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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DAVID READ, Plaintiff and Respondent, v. HOWROYD-WRIGHT EMPLOYMENT AGENCY, INC., Defendant and Appellant.	B271515 (Los Angeles County Super. Ct. No. BC449744)

APPEAL from an order of the Superior Court of Los Angeles County, Jane L. Johnson, Judge. Reversed.

Reed Smith, Raymond A. Cardozo and Remy Kessler for Defendant and Appellant.

Law Offices of Kevin T. Barnes, Kevin T. Barnes, Gregg Lander; Law Office of Joseph Antonelli and Giuseppe

Joseph Antonelli for Plaintiff and Respondent.

BACKGROUND

In November 2010, David Read filed a class action lawsuit against AppleOne Business Solutions (AppleOne), a staffing agency for temporary workers. The complaint alleged that thousands of workers were not paid when interviewing with AppleOne clients who did not hire the job applicants. According to the complaint, AppleOne was legally required to compensate the applicants for their time because AppleOne arranged and controlled the client interviews.[1] In July 2015, Plaintiff filed a motion for class certification.

In November 2015, AppleOne filed an opposition to the motion. In support of its opposition, AppleOne submitted eight declarations to demonstrate that the company did not control job applicants' interviews with potential employers. To procure the declarations, AppleOne contacted applicants who had interviewed with employers. Counsel for AppleOne used a written script when calling prospective witnesses. During the conversations, counsel cautioned the witnesses in relevant part:

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[1] In February 2012, the trial court removed David Read as class representative for reasons unrelated to this appeal. Read was replaced by Eric Przywara (Plaintiff). In May 2014, Plaintiff filed a sixth amended complaint, which is the operative complaint in this case.

"I am an attorney representing AppleOne. I do not represent you, the Plaintiff, or any of the potential class members. [¶] Because you may be a member of the putative class, your interests may be adverse to . . . AppleOne's interests, and in the event there is a settlement or a judgment against AppleOne, you may be entitled to a monetary recovery. [¶] This is a voluntary conversation and you can let me know if you don't wish to speak to me or answer any of my questions. No benefits or repercussions will follow from you choosing to speak or not to speak to me today. The purpose of my call is to investigate the Plaintiff's allegations so that AppleOne can properly defend itself in the lawsuit." (Italics omitted.)

If an applicant consented to the conversation, he or she was then asked to provide a signed declaration. Each declaration contained similar disclosures and stated in relevant part:

"I understand that Eric Przywara seeks to be the class representative for me and others in a lawsuit against AppleOne. I further understand that Eric Przywara claims that he and other applicants like him, including me, should have been paid wages for the time spent attending Client Interviews. [¶] . . . I further understand that it was my decision whether to assist in AppleOne's efforts to gather information about the matters in this Declaration, even if the information I provide is contrary to the allegations made by Eric Przywara."

On November 30, 2015, the trial court held a status hearing in the case. During the hearing, the parties discussed Plaintiff's request for the declarants' contact information so that Plaintiff could notice and take their depositions. Defense counsel (Kenneth P. Roberts) told Plaintiff and the trial court that his firm might represent the declarants at deposition. Plaintiff did not object to this potential representation. Indeed, Plaintiff's attorney later filed a summary of the status hearing rulings, which noted the deadline by which defense counsel had to confirm his representation of the declarants at the upcoming depositions.

From November 30, 2015 to December 2, 2015, defense counsel contacted the declarants, told them that Plaintiff wanted to depose them, and offered to represent them at the deposition—and only the deposition. Two out of the eight declarants, Nicholas Stephens and Iva Johnson, accepted the offer. On December 2, 2015, defense counsel emailed Plaintiff's attorney to inform him that he would be representing Stephens and Johnson (as well as several other applicants) at the deposition. Plaintiff did not oppose this limited representation.

From December 2, 2015 to December 14, 2015, the parties' attorneys exchanged several emails to coordinate the dates and locations for the depositions. In a December 7, 2015 email, defense counsel again stated that he would be

representing the declarants at the depositions.[2] Plaintiff again failed to oppose this limited representation.

On January13, 2016, Plaintiff's attorney deposed Stephens and Johnson later that day. During the first deposition, Stephens confirmed that defense counsel's offer of representation extended only to the deposition. "After . . . giving a declaration," Stephens explained, "I received word that I was going to have to give a deposition and in that deposition [defense counsel] could represent me in talking with [Plaintiff's attorney]." Plaintiff did not object to defense counsel's limited representation of Stephens and instead proceeded with Johnson's deposition. Like Stephens, Johnson confirmed that defense counsel's offer of representation extended only to the deposition.[3] Immediately after these two depositions, Plaintiff moved to disqualify defense counsel (both the Kenneth P. Roberts firm

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[2] According to defense counsel, when preparing Stephens and Johnson for deposition, no confidential information was exchanged. Instead, they discussed only deposition procedures and the facts contained within the already-filed declarations.

[3] Plaintiff's attorney did not portray this as an offer, however. Instead, he asked Johnson, "[A]fter you signed the declaration, my office wanted to take your deposition. That's when [defense counsel] said that: "[Plaintiff's attorney] wants to take your deposition, and I will represent you. Is that fair?" Johnson disagreed. "Actually, no. He gave me the option if I wanted representation or if I just wanted to do it by myself."

and Reed Smith) based on the Roberts' firm representation of Stephens and Johnson at the depositions.

The next day, Plaintiff's attorney sent defense counsel a lengthy email detailing his legal arguments for disqualification, and gave counsel five days to withdraw from the case. Defense counsel refused to do so, and Plaintiff moved to disqualify both firms.

THE TRIAL COURT'S RULING

The trial court held its hearing on the disqualification motion on March 15, 2016. According to Plaintiff's attorney, he had standing to bring the motion based on his fiduciary duty to putative class members who were not yet clients. California Rule of Professional Conduct 3-310(C) formed the basis of the motion.[4]

The trial court first noted the challenging nature of the issue before it, which was compounded by the absence of an exact case on point. The trial court also noted its displeasure with Plaintiff's tactics. "[I]t would have been so easy to . . . just say, hey, if these people want representation, then . . . we're either going to seek to disqualify you, after

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[4] Under this rule, a concurrent or simultaneous conflict of interest generally leads to automatic disqualification: "A member shall not, without the informed written consent of each client . . . [a]ccept representation of more than one client in a matter in which the interests of the clients potentially conflict." (Cal. Rules of Court, rule 3-310(C).) It is undisputed that defense counsel did not obtain written conflict waivers from Stephens or Johnson.

five a half years of litigation, or get somebody else to come and represent them, than to put everybody in this kind of position at this point."[5]

Although disqualification would put "defendants at a terrible disadvantage [f]or what appears to be not much of a disadvantage of plaintiffs," the trial court held that it had no choice but to automatically disqualify the Roberts firm based on the firm's simultaneous representation of a putative class member and AppleOne. The court did not disqualify Reed Smith given that the firm did not participate in the depositions.

STANDARD OF REVIEW

"Generally, 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.) "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. [Citation.] When substantial evidence supports the trial court's factual findings, the appellate court reviews the conclusions based on those findings for abuse of discretion." (*Id.* at pp. 1143–1144.)

"However, the trial court's discretion is limited by the applicable legal principles. [Citation.] Thus, where there

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[5] The court did not believe Plaintiff's attorney was shocked by defense counsel's limited representation of the declarants, calling this a " 'gotcha' " tactic.

are no material disputed factual issues, the appellate court reviews the trial court's determination as a question of law." (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.*, *supra*, 20 Cal.4th at p. 1144.) A disposition that rests on an error of law constitutes an abuse of discretion. (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711–712.)

DISCUSSION

Just days after the trial court's ruling, the Ninth Circuit Court of Appeals handed down *Radcliffe v. Hernandez* (2016) 818 F.3d 537, certiorari denied January 9, 2017, (*Radcliffe*) which held that, under California law, the automatic disqualification rule did not apply to class actions in which an attorney had a concurrent or simultaneous conflict of interest. Based on this persuasive authority, AppleOne sought, and received, a stay of the trial court's order.

In *Radcliffe*, *supra*, 818 F.3d 537, the Ninth Circuit affirmed an order denying a motion to disqualify one group of plaintiffs' class counsel, who had "created a conflict of interest by conditioning incentive awards for the class representatives on their approval of the proposed settlement agreement." After an earlier appeal invalidated that settlement, the district court heard a motion to disqualify the conflicted group of counsel. (*Ibid.*) Finding the alleged conflict did not seriously threaten the policy concerns underlying the duty of loyalty, the district court applied a

balancing test instead of the automatic disqualification rule, and denied the motion. (*Ibid.)*

The Ninth Circuit held the district court properly applied a balancing test.[6] (*Radcliffe*, *supra*, 818 F.3d at p. 547.) The court reasoned that "the policy justifications . . . for the automatic disqualification rule are not fully transferrable to class action cases," but instead "envisioned simultaneous conflicts of interest as they generally occurred in individual litigant suits rather than in class actions." (*Id.* at p. 544.) Moreover, the Ninth Circuit observed, "because the California Supreme Court has never discussed the automatic disqualification rule in the context of class actions, it also has never been required to confront the ethical issues and conflicts of interest that are unique to class action cases." (*Id.* at p. 545.)

Given this vacuum, the Ninth Circuit said it was "not willing to assume that California courts would apply the same disqualification rules to a class action case as they do in individual plaintiff cases." (*Radcliffe*, *supra*, 818 F.3d at

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[6] When conducting this balancing test, a court "must weigh . . . a party's right to counsel of choice, an attorney's interest in representing a client, the financial burden on a client of replacing disqualified counsel and any tactical abuse underlying a disqualification proceeding against the fundamental principle that fair resolution of disputes within our adversary system requires vigorous representation of parties by independent counsel unencumbered by conflicts of interest." (*William H. Raley Co. v. Superior Court* (1983) 149 Cal.App.3d 1042, 1048 (*Raley*).)

p. 545.) Because trial courts "should have discretion to deal with the unique complexities and ethical concerns involved in class action lawsuits," the Ninth Circuit held, "California law does not require automatic disqualification for simultaneous conflicts of interest in class actions."[7] (*Id.* at pp. 546–547.)

Although not binding on this court, the reasoning of *Radcliffe*, *supra*, 818 F.3d 537 is very persuasive.[8] Under

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[7] As the Ninth Circuit noted, several other circuits have declined to mechanically apply disqualification rules to class action cases. (See *In re "Agent Orange" Product Liability Litigation* (2d Cir.1986) 800 F.2d 14, 19 [observing that automatically disqualifying those most familiar with a case whenever class members have conflicting interests "would substantially diminish the efficacy of class actions as a method of dispute resolution"]; *Lazy Oil Co. v. Witco Corp.* (3d Cir.1999) 166 F.3d 581, 589 ["If . . . class counsel could easily be disqualified in these cases . . . many fair and reasonable settlements would be undermined by the need to find substitute counsel after months or even years of fruitful settlement negotiations"].)

[8] *Radcliffe, supra*, 818 F.3d 537, has only been addressed once since it was handed down. (See *Walker v. Apple, Inc.* (2016) 4 CalApp.5th 1098.) In *Walker*, the trial court found counsel had a conflict of interest arising from his concurrent representation of the class in the case before the court and the class in another wage-and-hour class action against Apple. (*Id.* at p. 1102.) Thus, the trial court held, automatic disqualification was required. (*Ibid.*) The Court of Appeal, Fourth Appellate District, Division Eight, affirmed. The conflict between the two classes was the kind

California law, the generally appropriate response to a simultaneous representation conflict is automatic disqualification. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 284 [in all but a few instances, disqualification in simultaneous representation cases is automatic].) Nevertheless, Division Three of the Fourth Appellate District has also observed that traditional rules addressing an attorney's representation outside the class action context " 'should not be mechanically applied to the problems that arise in . . . class action litigation.' " (*Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 735.) Indeed, the appellate court has cautioned that "[p]articular care should be taken in the imposition of the sanction of disqualification upon attorneys involved in class action litigation." (*Ibid.*) Thus, it is unsurprising that the Ninth Circuit could not find a single California Supreme Court or Court of Appeal opinion applying *Flatt*'s automatic disqualification rule to a class action case. (*Radcliffe*, *supra*, 818 F.3d at p. 543.)

Furthermore, the concerns outlined by California and federal courts are apparent here. This litigation, and

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of conflict that could "arise in individual litigant suits—it just happen[ed] to have arisen in a class action." (*Id.* at p. 1115.) "[U]nlike an *intraclass* dispute regarding the advisability of a settlement in the same case, the conflict [arose] between members of different classes in different cases and [thus] 'seriously threaten[ed] the policy concerns underlying the duty of loyalty.' " (*Ibid.*)

defense counsel's representation, has been ongoing for no less than six years. Moreover, the interests of the potential class members and AppleOne aligned, rather than conflicted, during defense counsel's limited representation of the declarants. To the extent there was a conflict, the potential class members were expressly warned that their interests might be adverse to AppleOne's interests, and that if there was a settlement or a judgment against AppleOne, they could be entitled to a monetary recovery. Lastly, any conflict could have been cured by the limited nature of the representation, or by excluding the declarations and the witnesses from any further participation in the litigation, as the trial court contemplated. Yet the trial court believed it could not consider any of these equitable factors or prospective remedies, instead finding it had no choice but to disqualify counsel under California law.

California law is not so mechanical. (See *White v. Experian Information Solutions* (C.D.Cal. 2014) 993 F.Supp.2d 1154 [collecting cases].) Our cases state, for example, that the power to disqualify is discretionary, depending on the specific circumstances of each case, (*Oaks Management Corp. v. Superior Court* (2006) 145 Cal.App.4th 453, 461–462), and direct courts to weigh several factors to make this determination. (*Raley*, *supra*, 149 Cal.App.3d at p. 1048.) California law also generally disfavors motions to disqualify. (*Sharp v. Next Entertainment, Inc.* (2008) 163 Cal.App.4th 410, 424.) While these broad disqualification principles give way to narrower, more specific rules when

addressing attorney-client conflicts, class actions require a more flexible approach. Indeed, the fact that the conflict in this case was limited and brief encourages such an approach. (See *White, supra,* 993 F.Supp.2d at p. 1166 [conflict that has ended and does not call counsel's loyalty into question mitigates concerns about confidence in legal profession and judicial process].)

When considered alongside cases which show a willingness to use disqualification rules flexibly, we agree with *Radcliffe*, *supra*, 818 F.3d 537 that, under California law, a rigid application of the rules is not appropriate in the class action context. To be sure, the conflict in *Radcliffe* arose not because counsel simultaneously represented litigation adversaries but because they simultaneously represented different members of the same class who developed divergent interests regarding how to prevail on their shared claims. (*Id.* at p. 540.) However, Stephens and Johnson were not AppleOne's litigation adversaries. Indeed, they expressly *supported* AppleOne's opposition to the class certification motion, while acknowledging that their interests might be adverse to AppleOne's and that if there were a settlement or a judgment against AppleOne in the future, they could be entitled to a monetary recovery. Given that the facts of this case and *Radcliffe* are more similar than not, and that, in any event, the Ninth Circuit's analysis was not limited to the facts of that case, *Radcliffe* remains persuasive here. Because we agree that California law does not require automatic disqualification for simultaneous

conflicts of interest in class actions, we necessarily hold that the trial court's disposition rested on an error of law. Such an error constitutes an abuse of discretion and therefore requires reversal. (See *People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 742.)

Rather than simply remand the case so that the trial court can conduct *Raley*'s balancing test in the first instance and determine whether disqualification was truly appropriate here, AppleOne urges us to reverse with directions to the trial court to vacate its order and enter a new order denying the disqualification motion. This is the proper disposition according to AppleOne because the record compels a finding that counsel's disqualification was unwarranted. Alternatively, AppleOne contends, the trial court's statements and findings at the hearing show that it would have denied the motion had it applied the correct legal standard.

It is unclear from the record here whether, under the proper standards, the trial court would have disqualified defense counsel. On one hand, the court acknowledged that disqualification put AppleOne at a terrible disadvantage without much of a disadvantage of Plaintiff, and derided Plaintiff's motion as a "gotcha" tactic. On the other hand, the court noted that AppleOne could have easily warded off the disqualification motion by obtaining a written conflict waiver. In the end, however, the court clearly truncated its discussion of the balancing test factors based on its belief that automatic disqualification was required.

Given that the court focused on the wrong legal standard, and the application we discuss here is new in some respects, "[w]e cannot foreclose the possibility that further information was available, but not presented, at the time the trial court ruled upon the motion." (*People v. Calderon* (1994) 9 Cal.4th 69, 81.) Accordingly, the prudent course is to remand the matter to the trial court for rehearing of the disqualification motion, rather than to decide the matter on the existing state of the evidentiary record. (*Ibid.*; see *In re Charlisse C.* (2008) 45 Cal.4th 145, 167; *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 824 ["proper course" is to remand for application of "new" standard "to the facts of this case"]; *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 803 [remand for further factfinding appropriate where trial court's application of incorrect legal standard keeps it from resolving factual disputes]; *Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442, 454 [remand proper where trial court's ruling "rested upon [an] erroneous legal basis" and thus "constituted an abuse of . . . discretion"].)

We note, as did the trial court, that defense counsel did not use best practices here and could have easily warded off the disqualification motion, as well as this appeal, by obtaining a written conflict waiver. By not doing so, counsel cost his client time and money, and potentially impaired the claims of putative class members, while risking a potential loss in this court. Nevertheless, the limited representation at issue in this case, which resulted from temporarily aligned interests and has long since ceased, necessarily

limited the risk of a prospective conflict. (See *Maxwell v. Cooltech, Inc.* (1997) 57 Cal.App.4th 629, 632.) Given that the purpose of a disqualification order is prophylactic, not punitive, (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 308–309), and that application of the balancing test will root out those cases where disqualification is appropriate, allowing the trial court to conduct that test in the first instance is the proper disposition here.

DISPOSITION

The order is reversed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J.

LUI, J.