basis that Storey's representation had been incompetent. The trial court exercised its discretion to recuse the prosecutor's office. On appeal, the court found no abuse of discretion. (*People v. Lepe, supra,* 164 Cal.App.3d at pp. 686-687 & fn. 1.) Because the court concluded that Storey had received confidential information relevant to the current prosecution while engaged in the prior representation, an actual conflict existed. Recusal was upheld on the basis that Storey would be motivated to vigorously defend his own lawyering in the earlier case and, through his supervisory control over his deputies, could influence their performance. "The 'evenhanded' manner required of the prosecution is missing." (*Id.* at pp. 688-689.) Again, *Lepe* supports granting the trial court discretion when the head of an office has a conflict and not disqualifying the office automatically. When the conflict involves the type of personal embroilment suggested by *Lepe* and *Choi*, the trial court *may* properly conclude that the deputy actually handling the matter will reasonably fear abuse of the boss's supervisory power.

Finally, in *Younger*, a criminal defense attorney left his law firm to become the third-highest ranking prosecutor in the Los Angeles County District Attorney's Office. (*Younger, supra,* 77 Cal.App.3d at p. 895.) The successor law firm was then defending between 75 and 200 felony cases in which the district attorney's office was the opposing party. (*Id.* at p. 894.) The sheer number (and likely variety) of active prosecutions involving the attorney's former clients may have made creation of an effective ethical screen infeasible and justified the exercise of discretion by the trial court. In any event, it would explain the unique procedural aspect of this case: the district attorney's office

joined the defense in the motion that the office be recused.[8] If the government law office, itself, believes it cannot adequately screen the disqualified attorney, the trial court's concurrence is unlikely to be an abuse of discretion. In our case, the Office believes it has effectively screened Herrera. I believe the trial court should evaluate that screen before deciding if vicarious disqualification is required.

The screen imposed in this case by the Office contains many but not all elements recommended by the ABA. It was imposed in a timely fashion, and both Herrera and the deputies handling the case were informed of the screen, as each has acknowledged. After imposition of the screen, Herrera had no further involvement in the case, and his chief deputy exercised Herrera's authority in the matter. The files relating to the lawsuit are maintained under lock and key at a different physical location than Herrera's office. He has no access to those files or to any computerized records in this matter. Are these precautions "reasonably adequate under the circumstances?" (ABA rule 1.0(k).) Under the majority's rule, that is a question that need not be asked or answered. I would reverse and remand to permit the trial court to make that determination.

Of course, there is a risk that Herrera *may* be tempted to evade the screen and disclose the former client's confidences, or the public *might* perceive that Cobra will be treated more harshly because of its former relationship with Herrera.[9] But, without more, this risk is outweighed by the social, professional and monetary costs of disqualifying an entire public law office. (See *In re Lee, supra,* 1 Cal.App.4th at p. 28.) We tolerate this

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[8] The effect of the disqualification was to transfer responsibility for prosecuting the 75 to 200 cases at issue from the district attorney's office to the Attorney General, and it was the Attorney General, Evelle Younger, who sought the writ to overturn the trial court's decision to disqualify the local prosecutor. (*Younger, supra,* 77 Cal.App.3d at p. 894.)

[9] As the majority notes, the public may also be concerned that Cobra will be treated more leniently because Herrera formerly represented the company. However, the vicarious disqualification rule, at issue in this case, is not designed to address this separate ethical problem. The concern that Cobra might be treated more leniently is unrelated to the purpose of the vicarious disqualification rule, which is intended to benefit the former client.

risk in civil cases, when a government lawyer changes firms, and in criminal and juvenile dependency cases, when a public law office represents clients with adverse interests in the same case, so long as a screen, effective in the circumstances, is in place. In part, we are willing to do so because we believe that lawyers take their ethical responsibilities seriously. We should do so here.

I would reverse.

SIMONS, J.

City and County of San Francisco v. Cobra Solutions, Inc., A103479

Trial court:	San Francisco County Superior Court
Trial judge:	Hon. Donald S. Mitchell

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