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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

JOHNEEN JONES et al., Plaintiffs and Respondents, v. CITY OF LOS ANGELES, Defendant and Appellant.	B280233 (Los Angeles County Super. Ct. No. BC604336)

APPEAL from an order of the Superior Court of Los Angeles County, Howard L. Halm, Judge. Affirmed.

McNicholas & McNicholas, Matthew S. McNicholas, Douglas D. Winter; Esner, Chang & Boyer, Stuart B. Esner and Shea S. Murphy for Plaintiffs and Respondents.

Gutierrez, Preciado & House and Calvin R. House for Defendant and Appellant City of Los Angeles.

Defendant City of Los Angeles (City) appeals from an order disqualifying the law firm of Gutierrez, Preciado & House (GPH) from representing it in this action. We conclude that the disqualification order was not an abuse of discretion, and thus we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I.

The English-Only Directive and Resulting Litigation

In November 2013, Lieutenant Kristine Kenney, the supervisor of the Foothill Division of the Los Angeles Police Department (LAPD), directed that only English be used to communicate in the Foothill Division squad room. That directive led to two groups of lawsuits that are relevant to the present appeal.

A. The Moreno Actions

Edward Moreno, Kirby Carranza, Jose Martinez, Ruben Gutierrez, and Mario Santana (the detectives) are LAPD detectives assigned to the Foothill Division. All are Latino and Spanish-speaking. In three separate lawsuits filed in 2014 and 2015 (collectively, the *Moreno* actions), the detectives sued the City, alleging that because they complained about the English-only policy, they were subjected to harassment, discrimination, and retaliation on the basis of race and national origin in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, §§ 12940 et seq.)

The City was defended in the *Moreno* actions by Deputy City Attorney Dania Minassian, assisted by Detective Carla Cryer, a detective with the LAPD's Legal Affairs Division.

B. The Jones Action

In December 2015, Foothill Division officers Johneen Jones, Kenney, Kristine Klotz, Debra Kane, and Robert Plourde (plaintiffs) sued the City of Los Angeles and others (the *Jones* action). The *Jones* action alleged that in 2012 and 2013, Jones, Klotz, and Plourde were subjected to harassment and discrimination by a group of male Hispanic coworkers, identified in subsequent pleadings as the detectives, who disparaged them in Spanish. Jones reported the detectives' conduct to Kenney, who instituted the English-only policy. The detectives complained about the new policy to their commanding officers, alleging that the policy discriminated against them. As a result of the detectives' complaints, each plaintiff allegedly was subjected to discrimination, harassment, and retaliation in violation of FEHA and Labor Code section 1102.5.

The City was defended in the *Jones* action by GPH, assisted by Detective Cryer.

II.
The Disqualification Motion

A. Plaintiffs' Motion to Disqualify Counsel

On November 14, 2016, plaintiffs moved to disqualify GPH from representing the City in the *Jones* action. Plaintiffs urged that Detective Cryer provided litigation support to the City in both the *Moreno* and *Jones* actions, in the course of which she "was privy to confidential and privileged communications" that "[are] vicariously imputed to the [GPH] firm." Thus, "[d]efense counsel now has a direct and successive conflict, and must be disqualified from the current litigation."

In support of the disqualification motion, plaintiffs submitted the declarations of Kenney, Kane, and Plourde. Each

stated that after the *Moreno* actions were filed, he or she was summoned to a meeting with Deputy City Attorney Minassian, at which Detective Cryer was also present. None of the plaintiffs was told Minassian did not represent him or her, and none was asked to signed a conflict waiver. Each plaintiff believed Minassian was representing his or her interests.

Kenney additionally declared that after she filed a complaint against the City with the Department of Fair Employment and Housing (DFEH), the City retained outside counsel Ed Zappia to represent her in the *Moreno* actions. Zappia interviewed Kenney on March 10, 2015, at the City Attorney's office, in the presence of Detective Cryer. Kenney described that interview as follows:

"Mr. Zappia explained that the purpose of the meeting was to discuss my involvement in the 'English-only' directive I gave at Foothill and the claims arising therefrom that were being asserted against the Department. Mr. Zappia also explained that it was likely I would be deposed in the litigation, and that it was important that my testimony present the Department in the best possible light to minimize its liability and exposure as a result of the allegations made against it in the underlying litigation. The meeting and discussion lasted over two (2) hours, and was between Mr. Zappia, Det. Cryer, and me. Det. Cryer participated throughout the meeting by joining in the dialog among all three of us, as well as taking notes and reviewing documents that I had prepared as well as other documents that I understood had been generated as part of the underlying litigation. I came to the meeting with a notebook of my own materials, including documents that I had written based on my own thoughts and impressions regarding the directive I gave as the Detective

Supervisor at Foothill Division as well as the allegations that focused on my alleged wrongdoing in the underlying litigation against the Department. I shared the contents of those written impressions with Det. Cryer and Mr. Zappia during the meeting, as well as other documents in the notebook, including work and other emails written to and from me relating to the incidents alleged in the litigation.

". . . During the March 10, 2015 meeting, attorney Zappia, Det. Cryer and I discussed various topics relating to my involvement in the 'English only' directive, including the reasons I gave the directive, the legal and other bases I believed that I had for doing so, what I had learned from my experience at the Department and its role in giving the directive, my thought processes as to why I gave the order, and what I knew regarding previous comments made in Spanish by Detectives Santana, Martinez, Carranza, Moreno, and Gutierrez. I recall that Mr. Zappia had documents in front of him that I believed contained the allegations in the underlying lawsuits, as he read and asked me questions regarding allegations and statements that focused on my involvement in giving the directive at Foothill [D]ivision. I recall that over the 2 hour-plus meeting I explained step by step what my thinking was as I took the actions I did at Foothill, both before, during and after I issued the directive to the Detectives that it was important that English be used at the workplace when doing their work. Mr. Zappia, Det. Cryer and I discussed other officers . . . who might support my version of the events, including what I believed they may testify to. We discussed the impact the underlying litigation had on me, including . . . my transfer, being condemned as a wrongdoer, and being ostracized by the Department. Mr. Zappia also explained

that it was important that I understand how my testimony in the case could impact the Department's liability. He emphasized that the strategy was to present the Department in the best possible light, and explained how certain potential questions could be answered in a manner that would accomplish this."

Kenney said that during her meeting with Zappia and Detective Cryer, she "fully understood that everything communicated therein was protected by the attorney-client privilege" and "certainly never believed at any time that after being privy to my confidential statements made during this meeting that Det. Cryer would or could be employed or associated with attorneys representing the Department against me in my own litigation against the Department arising from the same set of events." However, when she was deposed in her action against the City by GPH attorney Nohemi Gutierrez-Ferguson on October 27, 2016, Detective Cryer "was present throughout my testimony and took extensive notes. At the conclusion of the deposition, Ms. [Gutierrez]-Ferguson invited Det. Cryer to '*Come talk in my office*.'. . . [T]his was when I first learned that Det. Cryer was actively working to assist defense counsel against me in this case."

B. City's Opposition to Motion to Disqualify Counsel

The City opposed the motion to disqualify. In support, it submitted the declaration of attorney Gutierrez-Ferguson, who declared that she had not received any confidential information from Detective Cryer. Gutierrez-Ferguson said: "I have not obtained any information regarding any communications that took place between any of the Plaintiffs and Deputy City Attorney Dania Minassian either through Detective Carla Cryer, or from any other source. The first time I learned that Det. Cryer

was present at any meetings with the Plaintiffs and Ms. Minassian was on November 1, 2016, when I reviewed the letter from Plaintiffs' counsel giving ex parte notice of an appearance on November 2, 2016. [¶] . . . [¶] I have also never obtained any information regarding any communications that took place between Plaintiff Kristine Kenney and her former counsel, Ed Zappia[,] from Det. Cryer or any other source. . . . [¶] . . . I have never received or reviewed any notes from Det. Cryer pertaining to any meetings she attended with Ms. Minassian or Mr. Zappia. . . . [¶] . . . [¶] Det. Cryer was assigned to assist Defense Counsel in obtaining documents responsive to discovery requests and to facilitate meetings between our office and the individual defendants and witnesses in this case. Our interaction with Det. Cryer has been limited to those functions . . . . [¶] . . . At no time did Det. Cryer ever discuss anything pertaining to the Plaintiffs' meetings with the City Attorney or Mr. Zappia with me or other members of our firm. Her discussions were limited to responding to our requests for documents in our preparation of discovery responses and facilitating meetings. Det. Cryer accompanied me to the meetings, but she did not make any comments about the Underlying Lawsuits or any meetings she attended with the Plaintiffs during my meetings."

The City also submitted the declaration of Detective Cryer. Detective Cryer stated that in her current assignment with LAPD's Legal Affairs Division, she provided litigation support in the *Moreno* actions, including setting up interviews between Deputy City Attorney Minassian and various witnesses, including plaintiffs. Each of the plaintiffs was interviewed except Jones, who refused to be interviewed. She also sat in on interviews of plaintiffs Kenney, Klotz, Kane and Plourde

conducted by Minassian, and on an interview of Kenney conducted by Zappia. Detective Cryer "did take some notes of the interviews, but [has] not shared them with anyone." Detective Cryer also was assigned to provide litigation support in the *Jones* action, in which capacity she coordinated meetings and provided documents requested by defense counsel. However, while she was present at meetings, "at no time did I discuss any information I previously obtained in connection with the prior lawsuits and I also did not offer opinions or comments." Further, "I have not shared any information from my prior participation in the [*Moreno* actions] with anyone."

C. Order

On January 9, 2017, the trial court granted the motion to disqualify. The court concluded that plaintiffs had not established that they had an attorney-client relationship with Minassian or had conveyed confidential information to her, and thus they could not show that Detective Cryer became privy to confidential information during meetings between plaintiffs and Minassian. However, "the supplemental declaration of Kenney demonstrates that confidential attorney-client information *was* imparted to Cryer when Kenney met with Ed Zappia, the attorney retained by the City as conflict counsel to represent the interests of Plaintiffs Kenney and Jones. . . . [¶] . . . [¶] [Kenney's supplemental declaration] demonstrates more than mere potential access to Kenney's confidences. Rather, it shows that Cryer was actually exposed to confidential information. [Citation.] . . . [¶] . . . [I]n *In re Complex Asbestos Litigation*, the court rejected the argument that the party seeking disqualification needed to show the specific confidences that were obtained. Rather, all that is required to be shown is 'the nature

of the information and its material relationship to the present proceedings.' (232 Cal.App.3d at p. 597.) The supplemental declaration of Kenney satisfies this burden.

"Because Plaintiffs have shown that Cryer possesses confidential information, a rebuttable presumption arises that the information has been used or disclosed in the current employment. This presumption may be rebutted by showing 'that the practical effect of formal screening has been achieved.' (*Id*. at p. 596.) The City fails to rebut this presumption. In fact, Cryer admits that after this action was filed, she 'was assigned to handle this matter and provide litigation support to conflict counsel for the City of Los Angeles.' [Citation.] Kenney also testifies that, on or around October 27, 2016, Cryer was present during Kenney's deposition and she was invited by counsel for the City to 'come talk in my office.' [Citation.] Thus, the City cannot show that Cryer has not had any involvement with this litigation.

"Because the City cannot rebut the presumption that confidential information has been used or disclosed by Cryer in this action, disqualification is warranted."

Notice of entry of the order was served on January 10, 2017. The City timely appealed.

DISCUSSION

I.

Standard of Review

" '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.]' . . . 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.' [Citation.]" (*Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776, 791–792 (*Kirk*).)

"An order granting or denying a disqualification motion is an appealable order. (*Meehan v. Hopps* (1955) 45 Cal.2d 213, 215; *A.I. Credit Corp., Inc. v. Aguilar & Sebastinelli* (2003) 113 Cal.App.4th 1072, 1077) and is reviewed for abuse of discretion (*Federal Home Loan Mortgage Corp. v. La Conchita Ranch Co.* (1998) 68 Cal.App.4th 856, 860 (*Federal Home Loan*)). The trial court's ruling is presumed correct (*H.F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1451) and reversal is permissible 'only when there is no reasonable basis for the trial court's decision' (*Federal Home Loan*, at p. 860). We accept as correct all of the court's express or implied findings that are supported by substantial evidence. (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143 (*SpeeDee*).)" (*Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197, 1203.)

II.
THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DISQUALIFYING THE CITY'S COUNSEL

A. Disqualification Standards

When an attorney obtains confidential information from a client, that attorney is prohibited from accepting a representation adverse to the client in a matter to which the confidential information would be material. (*Kirk*, *supra*, 183 Cal.App.4th at p. 784.) The Court of Appeal adapted this rule to a case in which a *nonlawyer* worked at different times with attorneys representing adverse clients in *In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572 (*Asbestos Litigation*). There, the court concluded that hiring a former employee of an opposing counsel is not, in and of itself, sufficient to warrant disqualification of an attorney or law firm. However, "when the former employee possesses confidential attorney-client information, materially related to pending litigation, the situation implicates ' " . . . considerations of ethics which run to the very integrity of our judicial process." ' " (*Id.* at pp. 592–593, fn. omitted.) The court thus adopted a two-step procedure for evaluating disqualification based on nonlawyer employee conflicts of interest, as follows.

Initially, "[t]he party seeking disqualification must show that [the nonlawyer] possesses confidential attorney-client information materially related to the proceedings before the court. The party should not be required to disclose the actual information contended to be confidential. However, the court should be provided with the nature of the information and its material relationship to the proceeding. [Citation.]" (*Asbestos*

Litigation, *supra*, 232 Cal.App.3d at p. 596, fn. omitted.) Once this showing has been made, "a rebuttable presumption arises that the information has been used or disclosed in the current employment. The presumption is a rule by necessity because the party seeking disqualification will be at a loss to prove what is known by the adversary's attorneys and legal staff. [Citation.]" (*Ibid*.)

To rebut the presumption, "the challenged attorney has the burden of showing that the practical effect of formal screening has been achieved. The showing must satisfy the trial court that the employee has not had and will not have any involvement with the litigation, or any communication with attorneys or coemployees concerning the litigation, that would support a reasonable inference that the information has been used or disclosed. If the challenged attorney fails to make this showing, then the court may disqualify the attorney and law firm." (*Asbestos Litigation*, *supra*, 232 Cal.App.3d a p. 596; see also *Shandralina G. v. Homonchuk* (2007) 147 Cal.App.4th 395, 407.)

B. Substantial Evidence Supported the Trial Court's Finding That Detective Cryer Possessed Confidential Information

With the foregoing principles in mind, we begin by considering whether Detective Cryer possessed relevant, confidential attorney-client information materially related to the proceedings before the court—i.e., " 'information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is

reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.' " (*McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal.App.5th 1083, 1100, quoting Evid. Code, § 952; see also *Catalina Island Yacht Club v. Superior Court* (2015) 242 Cal.App.4th 1116, 1129, fn. 5 ["the attorney-client privilege attaches only to confidential communication made in the course of or for the purposes of facilitating the attorney-client relationship"].)

Substantial evidence supports the trial court's finding that Detective Cryer possessed relevant, confidential attorney-client information materially related to the proceedings before the court. Kenney stated in her declaration that after she filed a DFEH complaint against the City, the City retained private counsel Ed Zappia to represent her in the *Moreno* actions. In March 2015, Kenney met for approximately two hours with Zappia to discuss these actions. Detective Cryer was present throughout that meeting, during which Kenney shared "documents that [she] had written based on [her] own thoughts and impressions regarding the [English-only] directive" and discussed "the reasons I gave the directive, the legal and other bases I believed that I had for doing so," "my thought processes as to why I gave the order," and "what I knew regarding previous comments made in Spanish by [the detectives]." Further, Kenney "explained step by step what my thinking was as I took the actions I did," described the impact the litigation had on her, and identified other officers she believed would support her version of events. These statements unquestionably were confidential—

Kenney made them to her lawyer, in confidence, in the course of an attorney-client relationship. They were, moreover, materially related to the proceedings before the court in this case, as both the *Moreno* actions and the present action arose out of Kenney's English-only directive. Thus, Detective Cryer's exposure to Kenney's confidences presumptively disqualified her from assisting Kenney's adversary in related litigation.

The City does not dispute Detective Cryer's access to Kenney's confidential information but, citing *Roush v. Seagate Technology, LLC* (2007) 150 Cal.App.4th 210, 219 (*Roush*), *Neal v. Health Net, Inc.* (2002) 100 Cal.App.4th 831 (*Neal*), and *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294 (*Paladino*), it contends that attorneys typically should not be disqualified for receiving confidential information from their own clients. The City suggests that this principle governs the present case because Detective Cryer, the presumptive supplier of confidential information to GPH, "was an employee of the City (GPH's client)." The City's contention is without merit. In each of the cases the City cites, the client was an *individual*, and thus disqualification would have been "an ineffective remedy because it would not prevent the party from giving new counsel the information, which would leave the adversary in the same position as before." (*Neal*, at p. 844; see also *Roush*, at pp. 215, 219–220; *Paladino*, at pp. 297–298, 302–304.) In the present case, in contrast, the client is not an individual, but instead is a large municipality with myriad employees. Because Detective Cryer is not essential to the City's defense of this case—indeed, GPH says that Cryer was screened from any contact with the *Jones* matter "immediately upon Plaintiffs' claim of the possible conflict"—disqualification *can* be an effective remedy.

Moreover, although Detective Cryer was a City employee, she was neither legally nor functionally GPH's client. As a leading treatise notes, "a public attorney's client is the government entity, *not* the individual members of the governing board or its officers or employees." (Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2017) 4:113, p. 4-64, italics added and omitted].) And, Detective Cryer's role in the *Moreno* and *Jones* matters was as a litigation assistant—that is, an adjunct of the city attorney's office—not as a client. As such, the cases cited above have no application here.

C. The City Did Not Rebut the Presumption That Detective Cryer Shared Confidential Information With GPH

Having concluded that a rebuttable presumption arose that Detective Cryer shared confidential attorney-client information with GPH, we next consider whether the presumption was rebutted. The trial court concluded that the City had not rebutted the presumption because it did not demonstrate " 'that the practical effect of formal screening ha[d] been achieved.' " The conclusion that Detective Cryer was not screened from participating in the *Jones* action unquestionably is supported by substantial evidence. Indeed, it was undisputed that the City assigned Detective Cryer to provide litigation support to GPH in the *Jones* action, in which capacity Detective Cryer coordinated and sat in on meetings, provided documents to defense counsel, and attended depositions. Thus, there can be no reasonable debate that Detective Cryer communicated with the City's attorneys concerning the *Jones* litigation.

The City contends it did not have to show that it screened Detective Cryer from the *Jones* litigation in order to rebut the

presumption of disclosure; instead, it says, it was sufficient that Detective Cryer and GPH's attorneys provided uncontroverted testimony that Detective Cryer did not share with GPH any notes she took or information she obtained in connection with the *Moreno* actions. The Court of Appeal rejected a similar contention in *Shadow Traffic Network v. Superior Court* (1994) 24 Cal.App.4th 1067, 1086 (*Shadow Traffic*). There, the trial court disqualified defense counsel's law firm after counsel retained an expert with whom plaintiff's counsel had consulted. (*Id.* at p. 1071.) Defendant filed a petition for writ of mandate; the Court of Appeal upheld the trial court's order and denied the petition, finding that the presumption of disclosure had not been rebutted.

In so concluding, the court specifically rejected the defendant's contention that declarations from defense counsel and the expert disclaiming any sharing of plaintiff's confidential information were dispositive of the disclosure issue. (*Shadow Traffic*, *supra*, 24 Cal.App.4th at p. 1085–1087.) The court explained: "[Defendant] tendered a declaration from [the expert] that [defense counsel] had not inquired about, and [the expert] had not disclosed, 'any of the substance of the meeting' he had with [plaintiff's counsel]. A supplemental declaration from [defense counsel] reiterated that he had not asked [the expert] about his meeting with [plaintiff's counsel] and that no one had told [defense counsel] anything about the substance of the . . . meeting between [plaintiff's counsel] and [the expert]. [¶] *To a large extent, these declarations miss the point*. [The expert] was privy to confidential information about [plaintiff's] action against [defendant], including counsel's theories on damages. Damages was the very topic [defense counsel] conceded he had discussed

with [the expert]. Even assuming that [defense counsel] did not expressly ask [the expert] about the contents of his discussion with [plaintiff's counsel] and that [the expert] did not explicitly disclose the information to [defense counsel], [defense counsel] could still obtain the benefit of the information because the data, consciously or unconsciously, could shape or affect the analysis and advice [the expert] rendered to [defendant]. Given that both [plaintiff] and [defendant] consulted [the expert] on the same issue—[plaintiff's] damages—it is highly unlikely that [the expert] could conscientiously discharge his duty to [defendant] as its retained expert and at the same time discharge his duty not to divulge confidential information received from [plaintiff]." (*Id.* at p. 1086, italics added.)

The court continued: "There are circumstances in this case—notably the very short time that [the expert] was retained by [defense counsel] and the brevity of the telephone . . . conversation [between the expert and plaintiff's counsel]—from which the trial court could have concluded that the presumption that [the expert] had disclosed confidential information to [defense counsel] was rebutted. But, as we have already discussed, there are other circumstances from which the trial court could reach a contrary conclusion. In this circumstance, appellate review of the trial court's decision is narrowly circumscribed. When a judicially created presumption affecting the burden of proof is triggered, the question of whether the party who has the burden of establishing the nonexistence of the presumed fact has carried its burden of persuasion is an issue for the trier of fact to decide, not a reviewing court. [Citation.] Thus, we may not reweigh the evidence or substitute our deductions for those of the trial court. [Citations.] [¶] The record

before us and our analysis of the declarations do not compel the conclusion that the trial judge exceeded the bounds of reason by implicitly concluding that [defendant] had failed to carry its burden of persuading the court of the nonexistence of the presumed fact, to wit, that [the expert] had disclosed confidential information to [defense counsel]. [Citations.] Thus, the presumption of disclosure remained unrebutted." (*Shadow Traffic*, *supra*, 24 Cal.App.4th at pp. 1086–1087.)

The present case is analogous to *Shadow Traffic*. As in that case, GPH attorneys and Detective Cryer have proffered declarations stating that Detective Cryer did not disclose any of Kenney's confidential information to GPH lawyers. But as in *Shadow Traffic*, Detective Cryer was privy to a great deal of plaintiff's confidential information, including why Kenney gave the English-only directive, and which detectives she believed would bolster her version of events. Thus, even if Detective Cryer did not disclose any of this information to GPH, the trial court reasonably could have concluded that the information would shape the litigation support Detective Cryer provided GPH. (See *Shadow Traffic*, *supra*, 24 Cal.App.4th at p. 1086.) Given the narrow scope of our appellate review, we cannot revisit this conclusion on appeal. Indeed, given Detective Cryer's extensive involvement in the *Jones* matter, we question whether the trial court could have reached any other conclusion.

Seizing on *Shadow Traffic*'s statement that the circumstances of that case would have allowed the trial court to find the presumption of disclosure rebutted, the City urges the trial court misunderstood the scope of its discretion, believing that "the only way to rebut the presumption was by proof that the firm erected the equivalent of a formal screen around the

nonlawyer." But nothing in the trial court's order suggests the court believed an ethical screen was the only way to rebut the presumption in *every* case—it merely concluded that an ethical screen was required in *this* case. Given the extent of Detective Cryer's involvement in the *Moreno* litigation—and specifically her exposure to Kenney's attorney-client confidences during her meeting with attorney Zappia—that conclusion manifestly was not an abuse of discretion.

None of the cases on which the City relies suggest a different result. In *Western Digital Corp. v. Superior Court* (1998) 60 Cal.App.4th 1471 (*Western Digital*), the plaintiff's attorneys met with members of Hankin, a consulting firm, to discuss retaining the firm's founder to provide damages calculations, but ultimately did not retain him. Subsequently, defendant hired a different Hankin employee, but specified that no member of the consultant's team could have had any prior contact with the plaintiff. (*Id*. at pp. 1476–1478.) Declarations from all relevant Hankin personnel attested the creation of an ethical wall between the team that had consulted with the plaintiff and the team working with the defendant. (*Id*. at pp. 1478–1479.) The Court of Appeal therefore concluded the trial court erred in disqualifying counsel, finding "no evidence the screening wall at Hankin & Co. was breached." (*Id*. at p. 1488.)

The present case shares little in common with *Western Digital*. Significantly, plaintiff's and defendant's counsel in *Western Digital* spoke to different members of the consulting firm, between whom an ethical wall had been created, and thus the court concluded there was no opportunity for defendant's consultants to have been exposed to plaintiff's confidential information. In the present case, in contrast, it is undisputed

that Detective Cryer *was* exposed to Kenney's confidential information through her work on the *Moreno* actions, and that she subsequently provided substantive litigation support in the *Jones* action.

Collins v. State (2004) 121 Cal.App.4th 1112 (*Collins*) is even farther afield. In *Collins*, an expert agreed to consult with defense counsel; subsequently, the expert agreed to consult with plaintiff's counsel without revealing his earlier contact with defense counsel. When defendant moved to disqualify plaintiff's counsel, both plaintiff's counsel and the expert stated in declarations that none of defendant's confidential information had been shared; in fact, the expert said he had forgotten that he had been retained by defendant. Under these circumstances, the court held that a rebuttable presumption of disclosure was neither necessary nor appropriate because the expert remained available to the party that first consulted him. The *Collins* court explained: "[T]he shifting of the burden of proof to the opposing party ' "is a rule by necessity because the party seeking disqualification will be at a loss to prove what is known by the adversary's attorneys and legal staff. [Citation.]" [Citation.]' [Citation.] When the expert has gone to the other side and is no longer available to the side that originally retained him, the shifting of the burden of proof makes eminent sense. [¶] Here, however, we conclude the rebuttable presumption should not apply. At all times, the expert witness, Dr. Clark, remained a consultant for [defendant's] counsel. . . . The most important source of the information from which to ascertain whether Dr. Clark had passed on any confidential information to [plaintiff's counsel] thus remained in [defendant's] hands. [¶]

Under these circumstances, the reason for shifting the burden of proof to the opposing party does not exist." (*Id.* at p. 1129.)

In the present case, in contrast, Detective Cryer is not available to plaintiffs as a witness; rather, throughout both the *Moreno* and *Jones* actions, she has been employed by, and working at the direction of, the City. Thus, unlike in *Collins*, "the shifting of the burden of proof makes eminent sense." (*Collins*, *supra*, 121 Cal.App.4th at p. 1129.)

For all of these reasons, the trial court did not abuse its discretion in disqualifying GPH.

DISPOSITION

The disqualification order is affirmed. Plaintiffs are awarded their appellate costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

EGERTON, J.

DHANIDINA, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.