INTRODUCTION

This case should be called: "The Case of the Forgetful Expert Twice Retained." It is unique in the annals of American law. For the first time, a lawyer has been disqualified from representing a client because an expert experienced a senior moment. The expert made himself available to testify for one party in a lawsuit, forgetting he had briefly consulted with the opposing party a year earlier.[1] Because of the expert's regrettable mistake, plaintiffs have been deprived of their counsel.

The facts are largely undisputed and come from the sworn declarations of opposing counsel and of Dr. Carl Clark, one of the world's leading experts on the ability of glass-plastic windshield glazing to reduce injuries in automobile accidents, who was contacted by both sides.[2] Two uncontroverted facts loom large and distinguish this case from those that have gone before it:

First, Clark's agreement to act as an expert for opposing parties in the same lawsuit was *inadvertent*. Clark was initially contacted by defendant's attorney who paid him a retainer fee, gave him a copy of a

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[1] AA 997, ¶ 4 [Clark Dec.]. References to the Appellant's Appendix are abbreviated as "AA" and is followed by the page number.

[2] AA 540:9-541:2 [Yudenfriend Dec.]; 648:9-18 [Purtill Dec.].

police report, and briefly solicited some of his opinions.[3] When Clark was called by plaintiffs' counsel a year later, he had completely forgotten about the prior contact. As a result, he did not impart anything to plaintiffs' counsel that may have passed between him and defendant's lawyer, whether it might have been deemed legally confidential or not.[4]

Second, from the moment plaintiffs' attorney learned that Clark had previously served as the other side's consultant, he acted in accordance with the highest ethical standards of the legal profession. He immediately told Clark he could no longer speak with him. He then ceased all contact with Clark until the court could resolve Clark's status as an expert.[5]

Yet, despite Clark's totally mistaken contact with the opposing attorneys, the impeccable conduct of plaintiffs' counsel when Clark's dual retention was revealed, and the absence of any suggestion that Clark transmitted defendant's work product (or anything else about his totally forgotten communications with defendant's lawyer) to plaintiffs, plaintiffs lost their lawyer. It was a loss they could ill afford.

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[3] AA 369:7-370: 6 [Motion to Disqualify]; 375:12-276:13; 379-383 [Sears Dec.]; 481:19-482:4 [Purtill Dec.].

[4] AA 997-998 [Clark Dec.].

[5] AA 481:19-28; 649:7-8 [Purtill Decs.]; 640:24-25 [Carcione Dec.]; 998, ¶ 6 [Clark Dec.].

Plaintiff William Collins lies in a vegetative state in a nursing home.[6] His wife Barbara Collins has been appointed his guardian and is his co-plaintiff in this lawsuit.[7] Plaintiffs have appealed to this court because the loss of their lawyers now – after four years of litigation in an incredibly difficult case – has sounded the death knell of their claims for a catastrophic and devastating injury.

Bill Collins' traumatic injury was produced by a two-pound rock that smashed through the windshield of his truck and struck him in the head as he was driving down Interstate 5.[8] The rock was tossed by a juvenile miscreant who obtained both his projectile and the convenient and inviting location from which he launched it – three feet from a freeway bridge – from an array of government entities who were well aware of prior rock-throwing and other misconduct by derelicts at the site.[9] The rock pierced right through a flat windshield that was made of inferior and dangerously

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[6] AA 1138 [8/31/02 letter from Carcione].

[7] AA 1193-1195.

[8] AA 61-62 [Police Report]; 74-77 [Complaint].

[9] AA 56 [Police Report]; 74-77 [Complaint].

defective glass, rather than shatter-resistant, glass-plastic that would have prevented the rock from penetrating the occupant's survival zone.[10]

Not surprisingly, the Collinses' lawsuit has been hotly contested from the outset by more than a half dozen well-financed corporate and government entities. Since its filing in December of 1998, this action has produced 574 docket sheet entries in the superior court, generated hundreds of thousands of pages of paper,[11] resulted in tens of thousands of dollars worth of discovery and other monetary sanctions against multiple defendants,[12] incurred a $1.5 million+ lien for plaintiffs' attorneys' services, and generated three separate appeals now pending in this court.[13]

Difficult and protracted discovery proceedings remain to be completed. A motion for terminating discovery sanctions against the State of California has yet to be decided.[14] No expert discovery has been done

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[10] AA 48-53 [Complaint].

[11] AA 482:16-21 [Purtill Dec.]; 1230-1270. See Request for Judicial Notice ("RJN"), filed June 30, 2003 in Case No. C042503, Exhibit A.

[12] AA 925:12-26 [8/20/02 Trial Continuance Hearing].

[13] AA 482:13 [Purtill Dec.]; RJN, filed June 30, 2003 in Case No. C042503, Exhibit A.

[14] RJN, filed June 30, 2003 in Case No. C042503, Exhibit A.

following the parties' designations of 50 expert witnesses.[15] In short, there is much more to be done in this case in the full year before it is ready for a several-month trial. No lawyer in his or her right mind would take this case at this stage.

JURISDICTIONAL STATEMENT

Plaintiffs William and Barbara Collins have appealed from: (1) an order disqualifying their attorneys, the Law Offices of Joseph W. Carcione, Jr.; and (2) a subsequent order refusing to reconsider the disqualification.[16]

The order granting defendants' motion to disqualify counsel is appealable.[17] The order denying a motion for reconsideration is either directly appealable[18] or reviewable as an order following an appealable

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[15] AA 385-398 [Collins' Designation of Experts]; 482:6-7 [Purtill Dec.]; 485-492 [NIC's Designation of Experts]; 879:16-21; 919:25-920:1; 921:26-922:4 [8/20/02 Trial Continuance Hearing].

[16] AA 1186-1188 [Original Notice of Appeal from order and amended order on motion for disqualification and all adverse orders and judgments]; 1222-1223 [Amended Notice of Appeal from order on plaintiffs' motion for reconsideration and all adverse orders and judgments].

[17] *Reed v. Superior Court* (2001) 92 Cal.App.4th 448, 450, 453 & fn. 2; *Strasbourger Pearson Tulcin Wolff, Inc. v. Wiz Technology Inc.* (1999) 69 Cal.App.4th 1399, 1402, fn. 1.

[18] Code of Civil Proc., section 906; *Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.* (2001) 88 Cal.App.4th 439, 448, fn. 1 [orders which "involve" or "necessarily affect" an appealable order are reviewable on appeal from that order].

order.[19] Plaintiffs' appeal was timely filed within 60 days of notice of entry of the first order.[20]

While recognizing the appealability of orders disqualifying counsel, this court has expressed a preference for writ review of disqualification decrees, observing that the "'specter of [improper] disqualification of counsel should not be allowed to hover over the proceedings for an extended period of time for an appeal.'"[21] Writ review was not feasible in this case because the complexity of the record, the necessity of associating new counsel, and the pendency of two other appeals in this case did not permit plaintiffs to meet the 60-day writ deadline. For these reasons, plaintiffs have proceeded in the ordinary course on appeal.

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[19] *Blue Mountain Development Co. v. Carville* (1982) 132 Cal.App.3d 1005, 1010-1011 [order denying reconsideration appealable if underlying order appealable and reconsideration is based on different facts], *contra* see *Rojes v. Riverside General Hosp.* (1988) 203 Cal.App.3d 1151, 1160-1161.

[20] Notice of entry of the original order of disqualification was first given on October 8, 2002. (AA 574.) Notice of entry of the amended order of disqualification was first given on October 21, 2002. (AA 1079.) Notice of entry of the order denying plaintiffs' motion for reconsideration was given on December 31, 2002. (AA 1215.) Plaintiffs' original notice of appeal was filed on December 5, 2002, and amended on January 16, 2003 to include the order denying reconsideration. (AA 1186-1192; 1222-1227.)

[21] *State Water Resources Control Bd. v. Superior Court* (2002) 97 Cal.App.4th 907, 913-914.

STATEMENT OF FACTS

A. William Collins Sustained Severe Injuries When A Concrete Projectile Penetrated His Windshield.

William and Barbara Collins' complaint in this action alleges the following: On December 4, 1997, at approximately 2:00 a.m., William ("Bill") Collins was driving his International truck trailer Model 8200 north on Interstate 5 near Stockton, California.[22] As Bill approached the point where the freeway traverses Smith's Canal, a two pound chunk of broken concrete hurled by a 15-year-old boy penetrated his windshield, retaining enough velocity to strike him in the head and cause grave and immediate injury.[23] Bill lost control of his big rig.[24] A violent crash ensued, ending with the big rig's trailers turned sideways.[25]

Bill suffered severe brain injuries from the impact of the concrete projectile.[26] He is now in a vegetative state.[27] His wife and guardian at

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[22] AA 57-59 [Police Report]; 244 [Complaint].

[23] AA 56; 62 [Police Report]; 245-246 [Complaint].

[24] AA 9 [Complaint].

[25] AA 10; 246 [Complaint].

[26] AA 23; 241:8-13 [Complaint].

[27] AA 241:8-13 [Complaint]; 1138 [8/31/02 letter from Carcione].

litem Barbara Collins, who brought a claim for loss of consortium, now faces the prospect of witnessing her once vital husband endure a long and undignified slide towards death while connected to mechanical life support apparatus.[28]

B. <u>The Collinses Filed a Lawsuit Asserting That Bill's Windshield Was Dangerously Nonresistant To Projectile Penetrations</u>.

Bill and Barbara Collins (the "Collinses") retained the Law Offices of Joseph W. Carcione, Jr. (the "Carcione firm") to represent them.[29] On December 3, 1998, the Collins filed a complaint in the Alameda County Superior Court seeking damages resulting from Bill's injuries against 10 private and government defendants, including International Truck and

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[28] AA 54, 59, 231, 241:13-19 [Complaint].

[29] Barbara Collins is independently represented in her individual capacity by Laurence E. Drivon of the law firm of Drivon & Tabak. (See, e.g., AA 1275:8-11.) The Carcione firm has paid the vast expense of this lawsuit and conducted virtually all the discovery. (AA 482.) It is unquestionably lead counsel.

The Collinses' interests are represented by the same appellate counsel and they are aligned in interest in seeking reversal of the Carcione firm's disqualification. (AA 1222-1223.) In view of the expense and difficulties of the case, Mr. Drivon is in no position to continue without the Carcione firm. (AA 1305:2-1306:6) Therefore, Barbara Collins' individual interest and her interest as Bill's guardian require vigorous opposition to the Carcione's disqualification as Bill's counsel. For ease of reference, this brief refers to plaintiffs in the plural as the parties who jointly opposed the motion to disqualify and sought reconsideration in the trial court.

Engine Corporation[30] ("ITEC") and Navistar International Corporation ("Navistar"), the manufacturers of Bill's big rig.[31] The Collinses also alleged that ITEC is a wholly owned subsidiary of Navistar, and that they are legally a single business entity.[32] Venue in plaintiffs' action was later transferred to San Joaquin County.

ITEC and Navistar were originally jointly represented by the law firm of Harrington, Foxx, Dubrow & Canter ("Harrington"). However, during the pendency of this litigation, ITEC and Navistar obtained separate counsel. Harrington continues to represent ITEC.[33] Navistar is now represented by Kroloff, Belcher, Smark, Perry & Christopherson ("Kroloff").[34] Harrington and Kroloff have acted jointly in coordinating ITEC and Navistar's defense of this action.[35] (ITEC and Navistar are collectively referred to as "NIC.")

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[30] ITEC was named "Navistar International Transportation Corporation" at the beginning of this action.

[31] AA 1 [Complaint].

[32] AA 359-364 [Amendment to Complaint].

[33] AA 1275:18-22.

[34] AA 1276:1-5.

[35] *See generally* Record on Appeal.

The Collinses brought claims against NIC based on the theories of negligence, strict products liability, and breach of express and implied warranties.[36] The Collinses alleged that NIC knowingly used a windshield that failed to provide adequate protection against the penetration of external objects in its Model 8200 vehicle.[37] Among other things, the Collinses alleged that NIC knew that technology to make windshields with high penetration resistance, namely windshields incorporating glass-plastic technology, was available and feasible, and that other manufactures had been using such technology since the mid-1980s.[38]

C. **NIC Moved To Disqualify Expert Witness Carl Clark and The Carcione Law Firm**

After four years of litigation, the Collinses filed their designation of expert trial witnesses on or about June 3, 2002.[39] This designation contained the name of "Carl Clark, Ph.D." ("Clark").[40] Shortly thereafter, Harrington claimed that Clark was its continuing consultant and moved to

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[36] AA 48 [Complaint; Products Liability Attachment].

[37] AA 350-358 [Amendment to Complaint].

[38] AA 352 [Amendment to Complaint].

[39] AA 385-398 [Collins' Designation of Experts].

[40] AA 389:15-23 [Collins' Designation of Experts].

disqualify both Clark as an expert witness for plaintiffs and the Carcione firm based on its contacts with Clark.[41]

During the proceedings on its motion, NIC declined to present Clark's testimony, while maintaining it still had a consulting relationship with him. Indeed, NIC fanatically resisted all attempts to secure Clark's testimony with objections to his deposition, motions to quash his deposition subpoena, motions for protective order, and requests for sanctions against plaintiffs and their lawyers for daring to seek Clark's testimony on the subject of disqualification.[42]

However, just before the hearing on the Carcione firm's motion for reconsideration, Clark unilaterally submitted his declaration. Clark's declaration was prepared by Clark and his personal attorney.[43] Clark's testimony is noted throughout this brief as it is relevant to each issue. A copy of Clark's declaration is attached to this brief as Exhibit A.

Mindful of the substantial evidence rule, plaintiffs will summarize the uncontradicted evidence in the record noting any material conflicts in testimony.

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[41] AA 365.

[42] AA 1094-1100.

[43] AA 996-999 [Clark Dec.]; 1146-1149 [Supplemental Clark Dec.].

1. **<u>NIC's Evidence Supporting Disqualification – the Sears Declaration</u>.**

The only evidence presented by NIC in support of its motion to disqualify the Carcione firm was the three-page declaration of Craig Sears, a Harrington lawyer.[44] Sears declared that his law firm had contacted Clark at some time around August 1999,[45] and paid him $2,500 to "secure [his] position as a "*technical*" consultant "*regarding glass and glazing*."[46]

Sears' declaration attached a copy of a letter from Sears to Clark purporting to confirm an agreement to keep Clark's consulting engagement – including his identity as an NIC consultant – absolutely secret from everyone.[47] By its terms, the letter positively forbade Clark from telling plaintiffs' counsel – or anyone else – that he was consulting with NIC. The letter states:

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[44] AA 375-383 [Sears Dec.].

[45] The time of the contact is uncertain. The Sears declaration purports to describe an initial telephone conversation between Sears and Clark on September 9, 1999 while Clark was on vacation in Vermont in which Clark stated the terms under which he was prepared to consult with Sears. It also ambiguously reports communications the previous month in which Clark supposedly agreed to act as a consultant and gave his initial opinions to Sears. (AA 375-376.)

[46] AA 376:1-4; 379; emphasis added.

[47] AA 379.

"Also as part of our agreement, it is understood that you will not disclose to any third party that your are consulting with Navistar in the above-captioned matter. In turn, we agree that we will not reveal your identity as a consultant. . . ."[48]

To elicit Clark's opinions about glass-plastic glazing, Sears forwarded to Clark on September 1, 1999 a copy the police report regarding Bill Collins' crash.[49] Sears does not list or describe in his declaration, even in general terms, the subject matter of any other documents or information Sears may have supplied to Clark during or in connection with their communications about this case.

Sears vaguely described his communications with Clark, stating only that the two of them "candidly" discussed undefined "aspects of this case" and NIC's "defense positions."[50] He further states that Clark conveyed his "opinions" to Sears "regarding the incident in question" and the "glass windshield and other issues."[51]

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48 AA 379 [Sears Dec.]. Harrington lawyer David H. Canter confirmed the absolutely secret nature of Clark's employment in open court. (AA 1307:28-1308:2 [Canter oral argument].)

49 AA 383 [Sears Dec.]; 630-638 [Dolinski Dec.].

50 AA 375:27-28; 377:17-18.

51 AA 375:18-19 & 27-28; 376:11-13; 377:17-18.

Sears declares that NIC somehow used Clark's opinions in an undescribed way "to plan discovery and discovery responses, retain other consultants and plan trial strategy."[52] Critically, his declaration does not differentiate information within the category it describes that was not legally confidential, e.g., Clark's previously well-publicized opinions about glass-plastic, information that wound up in discovery responses served on plaintiffs, or information that will be part of NIC's expert's testimony at trial.

When Sears saw the name "Carl Clark" in plaintiffs' expert witness designation on June 10, 2002, he immediately telephoned Clark to "discuss [Clark's] role as an expert witness for the plaintiff."[53] Sears says nothing at all about what he said to Clark or what Clark said to him in their June 10 conversation. He reports only that he spoke with Clark again on June 13, 2002, "at which time [Clark] acknowledged that he had previously agreed to consult with defendants ITEC and NIC, and had received the retainer."[54]

The only reasonable inference from this cryptically-described exchange is that Clark did not even remember who Sears was or anything

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[52] AA 377:19.

[53] AA 376:20-21.

[54] AA 376:21-23.

about their prior communication more than two years before. Before he could confirm the consulting relationship, Clark had to consult his records. His confirmation was reported in a second conversation three days later.[55]

Sears maintained that Clark had told him nothing about Clark's communications with the Carcione law firm and asserted that Clark remained at all times a defense consultant under an August 31, 1999 consulting agreement. As Sears testified:

> "At no time did Mr. Clark ever advise that he was also speaking with [the Carcione firm] regarding this case, nor did either party ever request that the consulting relationship be terminated. **Therefore, Mr. Clark was and still is a consultant for defendants ITEC and NIC**."[56]

2. Plaintiffs' Evidence Opposing Disqualification – The Yudenfriend and Purtill Declarations

In opposition to the motion to disqualify, plaintiffs submitted the declarations of Stephen Purtill, the Carcione law firm attorney who had spoken with Carl Clark and designated him as an expert, and Herbert

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[55] *Id.*; 997-998 [Clark Dec., ¶¶ 4, 6].

[56] AA 377:21-23; emphasis added.

Yudenfriend, another autoglass engineering expert who discussed Clark's unique qualifications and his views on glass-plastics.[57]

Yudenfriend's testimony, which was not challenged or contradicted by NIC, revealed that: (1) Carl Clark's unparalleled experience with glass-plastics, and his unique experience with government agencies made him one of the most knowledgeable windshield-safety experts in the world;[58] and (2) Clark has long been an outspoken proponent of the use of glass-plastic windshields[59] and an outspoken critic of the automotive industry for its "utter lack of concern for preventing many avoidable injuries by failing to move to glass-plastic."[60]

Clark's pro-consumer views about glass-plastic had been extensively published in professional journals and other media sources and he had testified numerous times as an expert.[61] In view of Clark's well established and widely published opinions and track record on autoglass issues, Yudenfriend declared that NIC could not possibly have approached Clark

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[57] AA 480-529 [Purtill Dec.]; 539-553 [Yudenfriend Dec.].

[58] AA 541:11-27 [Yudenfriend Dec.].

[59] AA 539:11-12 [Yudenfriend Dec.].

[60] AA 540:26-541:2 [Yudenfriend Dec.].

[61] AA 1000-1005 [Clark C.V.].

intending to hire him as a legitimate consultant, let alone an expert witness.[62]

Attorney Stephen Purtill of the Carcione law firm first contacted Carl Clark on September 27, 2000.[63] He did so because his independent research had revealed numerous references to Clark's work on glass-plastic and Clark's outspoken pro-consumer advocacy of the use of glass-plastic in vehicles.[64]

Purtill declared that Clark never mentioned to Purtill his prior contact with NIC or its lawyers or his retention as their consultant.[65] Clark gave Purtill only his opinions on the technical subject whether glass plastic would have prevented Bill Collins' injury, just as Purtill had requested. As Purtill stated:

> "The only information Dr. Clark has given me is his opinion regarding whether a glass-plastic windshield would have prevented the concrete from entering William Collins' truck, and information

[62] AA 541:3-10 [Yudenfriend Dec.].

[63] AA 481:6 [Purtill Dec.].

[64] AA 481:6-10 [Purtill Dec.].

[65] AA 481:11-15 [Purtill Dec.].

related to his experience at NHTSA during the period that FMVSS 205 was being amended to allow the use of glass-plastic."[66]

On June 3, 2002, Purtill filed the Carcione firm's designation of expert witnesses regarding this case, naming 78 retained and non-retained experts.[67] With Clark's express consent, Number "2" on that list was "Carl C. Clark, Ph.D."[68]

Shortly after serving the Carcione firm's designation, Purtill heard from Clark, who told him for the first time that Clark had received a call "from an attorney in Los Angeles who he had completely forgotten about."[69] Clark explained that the Los Angeles attorney – later identified as Sears – had reminded Clark of his prior consultation with NIC and had told him that he had to recuse himself as plaintiff's expert witness.[70] Clark told Purtill that Sears had given him a copy of the police report and that Clark had written a letter to Sears stating his opinion.[71] Clark said his initial

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[66] AA 481:15-18 [Purtill Dec.].

[67] AA 385-398 [Collins' Designation of Experts].

[68] AA 386:3 [Collins' Designation of Experts].

[69] AA 481:19-20 [Purtill Dec.].

[70] AA 998:4-14 [Clark Dec.].

[71] AA 481:19-27 [Purtill Dec.].

contact with Sears had been brief, that very little had been discussed, and that he had not heard from Sears between 1999 and June 2002.[72]

Upon learning of Clark's prior communication with Sears, Purtill told Clark that Purtill could not have any further contact with Clark "until the matter was sorted out."[73] ***Purtill, who was the only Carcione law firm lawyer who had ever spoken with Clark, never spoke with him again***.[74]

Purtill described both the complexity of the Collinses' lawsuit and the their utter dependence on the Carcione firm as their lawyers. The Carcione firm had 901 separate documents filed in 75 files plus tens of thousands of pages of documents produced in discovery.[75] 50 experts had been disclosed by the parties. The trial was expected to last several months. The Carcione firm had spent $200,000 in out-of-pocket costs on the case and expected to spend another $300,000 to $500,000. Coupled with the value of attorney time, the Carcione firm expected to have a lien of

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[72] AA 481:23-27; 649:4-5 [Purtill Decs.]. Sears repeated that he had spoken with Clark on March 12, 2002. (AA 370:3-4; 376:11.) Clark would not confirm the conversation. (AA 997-999.)

[73] AA 481:27-28 [Purtill Dec.].

[74] AA 649:14-19 [Purtill Dec.]; 998, ¶ 6 [Clark Dec.].

[75] AA 482:16-21 [Purtill Dec.].

$1,500,000+ on the proceeds of any judgment, making it unlikely that any other attorney would take on the case.[76]

Plaintiffs' complaint was filed on December 3, 1998,[77] the Notice of Appeal was filed on December 5, 2002.[78] This means any new lawyer would have slightly less than one year under the five-year statute[79] to learn this case, complete discovery including dozens of expert depositions, fend off summary judgment motions, and commence a several-month trial.

3. The Trial Court's Order Granting Disqualification

The trial court granted NIC's motion to disqualify Carl Clark as plaintiffs' expert witness (but not as NIC's expert consultant) *and* to disqualify the Carcione law firm as counsel. Its Amended Order was entered on October 21, 2002.[80]

The trial court made no findings of fact regarding any element of any standard governing attorney disqualification, but simply stated in its order

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[76] AA 482:5-15 [Purtill Dec.].

[77] AA 3.

[78] AA 1186.

[79] Code Civ. Proc., §§ 583.310; 583.360; see also 583.240.

[80] AA 655-659. *See also* AA 660-670 [Notice of Entry of Amended Order [Etc.]]. The trial court granted NIC's motion and entered its original order disqualifying the Carcione firm on October 8, 2002. (AA 571-576 [Order]; 577-578 [Notice of Entry of Order [Etc.]].)

that NIC had “provided the following evidence,” then summarized Sears’s declaration. The order implied that plaintiffs’ counsel had, in the court’s view, somehow acted improperly because “[d]espite three written requests, plaintiffs’ counsel refused to withdraw Mr. Clark as an expert.” It then concluded that disqualification was “proper,” apparently for that reason.[81]

With respect to the recusal demands referred to in the order, the record reveals that Sears wrote to Purtill on June 18, 2002, 15 days after the expert designation, stating that Clark had been retained as NIC’s expert in August 1999 and had accepted a fee from NIC. The letter contained no copies of correspondence or other information that would have allowed Purtill to verify the statement made or to ascertain the nature or scope of the alleged retainer. The letter demanded that the Carcione firm withdraw Clark as an expert witness.[82]

Before the Carcione firm could respond, Sears wrote to Purtill again on June 24 – 6 days later – demanding not only that Clark be withdrawn as an expert witness, but that the entire Carcione firm disqualify itself from the

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[81] 3 AA 657:1-2 [Amended Order].

[82] AA 400.

case.[83] The letter cited *County of Los Angeles v. Superior Court*[84] and *Shadow Traffic Network v. Superior Court.*[85]

A third letter from Sears – responding to the Carcione firm's request for more information about NIC's contact with Clark – purported to discuss the history of NIC's relationship with Clark, again without supplying supporting documentation. Relying on *Shadow Traffic*, the letter again demanded recusal of both Clark and the Carcione law firm.[86] The motion to disqualify was filed on July 29, 2002, 14 days after the third demand letter.[87]

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[83] AA 402-403.

[84] (1990) 222 Cal.App.3d 647.

[85] (1994) 24 Cal.App.4th 1067.

[86] AA 405-406.

[87] AA 365.

4. **<u>The Motion for Reconsideration and Carl Clark's Declaration Confirming the Carcione Firm's Testimony</u>**

a. **<u>The Basis for Reconsideration: The Manifest Necessity for Carl Clark's Testimony and NIC's Efforts to Preclude It</u>**

The Carcione firm brought a timely motion for reconsideration on October 18, 2002, with a hearing scheduled for November 27, 2002.[88] The motion was based on the emergence of new and different facts and circumstances, namely those new facts and circumstances that the Carcione firm intended to reveal by securing expert Carl Clark's testimony.[89]

In support of reconsideration, attorney Joseph W. Carcione declared that because his firm had been ethically required to cease all contact with Clark following Harrington's assertion that Clark was its continuing consultant, it had not been possible for the firm to procure Clark's testimony by interviewing him and procuring his declaration.[90] Carcione

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[88] AA 585-654 [Motion For Reconsideration].

[89] AA 592:28-593:6 [Notice of Motion For Reconsideration]; 640:12-641:2 [Carcione Dec.].

[90] AA 640:20-24 [Carcione Dec.]. Carcione reemphasized this point at oral argument. (AA 1325:2-12; 1336:2-1337:4.)

observed that Clark's testimony, once secured, would constitute new or different facts or circumstances justifying reconsideration of the disqualification order.

The Carcione firm attempted to obtain Clark's testimony in preparation for its motion for reconsideration in two ways:

- *First*, Carcione renewed his request that the trial court procure Clark's testimony by one of several suggested means.[91] The court ultimately ignored this request.
- *Second*, on October 18, 2002, Carcione attorney Gary Dolinski wrote a letter to Clark enclosing a deposition subpoena.[92] With that same October 18 letter to Clark, Dolinski served Clark with a subpoena requiring Clark to attend the hearing on the motion for reconsideration scheduled for November 27, 2002, along with a subpoena *duces tecum* to produce relevant documents at that hearing. In the letter, Dolinski recommended that Clark take the subpoenas to his own attorney.[93]

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[91] AA 640:25-641:2 [Carcione Dec.].

[92] AA 610-611.

[93] AA 610-622 [Dolinski Dec., Exhibit A (Letter and subpoenas from Dolinski to Clark)].

NIC's lawyers immediately launched multiple attacks designed to smother Clark's testimony. On October 22, 2002, Sears wrote a threatening letter to Clark, reminding him that he remained NIC's consultant and warning him to consider that fact if he was contacted by the Carcione firm.[94] On October 31 and November 4, 2002, each law firm working for NIC served separate but substantively identical objections to Clark's deposition subpoena (Kroloff on behalf of NIC and Harrington on behalf of ITEC).[95] Then, on November 7 and 8, 2002, NIC's law firms filed separate but virtually identical motions to stay Clark's deposition, quash the deposition subpoena, and for sanctions totaling more than $13,000 against the Collinses.[96]

NIC's lawyers argued that Clark's testimony would not supply "new or different facts" because, as the argument went, the Carcione firm should have used some unspecified method to obtain Clark's testimony in

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[94] AA 783-784 [Canter Dec., Exhibit D].

[95] AA 740-745 [11/4/02 Objection by Kroloff to Clark's Deposition Subpoena]; 846-851 [10/31/02 Objection by Harrington to Clark's Deposition Subpoena].

[96] AA 677-745 [11/7/02 Motion by Kroloff to Quash Clark's Deposition Subpoena]; 746-865 [11/8/02 Motion by Harrington to Quash Clark's Deposition Subpoena].

connection with the original motion for disqualification.[97] In an inconsistent second argument, NIC's lawyers insisted that Clark was *their* consultant and therefore neither the Carcione firm nor, presumably, the court was entitled to have Clark's evidence.[98] NIC's motions to quash automatically stayed Clark's deposition until December 10, 2002, almost two weeks after the motion for reconsideration was heard.[99]

Finally, on November 13, 2002, NIC filed a motion for a protective order preventing the Collinses from obtaining Clark's testimony in any form, and seeking $8,000 more in sanctions against the Collinses.[100] NIC again argued that because Clark is its consultant, the Collinses were not permitted to have Clark's testimony about any subject, including his role as a twice-retained expert.[101] ITEC's lawyer Kroloff joined in this motion.[102]

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[97] AA 688:4-26 [NIC's Motion to Quash Clark's Deposition Subpoena].

[98] AA 687:1-688:3 [1/7/02 Motion by Kroloff to Quash Clark's Deposition Subpoena]; 752:14-753:22 [11/8/02 Motion by Harrington to Quash Clark's Deposition Subpoena].

[99] AA 690:4-12 [1/7/02 Motion by Kroloff to Quash Clark's Deposition Subpoena].

[100] AA 866-987 [NIC's Motion For Protective Order re Deposition of Clark].

[101] AA 872:1-873:10 [NIC's Motion For Protective Order re Deposition of Clark].

[102] AA 1045A-1045D [Joinder in Motion For Protective Order].

NIC's lawyers' threats and court filings succeeded in stifling the Collinses' attempts to secure Clark's live testimony. In a letter to Sears dated November 6, 2002, Clark's personal lawyer, Matthew Ranck, Esq., a Baltimore attorney, confirmed that Clark would not appear for deposition and would not attend the hearing on the Collinses' motion for reconsideration.[103]

After having apparently failed in their attempt to secure Clark's testimony, the Carcione firm got a break: After Clark hired his own attorney, Clark voluntarily submitted a declaration for use at the hearing on the motion for reconsideration on November 13, 2002, just 14 days before that hearing.[104] In a last attempt to smother their own consultant Clark's testimony, NIC's lawyers objected to the introduction of Clark's declaration as "untimely."[105]

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[103] AA 981-982 [Canter Dec. re Motion For Protective Order, Exhibit L (11/6/02 letter from Ranck to Sears)].

[104] AA 996-1008 [Clark Dec.]; 1325:13-26.

[105] AA 1094-1101 [NIC's Objection to and Motion To Strike the Declaration of Clark].

b. <u>Expert Carl Clark Confirms The Carcione Firm Attorneys' Testimony In *Every* Respect</u>.

Carl Clark confirmed the Carcione firm's testimony in all respects. His bottom line was: "I forgot." Clark declared that on or about September 27, 2000, he was contacted by Purtill regarding the *Collins v. Navistar* case and spoke only with him and no other Carcione lawyers about it.[106] Clark confirmed that Purtill had asked him if he was "available and agreeable" to be retained as an expert witness for plaintiffs, and that Clark had responded in the affirmative.[107] Clark confirmed his receipt of a letter, a check, and documents from Purtill in April 2002.[108]

Clark testified that he was "certain" that he did not mention anything to Purtill about his prior contact with Sears or say anything about his communications with Sears.[109] He did not, at any time in his conversations with Purtill, "tell him what Mr. Sears had said to me about the Collins case or what I told Mr. Sears about the case."[110]

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[106] AA 998 [Clark Dec., ¶ 8].

[107] AA 997 [Clark Dec., ¶ 3].

[108] AA 997 [Clark Dec., ¶ 5].

[109] AA 997-998 [Clark Dec., ¶¶ 4, 5, 7].

[110] AA 998 [Clark Dec., ¶ 7].

Clark's absolute certainty that he did not disclose to Purtill any of his communications with Sears stemmed from the simple fact that Clark simply did not remember *at all* his prior contact with Sears when he spoke with Purtill. As Clark put it:

> "***When I agreed to serve as an expert for the plaintiffs in the Collins case, I did not realize that this was the same case that I agreed to act as a consultant for Mr. Sears, or having been contacted by any lawyer other than Mr. Purtill about this case. Because I did not realize that I had discussed the same case with Mr. Sears, I am certain that I did not mention anything about any such prior contact, or any communication related to such contact, to Mr. Purtill***."[111]

Clark also confirmed that Purtill had truthfully reported Clark's post-expert designation phone call.[112] He verified that Purtill had refused to communicate further with him from the moment Purtill learned he had consulted with NIC. As Clark testified: "***After this brief conversation, Mr. Purtill told me that there might be a conflict and that I could not have any***

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[111] AA 997-998 [Clark Dec., ¶ 5]; see Exhibit A hereto.

[112] AA 998 [Clark Dec., ¶ 6].

***further contact with him or his office until the matter was sorted out in court*."[113]

5. <u>The Hearing on the Motion for Reconsideration and the Order Denying Reconsideration</u>

The trial court refused to reconsider the disqualification order.[114] It stated on the record that it did not believe the Carcione firm had presented any new facts, circumstances, or law, and, alternatively, that, even if it had elected to reconsider the disqualification order, the trial court would have confirmed its original order because the *Shadow Traffic* case was "right on point."[115]

ISSUES PRESENTED

The appeal of Bill and Barbara Collins presents the following issues for this court's consideration:

1. The Standard Governing Inadvertent Expert Contact.

When opposing attorneys inadvertently communicate with the same expert, is the second attorney making contact with the expert automatically subject to disqualification when:

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[113] *Id.*; emphasis added.

[114] AA 1210-1221 [12/20/02 Order on Motion For Reconsideration].

[115] AA 1388:23-1389:6.

(a) the expert testifies without contradiction that he completely forgot about the first attorney's contact – which occurred a year before the second contact – and that he shared no information from it with the second attorney;[116] and

(b) immediately upon learning of the first attorney's contact, the second attorney ceases all communication with the expert pending a court decision about the expert's status in the action?[117]

The short answer must be a resounding: "No." An attorney who *inadvertently* communicates with an opposing party's expert in the good faith belief that he is entitled to retain the expert's services is not *per se* disqualified from continuing to represent his or her client. Indeed, such an attorney would be remiss in duty to a client if he or she did not diligently locate and seek to retain the best qualified expert to testify on the client's behalf.

Because there is no doubt on this record that plaintiffs' attorneys acted in innocence and were in no position to exploit – and did not exploit – any confidential information belonging to an opposing party,

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[116] AA 481:11-482:4 [Purtill Dec.]; 996-999 [Clark Dec.].

[117] AA 481:27-28 [Purtill Dec.]; 998 [Clark Dec., ¶ 6].

disqualification of counsel here was an error of law, a manifest abuse of discretion, and a travesty of justice.

2. Application of the *Shadow Traffic* Rule.

Disregarding the indisputably inadvertent nature of the contact between the expert and the second lawyer, the trial court applied the rules of cases in which misbehaving counsel *intentionally* raided an opposing party's stable of experts in order to steal work product, i.e., *Shadow Traffic Network v. Superior Court*[118] and *County of Los Angeles v. Superior Court*.[119]

The first of these cases – *Shadow Traffic* – applied a ***rebuttable*** presumption that confidential information disclosed by a party to an expert was imparted to an opposing lawyer who later hired the expert knowing of his prior contact with the other side. The trial court's decision to apply the rule of *Shadow Traffic* here raises a host of additional issues, including each of the following:

(a) When a party moving for disqualification asserts A continuing consulting relationship with an expert, is that party entitled to *Shadow*

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[118] (1994) 24 Cal.App.4th 1067 ("*Shadow Traffic*").

[119] (1990) 222 Cal.App.3d 647 ("*Los Angeles County*").

Traffic's rebuttable presumption that confidential information passed between that expert and an opposing party?

Here the moving defendant claimed that the twice-retained expert had remained its consultant at the time of the motion to disqualify plaintiffs' counsel.[120] Under the rationale of *Shadow Traffic*, defendant can prove its case for disqualification by providing the expert's testimony. It is not entitled to the leg up supplied by a presumption.

(b) When a party moving for disqualification makes no showing that legally confidential information (e.g., attorney-client communications or opinion work product) was actually transmitted to an expert – the key fact that *Shadow Traffic* holds must be established to invoke its rebuttable presumption – can the presumption nonetheless be dredged up to justify disqualification?

Under *Shadow Traffic*, the answer is no. Because the only declaration offered in support of disqualification said no more than that defendant's lawyer gave the expert a police report,"candidly" discussed the case with him, and received his preliminary opinions, there was no showing

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[120] AA 370:8-15 [Motion to Disqualify]; 377:15-23 [Sears Dec.].

of transmission of legally confidential information sufficient to invoke the presumption.[121]

(c) When a party opposing disqualification of its lawyer supplies unchallenged and uncontradicted evidence from its lawyer – and a forgetful expert – that the expert could not and did not transmit to the lawyer anything about the expert's communications with the moving party, has that party rebutted the *Shadow Traffic* presumption?

Again, under *Shadow Traffic*, such evidence, which was supplied here, decisively rebuts the presumption. If it were otherwise, the presumption would become *conclusive* and would constitute a *per se* rule of disqualification.

(d) When the moving party fails to prove any prejudice to its case from a contact between its expert consultant and an opposing party – and the record reveals that the contact was at least as detrimental to the opposing party – can disqualification be justified?

Again, the answer must be: "No." The moving party here failed to prove transmission of attorney opinion work product or similarly confidential information to plaintiffs' counsel that could even conceivably have jeopardized the ongoing defense of this action. Indeed, in light of the

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[121] AA 375:25-28; 377:15-19; 383 [Sears Dec.].

record, there is at least an equal prospect that plaintiffs' counsel, who also communicated with the expert about this case for more than two years before counsel discovered that the expert was defendant's "continuing consultant," imparted plaintiffs' work product that was passed on to the defense.[122]

Neither the rule of *Shadow Traffic* nor that of any other case can support disqualification of a lawyer in the absence of *prejudice* to the moving party affecting the future course of the action; none was present here.

3. Failure to Consider the Forgetful Expert's Vitally Important and Previously Inaccessible Testimony.

Were Bill and Barbara Collins denied a fair hearing on the issue of disqualification by the trial court's alternative ruling refusing to consider Clark's declaration when it was first supplied by Clark's own lawyer on the Collinses' motion for reconsideration?

The answer is yes. The entire disqualification controversy centered on the knowledge and conduct of expert witness Dr. Carl Clark, a Maryland resident.[123] Yet the moving defendant, who claimed that Clark had always

[122] AA 375:12-376:23; 379-384 [Sears Dec.]; 481:6-482:4; 648:9-649:13 [Purtill Decs.].

[123] AA 996-1005 [Clark Dec.].

been and still remained its agent and consultant, not only refused to produce Clark for deposition, it staunchly and vigorously opposed every one of the numerous efforts made by the Collinses' lawyers to depose him.[124]

When Clark's testimony finally became available – in the form of a declaration prepared under the direction of Clark's own personal lawyer – defendants *objected* to its consideration.[125] The trial court ruled that the declaration was not a new fact justifying reconsideration and, in any event, would not have changed the outcome of the disqualification motion.[126] These rulings rendered the Collinses unable to oppose disqualification with Clark's uniquely relevant and wholly credible evidence. For this reason, they were abuses of judicial discretion and now constitute additional grounds for reversal.

STANDARD OF REVIEW

The standard of review applicable to disqualification motions is unusually nuanced. Although sometimes denominated "abuse of discretion," it requires the appellate court to carefully review and weigh the evidence supporting and opposing disqualification in light of the vital policy interests

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[124] *See generally* AA 677-987.

[125] AA 1094-1101.

[126] AA 1388:23-1389:6.

in protecting the integrity of the judicial process and safeguarding the right to counsel. As the Supreme Court has explained:

> "***Generally, a trial court's decision on a disqualification motion is reviewed for abuse of discretion. . . When substantial evidence supports the trial court's factual findings, the appellate court reviews the conclusions based on those findings for abuse of discretion. However, the trial court's discretion is limited by the applicable legal principles. <u>Thus, where there are no material disputed factual issues, the appellate court reviews the trial court's determination as a question of law</u>.***"[127]

Further, "[t]he disqualification issue impacts each party's concerns, such as the right to counsel of choice, and professional ethical considerations, such as client confidentiality and trust. It also implicates public trust in the scrupulous administration of justice and the integrity of the bar. The importance of a disqualification motion mandates a careful

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[127] *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143-1144 [citations and internal quotations omitted; emphasis added; reviewing disqualification motion as matter of law].

review of the trial court's exercise of discretion."[128] As the Supreme Court emphasized, rigid adherence to a technically deferential standard of review cannot supplant a party's right to counsel. Rather: "***[J]udicial scrutiny [is required] to prevent literalism from possibly overcoming substantial justice to the parties***."[129]

In a very recent decision entitled *Hetos Investments, Ltd. v. Kurtin,*[130] the Fourth District Court of Appeal held that, when the material facts are undisputed, the trial court has no discretion at all in determining a motion to disqualify counsel and that appellate review is *de novo*. As the court stated: ***"Whether this set of [undisputed] facts compels disqualification is a question we will review as a matter of law***."[131]

Because the facts in this case are undisputed, the Collinses submit the standard of review should likewise be de novo. Such a standard – or its equivalent – has frequently been applied in attorney disqualification cases,

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[128] *Strasbourger Pearson Tulcin Wolff, Inc. v. Wiz Technology, Inc.* (1999) 69 Cal.App.4th 1399, 1403 [internal quotes and citations omitted].

[129] *Comden v. Superior Court* (1978) 20 Cal.3d 906, 915; emphasis added.

[130] (2003) 110 Cal.App.4th 36.

[131] *Id.*; emphasis added.

resulting in a more aggressive appellate review of disqualification orders, greater scrutiny of the evidence, and more frequent reversals.[132]

DISCUSSION

I. **THE TRIAL COURT ERRED BY FAILING TO APPLY THE *UNINTENTIONAL* EXPOSURE DISQUALIFICATION RULE TO THE CASE OF THE FORGETFUL EXPERT TWICE RETAINED.**

Two central undisputed facts dominate this case:

- To the extent the Carcione firm conceivably might have been exposed to any possibly confidential information in Carl Clark's possession, it was purely inadvertent – the product of an expert's forgetfulness and an able and diligent law firm's legitimate effort to find the best qualified expert to testify on its client's behalf;[133] and

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[132] See, e.g., *Koo v. Rubio's Restaurants, Inc*. (2003) 109 Cal.App.4th 719 [reviewing evidence and reversing disqualification order]; *McPhearson v. Michaels Company* (2002) 96 Cal.App.4th 843, 851 [same]; *Strasbourger Pearson Tulcin Wolff, Inc. v. Wiz Technology, Inc*. (1999) 69 Cal.App.4th 1399, 1406 [reversing order despite relatively strong supporting evidence]; *Mills Land & Water Co. v. Golden West Refining Co.* (1986) 186 Cal.App.3d 116, 126 [same].

[133] AA 375:12-376:23; 379-384 [Sears Dec.]; 481:6-482:4; 648:9-649:13 [Purtill Decs.]; 996-1005 [Clark Dec.].

- Purtill, the only lawyer at the Carcione firm who had ever communicated with Clark, permanently ceased all contact with him *immediately* upon receiving notice of Clark's previous consulting engagement by an opposing party and allowed the court to decide Clark's status as an expert.[134]

Given these facts, the trial court should have applied the relatively lenient rules applicable to disqualification motions based on an attorney's ***inadvertent or mistaken exposure*** to an opponent's confidential information rather than the stricter *Shadow Traffic/Los Angeles County* rule, which was designed for cases in which lawyers are ***intentionally raiding*** an opposing party's work product by tapping into its experts. If the court had applied the correct rule, it would have denied the motion to disqualify.

A. The Trial Court's Failure To Apply The Rules Applicable To Inadvertent Exposures Was Legal Error and A *Per Se* Abuse Of Discretion.

When an attorney intentionally seeks out and obtains an opponent's confidential information, the opponent can secure the attorney's disqualification by proving access and prejudice. That is the rule of *Shadow*

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[134] AA 481:19-28; 649:7-8 [Purtill Decs.]; 640:24-25 [Carcione Dec.]; 998 [Clark Dec., ¶¶ 6, 8].

Traffic/Los Angeles County – the cases most heavily relied on by NIC/Harrington and cited by the court in support of disqualification.[135]

Both of the cases just referenced involved devious strategies that succeeded in allowing parties to loot their opponents' work product. In *Los Angeles County*, the offending attorney contacted an expert who had been de-designated, told him he was now free to work for the attorney, met with the expert, and induced him to disclose a work product report made to his prior employer.[136]

In *Shadow Traffic*, misbehaving counsel hired a group of accountants from a Big Six firm who counsel knew had gone through a retention interview with opposing counsel. In the disqualification proceedings, the accountants could do no better than state they "did not recall" learning anything "confidential" in the retention interview when confronted with positive and detailed declarations establishing that opposing counsel had laid out their legal opinions and theories with respect to damages and trial strategies to the accountants.[137]

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[135] AA 573:3-6 [Disqualification Order]; 1389:1-2.

[136] *Los Angeles County, supra*, 222 Cal.App.3d at pp. 651-652.

[137] *Shadow Traffic, supra*, 24 Cal.App.4th at pp. 1071-1076.

In stark contrast, however, in cases where, as here, an attorney is allegedly exposed to an opponent's confidential information inadvertently and through no fault of his or her own, an attorney cannot be disqualified in the absence of evidence that he or she took advantage of the situation to steal an opponent's work product. Thus, "***[m]ere exposure to the confidences of an adversary does not, standing alone, warrant disqualification. Protecting the integrity of judicial proceedings does not require so draconian a rule. Such a rule would nullify a party's right to representation by chosen counsel any time inadvertence or devious design put an adversary's confidences in an attorney's mailbox***."[138]

The rules governing inadvertent exposure to an opponent's confidential information are illustrated by *State Compensation Insurance Fund v. WPS, Inc. (SCIF)*,[139] a case that erected a high barrier to attorney disqualification. In *SCIF*, the court required the party seeking to hold an opposing lawyer accountable for misuse of inadvertently disclosed materials to "persuasively demonstrate" at the outset that exposure to the alleged confidence was not a set-up designed to trap opposing counsel in order to concoct a basis for disqualification. Even if that hurdle is cleared,

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[138] *In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, 589 [emphasis added].

[139] (1999) 70 Cal.App.4th 644.

disqualification cannot be ordered if the attorney who inadvertently encounters confidential information behaves honestly and ethically once he or she learns of its character. As the *SCIF* court stated:

> ***"[W]henever a lawyer seeks to hold another lawyer accountable for misuse of inadvertently received confidential materials, the burden must rest on the complaining lawyer to persuasively demonstrate inadvertence. Otherwise, a lawyer might attempt to gain an advantage over his or her opponent by intentionally sending confidential material and then bringing a motion to disqualify the receiving lawyer . . .***
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> ***Having so noted, however, we do not rule out the possibility that in an appropriate case, disqualification might be justified if an attorney inadvertently receives confidential materials and fails to conduct himself or herself in [an appropriate manner], assuming other factors compel disqualification."***[140]

Here there is no question Purtill and the other Carcione lawyers behaved honestly and ethically when they first learned from the mouth of

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[140] *Id.* at p. 657; emphasis added. See also *Neal v. Health Net, Inc.* (2002) 100 Cal.App.4th 831, 852 [Grignon, J., concurring] ["there are occasions in which inadvertent access by an attorney to the opposing party's confidential information does not, and should not, result in disqualification. . ."].

their designated expert that he had previously consulted with an opposing party and forgotten about it.

B. **Because the Carcione Firm Acted Ethically and Honestly By Ceasing All Communication With the Twice Retained Expert From the Moment It Learned Of His Status, It Cannot Be Disqualified For Any Supposed Inadvertent Exposure to NIC/Harrington's Allegedly Confidential Information.**

When an attorney inadvertently receives apparently confidential information belonging to an opponent, he or she is ethically required under the *SCIF* decision to: ***"[1] refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and [2] . . . immediately notify the sender that he or she possesses material that appears to be privileged."***[141]

The undisputed evidence reveals the Carcione firm's full compliance with the *SCIF* ethical rule. When Purtill first learned from Clark that he had consulted with NIC/Harrington, he immediately broke off communication and allowed the court to decide Clark's fate as an expert.[142] There was

[141] *SCIF, supra,* 70 Cal.App.4th at pp. 656-657; emphasis added.

[142] AA 481:19-28; 649:7-8 [Purtill Decs.]; 640:24-25 [Carcione Dec.]; 998 [Clark Dec., ¶ 6].

obviously no need for him to inform NIC/Harrington of Clark's twice retained status because it was already aware of his conflict and had caused Clark to inform Purtill. Purtill could do no more and no less than what he did. There was no basis – ethical, legal, or practical – meriting the Carcione firm's disqualification under these circumstances.

C. **The Trial Court Erred In Punishing the Carcione Firm With Disqualification Just Because It Asked the Court to Decide Carl Clark's Status As An Expert**.

In its Amended Order, the trial court observed that NIC had "presented evidence" that the Carcione firm "refused to withdraw Clark as an expert" after Harrington claimed that Clark was its consultant,[143] thereby suggesting some form of impropriety. The suggestion appears to be that the Carcione firm had an overriding ethical duty to withdraw its designated expert – a uniquely qualified professional who planned to give invaluable testimony on a subject of vital interest to the firm's comatose client – immediately upon receipt of unsubstantiated correspondence from an opponent saying: "We saw him first!"

Initially, no such ethical obligation exists. Rather, the Carcione firm had an overriding obligation to its client, Bill Collins. California lawyers

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[143] AA 657:1-2 [Amended Order].

have a "bedrock duty of loyalty and vigorous advocacy" *to their clients*, not to their opponents.[144] In this case, no less than all cases in which severe injuries have been suffered and highly specialized subjects are in dispute, the recruitment of the best available expert witnesses is vital to vigorous client representation.[145]

Had the Carcione firm simply dropped Clark – one of the most qualified experts in the world – without so much as a "show me why I should," it would have neglected its solemn ethical duty to a catastrophically injured man and his wife – the two people whose interests it had sworn to protect. Their case demanded the best available expert – one of Carl Clark's caliber. Because the Carcione firm did not know, and still does not know, all the underlying facts surrounding the expert twice retained and how he got that way, it had a duty to its client to allow the matter to be sorted out in court. That is exactly what Purtill told Clark the Carcione firm would do.

Under the holding in *SCIF*, the Carcione firm had an absolute right to do as it did. As the Court of Appeal observed there, when an attorney

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[144] *Howard v. Babcock* (1993) 6 Cal.4th 409, 426.

[145] See *Korsack v. Atlas Hotels, Inc*. (1992) 2 Cal.App.4th 1516, 1523 ["[E]xpert evidence has become 'increasingly important in modern litigation.'"].

who inadvertently runs across an opponent's confidential information behaves ethically and tells his or her opponent about the disclosure "***[t]he parties may then proceed to resolve the situation by agreement <u>or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified</u>.***"[146]

Here the Carcione firm "resort[ed] to the court for guidance," just as the law allows, and was punished for loyalty to its client with an order of disqualification. Even if the Carcione firm's vigorous representation of its client were an ethical sin of some sort – and thankfully it is not – attorney disqualification cannot be used as a punitive or disciplinary measure. As the Court of Appeal has observed: "'If . . . the court's purpose is to punish a transgression which has no substantial continuing effect on the judicial proceedings to occur in the future, neither the court's inherent power to control its proceedings nor [the] Code of Civil Procedure section 128 [statutory powers] can be stretched to support disqualification.'"[147]

In short, Carl Clark's status as an expert was a matter for the trial court to decide. The Carcione firm's decision to let the court do its job rather than to withdraw Clark had no conceivable continuing effect on

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[146] *SCIF, supra*, 70 Cal.App.4th at pp. 656-657; emphasis added.

[147] *Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 734.

future judicial proceedings in this case. It was wrong of the court to use it to punish the Carcione firm and its client.

D. **NIC/Harrington Totally Failed To Demonstrate That "Other Factors" Compelled Disqualification.**

The SCIF case makes reference to unnamed "other factors" that might impact an attorney disqualification proceeding. Because the record here reveals no prejudice at all to NIC/Harrington from the Carcione firm's inadvertent contact with its consultant and overwhelming prejudice to plaintiffs through loss of their lawyer, the "other factors" decidedly favor denial of disqualification.[148] It was error for the to grant it.

II. **THE TRIAL COURT'S APPARENT APPLICATION OF THE *SHADOW TRAFFIC* RULE WAS LEGAL ERROR AND ABUSE OF DISCRETION.**

Although the trial court failed to make findings or explain its reasoning in the disqualification order, it orally observed during the hearing on the motion to disqualify that *Shadow Traffic Network v. Superior Court*

[148] See further discussion in Section II (B) below.

was "on point."[149] It also cited both *Shadow Traffic* and *Los Angeles*[150] *County* in its order.

As the Collinses have shown in Section I above, the trial court's reliance on *Shadow Traffic* and *Los Angeles County*, both of which involved a law firm's *deliberate and improper* contact with an opponent's former expert consultant, was erroneous.[151] But even if the *Shadow Traffic* rule were arguably applicable, the court erred in relying on it here to support disqualification for several additional reasons:

- *Shadow Traffic* applied a rebuttable presumption of expert disclosure of legally confidential information to an opposing lawyer. The *Shadow Traffic* presumption triggers when the moving party has established two things: (1) that it had no access at the time of the disqualification motion to evidence of the expert's communications with the opposing party; *and* (2) that it had actually disclosed legally confidential

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[149] AA 1389:1-2.

[150] AA 573:3-6 [Disqualification Order].

[151] It is interesting to note that, during the hearing on the motion to disqualify, NIC's attorney, Mr. Perry, incorrectly represented that in neither case NIC relied upon (*County* and *Shadow Traffic*) had an attorney committed misconduct, when in fact both cases involved attorney misconduct. (AA 1309:27-1310:6.)

information to the expert. NIC/Harrington supplied no proof of either required item.

- Even if properly invoked, the *Shadow Traffic* presumption is decisively rebutted here by evidence showing that the challenged attorney received no legally confidential information.
- There can be no disqualification under the rule of *Shadow Traffic* – or any other decision – in the absence of *prejudice* to an opponent, i.e., some event that had "'a substantial continuing effect on the judicial proceedings to occur in the future.'"[152] There was no evidence of prejudice here.

A. <u>The *Shadow Traffic* Presumption Cannot Be Applied In This Case</u>.

The Facts of Shadow Traffic. In *Shadow Traffic*, defendant Shadow Traffic Networks was sued by a competitor, plaintiff Metro Traffic Control, Inc., for business torts. While preparing for trial, Metro's attorneys Andrews & Kurth (Andrews) met with four accounting professionals from Deloitte & Touche (Deloitte) to discuss the possibility of Andrews hiring Deloitte personnel as economic damage expert witnesses against Shadow

[152] *Koo v. Rubio's Restaurants, Inc*. (2003) 109 Cal.App.4th 719, 734.

Traffic. One of the Deloitte representatives at the meeting was David Thompson. Andrews attorneys testified that they stressed to the Deloitte personnel that the meeting was confidential, and then discussed plaintiff Metro's litigation strategy in detail – specifically its approach to damage calculation.[153] Metro subsequently decided not to hire Deloitte.[154]

Subsequently, William Bottger, an attorney with Shadow Traffic's attorneys Latham & Watkins (Latham), contacted Thompson. ***Thompson informed Bottger up front that he had discussed the case with Metro's attorneys.*** *Notwithstanding Thompson's disclosures, Latham hired Thompson and immediately designated him as an expert witness.* Bottger never contacted Andrews to discuss Latham's retention of Thompson.[155]

Metro moved to disqualify Latham for improperly obtaining Metro's privileged information through improper *ex parte* contact with Deloitte.[156] The trial court ordered Latham disqualified, noting that Latham's

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[153] *Shadow Traffic, supra,* 24 Cal.App.4th at pp. 1071-1073.

[154] *Id*. at pp. 1072-1073.

[155] *Id*. at p. 1072.

[156] *Id*. at p.1072.

knowledge that Thompson had previously consulted with Andrews should have been a huge "red flag" to an honest and ethical lawyer.[157]

The Issues in Shadow Traffic. The Court of Appeal framed the issues as follows: (1) Did Metro, through its lawyers, communicate confidential information to Deloitte? and (2) If so, did Deloitte share that information with Shadow Traffic's attorneys?[158] The court found substantial evidence supporting the trial court's finding that Deloitte had obtained and possessed Metro's confidential information.[159] It then applied a rebuttable presumption that the information was passed on to Shadow Traffic's lawyers, and found that Shadow Traffic had failed to rebut the presumption.[160] By this route, the court upheld the order of disqualification.

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[157] *Id*. at p. 1077, fn. 7.

[158] *Id*. at p. 1078.

[159] *Id*. at p. 1083.

[160] *Id*. at p. 1085.

1. **NIC/Harrington Cannot Invoke the Shadow Traffic Presumption Because, By Their Own Admission, They Had Complete Access to Any Evidence Of Any Transmission of Confidential Information Though Their Continuing Consultant, Carl Clark.**

In Shadow Traffic, the court presumed that Deloitte shared the confidential information it obtained from Metro with Latham ***because the only evidence as to whether Deloitte shared Metro's confidential information with Shadow Traffic was in the hands of Shadow Traffic's attorneys and their consultant Deloitte***. In this regard, the court relied on *In re Complex Asbestos Litigation*[161] in which the court emphasized that "[t]he 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."[162]

In contrast to cases like *Shadow Traffic* and *Complex Asbestos*, when no disparity exists in the parties' abilities to produce evidence regarding a disqualification-related issue, courts do not indulge in presumptions, but leave intact the traditional burdens of proof. Thus, for example, in the *Los*

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[161] (1991) 232 Cal.App.3d 572.

[162] *Id.* at p. 596.

Angeles County case,[163] the County retained an expert witness (Verity) who prepared a written report for the County. Verity's report was, of course, the County's work product. The County designated Verity as an expert witness, but later withdrew that designation, keeping him as a consultant.[164]

After the County de-designated Verity, the plaintiff's attorney secretly contacted Verity, and assured Verity that he was "at liberty to be engaged" by the plaintiff. Despite Verity's misgivings, the plaintiff's lawyer and Verity thereafter discussed Verity's report for the County at length. Plaintiff then designated Verity as an expert trial witness.[165]

When the County moved to bar Verity's expert testimony and to disqualify the plaintiff's lawyer, it filed a declaration of Verity – the ***County's continuing consultant*** – in support of the motion.[166] Based on the declarations, the court ruled that the plaintiff's counsel had obtained the County's confidential work product, and upheld the disqualification of the plaintiff's attorney. ***In making this ruling, the court did not apply any***

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[163] (1990) 222 Cal.App.3d 647.

[164] *Id.* at pp. 651-652.

[165] *Id.* at pp. 700-701.

[166] *Id.*

presumption that Verity disclosed confidential information to plaintiff's lawyers.[167] ***It did not need to – the County had access to Verity.***

As a comparison of the cases just discussed reveals, the *Shadow Traffic* presumption does not apply here because NIC had complete access to Clark – who it has consistently declared to be its continuing consultant.[168] If NIC wished to establish that Clark had conveyed confidential information to the Carcione firm, it should have secured a declaration from Clark to that effect. That is exactly what the party seeking to disqualify their opponent's lawyers did in *County*.[169] Instead, NIC did the opposite. It strove mightily to preclude Clark's testimony – and almost succeeded.

If one is to be faithful to the logic of *Shadow Traffic*, there should be a *reverse presumption* in this case. Because NIC/Harrington had access to Clark and plaintiffs had none, the trial court should have presumed that no confidential information was disclosed to Clark or by Clark. In view of NIC/Harrington's brazen and tenacious resistance to Clark's testimony, they

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[167] See generally *County of Los Angeles, supra,* 222 Cal.App.3d 647.

[168] AA 371:20-21; [MPA In Support of NIC's Motion To Disqualify]; 377:15-16 [Sears Dec.]; 687:11-12; 753:7-9 [Both MPAs In Support of NIC's Two Motions To Quash Deposition Notice to Clark]; 889:12-14 [MPA In Support of NIC's Motion For Protection Order]; 1289:2-16; 1294-1295.

[169] See *County of Los Angeles, supra,* 222 Cal.App.3d at pp. 700-701.

should, consistent with Shadow Traffic, be estopped to claim any disclosure and the presumption should be deemed conclusive.

It is easy to understand *why* NIC/Harrington did not submit Clark's testimony and so vigorously attempted to suppress it: When Clark submitted his declaration, he stated unequivocally that he was absolutely certain he had never shared with Purtill or the Carcione anything he said to NIC/Harrington or anything it said to him.[170] His testimony was thus fatal to the motion to disqualify.

2. NIC/Harrington Cannot Invoke the Shadow Traffic Presumption Because They Failed to Prove Actual Disclosure of Legally Confidential Information to Carl Clark.

Before invoking the *Shadow Traffic* presumption, NIC/Harrington had the burden of establishing an initial fact – that Sears ***actually*** imparted confidential information to Clark. This rule has a strong policy basis. "Were this not [the rule], lawyers could then disable potentially

[170] AA 640:12-641:2; 645:5-7 [Carcione Dec.]; 481:11-18; 649:813; 989-991 [Purtill Decs.]; 997-999 [Clark Dec.].

troublesome experts merely by retaining them, without intending to use them as consultants."[171]

To prove this element, "[t]he party should not be required to disclose the actual information contended to be confidential. ***However, the court should be provided with [1] the nature of the information and [2] its material relationship to the proceeding*.**"[172] Without such a showing, it is impossible for the court to determine whether confidential information was conveyed, or merely discoverable information contained in, for example, a police report.

Even though chapter-and-verse renditions of privileged communications need not be given, evidence of confidential disclosures must be reasonably clear and not founded on "suspicion, imagination, speculation, surmise, conjecture, or guesswork."[173] Vague or conclusory declarations are insufficient to support a finding that a litigant "actually disclosed" confidential information.[174]

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[171] *Wang Laboratories, Inc. v. Toshiba Corp.* (E.D.Va. 1991) 762 F.Supp. 1246, 1248.

[172] *Shadow Traffic, supra,* 24 Cal.App.4th at p. 1085.

[173] *Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1204.

[174] See *In re Marriage of Zimmerman* (1993) 16 Cal.App.4th 556, 565.

As even a cursory reading reveals. NIC/Harrington's evidence in support of disclosure – which consisted solely of Sears' three-page declaration – did not meet the test:

Sears's Non-Descript But "Candid" Discussions With Clark. Sears declared that: (1) "Clark and [Sears] ***candidly discussed aspects of this case***,"[175] and (2) during Sears's various conversations with Clark, Sears "***spoke very candidly about the defense positions***."[176]

But "candid discussions" do not signify even at a general level "confidential discussions," let alone establish that something specific and privileged was imparted. Webster's dictionary defines "candid" as: "frank" and "impartial." "Frank" and "impartial" discussions are not necessarily confidential. Indeed, lawyers "candidly" discuss their "positions" with opposing attorneys all the time, yet there is nothing confidential (in the work-product or attorney-client sense) about those communications.

Clark's receipt of any genuinely confidential information from Sears was not only unestablished, it was highly unlikely given what he was asked to do.[177] Clark is a glass-plastic scientist. The only information he needed

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[175] AA 375:24-28 [Sears Dec.]; emphasis added.

[176] AA 377:15-19 [Sears Dec.]; emphasis added.

[177] *In re Marriage of Zimmerman* (1993) 16 Cal.App.4th 556, 565 ["Nor does it appear from the nature of appellant's relationship with Gack, brief

to form an opinion on the technical subject of his expertise was the factual background of the rock-windshield collision in which Bill Collins was injured. NIC/Harrington failed to show that it had any information about the facts that would have been work product rather than fully discoverable. If it had any genuine work product, it would have been easy enough to provide a general description of it and its source.

Sears's Sending Clark The Police Report. Sears declared that he sent Clark the police report regarding Bill Collins' crash.[178] Obviously, the police report was never NIC/Harrington's confidential information.

The Letter Evidencing Harrington and Clark's Agreement. Sears drafted a letter to Clark "confirming the agreement to retained [*sic*] Mr. Clark as a consultant, and forwarding a check in the amount of $2500 representing the retainer of Mr. Clark."[179] In this regard, Sears also claimed that he left a voicemail message for Clark "regarding the terms of his retention as a consultant. . . ."[180] The terms under which a party retains a

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and insubstantial as it was, that confidential information material to the current dispute would normally have been imparted to the attorney."].

[178] AA 376:6-9; 383 [Sears Dec.]; 630-638 [Dolinski Dec., Exhibit C (Police Report)].

[179] AA 376:1-4; 379 [Sears Dec.].

[180] AA 375:21-22 [Sears Dec.].

consultant are not confidential in a work product or attorney-client sense.[181] An adverse party cannot gain any advantage from them.

Clark's Statements Of His Opinion To Sears. Sears declared that Clark: (1) "***outlined his qualifications and initial opinions*** regarding the incident in question,"[182] (2) "***relayed his initial opinions*** regarding the incident in question,"[183] (3) "***provided his expert opinions***" to Sears over the telephone,[184] and (4) "***provided his expert opinions*** regarding the glass windshield and other issues."[185]

An expert's abstract opinion does not become a lawyer's confidential work-product ***unless that opinion is founded, at least in part, upon independently confidential information***.[186] This is true even if the expert

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[181] Cf. *In re Osterhoudt* (9th Cir. 1983) 722 F.2d 591, 592-593 [retainer arrangements generally outside the scope of attorney-client privilege]; *Gold Standard, Inc. v. American Barrick Resources Corp*. (Utah 1990) 801 P.2d 909, 911 ["Retainer agreements are generally not protected by the attorney-client privilege. The items contained in them, describing the external trappings of the attorney-client relationship, are not confidential."].

[182] AA 375:18-19 [Sears Dec.]; emphasis added.

[183] AA 375:24-28 [Sears Dec.]; emphasis added.

[184] AA 376:11-13 [Sears Dec.]; emphasis added.

[185] AA 377:15-19 [Sears Dec.]; emphasis added.

[186] See *State of Oregon v. Riddle* (Or. 2000) 330 Or. 471, 480-481 [ruling that although an expert's report to a particular party might be the party's work product, the expert's opinion as to a particular fact situation is not].

formed and disclosed an opinion while consulting for the first party. As the federal courts have recognized, a movant cannot make an "end-run" around this rule by simply feeding an expert public or non-privileged technical data, then declaring that the expert's abstract opinion is its "confidential information."[187]

In this case, there is no evidence that Clark's opinion was based on anything but non-privileged technical data about the accident. Clark formed his opinion regarding the benefits of glass-plastic windshields long ago, and would have rendered the same opinion no matter who provided him with a copy of the police report. Therefore, that opinion is ***not*** Harrington's confidential "work product."

In short, Sears's statements that Clark provided his "expert opinion" and that Sears "used confidential information *provided by* Mr. Clark"[188] are, absent evidence of disclosure of independently confidential information to Clark, insufficient to support a finding that Clark ever possessed Harrington's confidential information.

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[187] See *Paul v. Rawlings Sporting Goods Co.* (S.D. Ohio 1988) 123 F.R.D. 271, 280. See also *Nikkal Industries, Ltd. v. Salton, Inc.* (S.D.N.Y. 1988) 689 F.Supp. 187, 191-192 ["Communication based upon technical information as opposed to legal advice is not considered privileged."].

[188] AA 376-377 [Sears Dec.].

Sears Used Clark's Opinions To Plan Discovery, Etc. Sears declared that "ITEC and NIC used ***confidential information provided by Mr. Clark to plan discovery and discovery responses, retain other consultants and plan trial strategy***."[189]

Although this allegation sounds like a claim that Sears imparted confidential information to Clark – after all, it talks about "confidential information" and planning discovery, etc. – a moment's reflection dispels any such impression.

First, Sears's unsupported characterization of Clark's opinions as "confidential information" is exactly the type of conclusory assertion that California courts find insufficient to support disqualification motions.

Second, to the extent Clark's information was simply a repetition of his publicly expressed views, based on discoverable data, or became part of discovery responses, it is not privileged in any event. Since the declaration makes no attempt to explain what part of Clark's information was in discoverable form and what part was not, it is a matter of speculation whether any alleged confidential Clark-provided information was used by NIC/Harrington.

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[189] AA 377:15-19 [Sears Dec.]; emphasis added.

NIC/Harrington's failure to show that opinion work-product was given to Clark contrasts starkly with the strong showings made by litigants in other disqualification cases. For example, in *Shadow Traffic*, the victorious movant declared that it imparted to its expert consultant its: (1) litigation and trial strategy; (2) theories; and (3) legal analysis.[190] Likewise, in *In re Complex Asbestos Litigation*, computer records proved that a paralegal had accessed Brobeck's confidential case records regarding several cases being prosecuted by the Harrison firm.[191] And in *County of Los Angeles*, the movant showed conclusively that its confidential written report had been obtained and reviewed by the opposing lawyer.[192]

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[190] See *Shadow Traffic, supra,* 24 Cal.App.4th at p. 1073.

[191] See *In re Complex Asbestos Litigation, supra,* 232 Cal.App.3d at pp. 583-584.

[192] *Los Angeles County, supra,* 222 Cal.App.3d at pp. 700-701.

B. **<u>Even If the Shadow Traffic Presumption Applied, Plaintiffs Decisively Rebutted It. There Is Simply No Evidence NIC/Harrington Suffered Any Prejudice As A Result of the Carcione Firm's Contact With Clark.</u>**

To the extent the trial court may have properly *applied Shadow Traffic's* ***rebuttable*** presumption, it disregarded the uncontroverted evidence decisively rebutting the presumption. In this way, the trial court improperly made the purported presumption *conclusive*.

The Carcione firm presented all the evidence it possibly could indicating that it did not receive any confidential information from Clark. It supplied declarations from the only attorney working on the case that positively affirmed that he had received nothing confidential from Carl Clark.[193] And Clark himself declared that he did not tell Purtill anything Sears said to him for a self-evident reason – he did not remember his over one year-old communications with Sears.[194] Yet, the Carcione firm was disqualified.

As the federal courts have observed: "It will not do to make the presumption of confidential information rebuttable and then to make the

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[193] AA 480-529; 647-650; 988-995 [Purtill Decs.].

[194] AA 997-999 [Clark Dec.].

standard of proof for rebuttal unattainably high. This is particularly true where, as here, the attorney must prove a negative, which is always a difficult burden to meet."[195]

To the extent the trial court relied on the *Shadow Traffic* presumption, it committed legal error and abused its discretion for the reasons discussed above. Improper application of an evidentiary presumption invalidates an ensuing disqualification order.[196] But even if the court did not rely on the presumption, its order is subject to reversal because there is simply no evidence that NIC/Harrington suffered *any prejudice* to its continuing defense of this lawsuit as a result of anything that could have come out of the Carcione firm's inadvertent contact with Clark. Under established law, a showing of prejudice is vital to sustain a disqualification order. As the Court of Appeal observed in *Koo v. Rubio's Restaurants, Inc.*:

> "As stated in *Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597, 607 . . .: 'We detect a common theme in the cases relating to disqualification of attorneys by trial courts.

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[195] *MMR/Wallace Power & Industrial, Inc. v. Thames Associates* (D. Conn. 1991) 764 F.Supp. 712, 720, fn. 10, quoting *Laskey Brothers of West Virginia v. Warner Brothers Pictures* (2nd Cir. 1955) 224 F.2d. 824, 827, *cert. den.* 350 U.S. 932.

[196] See *Adams v. Aerojet General Corp.* (2001) 86 Cal.App.4th 1324, 1341.

> If the status or misconduct which is urged as a ground for disqualification will have *a continuing effect on the judicial proceedings which are before the court*, it is justified in refusing to permit the lawyer to participate in such proceedings . . . If, on the other hand, the court's purpose is to punish a transgression which has *no substantial continuing effect on the judicial proceedings to occur in the future*, neither the court's inherent power to control its proceedings nor [the] Code of Civil Procedure section 128 [statutory powers] can be stretched to support the disqualification.'"[197]

In the absence of any evidence that the Carcione law firm got anything belonging to NIC/Harrington that it could unfairly exploit in prosecuting plaintiffs' case, there is no "continuing effect on the judicial proceedings" in this action. Rank speculation that a party conceivably might have inadvertently picked up something from an opponent is simply not enough to toss out that party's lawyer. For this additional reason, the order must be reversed.

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[197] *Koo, supra,* 109 Cal.App.4th at pp. 426-427.

III. THE TRIAL COURT'S RULINGS REGARDING EXPERT CLARK'S TESTIMONY DENIED PLAINTIFFS A FAIR HEARING ON THE DISQUALIFICATION OF THEIR ATTORNEYS.

A critical factual issue on the motion to disqualify was the following: Did Carl Clark disclose NIC/Harrington's legally confidential information to the Carcione law firm? Obviously, the testimony of Carl Clark was vital to the resolution of the question.

NIC/Harrington has asserted that Clark was at all times their continuing agent and consultant.[198] To insure a fair hearing to plaintiffs, the trial court should, at a minimum have: (1) required NIC/Harrington to prove that Clark disclosed confidential information to the Carcione firm, thereby encouraging NIC/Harrington to present Clark's testimony; or (2) considered Carl's declaration as new and undisputed evidence that refuted any hint of disclosure and denied the motion to disqualify the Carcione firm. It did neither.

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[198] AA 370:8-15 [Motion to Disqualify]; 377:15-23 [Sears Dec.].

A. **The Trial Court Should Have Secured Carl Clark's Testimony**.

The trial court failed to require NIC/Harrington to produce Clark's testimony to prove its disqualification case while ignoring the Carcione firm's pleas that it secure that testimony. As illustrated by *Gregori v. Bank of America*,[199] this was reversible error. In *Gregori*, Jane Doe, a legal secretary, was steeped in privileged information belonging to her law firm employer and one of its divorce clients. When she had an affair with the opposing party's lawyer, her employer fired her and moved to disqualify the lawyer and his firm. When his deposition was taken, the lawyer claimed he just "could not remember" what the secretary told him about the case. After refusing to compel the secretary to testify at a deposition, the trial court denied the motion to disqualify.[200]

Reversing the order for abuse of discretion, the Court of Appeal held that the secretary's deposition was essential. She was "unquestionably the most important witness on the central question whether she revealed confidential information to [opposing counsel]

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[199] (1989) 207 Cal.App.3d 291, 310.

[200] *Id*. at pp. 296-299.

that might affect the outcome of the litigation."[201] So, too, in this case. The trial court should have heeded one of the Carcione firm's numerous entreaties to obtain Clark's essential testimony or placed the burden on his continuing employer, NIC/Harrington, to produce him.

B. **The Trial Court Should Have Reconsidered And Denied the Disqualification Motion Based On Clark's Declaration.**

Reconsideration under Code of Civil Procedure section 1008 is in order when a moving party demonstrates the existence of "new or different facts, circumstances, or law."[202] "To merit reconsideration, a party must give a satisfactory reason why it was unable to present its 'new' evidence at the original hearing."[203]

Plaintiffs had the quintessential good reason for not providing Clark's testimony earlier: From the moment the motion to disqualify was brought, the Carcione firm could not contact Clark without risking charges

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[201] *See id.* at p. 311 (emphasis added).

[202] Code Civ. Proc., § 1008(a).

[203] *McPherson v. City of Manhattan Beach* (2000) 78 Cal.App.4th 1252, 1265, quoting *Foothills Townhome Assn. v. Christiansen* (1998) 65 Cal.App.4th 688, 693, fn. 6.

by NIC/Harrington that its originally *inadvertent* contact with an opponent's expert had now become *willful and unethical.*

Moreover, NIC/Harrington announced to the world, including Clark, that Clark had always been and remained its expert. They pulled no punches in their relentless efforts to prevent Clark from testifying – opposing his deposition, moving for sanctions, and making an implied threat that Clark would face a breach of fiduciary duty lawsuit if he did so.[204] Clark courageously chose to submit his declaration unilaterally, without judicial compulsion or subpoena, upon the advice of his own lawyer.[205]

Clark's declaration was unquestionably new evidence, facts, and a circumstance not available when the original motion was heard and decided. When there is a "reasonable and credible explanation" for a party's failure to present facts at an earlier time, it is an abuse of discretion not to reconsider a prior order and rule on the merits of the moving party's request for relief.[206] Because plaintiffs had a solid and irrefutable

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204 AA 370:8-15 [Motion to Disqualify]; 377:15-23 [Sears Dec.]; see in general 677-987; see specifically 783-784; 1325:2-12; 1336:21-1337:4.

205 AA 996-999; 1146-1149 [Clark Dec.].

206 *Glade v. Glade* (1995) 38 Cal.App.4th 1441, 1457; see also *Hollister v. Benzl* (1999) 71 Cal.App.4th 582, 585 [no abuse of discretion in reconsidering prior order when documents previously requested in

explanation for the absence of Clark's testimony, the court abused its discretion in failing to consider the Clark declaration and, based on its incontrovertible statements that Clark's contact with the Carcione firm was accidental and resulted in no harm, reversing the order of disqualification.

CONCLUSION

NIC/Harrington's attempt to disqualify the Carcione law firm falters on the horns of a dilemma. Either the Case of the Expert Twice Retained was: (1) a regrettable snafu resulting from an expert's forgetfulness; or (2) a nefarious NIC/Harrington strategy designed to sideline the most qualified expert witness – the one who could most effectively aid the trier of fact – and then to disqualify an unusually able and tenacious opposing law firm. In either event, Bill and Barbara Collins are entitled to have their lawyers restored to their case. The disqualification order should be reversed.

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discovery were not produced until the motion for reconsideration was heard].

Dated: August 20, 2003

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 14(c)(1))

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