Filed 11/8/18 DeMartini v. Blotzer CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

WARREN DeMARTINI, Plaintiff and Respondent, v. ROBERT BLOTZER, Defendant and Appellant.	B282271 Los Angeles County Super. Ct. No. BC596228

APPEAL from an order of the Superior Court of Los Angeles County, Maureen Duffy-Lewis, Judge. Affirmed.

ADLI Law Group and Drew H. Sherman for Defendant and Appellant.

Friedman, Enriquez & Carlson and Grant A. Carlson for Plaintiff and Respondent.

INTRODUCTION

This lawsuit involves a dispute between members of the rock band, RATT. Robert Blotzer appeals from an order denying his motion to disqualify Warren DeMartini's counsel, Grant A. Carlson and his law firm, Friedman, Enriquez & Carlson (FEC). More than a decade before DeMartini filed this action against Blotzer, Kyle P. Kelley represented DeMartini, Blotzer, and WBS, Inc.—the owner of RATT's intellectual property—in a lawsuit filed by RATT band member Stephen Pearcy. At the time, Kelley had his own law practice, through which he represented Blotzer et al., and also was designated "of counsel" to FEC. Kelley severed his ties with FEC in 2012 and moved to Texas in 2014. Carlson and FEC filed this action on behalf of DeMartini in September 2015.

Blotzer noticed Kelley's name on FEC's letterhead in November 2016. He essentially contends Carlson must be presumed to have worked on the prior matter with Kelley, and, because the prior matter and current matter are substantially related, Carlson and FEC should have been disqualified. We conclude the trial court did not err because substantial evidence demonstrates (1) Kelley left FEC in 2012, and (2) Carlson did not acquire any confidential information material to the underlying lawsuit.

FACTS AND PROCEDURAL BACKGROUND

The record on appeal does not include the operative complaint in the underlying action.[1] Accordingly, we state the

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[1] Blotzer improperly attached as an exhibit to his opening brief a highlighted copy of the caption page of the second amended complaint. He also attached his counsel's supplemental declaration filed in support of Blotzer's motion to disqualify

background facts relevant to this appeal primarily as described by DeMartini, the prevailing party, in his opposition to Blotzer's motion to disqualify, which cites to the operative complaint.[2]

1. *Facts giving rise to the underlying litigation*

WBS was created to manage the business and operations of the rock band RATT. The original members of RATT were DeMartini, Blotzer, Stephen Pearcy, Juan Croucier, and Robbin Crosby. Crosby is deceased. DeMartini is the CEO of WBS and Chairman of the Board of Directors. Blotzer and Pearcy also are members of the Board of Directors, but Pearcy is not active.

WBS owns the intellectual property relating to RATT, including the right to use the band name. The WBS shareholder agreement limits the use of the band name "RATT" to touring and recording by the three remaining RATT members, DeMartini, Blotzer, and Pearcy. Specifically, "[s]o long as all three of DeMartini, Blotzer[,] and Pearcy are Band members, the

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DeMartini's counsel and its exhibit, Carlson's biography page from his firm's website. Neither is part of the Clerk's Transcript or a motion to augment the record. (See Cal. Rules of Court, rule 8.204(d) ["A party filing a brief may attach copies of exhibits or other materials *in the appellate record*." (italics added)].)

[2] DeMartini's opposition to Blotzer's motion to disqualify is included in the Clerk's Transcript as an exhibit to Blotzer's objection to the opposition as late-filed. We granted DeMartini's motion to augment the record with the opposition itself. Blotzer designated the opposition to motion to disqualify for inclusion in the Clerk's Transcript, but because he listed the wrong date, DeMartini's opposition to Blotzer's demurrer to the second amended complaint was included instead.

Band may record and perform under the 'RATT' name, and utilize all of [WBS's] intellectual property embodying such name."

DeMartini, Blotzer, and Pearcy disagree on whether the band should continue to tour together. Pearcy has stated he will not tour. DeMartini will tour with the full band, but not with replacement musicians. Blotzer has toured with substitute musicians in tribute bands. He now wants to use the name "RATT" with his tribute band. DeMartini "believes this is a huge mistake and a fraud on RATT's loyal fans. Touring with inferior substitutes would dilute the value of the band, produce low revenue and damage the credibility of the band in the future. [DeMartini] and Blotzer toured previously without Pearcy and made a mere fraction of what can be made with [the] complete line-up." Pearcy is the lead vocalist, DeMartini is the lead guitarist, and Blotzer is the drummer.

On August 24, 2015, Blotzer's current attorney sent a notice of annual shareholders meeting. The notice stated, " 'The meeting will address the payments of the corporate credit card, and use of the corporation[']s intellectual property.' " The notice provided no other information.

DeMartini told Blotzer's attorney that he would be unable to attend the meeting as scheduled. Nevertheless, Blotzer and his attorney proceeded with the shareholders meeting on September 3, 2015. At that meeting, a new director purportedly was elected to the board. A board of directors meeting then was held immediately after the shareholders meeting. The board purported to: elect Blotzer as Chairman of the Board and President in place of DeMartini; elect DeMartini as Vice President of guitars; elect Blotzer's attorney as counsel for WBS; decide Blotzer will be the only touring member of RATT; decide

Blotzer will be the only person allowed to use the name "RATT"; and decide ADLI Law (Blotzer's counsel elected as WBS's counsel) would institute actions against alleged infringers.

The bylaws of WBS require a quorum for any action by its shareholders or directors. DeMartini asserts Blotzer could not have taken any valid action without DeMartini present because Blotzer owns 50 percent of the shares of WBS, less than the required majority quorum. Blotzer contends his actions at the September 3, 2015 meeting were valid.

DeMartini sent a cease and desist letter to Blotzer on September 10, 2015, demanding he stop taking any action in the name of WBS and notifying Blotzer his actions taken at the September 3 meeting were null and void. Blotzer did not cease to act for WBS as demanded.

DeMartini also discovered Blotzer has been promoting his tribute band as RATT. DeMartini contends the shareholder agreement forbids Blotzer from using the name RATT for his tribute band and any act at the September 3, 2015 shareholders and board of directors meetings allowing him to do so was invalid.

On September 29, 2015, DeMartini filed a shareholder's derivative action against Blotzer and WBS, individually and derivatively on behalf of WBS.

2. *Facts giving rise to motion to disqualify FEC*

In February 2001, RATT band member Stephen Pearcy filed a shareholder's derivative suit against WBS, DeMartini, and Blotzer, among others. WBS, DeMartini, and Blotzer cross-complained against Pearcy for trademark infringement and breach of fiduciary duty, among other claims. Judgment was entered in favor of WBS in August 2002. The trial court found

Pearcy willfully infringed on WBS's trademarks and enjoined him from using the RATT trademark in his business or profession, unless authorized. Kelley represented WBS, DeMartini, and Blotzer in that action (Pearcy Lawsuit).

Carlson and his law firm FEC represent DeMartini in the current litigation. Blotzer is represented by Drew H. Sherman with the ADLI Law Group. According to Sherman's declaration filed in support of Blotzer's motion to disqualify Carlson and FEC, Blotzer noticed the name "Kyle Kelley" on FEC's letterhead for the first time when reviewing communications from DeMartini's counsel "[i]n preparing to oppose [DeMartini's] attorney's fees motions."[3] Sherman pulled up Carlson's firm website and saved screen shots of the "Attorneys" and "Contact" web pages. The screen shots, printed on November 5, 2016, list Grant Carlson as an attorney in the firm and Kyle Kelley as an associate/of counsel of the firm, and list the same Beverly Hills address for FEC as Kelley used during the Pearcy Lawsuit.

Blotzer filed a motion to disqualify DeMartini's counsel on November 7, 2016. He submitted Sherman's declaration in support of the motion, including the judgment from the Pearcy Lawsuit and the screen shots from the FEC website.

3. *The opposition to the motion to disqualify*

In support of his opposition to Blotzer's motion to disqualify, DeMartini submitted the declarations of Attorneys Kelley and Carlson.

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[3] The referenced attorney fees motion is not part of the appellate record. The case summary indicates plaintiff's motion for fees and costs was heard November 7, 2016, over a year after the underlying lawsuit was filed. The motion was granted.

Kelley confirmed he represented WBS, DeMartini, and Blotzer in the Pearcy Lawsuit. At the time, Kelley had a solo practice, the Law Office of Kyle P. Kelley. He declared he represented WBS, DeMartini, and Blotzer in the Percy Lawsuit through that solo practice. Kelley "ran" his law practice as a separate business out of an office within FEC's offices. In lieu of paying rent to FEC, Kelley performed part-time legal services for the firm and was listed as "of counsel" so that he could make court appearances on behalf of FEC clients.

Kelley declared that he maintained his own client files in his office separately from the FEC files and performed his own accounting. He invoiced FEC for time he spent on FEC client matters. Kelley also maintained a phone number that rang directly to his desk. He listed that number on his business card for his own practice. Kelley declared that Blotzer always called him on this direct line.

Kelley also had a separate business card that he used for his FEC matters. That card listed the firm's telephone number. The firm receptionist directed calls made on that number to Kelley.

Kelley ended his of counsel relationship with FEC in June 2012 when he moved out of the FEC office and began working from home. He threw away all of his FEC business cards when he moved out of the office. Kelley continued to receive mail at the FEC office to avoid disclosing his home address, but no longer had a business relationship with the firm after he moved. Kelley declared he has not worked for FEC or any of its clients since he moved in 2012, and he has no access to files in FEC's office. He also declared he does not discuss any of his "cases, past or

present, with Mr. Carlson, especially any confidential information or attorney client communications."

Kelley also declared that FEC's failure to remove him as "of counsel" from the firm's website and marketing materials was "apparently an oversight by the firm. . . . I have had no continuing business relationship with FEC since vacating my office in June, 2012. Had I known FEC had not removed me as 'of counsel,' I would have directed them to do so."

Kelley further declared under penalty of perjury:

> "At no time have I ever consulted with any attorney at [FEC] about this case, nor do I recall having spoken to Mr. Blotzer's attorney. Any documents which I had on the Pearcy Lawsuit were long ago destroyed. I have no material information relative to the merits of Mr. Blotzer's takeover of WBS, and I have no intent in playing a role in any dispute between Messrs. DeMartini and Blotzer. [¶] . . . [¶] *Most importantly, I never shared any confidential information from the Pearcy Lawsuit with Mr. Carlson or anyone at FEC*, nor would I ever breach the attorney client privilege by doing so." (Italics added.)

Kelley moved to Texas in February 2014. He declared Blotzer was aware of the move because they spoke in 2014 when Kelley was moving and have spoken since Kelley moved. Kelley also has spoken to DeMartini "on matters unrelated to the[ ] pending litigation." Kelley declared that Blotzer has never mentioned to him any issue related to FEC representing DeMartini. He further declared DeMartini and Blotzer both have

known he did part-time legal work for FEC in the past and that FEC represented DeMartini.

Carlson declared the Pearcy Lawsuit "was handled by Mr. Kelley through his own firm, not [FEC]. My firm had no involvement in the case and prior to this action I have never represented any partners [*sic*] to the present case." Carlson also declared he has not consulted Kelley about the present action or sought any information from him "to prosecute this case." He declared FEC "maintains no continuing business relationship with Mr. Kelley, financial or otherwise. After receiving the motion [to disqualify], I realized that we had not removed Mr. Kelley as 'of counsel.' This is an oversight on our part. Senior Partner at the time, Barry Friedman, was moving toward retirement. He was the Managing Partner. My Partner Paul Enriquez and I had not previously engaged in any management and we have been slow on certain housekeeping issues. It was a good faith oversight."

The trial court heard Blotzer's motion to disqualify on April 10, 2017. No reporter was present at that hearing; the court entered a minute order the same day. The court granted Blotzer's request to take judicial notice of the judgment in the Pearcy Lawsuit. The court questioned the admissibility of the screen shots and internet printouts presented by Blotzer to show a current association between Kelley and FEC. The court explained that evidence "alone [did] not necessarily show a current association." The court also referred to the declarations DeMartini submitted in opposition. It determined "[t]he failure of the firm to remove Kelley from the firm material appears to be an oversight."

The court denied the motion, concluding, "This is not a matter of successive representation on the part of Mr. Kelley. There are no grounds to disqualify the law firm o[f] Friedman, Enriquez and Carlson."

Blotzer filed a timely notice of appeal on April 26, 2017.

DISCUSSION

Blotzer contends the trial court incorrectly focused on Kelley instead of Carlson when the court denied the motion to disqualify. He contends there is an irrebuttable presumption that Carlson received confidential information when Kelley was representing the parties in the Pearcy Lawsuit, requiring his and FEC's disqualification. We disagree. California law does not impose such a presumption in these circumstances, and Kelley's current status with FEC was relevant to the trial court's inquiry.

1. *Standard of review and applicable law*

"Generally, a trial court's decision on a disqualification motion is reviewed for abuse of discretion. [Citations.] If the trial court resolved disputed factual issues, the reviewing court should not substitute its judgment for the trial court's express or implied findings supported by substantial evidence. [Citations.] When substantial evidence supports the trial court's factual findings, the appellate court reviews the conclusions based on those findings for abuse of discretion. [Citation.] . . . [W]here there are no material disputed factual issues, the appellate court reviews the trial court's determination as a question of law. [Citation.]" (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143-1144 (*SpeeDee Oil*).) In conducting our appellate review, we presume the order of the lower court is correct and "all intendments and presumptions are indulged to support it on matters as to which

the record is silent." (*H. F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1451 (*Ahmanson*).)

"Protecting the confidentiality of communications between attorney and client is fundamental to our legal system." (*SpeeDee Oil, supra*, 20 Cal.4th at p. 1146.) It is the duty of every attorney, therefore, "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." (Bus. & Prof. Code, § 6068, subd. (e)(1).) Then current rule 3-310(E) of the State Bar Rules of Professional Conduct prohibited an attorney, "without the informed written consent of the client or former client, [from] accept[ing] employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment." (Rules Prof. Conduct, former rule 3-310(E).) Thus, "[a] former client may seek to disqualify a former attorney from representing an adverse party by showing the former attorney actually possesses confidential information adverse to the former client." (*Ahmanson, supra*, 229 Cal.App.3d at p. 1452.)

Generally, possession of confidential information need not be proved in a successive representation case where "the former client can establish the existence of a substantial relationship between representations." (*Ahmanson, supra*, 229 Cal.App.3d at p. 1452; *Goldberg v. Warner/Chappell Music, Inc.* (2005) 125 Cal.App.4th 752, 759 (*Goldberg*).) Thus, " ' "[w]hen a substantial relationship has been shown to exist between the former representation and the current representation, and when it appears by virtue of the nature of the former representation or the relationship of the attorney to his former client confidential information material to the current dispute would normally have

been imparted to the attorney or to subordinates for whose legal work he was responsible, the attorney's knowledge of confidential information is presumed." ' " (*Goldberg*, at p. 759, citing *Rosenfeld Construction Co. v. Superior Court* (1991) 235 Cal.App.3d 566, 574, italics omitted.)

"Normally, an attorney's conflict is imputed to the law firm as a whole on the rationale 'that attorneys, working together and practicing law in a professional association, share each other's and their clients', confidential information.' " (*City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 847-848.) Thus, California decisional law has established that " '[[w]]here an attorney is disqualified because he formerly represented and therefore possesses [either actually or presumptively] confidential information regarding the adverse party in the current litigation, vicarious disqualification of the entire firm is compelled as a matter of law.' " (*Goldberg, supra*, 125 Cal.App.4th at p. 759.) An "of counsel" attorney's conflict of interest also may be imputed to the law firm associated with that attorney. (*SpeeDee Oil, supra*, 20 Cal.4th at pp. 1155-1156 [regarding of counsel attorneys "as the same as partners, associates, and members of law firms for conflict of interest issues"].)

"There is, however, a recognized 'limited exception to this conclusive presumption in the rare instance where the lawyer can show that there was no *opportunity* for confidential information to be divulged.' " (*Goldberg, supra*, 125 Cal.App.4th at p. 760.) The exception exists because "the substantial relationship test is 'intended to protect the confidences of former clients when an attorney has been in a position to learn them.' Therefore, to apply the remedy of disqualification 'when there is no realistic

chance that confidences were disclosed would go far beyond the purpose' of the substantial relationship test." (*Ahmanson, supra*, 229 Cal.App.3d at p. 1455; *Goldberg*, at p. 760.)

In *Goldberg*, our colleagues in Division Four considered such a scenario, explaining:

> "Where tainted attorneys and nontainted attorneys are working together at the same firm, there is not so much a conclusive presumption that confidential information has passed as a pragmatic recognition that the confidential information will work its way to the nontainted attorneys at some point. When, however, the relationship between the tainted attorneys and nontainted attorneys is in the past, there is no need to 'rely on the fiction of imputed knowledge to safeguard client confidentiality' and opportunity exists for a 'dispassionate assessment' of whether confidential information was actually exchanged." (*Id.* at p. 765.)

The court found this reasoning in line with the ABA Model Rules of Professional Conduct (Model Rules), noting California courts may consult the Model Rules "when a matter is not addressed by the California Rules." (*Goldberg, supra*, 125 Cal.App.4th at p. 765.) The court specifically looked to Model Rule 1.10(b). That rule provides:

> " 'When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client

> represented by the formerly associated lawyer and not currently represented by the firm, unless (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; *and* (2) any lawyer remaining in the firm has [protected] information . . . that is material to the matter.' " (*Ibid*., italics added.)

The court noted that "[c]ourts from other jurisdictions have followed . . . Model Rule [1.10] in situations analogous to the present one: where an attorney who presumptively acquired confidential information from a former client leaves the firm, the firm is not automatically disqualified if it chooses to represent a party adverse to the former client." (*Goldberg, supra*, 125 Cal.App.4th at p. 765.) Such is the relationship here between Kelley on the one hand and Carlson and FEC on the other. Kelley left the firm and Carlson and FEC now represent DeMartini adverse to Kelley's former client Blotzer. We thus find the rationale expressed in *Goldberg* and its reliance on Model Rule 1.10(b) applicable.

Moreover, the California Supreme Court has impliedly approved the *Goldberg* court's reasoning: it approved California's new rule 1.10 of the Rules of Professional Conduct (Cal. Rule 1.10), modeled after Model Rule 1.10, that took effect November 1, 2018. California Rule 1.10(b) is virtually identical to Model Rule 1.10(b). The executive summary to the new California Rule 1.10 explains that "[p]aragraph (b) incorporates Model Rule 1.10(b), which was adopted as the law of California by the court in *Goldberg* . . . . The concept recognized in *Goldberg* is that if a lawyer who has represented a client and acquired

confidential information has left the firm, and no other lawyer who has acquired confidential information remains, then there is no one left in the firm with knowledge that can be imputed to other lawyers in the firm." (Rules Prof. Conduct, rule 1.10 [eff. Nov. 1, 2018], Commission for Revision of Rules of Professional Conduct, Executive Summary, p. 3.) Thus, although California Rule 1.10 was not effective at the time, the standard it expresses has been the law of California since at least 2005 when *Goldberg* was decided.

We apply these principles to determine whether the trial court abused its discretion in denying Blotzer's motion to disqualify Carlson and FEC.

2. *We do not presume Kelley shared Blotzer's confidences with other FEC attorneys in light of his 2012 departure*

Relying on *SpeeDee Oil,* Blotzer contends Carlson and FEC are vicariously disqualified from representing DeMartini based on Kelley's conflict of interest. Blotzer misses two important factual distinctions in *SpeeDee Oil*—the "tainted" of counsel attorney *remained associated* with the vicariously disqualified law firm, and the attorney and the law firm represented opposing parties in the *same litigation*. (*SpeeDee Oil, supra*, 20 Cal.4th at pp. 1139-1140, 1152.)

In *SpeeDee Oil*, *supra*, 20 Cal.4th at pp. 1140-1141, the appellant defendant's attorney in a pending litigation consulted with an "of counsel" attorney at a different law firm to discuss the possibility of his assisting with the appellant's defense. Around the same time, respondent plaintiffs associated in that law firm as their counsel in the matter. (*Id.* at p. 1141.) Though the of counsel attorney declared he had not discussed the matter with

any attorney or employee of the law firm, "the declarations . . . submitted fail[ed] to demonstrate that any formal screening procedure prevented attorneys working on respondents' behalf from being exposed to [appellant's] confidences." (*Id.* at pp. 1142, 1151-1152.) The California Supreme Court concluded by virtue of the of counsel attorney's provision of legal services to the appellant through his consultation with appellant's attorney, the of counsel attorney and the law firm "represented adversaries in the same litigation, with the concomitant potential for a breach of the duty of confidentiality." (*Id.* at pp. 1155-1156.) The of counsel attorney's conflict of interest, therefore, "inevitably [led] to the . . . firm's vicarious disqualification from representing respondents to assure the preservation of [the appellant's] confidences and the integrity of the judicial process." (*Id.* at p. 1156.)

Like the of counsel attorney in *SpeeDee Oil*, Kelley also was "of counsel" and maintained his own legal practice separate from the firm. (*SpeeDee Oil, supra*, 20 Cal.4th at p. 1142 [attorney declared he had a separate practice with his own client, whom he billed separately from the firm].) The similarities end there, however. Unlike the attorney in *SpeeDee Oil*, Kelley did not represent Blotzer in the same litigation at the same time FEC represented DeMartini. Rather, Kelley's representation of Blotzer in the Pearcy Lawsuit had ended 13 years before Carlson and FEC began representing DeMartini in the current litigation. Moreover, as we discuss below, Kelley had severed his association with FEC three years before the current litigation began.

The successive representation at issue here is more similar to that in *Goldberg*. There, the appellant employee sued her former employer and supervisor for wrongful termination based

on discrimination. (*Goldberg, supra*, 125 Cal.App.4th at p. 754.) Six years earlier, the employee had consulted with a former partner of the law firm now representing the employer in her discrimination lawsuit about her employment contract. (*Id.* at p. 755.) Like Kelley, the partner had left the law firm three years before the underlying lawsuit was filed. (*Ibid.*) Appellant moved to disqualify the law firm based on that prior consultation. (*Ibid.*) The trial court denied the motion. It found the consultation between the employee and the partner consisted of a single meeting and there was no evidence the partner talked to anyone at the firm about the matter while he was there. (*Id.* at p. 758.) Because the partner left the firm three years before the underlying litigation began, the trial court concluded "[t]here is no fear of him talking about this case in the lunch room, or having his files seen by other members of the firm," and thus no need for vicarious disqualification of the firm. (*Ibid.*) The appellate court affirmed.

Although the Court of Appeal acknowledged that courts generally presume an attorney's knowledge of confidential information when a substantial relationship exists between the former and current representations (*Goldberg, supra*, 125 Cal.App.4th at p. 759), because the partner who had represented the former client was no longer at the law firm, "[i]t was appropriate under the circumstances for the trial court to make an assessment of whether [the partner] actually passed on confidential information. Since the [trial] court found he had not, there was no basis for disqualification." (*Id.* at p. 762.)

As does Blotzer, the appellant in *Goldberg* relied on *SpeeDee Oil* "for the proposition that there is an irrebuttable presumption" that the former partner's knowledge of confidential

information was passed on to other attorneys at the firm. (*Goldberg, supra*, 125 Cal.App.4th at p. 762.) The Court of Appeal distinguished *SpeeDee Oil*, as we have. It then explained the court's focus in *SpeeDee Oil* "on the continuing relationship between the attorney and the firm, and the danger of inadvertent disclosure as long as that relationship lasted, distinguishes that case from the present situation and renders its holding of little assistance here." (*Goldberg*, at p. 763).

The *Goldberg* court also distinguished *Rosenfeld Construction Co. v. Superior Court, supra*, 235 Cal.App.3d at p. 577, also relied on by Blotzer, explaining that case "involved the more commonplace disqualification issue that arises when tainted and nontainted attorneys work together in the same firm at the same time," requiring a conclusive presumption that the firm possessed confidential information of the former client where the matters were substantially related. (*Goldberg, supra*, 125 Cal.App.4th at p. 764.)

The situations in *SpeeDee Oil* and *Rosenfeld* are as equally inapplicable here as they were in *Goldberg*. Here, we have the exact situation described by the *Goldberg* court where we need not presume confidential information was passed from Kelley to other attorneys at FEC, such as Carlson, but may assess whether confidential information was *actually exchanged*. Certainly Kelley's representation of Blotzer, WBS, and DeMartini was much more extensive than the tainted partner's consultation with the employee in *Goldberg*, but the reasoning of the *Goldberg* court applies, including its reliance on Model Rule 1.10 (now adopted by the State Bar of California and approved by the California Supreme Court). Thus, to have prevailed on his motion to disqualify Carlson and FEC, Blotzer must not only

have demonstrated the Pearcy Lawsuit and the current matter are substantially related, but also have established Carlson or some other current lawyer at FEC received confidential information material to the current lawsuit. As Blotzer failed to present any evidence that anyone at FEC acquired protected, confidential information, for purposes of our analysis we assume without determining that the two matters in question are substantially related.[4]

3. *Blotzer did not establish Kelley was associated with FEC at the time this action was filed*

Blotzer speculates that, because Carlson worked at FEC when the Pearcy Lawsuit was pending, and FEC is a small five-person firm, "[i]t is inevitable that . . . Carlson and the rest of the firm worked on the [former] case and received confidential information about Blotzer, WBS, and this matter." Such a presumption, while perhaps appropriate if Kelley had remained of counsel to FEC, has no place in this situation where the lawyer who represented the client—Kelley—has not been associated with the firm since June 2012, more than three years before the underlying action was filed. (*Goldberg, supra*, 125 Cal.App.4th at p. 758 [partner who represented former client left firm three years before lawsuit began, resulting in no fear he could inadvertently divulge the client's confidential information].)

Blotzer contends Kelley remained affiliated with FEC after DeMartini filed this action in September 2015, relying on

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[4] We note, however, that the only *evidence* Blotzer presented to demonstrate the two matters are substantially related is the judgment in the Pearcy Lawsuit and the caption page of the superseded second amended complaint in the current action.

November 2016 screen shots from the FEC website listing Kelley as "of counsel." Carlson, however, declared under oath that he had not realized FEC had not removed Kelley's name as of counsel; the failure to remove Kelley's name "was a good faith oversight." He declared Kelley "left our firm long before this case" and that FEC "maintains no continuing business relationship with Mr. Kelley, financial or otherwise." Kelley similarly declared he has "had no continuing business relationship with FEC since vacating my office in June, 2012." He believed FEC's failure to remove his name as "of counsel" from their correspondence and marketing materials was an oversight. Kelley would have directed FEC to remove his name had he known it continued to be listed. Kelley also declared that after terminating his business relationship with FEC in June 2012, he no longer had access to FEC's offices or files. He declared he moved to Texas in February 2014 and spoke to Blotzer about his move.

The trial court credited Carlson's and Kelley's declarations. In its minute order denying the motion to disqualify, the trial court stated the evidence showed Kelley "stopped being 'of counsel' to [FEC] in June 2012, at which time he stopped working for that firm and any of their clients." The court accepted Carlson's explanation, finding "[t]he failure of the firm to remove Kelley from the firm material appears to be an oversight." Substantial evidence supports the trial court's findings.

4. *DeMartini presented evidence establishing Kelley did not exchange confidential information with any current FEC attorney*

As in *Goldberg*, Blotzer presented no evidence that any attorney currently at FEC, including Carlson, received

confidential information from Kelley or Blotzer.[5] DeMartini, however, presented evidence demonstrating no current FEC attorneys, including Carlson, were privy to Blotzer's confidential information. Although the trial court did not make express findings on this subject, substantial evidence supports the trial court's implied finding neither Carlson nor any other lawyer currently at FEC acquired Blotzer's protected confidential information. (*Federal Home Loan Mortgage Corp. v. La Conchita Ranch Co.* (1998) 68 Cal.App.4th 856, 860 [where express findings are absent, appellate court "review[s] the trial court's exercise of discretion based on implied findings that are supported by substantial evidence"].)

Carlson declared Kelley handled the Pearcy Lawsuit, FEC had no involvement in that case, and, until now, he has never represented any of the parties to this action. He also declared he has never consulted with Kelley about the present action or sought information from him. Blotzer makes much of the wording in Carlson's declaration, arguing that Carlson strategically declared he "never represented" any of the parties, rather than he "never worked on" the prior action. He contends that by stating "I have never represented" the parties, Carlson "intended to convey that he was involved in the prior litigation, just not by formally representing either [DeMartini] or Blotzer. Consequently, using Mr. Carlson's statements, Mr. Carlson could honestly make the statements he did in his declaration and still could have performed legal services for Mr. Kell[e]y's representation" of the parties in the Pearcy Lawsuit. Blotzer's

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[5] Blotzer submitted only Carlson's biography from FEC's website indicating he joined FEC in 2000.

argument is based on pure conjecture without any supporting evidence. Blotzer did not submit his own declaration to demonstrate Carlson provided legal services to him or even that he spoke to Carlson or any other attorney at FEC during the Pearcy Lawsuit. We can conclude only that the trial court weighed the evidence before it and found Carlson's declaration credible.

Moreover, Blotzer's contentions are belied by Kelley's declaration. Kelley declared he "never shared any confidential information from the Pearcy Lawsuit *with Mr. Carlson* or anyone at FEC, nor would I ever breach the attorney client privilege by doing so." (Italics added.) Kelley also declared he represented WBS, DeMartini, and Blotzer through his solo practice and that Blotzer always called him on the direct telephone line he gave only to his own clients, not through the FEC reception. He confirmed that "[a]t no time [has he] ever consulted with any attorney at" FEC about the current case and does not recall having spoken to Blotzer's attorney. He further declared he destroyed any documents he had on the Pearcy Lawsuit "long ago."

Blotzer presented no evidence to rebut Kelley's sworn declaration that he never shared his client's confidential information with Carlson or any other attorney at FEC. Substantial evidence, therefore, supports the trial court's implied finding that Kelley's declaration was truthful and no confidential information was passed on from him to Carlson or to anyone else at FEC.

Moreover, Kelley's declaration also supports an implied finding that Carlson did not "work on" the Pearcy Lawsuit as Blotzer surmises. He declared he ran his solo practice as a

separate business from FEC and did part-time contract work for FEC clients in lieu of paying rent to FEC. In addition to maintaining a separate phone line for his own clients, Kelley maintained his client files in his office separately from the FEC files.

Accordingly, we conclude substantial evidence supports the trial court's implied finding that no current attorney at FEC, including Carlson, acquired confidential information material to the current matter requiring the firm's vicarious disqualification. Thus, the trial court did not err in finding no basis to disqualify FEC, and by implication as a member of FEC, Carlson.

Blotzer argues the trial court looked at the wrong attorney and mistakenly believed Blotzer sought to disqualify Kelley. He thus urges us to review his motion de novo or direct the trial court to reexamine the facts, relying on *Beachcomber Management Crystal Cove, LLC v. Superior Court* (2017) 13 Cal.App.5th 1105 [granting petition for writ of mandate and directing trial court to vacate order disqualifying defendants' counsel to determine if authorities permitting prior attorney of company to represent its insiders in a derivative action applied to allow counsel to continue representing defendants]. Neither is warranted.

The only basis Blotzer had to disqualify Carlson and FEC was to impute Kelley's conflict of interest to them. The trial court, therefore, necessarily had to examine Kelley's relationship with FEC to determine if imputation was proper. It concluded Kelley had ceased his association with FEC three years before the current litigation was filed and had no current contact with FEC. Based on the evidence before it, we can imply the court also concluded Kelley did not disclose Blotzer's confidences to

anyone at FEC, including Carlson, and Carlson did not represent Blotzer or acquire his protected information during the Pearcy Lawsuit. Thus, no basis existed to disqualify FEC based on Kelley's prior representation of Blotzer.[6]

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[6] Even if the trial court's minute order focused on the "wrong attorney," it is a well-settled principle that we will not disturb a correct ruling on appeal " 'merely because given for a wrong reason. If right upon any theory of law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' [Citation.]" (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19.) No reporter was present at the hearing on Blotzer's motion so we do not know what the trial court may have said on this subject. And, as we have said, substantial evidence supports an implied finding that no current attorney at FEC has any confidential information from the Pearcy Lawsuit. Thus, under *Goldberg*, Model Rule 1.10(b), and now effective California Rule 1.10(b), the trial court did not abuse its discretion when it found no basis to disqualify DeMartini's counsel.

DISPOSITION

The trial court's order denying appellant's motion to disqualify respondent's counsel is affirmed. Respondent shall recover his costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

LAVIN, Acting P. J.

DHANIDINA, J.