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B217141

**IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA**

**OASIS WEST REALTY, LLC,
Plaintiff and Respondent,**

vs.

**KENNETH A. GOLDMAN, et al.,
Defendants and Appellants.**

**SUPREME COURT
FILED**

APR 13 2010

**Frederick K. Chilton Clark
Deputy**

**AFTER A DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION 5, CASE No. B217141
SUPERIOR CASE No. SC101564**

PETITION FOR REVIEW

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ISSUES PRESENTED

1. Whether a lawyer retained to represent a client to obtain approval of a project could perform services for the client, receive payment for those services and then, after severing his relationship with the client, affirmatively work against the very project he was retained to support so long as the lawyer is acting for his own self interest and is not then representing another client, or does this conduct violate the lawyer's duty of loyalty to his client?
2. In analyzing whether the "gist of an action" as pleaded concerns activity protected by the anti-SLAPP statute (the first step of the anti-SLAPP test) is it improper to consider "irrelevant" merits-based arguments, particularly when that analysis requires the Court to weigh evidence?

INTRODUCTION: WHY REVIEW SHOULD BE GRANTED

The Court of Appeal's published opinion which reversed an order denying an anti-SLAPP motion, presents two issues that strongly merit this Court's review. The first issue concerns the ethical duty of loyalty a lawyer owes to a client. Under the Court's opinion, a lawyer retained to represent a client with respect to a very specific matter (here the approval of a real estate project) could perform services for the client, receive payment for those services and then, after severing his relationship with the client, affirmatively work against the very project he was retained to support so long as the lawyer is acting on his own behalf and is not then representing another client.

It would be startling to most (if not all) clients that the very lawyer hired to champion their cause is able to work with impunity against that very cause. This is the very antithesis of "loyalty."

The Court of Appeal attempted to justify this conclusion because (1) the lawyer did not agree to represent a second client but instead acted on his own behalf when he affirmatively opposed the ongoing project he had been retained to support; (2) the lawyer's conduct supposedly concerned a matter of public interest, and (3) there was no affirmative evidence that the lawyer disclosed confidential information. None of these reasons passes muster.

First, from the client's perspective it does not matter whether the attorney who is now taking actions to stop the client's project is acting on his own behalf or on behalf of a second client. Either way the very same lawyer the client retained to gain approval for his project is now attempting to stop it. Indeed, if anything it is an even greater betrayal if the lawyer acts on his or her own behalf rather than for a new client, since the lawyer would be personally and not just professionally opposed to the client.

Second, as explained below, a lawyer may never switch sides in an ongoing legal matter. It is no justification that the lawyer attempts to justify his disloyal conduct on public policy grounds.

And third, it is conclusively presumed that a lawyer obtains confidential information while representing a client. Once that lawyer switches sides, the client need not produce affirmative evidence that the lawyer used that confidential information. The very fact that a lawyer who was retained to publicly support a project switched sides to publicly oppose that very project by itself reflects that the lawyer is being motivated by what he learned during his representation.

Under the Court of Appeal's analysis, clients will no longer know whether their lawyer will later affirmatively work against them in the very same matter. In view of this uncertainty, clients will be reluctant to tell the lawyer everything needed for the representation because of fear that information may later be used against them. The trust which is so critical to the lawyer-client relationship will be subverted.

The second issue concerns the manner in which a court rules on an anti-SLAPP motion. As this Court is well aware, such a motion involves a two step analysis. Under the first step, the defendant is obligated to show that the gist of the plaintiff's action involves matters that fall within the anti-SLAPP statute. If and only if that first prong is satisfied, the burden shifts to the plaintiff to demonstrate the merits of its claim. Here, however, the Court of Appeal conflated the two prongs, improperly weighed the evidence, and ruled contrary to a solid line of cases holding that conduct, such as what occurred here, is not within the anti-SLAPP statute.

As the Court acknowledged, the great weight of decisions to have considered the issue have concluded that a client's claim that a lawyer has violated his duty of loyalty involves conduct that does not fall within the anti-SLAPP statute – even though the backdrop for that conduct usually involves activity that would fall within the statute (such as the filing and prosecution of a lawsuit).

However, after acknowledging this rule and recognizing that the gist of plaintiff's action involved its attorney's conduct adverse to his client, the Court of Appeal proceeded to determine that the anti-SLAPP statute nevertheless applied because, according to the Court, plaintiff was wrong on the merits. In other words, as part of its determination whether the first prong of the anti-SLAPP analysis was satisfied, the Court skipped to the second prong (the merits of the action). Perhaps as troubling, in doing this the Court evaluated the evidence and drew inferences against the plaintiff in evaluating the merits

of its claim.

The reason this approach is so problematic is that it causes the Court to go to step two (the merits of the plaintiff's claim) even though on its face the gist of the plaintiff's claim does not fall within the ambit of the anti-SLAPP statute. If this approach is approved then the scope of the anti-SLAPP statute is expanded tremendously. A procedure which is already subject to abuse, will be even more abused.

In sum, this petition presents two issues which are of significant statewide importance meriting this Court's attention. (Cal. Rules of Court rule 8.500(b)(1).) Plaintiff therefore respectfully requests the Court grant review.

BACKGROUND

A. Oasis West Seeks Beverly Hills Approval For Its Redevelopment Project

Plaintiff Oasis West Realty, LLC ("Oasis") is a limited liability company that owns a 9-acre parcel of land in Beverly Hills. (JA2.) In January 2004, Oasis began efforts to develop the property, contemplating demolishing existing structures and constructing new improvements including a five-star hotel and luxury condominium units. (JA2.) This required the approval of the Beverly Hills City Council and the support of the citizens of the City of Beverly Hills. (JA2.)

B. Oasis Retains Attorney Ken Goldman, A Respected And Influential Beverly Hills Civic Leader, To Help Secure City Approvals

In January 2004, Oasis retained Defendant Ken Goldman, a partner in defendant Reed Smith LLP and a 30-year resident of Beverly Hills (JA60), to “render advice, strategic planning and assistance in the formulation of the Project . . . and to interface with the City officials from whom Oasis sought support for the project.” (JA2.) Oasis selected Goldman as counsel for the project, because “Goldman was an expert in civic matters and “a well-respected, influential leader who was extremely active in Beverly Hills politics.” (*Ibid.*) As Goldman was President of the Southwest Homeowners Association and had appeared before the City Council many times to address other major redevelopment projects in the City, his “statements and opinions on City development matters bore significant influence on City Council members and the local citizenry,” particularly members of the Southwest Homeowners Association. (*Ibid.*)

Goldman provided his services to Oasis for over two years, during which time Oasis paid approximately \$60,000 in fees. (JA60.) During his representation of Oasis, Goldman “was intimately involved in the formulation of the plan for Oasis’ development of the Property, its overall strategy to secure all necessary approvals and entitlements from the City and its efforts to obtain public support for the Project. Throughout the representation, Oasis revealed confidences to Mr. Goldman, which it reasonably believed

would remain forever inviolate.” (JA3.)

Goldman’s legal services to Oasis included many meetings with Oasis officers to plan project strategy vis-a-vis the City, the City Council, the School Board president and superintendent, City residents and homeowners associations; communications and meetings with City officials (including the mayor and city manager), planning staff, other City employees, and local residents concerning the project; conducting surveys, polls and community outreach, and identifying potential project opposition. (JA139,146,158,162-163,167,174,181,183,186,191-192,195.)

C. As The Project Moves Forward Towards Obtaining City Council Approval, Goldman Terminates His Representation Of Oasis; Opposition To The Project Forms

In the spring of 2006, Goldman advised Oasis that he and Reed Smith would no longer represent Oasis in connection with the project. (JA3.) Immediately after the City Council approved the project on April 29, 2008, a group of Beverly Hills residents formed a political action committee—the Citizens’ Right to Decide Committee (the “Citizens’ Committee”)—for the purpose of putting the City Council’s approval of the project to a public vote by referendum. (JA64.)

D. Goldman Takes Action In Direct Conflict With His Representation Of Oasis

Goldman immediately participated in efforts of the Citizens' Committee to abrogate the City's approval of the project. (JA3.)

- He authored and distributed a letter disparaging the Project, containing misleading information about its size, traffic impact and parking, and exhorting residents to join the opposition to the Project and to support the referendum. (JA227.)

- Goldman appeared before the members of the Beverly Hills City Council, all of whom he personally knew ("I know every single one of you"), to seek procedural changes to make it easier for the anti-project forces to solicit signatures authorizing the referendum. (Opn. p. 5, JA77.)

- Goldman personally solicited dozens of his neighbors to oppose the Project. (JA61.)

- Goldman sent several emails and correspondence on his firm letterhead to one of the leaders of the Committee, Mr. Larson, in which Goldman expressed his leadership role in the opposition movement. (JA202-207.)

Additionally, a full-page testimonial in a Beverly Hills newspaper dated March 2009 contained the signatures of over 200 residents boasting of Mr. Goldman's leadership and community service. (JA234.)

E. Oasis Demands Goldman Cease His Actions In Opposition To The Project

On May 14, 2008, Oasis demanded that Goldman and Reed Smith withdraw from all activities “that may in any manner be construed as adverse to the Project” and that they retract their opposition. (JA84.) Goldman and Reed Smith agreed that neither would take any additional acts opposing the project. (JA62.) The referendum succeeded in placing the City Council’s approval of the project on the ballot. (JA64-65.)

The Redevelopment Project was approved by voters in the November 2008 election by a very slim margin. (JA64.)

F. Oasis’ Lawsuit

In January 2009, Oasis filed an action for breach of fiduciary duty, negligence, and breach of contract against Goldman and Reed Smith alleging that “but for the conduct of Mr. Goldman and Reed Smith, Oasis would not have had to spend in excess of \$4 million to oppose the Petition and then to actively campaign for the approval of Measure 'H.’” (JA4.)

G. The Anti-SLAPP Dismissal

Defendants moved to strike the action as a SLAPP pursuant to section 425.16, primarily contending that Goldman's personal campaigning activities were protected by the First Amendment. (JA24.)

In opposing Goldman's anti-SLAPP motion, Oasis primarily contended that Goldman's switching sides to oppose the very project for which Oasis had retained him as its lawyer constituted a breach of the duty of loyalty, and that Goldman could not hide behind the First Amendment to justify his affirmative acts in opposition to that pending project. (JA107.)

The superior court denied the anti-SLAPP motion, ruling that (a) Goldman breached his duty of loyalty to his client Oasis, in "campaigning against approval of the project after representing Oasis in efforts to secure that very same approval" and (b) Goldman breached his ethical duties to Oasis when he accepted representation of Oasis without disclosing his potentially adverse personal interest in opposition to the project. (JA266.)

H. The Court Of Appeal's Decision

On March 3, 2010, the Court of Appeal reversed the superior court's decision in a published opinion which is described in the Legal Discussion portion of this Petition. (Opinion attached as Exhibit A.)

LEGAL DISCUSSION

I. **Review is necessary for this Court to confirm that the duty of loyalty prevents a lawyer from affirmatively working against the very project the lawyer was retained by a former client to support, regardless whether the lawyer is acting for his or her self interest or is representing a new client**

A. **An attorney's duty of loyalty to the client: "a distinct fundamental value of our legal system"**

The issue presented by this petition goes to the very essence of the loyalty lawyers owe their clients. The Court of Appeal crafted an artificial rule under which a lawyer may affirmatively act against the very matter he or she was retained and paid by the client to support so long as (1) the lawyer severs his or her relationship with the client and (2)

the lawyer takes those actions for his or her own self interest rather than on behalf of a new client. As explained, in view of this self-interest-exception to the duty of loyalty, clients will no longer be able to fully trust their lawyers. Clients will not know whether a lawyer will elect to terminate his or her relationship with the client and affirmatively work against the client as to the very pending matter that was the subject of the representation. In view of this uncertainty, clients will justifiably be reluctant to fully and candidly disclose the information necessary for the lawyers' representation. The trust which is so crucial to the lawyer-client relationship will be seriously eroded.

The United States Supreme Court has characterized the "duty of loyalty" as "perhaps the most basic of counsel's duties." (*Strickland v. Washington* (1984) 104 S. Ct. 2052, 2067.) This Court agrees, characterizing the relation between attorney and client as being "a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity -- uberrima fides." (*Cox v. Delmas* (1893) 99 Cal. 104, 123; see also *Rader v. Thrasher* (1962) 57 Cal.2d 244, 250; *Speedee Oil Change Systems* (1999) 20 Cal.4th 1135, 1146 [a "distinct fundamental value of our legal system is the attorney's obligation of loyalty"].)

In *Anderson v. Eaton* (1930) 211 Cal. 113, 116, this Court stressed that "[i]t is . . . an attorney's duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent given after full knowledge of all the facts and circumstances.

(*In re Boone*, 83 Fed. 944, 954-955.) By virtue of this rule an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests."

And this duty of loyalty does not stop once the attorney-client relationship ends. This Court has made clear that "an attorney is forbidden to do either of two things after severing his relationship with a former client. He may not do anything which will injuriously affect his former client in any manner in which he formerly represented him nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship." (*Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 573-574.)

In *SpeeDee Oil Change Systems*, *supra*, 20 Cal.4th at p. 1147, this Court recognized that when a lawyer switches sides in the same matter (which happened here) "[t]he most egregious conflict of interest" occurs. The Court explained that "[s]uch patently improper dual representation suggests to the clients – and to the public at large – that the attorney is completely indifferent to the duty of loyalty and the duty to preserve confidences. However, the attorney's actual intention and motives are immaterial, and the rule of automatic disqualification applies. 'The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct,' but also to keep honest attorneys from having to choose between conflicting duties, or being tempted to reconcile conflicting interests, rather than fully pursuing their clients' rights. (*Anderson v. Eaton* (1930) 211

Cal. 113, 116 [293 P. 788].)” (*Ibid.*)

Thus, a legion of cases in this Court and the Courts of Appeal reflects the rule that an attorney’s breach of loyalty is presumed when he switches sides in an ongoing matter:

- *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 846 [“an attorney may not switch sides during pending litigation representing first one side and then the other”];
- *People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1147 [partners and of counsel in same firm breached duty by representing adverse parties in the same litigation, because the duty to preserve client confidences (Bus. & Prof. Code, § 6068, subd. (e)) survives the termination of the attorney’s representation];
- *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 290 [firm would breach duty to client if it advised second client regarding the statute of limitations in a potential action against first client];
- *In re Zamer G.* (2007) 153 Cal.App.4th 1253, 1262 [“A lawyer who represents clients with adverse interests in the same litigation automatically will be disqualified, as will a lawyer who switches sides during pending litigation, because both situations present an unacceptable risk that the lawyer’s duties of loyalty and confidentiality will be compromised”];
- *Knight v. Ferguson* (2007) 149 Cal.App.4th 1207, 1215-1216 [attorney breached

- duty of loyalty by switching sides from client who had consulted attorney previously about forming a partnership and entering into a commercial lease to establish a new restaurant, over to representing party in a lawsuit against the client concerning that same business venture];
- *Pound v. DeMera DeMera Cameron* (2005) 135 Cal.App.4th 70, 76-77 [attorney breached duty of loyalty when he “switched sides in the same action” – the “most egregious conflict of interest”];
 - *City National Bank v. Adams* (2002) 96 Cal.App.4th 315, 329 [“Where the lawyer switches sides and represents the former client’s adversary in the same matter, everything the lawyer does for the new client necessarily will injuriously affect the former client”];
 - *Henriksen v. Great American Savings & Loan* (1992) 11 Cal.App.4th 109, 117 [attorney “switching sides” and representing parties adverse to client in the same litigation presumed to possess confidential information];
 - *Dill v. Superior Court* (1984) 158 Cal.App.3d 301, 306 [“the compelling reason for disqualification from representation is Hale's former personal involvement on petitioner’s behalf in the identical action”];
 - *Dettamanti v. Lompoc Union School Dist.* (1956) 143 Cal.App.2d 715, 723 [“the law regards the shifting of loyalty and allegiance from one of two adverse interests to the other as impossible, and will have none of it”].

This duty of loyalty is so important that the Court has tried to remove even the temptation that lawyers will act contrary to their client's interests. (See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23, 37-38.)

The question presented here is whether, even though a former lawyer unquestionably owes the client a continued duty of loyalty with respect to the subject matter of the former representation, can the lawyer nevertheless affirmatively take efforts against the very matter he was retained by his client to support? In its published opinion the Court of Appeal gave lawyers the right to do so, so long as the lawyer was acting in his or her own self interest.

As now explained, this holding subverts the trust that is at the very core of the attorney-client relationship and is not supported by the Court of Appeal's analysis.

B. The focus of an inquiry into whether the attorney has breached the duty of loyalty to his client must be from the perspective of that client

Here, the Court of Appeal recognized that "unquestionably [Goldman] acted against the interest of his former client, on the issue on which he was retained."

(Opinion, p. 13.)¹ The Court further recognized that Goldman's actions did "injuriously

¹As explained later in this petition, the Court improperly weighed the evidence to conclude that aspects of Goldman's conduct were not in breach of his duty of loyalty. However, for purposes of this issue, the fact that the Court acknowledged that at least

affect his former client in [a] manner in which he formerly represented him” and therefore violated the literal terms of *Wutchumna Water Co., v. Bailey, supra*, 216 Cal. at pp. 573-574.

But the Court of Appeal concluded that this Court could not possibly have meant what it said in *Wutchumna Water Co.* because it would “bar Goldman not only from circulating the petition, but from signing it, indeed, from voting against the measure. However, all the cases which recite this rule do so in the context of subsequent representations or employment. None involve the acts an attorney takes on his or her own behalf.” (Opinion, p. 14.)

However, to limit the time-honored, bed-rock rule of absolute lawyer loyalty only to circumstances where the lawyer is acting in a representative capacity defeats the very purpose of the duty -- to foster absolute client trust and confidence in counsel and the legal system. (*Wutchumna Water Co. v. Bailey, supra*, 216 Cal. 564.)

“The effective functioning of the fiduciary relationship between attorney and client depends on the client’s trust and confidence in counsel. (*Flatt, supra*, 9 Cal. 4th at pp. 282, 285.) The courts will protect clients’ legitimate expectations of loyalty to preserve this essential basis for trust and security in the attorney-client relationship. (Ibid.)” (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc., supra*, 20

some of Goldman’s conduct was adverse to Oasis with respect to the very subject of his representation, is sufficient to demonstrate why the Court’s opinion subverts the duty of loyalty Goldman and his firm owed to Oasis.

Cal.4th 1135, 1146-1147 (Cal. 1999); see *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164, 1174 [“no client should be forced to suffer representation by an attorney in whom that confidence and trust lying at the heart of a fiduciary relationship has been lost”].)

The Court of Appeal fails to appreciate that the duty of loyalty precludes an attorney from “assum[ing] a position adverse or antagonistic to his client without the latter's free and intelligent consent given after full knowledge of all the facts and circumstances.” (*Anderson, supra*, 211 Cal. at p. 116.) While “[t]he typical case falling within the rule arises in the context of legal representation of a client whose interests are adverse to another client or former client of the attorney. [Citation] . . . ‘adverse’ also connotes being ‘opposed to one’s interest’ or ‘unfavorable.’” (*David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 891-892.)

The focus therefore must be from the perspective of that former client to whom the duty of loyalty is owed. And from that perspective, it matters not in the least whether counsel’s disloyalty by taking adverse actions against the client was on behalf of another client or in his “personal,” non-representative capacity – the damage to the former client is the same. If anything, it is an even greater betrayal if a lawyer opposes the very matter he or she was retained to support, for personal rather than professional reasons. A lawyer who publicly acts adversely and exhorts others to join his cause will likely cause even more damage to the client than the lawyer who just represents a single, second client.

Therefore, no client would ever knowingly engage nor allow himself to continue to be represented by a lawyer that publicly opposes and encourages others to join in opposing the client's still-pending interests, regardless whether the lawyer was doing so for a new client or on his own account.

How could a client trust his lawyer enough to disclose confidential and potentially harmful information necessary for the lawyer to be able to competently represent the client? The answer to this inquiry is that, under the Court of Appeal's analysis, clients could no longer so trust their lawyers.

The "professional" versus "personal" distinction which the Court seeks to draw, is illusory. A lawyer's "personal" conduct – for example, whether he engages in drug use, moral turpitude, alcoholism or lack of contrition or failure to cooperate with investigators, to name but a few – is routinely considered in determining whether a candidate will be issued a license to practice law and whether a license should be suspended or revoked.

A lawyer's duty to hold confidences inviolate likewise extends to him in both his "professional" and "personal" capacities. If a lawyer revealed the confidences of a former client to his friends even while acting in his "personal" capacity, there could be no possible persuasive argument that he should be immune from liability because his confidence-revealing conduct was not undertaken on a subsequent client's behalf.

The plain fact of the matter is Mr. Goldman is one person. Regardless whether he is wearing a lawyer's suit and tie and appears as an advocate for another, or he is wearing

his civilian clothes and advocating for himself, his conduct, to the extent it serves to undermine exactly what he was previously engaged to advocate, must be actionable if the duty of loyalty is to have any meaning whatsoever.

This Court should therefore reaffirm its straightforward edict in *Wutchumna Water Co. v. Bailey, supra*, 216 Cal 564 that lawyers should not “injuriously affect his former client in any manner in which he formerly represented him. . . .”²

- C. **An attorney cannot, consistent with his duty of loyalty, switch sides and oppose his client’s ongoing legal matter, whether or not that opposition is under the guise of “the public interest”**

“Absent the former client’s informed written consent, an attorney may never switch sides in an ongoing legal matter.” (*City National Bank v. Adams* (2002) 96

²Finally, before ending this discussion, it bears mention that in reaching its conclusion the Court of Appeal parsed the words of Rule of Professional Conduct 3-310(E) which prohibits members from accepting “employment” adverse to the former client. But that does not mean “non-employed” conduct is immune from rules of ethical conduct. As the Court itself recognized (Opinion, pp. 8-11), “An attorney’s duty to a client is defined not just by the rules and statutes, but by the general principles of fiduciary relationships. The Rules of Professional Conduct do not supersede common law obligations.” (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 548 [28 Cal.Rptr.2d 617, 869 P.2d 1142] [abrogated by statute on other grounds].)” Thus, regardless whether Goldman’s conduct violated the precise terms of the Rules of Professional Conduct, it was directly antagonistic to Oasis’s interests with respect to the very subject of his representation and therefore violated his duty of loyalty.

Cal.App.4th 315, 330, emphasis added.)

Here, Goldman unquestionably switched sides in an ongoing legal matter. However, in concluding that Goldman nevertheless did not violate his duty of loyalty, the Court reasoned: “We cannot find that by representing a client, a lawyer forever after forfeits the constitutional right to speak on matters of public interest.” (Opinion, p. 17.)

The Court’s analysis is flawed. Goldman did not simply decide to speak generally about a matter of public concern. Rather, he engaged in activity that was targeted to *only* the still pending legal matter that was the very subject of his representation. Here, as stated above, Goldman was retained to support that real estate project because he was “a well-respected, influential leader who was extremely active in Beverly Hills politics.” (Ante at p. 6.) Goldman and his firm willingly accepted this work and were well paid for it. (Ante at p. 6.)

Then, after the lawyer-client relationship ended, Goldman turned around and publicly worked against that very project which was then still pending. If Goldman was willing to accept representation and be paid for his work because of his influence as to a matter of public concern, then he should not be able to claim he had some inalienable right to use that same influence to work against that project once the representation ceased.

None of the authorities referenced by the Court supports a lawyer engaging in such conduct targeted to the still pending subject of his representation. For example, in

Johnston v. Koppes (9th Cir. Cal. 1988) 850 F.2d 594, a government lawyer, using her vacation time, attended a public hearing concerning a controversial issue without saying a word. Thus, the lawyer in *Johnston* did not affirmatively work against a still pending matter that was the subject of her representation.

Likewise in *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 549, this Court considered whether lawyers working for a public entity could file an action seeking to enforce rights under a statutorily authorized collective bargaining agreement. That action did “not, in general, present a conflict with the client on matters in which the Attorneys represent the County.” (*Id.* at p. 546.)

In such an extremely narrow setting, this Court concluded that “attorneys employed in the public sector, who exercise their statutory right to sue to enforce rights given them . . . do not in such capacity violate their ethical obligations to their employer/client. In so holding, we emphasize that attorneys in such circumstances are held to the highest ethical obligations to continue to represent the client in the matters they have undertaken, . . .” (*Id.* at p. 553.)

Far from supporting the Court of Appeal’s conclusion, *Woodside* illustrates why Goldman’s conduct in fact violated his duty of loyalty owed to plaintiff. In *Woodside* this Court’s conclusion that the duty of loyalty was not breached in that case was based on (1) the existence of a statutory collective bargaining scheme under which the employee-attorneys were entitled to file their lawsuit and (2) the fact that the lawsuit was unrelated

to any matter on which the employee-attorneys were representing their client.

Both of these factors are missing here. Goldman had no separate agreement with Oasis allowing him to engage in his conduct attacking the real estate development and there is certainly no statute that specifically states he was entitled to engage in that conduct with respect to Oasis. Further, Goldman's conduct was directly related to the very matter on which Goldman represented Oasis. The careful manner in which this Court crafted the narrow exception to the duty of loyalty in *Woodside*, serves to illustrate why the Court of Appeal in this case was wrong when it created such a broad exception to that sacrosanct duty.

Moreover, if the Court of Appeal's analysis were accepted, then the duty of loyalty would be converted into a case-by-case standard dependent upon whether, in hindsight, a Court concludes that the lawyer's disloyal conduct was undertaken for public policy reasons. In *Beck v. Wecht* (2002) 28 Cal.4th 289, 297, this Court counseled against such an approach. There the issue presented was whether co-counsel owed fiduciary duties to each other in a contingency fee case. This Court concluded that the recognition of such a duty would diminish the undivided duty of loyalty each attorney owed to the client. (*Id.* at p. 296-297.) This Court then rejected the plaintiff's effort to carve out an exception to this rule based upon the limited facts of that case, explaining:

Beck's effort to distinguish his case on the facts raises a fundamental question.

Should this issue – whether co-counsel owe one another a fiduciary duty to

conduct their joint representation in a manner that does not diminish or eliminate the fees each expects to collect – be decided on a case-by-case basis? We think not. The better approach, we conclude, is a bright-line rule refusing to recognize such a fiduciary duty. . . .

(Ibid.)

So too, the better approach here would be to *not* determine whether a duty of loyalty is owed as to the very pending matter for which the lawyer was retained, based on the case-by-case determination whether the lawyer's conduct in a particular case was or was not in furtherance of public policy. Such an analysis would be unworkable to both clients and lawyers. Clients will not know whether their lawyer will remain loyal once the representation ceases or whether their lawyer will decide that switching sides would be in furtherance of public policy. And lawyers will not know whether a court will agree that their decision to switch sides was sufficiently linked to public policy to be justified. The standard employed by the Court will therefore foster uncertainty that will necessitate litigation to resolve making this ethical restriction on a lawyer's conduct punitive and not prophylactic, as it should be. (See *Hetos Investments, Ltd. v. Kurtin* (2003) 110 Cal.App.4th 36, 48 [disqualification is prophylactic not punitive].)

Simply put, there is no public policy justification for a lawyer switching sides as to the very subject of his representation.

D. **There is a “conclusive presumption” that a client discloses confidences to its attorney; the actual use or misuse of confidential information is not determinative**

As additional support for its conclusion, the Court of Appeal reasoned that “as long as confidentiality is not compromised” (Opinion, p. 16) Goldman was entitled to act as he did. But it does not matter whether Oasis, the client, is able to affirmatively demonstrate that Goldman was using confidential information in his post-termination work against the project. An “attorney-client relationship raises an irrefutable presumption that confidences were disclosed.” (*People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150, 156-157.)

This “conclusive presumption of knowledge of confidential information has been justified as a rule of necessity, ‘for it is not within the power of the former client to prove what is in the mind of the attorney. Nor should the attorney have to ‘engage in a subtle evaluation of the extent to which he acquired relevant information in the first representation and of the actual use of that knowledge and information in the subsequent representation.’” (*Global Van Lines, Inc. v. Superior Court* (1980) 144 Cal.App.3d 487, 489.)

“The conclusive presumption also avoids the ironic result of disclosing the former client's confidences and secrets through an inquiry into the actual state of the lawyer's

knowledge and it makes clear the legal profession's intent to preserve the public's trust over its own self-interest. [Citation.]” (*H. F. Ahmanson & Co. v. Salomon Bros.* (1991) 229 Cal.App.3d 1445, 1453; see also *City National Bank v. Adams, supra*, 96 Cal.App.4th at p. 330 [“When the prior and current representations are in exactly the same matter. . . there is no exception to the conclusive presumption of the exchange of confidential information.”]) The actual use or misuse of confidential information is not determinative; it is the possibility of the breach of confidence which controls. (*Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934 [“This duty to protect confidential information continues even after the formal relationship ends”].)

The Court of Appeal’s focus on whether there was affirmative evidence that Goldman actually used confidential information in his opposition to the Oasis project, has a series of flaws:

First, this focus loses site of the very reason there is a conclusive presumption of disclosure to begin with – because “it is not within the power of the former client to prove what is in the mind of the attorney.” (*Global Van Lines, supra*, 144 Cal.App.3d at p. 489.) How could Oasis possibly prove whether Goldman was being motivated to oppose the project based upon confidential information that had been disclosed to him while he was representing Oasis?

Second, the Court ignores that the conclusive presumption is designed to protect against “the possibility of the breach of confidence. . . .” (*Woods, supra*, 149 Cal.App.3d

at p. 934.) So long as the former lawyer is taking affirmative steps antagonistic to the very project he had been retained to further, this “possibility” certainly exists.

Third, the Court’s focus ignores the reality that if lawyers are able to affirmatively work against projects they were retained to support, then clients will be reluctant to fully disclose confidential information to their lawyers in the first place. The very existence of the exception to the duty of loyalty crafted by the Court of Appeal, will therefore subvert the lawyer-client relationship.

Fourth, the Court fails to appreciate that, from the outsider’s perspective, the fact that the client’s former lawyer is now opposing the project he was retained to support carries with it the implication that the lawyer must be opposing the project because of what he learned during that representation. No matter how hard Goldman struggles to do so, he could not purge himself from his role as Oasis’s former lawyer. Nor does it matter whether Oasis could point to evidence that Goldman affirmatively “trade[d] on his former representation of Oasis to lend credence to his opposition” (opinion, p.12) as noted by the Court of Appeal. He didn’t have to. The mere fact that he was Oasis’s former lawyer did it for him.

E. Review is necessary to preserve a lawyer's duty of loyalty

While ordinarily this Court may be reluctant to review a matter of first impression, it has done so in a variety of settings in recent years when the issue concerns a matter of significant importance.³

This case presents another such issue concerning a matter of significant importance. Under the Court of Appeal's opinion, clients will be placed in the untenable position of not knowing whether their lawyer – in whom they must share the most confidential and sensitive information in order to obtain adequate representation – could turn around and affirmatively work against the very matter that was the subject of the representation once the lawyer-client relationship ends. Fearing such conduct, clients will reasonably be reluctant to make the necessary disclosures. They will have to second guess everything they tell their lawyers asking whether if disclosed, this information may be used by that lawyer as motivation to work against them or even worse whether that very information may be used by the lawyer. Clearly this is an “important question of law” warranting review by this Court. (Cal. Rules of Court rule 8.500(b)(1).)

³See e.g. *TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal.4th 19, 26; *Californians for an Open Primary v. McPherson* (2006) 38 Cal.4th 735, 738; *Johnson v. Calvert* (1993) 5 Cal.4th 84, 104; *American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1116; *Prudential Reinsurance Co. v. Superior Court* (1992) 3 Cal.4th 1118, 1123.

II. **Review is necessary to confirm that in analyzing the first step of the anti-SLAPP test, it is improper to consider “irrelevant” merits-based arguments, particularly defendants’ argument here that is in direct conflict with numerous published decisions holding an attorney’s abandonment of his client by switching sides in the client’s ongoing matter breaches his duty of undivided loyalty and is activity unprotected by anti-SLAPP laws**

The second issue warranting review concerns the “two step process” a court must undertake in ruling on an anti-SLAPP motion to strike. Under the first step the defendant must make “a threshold showing that the challenged cause of action is one arising from protected activity.” (*Equillon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67; accord, *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) “A defendant meets this burden by demonstrating that the act underlying the plaintiffs cause of action fits one of the categories spelled out in section 425.16, subdivision (e) [citation].” (*Navellier, supra*, at p. 88.)

If and only if that first prong is satisfied does the Court then determine whether the plaintiff’s claim has even “minimal merit” to withstand an anti-SLAPP motion. (*Equillon, supra*, 29 Cal.4th at p. 67; accord, *Navellier, supra*, 29 Cal.4th at p. 88.)

Here, however, the Court of Appeal conflated the two prongs. The Court recognized “a substantial line of cases holds that section 425.16 does not apply to

litigation which is actually about an attorney's breach of the duty of loyalty.” (Opinion, p. 8.)

This is where the Court’s two-step analysis should have ended. Once the Court held that plaintiff’s cause of action against defendants was not based on activity fitting within section 425.16, the trial court’s ruling denying defendants’ anti-SLAPP motion should have been affirmed. (*Freeman v. Schack* (2007) 154 Cal.App.4th 719, 733 [“These merits based arguments have no place in our threshold analysis of whether plaintiffs’ causes of action arise from protected activity. Where Schack cannot meet his threshold showing, the fact he might be able to otherwise prevail on the merits under the ‘probability’ step is **irrelevant**”]; *Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 32 [considering merits-based arguments “would, in effect, turn the anti-SLAPP statute into a cheap substitute for summary judgment”].)

However, after acknowledging that plaintiff’s claims arose from an attorney’s duty of loyalty, and not protected conduct, the Court of Appeal proceeded to determine that the anti-SLAPP statute nevertheless applied because, according to the Court, plaintiff was wrong on the merits. In other words, in determining that the first prong of the anti-SLAPP analysis was satisfied, the Court skipped to the second step. This misapplication of the two-step process clearly violated the many decisions of this Court and of Courts of Appeal holding that merits-based arguments are simply irrelevant to the analysis.

Moreover, the Court of Appeal's irrelevant analysis that plaintiff's claim for breach of loyalty was insufficient on the merits is based on an utterly wrong premise. The Court of Appeal erroneously considered "a subsequent representation" as a fact that was critical to each of the settled cases which ruled that a cause of action for breach of loyalty does not implicate protected activity for purposes of prong one of the statute. Largely relying on the terms of the Rule of Professional Conduct 3-310(E), the Court proceeded to hold that because there was no subsequent representation in this case, a claim for breach of duty of loyalty could not be stated as a matter of law. (Opinion, pp. 8-9.)

But the Court's reasoning flies in the face of that settled line of cases which recognizes that section 425.16 does not apply to litigation which is actually about an attorney's breach of the duty of loyalty. While it is true that each of those cases involved an attorney's successive representation, that fact was flatly immaterial to the determination that the gravamen of the claim did not implicate protected activity under the statute.

In truth, the sole issue for purposes of the prong one determination in those cases (like this case) was whether the gravamen of the pleaded claim "arose out" of protected activity or not. Hence, those cases did not focus on the existence of a second client; rather they focused on the fact that the lawyer had "switched" sides to the detriment of the client who was entitled to the lawyer's undivided loyalty. The activity from which the claims in those cases arose was the accused lawyer's abandonment of the client and

taking a diametrically opposite position to the client. It was not determinative in those cases that the conflicting position was on behalf of a second client. Certainly, none of the opinions discussed much less held that a second representation is required in order for the attorney's switching sides to constitute a breach of his loyalty to the client. As the Court of Appeal itself recognized, of course, "cases are not authority for propositions not considered therein." (Opinion, p. 14, citing *People v. Burnick* (1975) 14 Ca1.3d 306, 317.)

Thus, in *Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179, where clients sued their former lawyers for accepting representation of a client in a subsequent matter whose interests were adverse to the first clients, the Court of Appeal concluded that the underlying "activity" was the lawyers' disregard of their former client's interests, the "thrust" of the claim was for breach of loyalty, and thus no "protected activity" was implicated. (*Ibid.* at 1189 ["the misconduct [sued upon is] not what occurs in the Courtroom during the second representation, but the very acceptance of that adverse engagement".])

In *Freeman v. Schack* (2007) 154 Cal.App.4th 719, where clients sued their former lawyer after the lawyer abandoned them and assumed representation for other parties in the exact same case, the Court of Appeal concluded that the "activity" giving rise to the case was counsel's abandonment of his first clients and switching sides to represent interests directly antagonistic to his clients' position. The "principal thrust" of the clients'

complaint, therefore, was counsel's side-switching disloyalty, not what he did or said in the course of his second representation.

In *U.S. Fire Ins. Co. v. Sheppard Mullin Richter & Hampton, LLP* (2009) 171 Cal.App.4th 1617, the Court of Appeal concluded that the particular content of the law firm's work in the second representation was merely incidental to the gravamen of the claim. Rather, the real essence of the claim, wrote the court, is disloyalty – and that “occurs not when the attorney steps into court to represent the new client, but when he or she abandons the old client.” (*Id.* at 1627.)

Here, although Goldman abandoned Oasis, his client, to further his own personal interests rather than the interests of a second client, the same unprotected “activity” is present – like the attorneys in the breach of loyalty cases, Goldman abandoned his client and switched sides in the client's ongoing matter (as this Court notes, the “most egregious conflict of interest”). In sum, not only did the Court of Appeal consider defendants' “irrelevant” merits-based arguments in analyzing the first step of the anti-SLAPP process, it did so erroneously, in direct contradiction to the numerous published decisions holding that an attorney's switching sides in the client's ongoing matter constitutes a breach of loyalty, activity that is flatly unprotected by the SLAPP laws.

III. Even assuming the Court of Appeal could proceed to step two – whether plaintiff’s claim for breach of duty of loyalty lacked minimal merit – the Court employed an inappropriate standard of review in erroneously reaching its conclusion

A. Plaintiff’s minimal burden

“The plaintiff need only establish that his or her claim has minimal merit to avoid being stricken as a SLAPP.” (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291.) The plaintiff’s burden “has been likened to that in opposing a motion for nonsuit or a motion for summary judgment.” (*Peregrine Funding* (2005) 133 Cal.App.4th 658, 675.) Thus, the Court shall “accept as true the evidence favorable to the plaintiff and evaluate the defendant’s evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.” (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 326.)

B. The Court of Appeal misapplied the proper standard of review

Here, the Court of Appeal held, “Because there was no breach of duty, Oasis did not show a legally sufficient claim. Moreover, while Oasis alleged that Goldman’s activities caused it \$4 million in damages, the total amount it spent as a result of the

petition and referendum, it presented no evidence that Goldman caused those damages.”

(Opinion, p. 17.) The Court’s cryptic holding was error.

The Court was prohibited from weighing the evidence much less drawing inferences against plaintiff. (*Flatley v. Mauro, supra*, 49 Cal.4th at 326.) “An anti-SLAPP-suit motion is not a vehicle for testing the strength of a plaintiff’s case, or the ability of a plaintiff, so early in the proceedings, to produce evidence supporting each theory of damages asserted in connection with the plaintiff’s claims. It is a vehicle for determining whether a plaintiff, through a showing of minimal merit, has stated and substantiated a legally sufficient claim.” (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 906.)

In disregard of these settled rules of review, the Court of Appeal overstepped its bounds – it weighed evidence, it drew inferences against plaintiff, and instead of analyzing the issues as if it were evaluating a motion for nonsuit, it acted as a trier of fact.

Perhaps the most glaring example of this is the Court’s discussion of Goldman’s appearance at and statement to the City Council. The Court stated: “Goldman did not speak in opposition to the project; he expressed his opinion on good government practices.” (Opinion, p. 13.) However, Oasis argued a trier of fact could reasonably infer from Goldman’s comments that Goldman spoke on behalf of the Project opponents and for their specific benefit in easing the burden the rule placed on those soliciting signatures to place their opposition referendum on the ballot. Consequently, anything that would

ease the burden on those who solicited signatures could only serve to hurt Oasis and help the cause of its opponents.

If he had made his appearance before the Council to argue to relax the rule in a vacuum as pertains to a matter which did not involve a former client and was the very matter on which he had been retained, his position could perhaps be considered general comment of a "neutral" nature on a matter of public interest. But he made that appearance in the context of discussion concerning the Oasis Project, specifically to help its opponents by a targeted tactical move that would serve only to strengthen Oasis' opponents ability to bring the Project to referendum vote.

Moreover, as the Court of Appeal acknowledged, Goldman was taking other affirmative actions, outlined in detail above, in opposition to the project. Thus, a trier of fact would certainly infer that when he appeared before the council it was to oppose the project, not simply to foster good government.

The Court of Appeal, however, disregarded these reasonable inferences, did not accept them as true as it was required to do, and instead weighed the evidence against plaintiff's inferences.

CONCLUSION

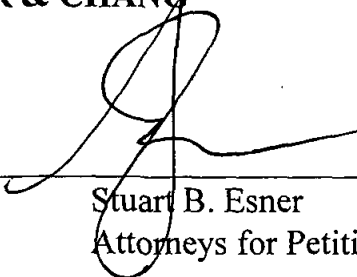
For two independent reasons review is warranted to (1) preserve the duty of loyalty which is so critical to the attorney-client relationship and (2) ensure that the ant-SLAPP procedure is not stretched to apply well beyond its intended scope by allowing courts to consider the merits of the plaintiff's claim in deciding whether that claim falls within the scope of the anti-SLAPP statute.

Dated: April 12, 2010

ROSOFF, SCHIFFRES & BARTA

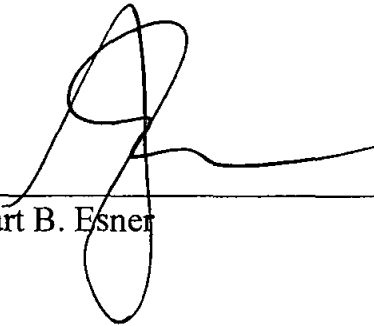
ESNER & CHANG

By: _____


Stuart B. Esner
Attorneys for Petitioner

CERTIFICATE OF WORD COUNT

This Petition for Review contains 8,336 words per a computer generated word
count.



Stuart B. Esner

Filed 3/3/10

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

OASIS WEST REALTY, LLC,

Plaintiff and Respondent,

v.

KENNETH A. GOLDMAN et al.

Defendants and Appellants.

B217141

(Los Angeles County
Super. Ct. No. SC101564)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Norman P. Tarle, Judge. Reversed.

Faribank & Vincent, Dirk L. Vincent, Michael B. Norman for Defendants and Appellants.

Rosoff, Schiffres & Barta, H. Steven Schiffres, Robert M. Barta for Plaintiff and Respondent.

This case presents itself as one concerning Code of Civil Procedure section 425.16 ("section 425.16"), the anti-SLAPP special motion to strike. In fact, the case primarily concerns the scope of an attorney's duty to a former client.

Defendants and appellants Reed Smith LLP, a law firm, and Kenneth Goldman, a partner at Reed Smith, for a time represented plaintiff and respondent Oasis West Realty, Inc. in connection with Oasis's efforts to redevelop real estate it owned in Beverly Hills. Two years after Reed Smith ended the representation, Goldman took some action in opposition to the redevelopment. Oasis sued Goldman and Reed Smith for breach of fiduciary duty, professional negligence, and breach of contract on the theory that Goldman's acts constituted a breach of appellants' ethical duties to Oasis.

Appellants filed a special motion to strike, contending that all causes of action arose from Goldman's acts "in furtherance of [his] right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." (§ 425.16, subd. (b)(1).) The trial court held that section 425.16 did not apply because the gravamen of the action was breach of an attorney's duties of loyalty and confidentiality.

Our review is de novo review. (*Tutor-Saliba Corp. v. Herrera* (2006) 136 Cal.App.4th 604.) After conducting such a review, we conclude that all causes of action in the complaint arose from acts in furtherance of protected activity, and that Oasis could not show a probability of prevailing at trial. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123.) We thus reverse.

Facts and allegations

Oasis West owned property in Beverly Hills which it wished to redevelop with a new hotel, luxury condominiums, and other improvements. (There was a Hilton hotel on the property, and the project is often referred to as the Hilton project.) The project required the approval of the Beverly Hills City Council.

On January 24, 2004, Oasis retained Reed Smith to represent it in connection with the project. Goldman was to have overall responsibility for the matter. In its complaint, Oasis alleged that it hired Reed Smith to "render advice, strategic planning and assistance in the formulation of the Project . . . and to interface with the City officials from whom Oasis sought support for the project." The complaint also alleged that Oasis sought Goldman's assistance because he was an expert in civic matters and because he was "a well-respected, influential leader who was extremely active in Beverly Hills politics." He was president of the Southwest Homeowners Association and had appeared before the City Council many times to address other developments in the City. Oasis alleged that it understood that Goldman's "statements and opinions on City development matters bore significant influence on City Council members and the local citizenry," particularly members of the Southwest Homeowners Association.

Reed Smith represented Oasis in connection with the Hilton project for a little over a year, until April of 2006. During that period, Oasis paid Reed Smith about \$60,000 in fees.

Oasis's complaint alleged that during the representation, Goldman "was intimately involved in the formulation of the plan for Oasis' [sic] development of the Property, its overall strategy to secure all necessary approvals and entitlements from the City and its efforts to obtain public support for the Project. Mr. Goldman was a key Oasis representative in dealing with Beverly Hills City Officials, including the Planning Commission and City Council. Throughout the representation, Oasis revealed confidences to Mr. Goldman, which it reasonably believed would remain forever inviolate."

Oasis's development proposal was put before the City Council in June 2006. For the next two years, the Council and the City's Planning Commission reviewed the project and held hearings on such things as the size of the buildings, parking, traffic, and so on. In April 2008, the Council certified the EIR and introduced an ordinance approving a development agreement between the City and Oasis.

Many Beverly Hills citizens opposed the project. On April 30, 2008, a political action committee called Citizens' Right to Decide Committee was formed, with the goal of putting a referendum on the ballot which would leave approval of the project up to the voters.

It was at this point that Goldman took the acts of which Oasis later complained. Oasis's complaint characterized Goldman's actions thusly: After Reed Smith terminated the representation, Goldman "switched sides," and "engaged in acts of treachery and disloyalty," intended to cause the City Council to deny permission for the project. The complaint alleged that Goldman "lent his support to a citizen's group opposed to the Project and campaigned for and solicited signatures for a Petition circulated by said citizen's group that sought to abrogate the City Council's approval of the Project and instead place approval of the Project in the hands of the citizenry by proposition"

Goldman's declaration in support of the special motion to strike is more specific. He declared that he took no part in any of the public hearings and discussions concerning the project for two years after Reed Smith's relationship with Oasis was terminated. After that, he did two things.

On May 6, 2008, he addressed the City Council, opposing a rule which required individuals seeking signatures on the referendum petition to carry with them the entire EIR and other documents, totaling about 15 pounds. Goldman's statement was that the

requirement was unnecessary and unfair "whether you're for the Hilton or for the Referendum."¹

On May 12, 2008, he and his wife spent about 90 minutes soliciting signatures on the referendum petition from their neighbors. At 4 or 5 houses, they left a "dear neighbor" note which they both signed, expressing concern about the size of the project and the traffic impact, indicating that they would sign the referendum petition, and urging the neighbor to do the same.

Goldman declared that he at no time disclosed confidential information to anyone, and did not believe that he disclosed that he had ever worked for Oasis in connection with the Hilton project.

By letter of May 14, 2008, Oasis demanded that Goldman and Reed Smith withdraw from all activities "that may in any manner be construed as adverse to the Project" and that they retract their opposition. Goldman and Reed Smith agreed that

¹ He supplied a transcript of his remarks. In full, it reads: "Good evening members of the Council. I am here to speak on a very narrow issue concerning the Hilton that has been discussed and alluded to tonight. It is hard for me to believe that anyone in this Chamber would view it as being fair, whether you're for the Hilton or for the Referendum, to have to carry around 15 1/2 pounds of material from home to home to home to home, whether you're 15 years old or 85 years old. It's never been done. [¶] We all know it's not necessary to inform anybody to whom a petition is being presented. They don't need to read the entire EIR, the entire draft EIR, never been done. I dare say 99 percent of the people in this room, whether they are for the Hilton or whether they are against the Hilton, none of them have read the entire EIR and DEIR. It's just not necessary. You can take the executive summary, you can take the resolution. [¶] I know every single one of you. I know every single one of you is fair and right and I cannot believe that you would think it is fair and right, whether you're for it or against it, to have someone, to require someone to carry that kind of material around with them when they are trying to seek whatever they are trying to seek. We've never done this before in this city, we shouldn't do it now. It's just not right; again, whether you're for the Hilton or for the Referendum. Don't require it, because it's not fair and each of the five of you knows that. It's not right. It's not necessary to inform the citizenry. There's a lot of material there. Nobody is going to read through that. Nobody that's spoken tonight, I guarantee you, I haven't read through that. Thank you."

neither would take any additional acts in opposition to the project. Oasis's letter in response insisted that both Goldman and his wife² retract their support for the referendum, and "remain silent" on the issue.

With the special motion to strike, appellants also submitted a declaration from Larry Larson, who headed the Citizen's Committee. He detailed the Committee's acts in opposition to the project, declaring in each instance that Goldman took no part in the effort. He further declared that the modest number of signatures Goldman and his wife collected made no difference to the success of the petition, that Goldman never disclosed any confidential Oasis information, and indeed that Goldman never disclosed that he had represented Oasis, so that Larson learned of the representation only from news reports concerning this lawsuit.

The Citizen's Committee was successful in placing the measure on the ballot, as Measure H. The measure passed by a narrow margin in November of 2008, allowing the project to go forward.

Oasis filed its complaint in January 2009. It sought \$4 million in damages, alleging that "but for the conduct of Mr. Goldman and Reed Smith, Oasis would not have had to spend in excess of \$4 million to oppose the Petition and then to actively campaign for the approval of Measure 'H.'"

With its response to the special motion to strike, Oasis submitted declarations authenticating the Reed Smith engagement letter and payment from Oasis to Reed Smith of \$59,963 in fees. The President of Oasis declared that Goldman had attended many Team Meetings, at which there was discussion and development of confidential planning and strategy with respect to the project.

Oasis also submitted a group of February 2008 emails (authenticated by a "cc" recipient) which include two emails from Goldman to the City Council stating his opposition to a different project; Larson's email to Goldman soliciting the Southwest

² Oasis wrote that since the "dear neighbor" letter was signed by both Goldman and his wife, they were mutual agents of each other.

Homeowner's Association opposition to the Hilton project; Goldman's response to Larson recounting the Association's activities in general, and, relevant to the Hilton project, stating that "Though the EIR and traffic reports for both the Hilton and 9900 state that the net traffic will not increase, I don't believe it and I am sure neither do you. My suggestion was going to be that NEITHER project be approved until something definitive and meaningful is done with the Wilshire/Santa Monica intersection;" and Larson's reply, against soliciting the Southwest Homeowner's Association's support on the referendum petition.

Discussion³

Under section 425.16, "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

An act "in furtherance of a person's right of petition or free speech" is statutorily defined as "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest;

³ The court also found an ethical violation in Goldman's failure to disclose his personal relationship with the City of Beverly Hills as an active citizen, and failure to disclose a potential personal conflict. Oasis did not advance this theory in its complaint or in proceedings on the special motion to strike, and does not advance it on appeal. In fact, the complaint alleges that Oasis knew when it hired Reed Smith that Goldman was active in Beverly Hills politics. The judgment cannot be affirmed on that ground.

(4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd (e).) "The statute's definitional focus is not on the form of the plaintiff's cause of action but rather the defendant's activity giving rise to his or her asserted liability and whether that activity constitutes protected speech or petitioning." (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1232.)

"When a special motion to strike is filed, the initial burden rests with the defendant to demonstrate that the challenged cause of action arises from protected activity." (*Brill Media Co., LLC v. TCW Group, Inc.* (2005) 132 Cal.App.4th 324, 329.) "In deciding whether the initial 'arising from' requirement is met, a court considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' (§ 425.16, subd. (b).)" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

There is no doubt that on the evidence presented here, Goldman's activities were protected activity. "The *typical* SLAPP suit involves citizens opposed to a particular real estate development. The group opposed to the project, usually a local neighborhood, protests by distributing flyers, writing letters to local newspapers, and speaking at planning commission or city council meetings." (*Dixon v. Superior Court* (1994) 30 Cal.App.4th 733, 741, fn. omitted.)

However, as Oasis argues, a substantial line of cases holds that section 425.16 does not apply to litigation which is actually about an attorney's breach of the duty of loyalty. (*Benasra v. Mitchell, Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179; *Freeman v. Schack* (2007) 154 Cal.App.4th 719; *U.S. Fire Ins. Co. v. Sheppard, Mullin, Richter & Hampton* (2009) 171 Cal.App.4th 1617; *PrediWave Corp. v. Simpson Thacher & Bartlett LLP* (2009) 179 Cal.App.4th 1204, but see *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658.)

In each of these cases, a former client sued a lawyer, alleging that the lawyer undertook concurrent or subsequent representation of an adverse party under

circumstances which made that second representation a violation of Rules of Professional Conduct Rule 3-310 (C), on concurrent representations, or Rule 3-310 (E), on subsequent representations. In each case, the holding is that the case arose from the lawyer's act in accepting the second representation, rather than the litigation activities the attorney undertook on behalf of the second client.

Oasis characterizes this case as one involving a subsequent representation, and a violation of Rule 3-310 (E). Rule 3-310 is titled "Avoiding the Representation of Adverse Interests." Rule 3-310 (E) provides that "A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment." We agree with appellants that there was no violation of this rule.

First, there was no second representation. Oasis's arguments to the contrary strain the facts. For instance, Oasis points out that in his comments to the City Council, Goldman said that it would be unfair to require an 85 year old to carry 15 pounds of material from home to home. From this, Oasis asks us to conclude that Goldman was "representing" senior citizens. Oasis points out that the emails it submitted were (to the extent that they were from Goldman) from Goldman's Reed Smith account. From this, Oasis concludes that Goldman was acting as a lawyer and was representing opponents of the project generally and the Southwest Homeowners' Association. Finally, Oasis cites its evidence that in March 2009, a number of Beverly Hills citizens took out an ad in the local newspaper "to support our neighbor and friend Ken Goldman," who had "recently been sued by Oasis." The many signers wrote that "We are not legal experts, but the lawsuit appears to many people to be a blatant attempt to intimidate a devoted community leader from exercising his Constitutional right to free speech."

The facts simply do not support the conclusions Oasis would have us draw.

As Oasis argues, an attorney can violate Rule 3-310(E) even if the second employment does not create an attorney-client relationship. (*American Airlines, Inc. v.*

Sheppard, Mullin, Richter & Hampton (2002) 96 Cal.App.4th 1017.) We do not see, however, that an attorney can violate the rule if there is no second attorney-client relationship or second employment of any kind.

In *American Airlines, supra*, a lawyer accepted employment (as a Federal Rule of Civil Procedure 30(b)(6) witness)⁴ with an entity, ADO, which was adverse to an existing client, American Airlines. American, which had objected to the employment, sued. It alleged, among other things, a breach of Rule 3-310(C), which provides that a member shall not accept representation of more than one client in a matter in which the interests of the client actually or potentially conflict, without the informed written consent of each client. The lawyer defended on the theory that employment as a Rule 30(b)(6) witness did not create an attorney-client relationship, and that Rule 3-310(C) only applied to such relationships. The court rejected the argument, holding that the rule "does not require representation of both clients *as an attorney*." (*Id.* at p. 1032, emphasis in the original.) The court found that as a witness, the lawyer was an agent and fiduciary of ADO and was required to act in ADO's best interest. He also owed fiduciary duties to American, and under the facts, the duties collided, creating a violation of Rule 3-310(C). (*Id.* at p. 1035; *Brand v. 20th Century Ins. Co.* (2004) 124 Cal.App.4th 594 [attorney may not testify as an expert witness against an insurer, where he had previously represented the insurer in substantially related matters].)

American Airlines, supra, also considered Rule 3-310(E), rejecting the lawyer's argument concerning the clause which provides that the subsequent representation is forbidden if "by reason of the representation of the client or former client, the member has obtained confidential information material to the employment." (This is what most of the litigation on this rule concerns.) The court said, "It is anathema to the State Bar Rules of Professional Conduct to suggest that an attorney can place himself in a situation in

⁴ As *American Airlines, supra*, explained, "the function of such a witness is to testify on behalf of a corporation or other organization as to matters known or reasonably available to the organization, and specifically as to those matters described in the deposition notice." (*American Airlines, supra*, 96 Cal.App.4th at p. 1024, fn. 3.)

which he undertakes adverse representation of a third party, and the client cannot object because the attorney has promised not to disclose the client's confidential information even though the information may be decidedly helpful to the new client. It is precisely this compromised situation, when the burden of deciding which client to favor is placed solely on the attorney's shoulders and within the attorney's sole power to decide, that Rule 3-310 is designed to avoid." (*American Airlines, supra*, 96 Cal.App.4th at p. 1039.)

But Goldman never undertook a second employment, or developed any other relationship which could create conflicting fiduciary duties. He was not placed in the position of choosing between clients, because there was no second client. The purpose of Rule 3-310(E) is "[t]o protect the confidentiality of the attorney-client relationship Where an attorney successively represents clients with adverse interests, and where the subjects of the two representations are substantially related, the need to protect the first client's confidential information requires that the attorney be disqualified from the second representation." (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1146.) Without a second relationship, there is no violation of Rule 3-310(E).

Rule 3-310(E) is of course not the only relevant constraint on an attorney's actions. "It is the duty of an attorney to . . . maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." (Bus. & Prof. Code, § 6068, subd. (e)(1); Rule 3-100(A).)

If, in opposing the Hilton project, Goldman had even hinted, or had by his conduct implied, that his opposition to the project was based on information obtained while he represented Oasis, he would have violated Business and Professions Code section 6068. One of the arguments Oasis makes is that a ruling in appellants' favor would allow a lawyer such as Goldman to buy radio or television time, tell the audience that he was once Oasis's lawyer on the project, and that he now opposed the project. Not so. "The relation of attorney and client is one of highest confidence and as to professional information gained while this relation exists, the attorney's lips are forever sealed, and

this is true notwithstanding his subsequent discharge by his client" (*Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 571.) The conduct Oasis outlines would violate Business and Professions Code section 6068.

However, there is no evidence that Goldman revealed any confidential information, or hinted that he had such information, or created circumstances which would encourage others to think that he did and that he was basing his opposition on that information. He did not trade on his former representation of Oasis to lend credence to his opposition. Such conduct would imply that he had confidential information and was basing his actions on that information, and would be tantamount to revealing confidential information.⁵

Our analysis does not end with the Rules and the Business and Professions Code. An attorney's duty to a client is defined not just by the Rules and statutes, but by the general principles of fiduciary relationships. The Rules of Professional Conduct do not supersede common law obligations (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 548 [abrogated by statute on other grounds]; *Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41, 45.) The heart of Oasis's case is not that appellants violated any rule of professional conduct, or any statute. Rather, Oasis contends that the duty of loyalty prohibited Goldman from opposing the Hilton project, and that the duty of loyalty not only limits successive adverse representation, but addresses a lawyer's conduct in a private capacity.

Before further examining that argument, we turn again to the facts, and conclude that a finding that Goldman's statements to the City Council breached a duty of loyalty to Oasis would stretch that duty to cartoonish proportions. In that statement, Goldman did

⁵ In a footnote, Oasis argues that Goldman's email statement that he did not believe the EIRs which stated that the Hilton project and another project would have no traffic impact suggested that he had confidential information about the Hilton project. We do not see that the email can be so construed. There is no indication that Goldman had access to confidential information on the second project, and the email states that he disbelieves the official reports on that one, too. He also expresses his confidence that Larson, who seems to have no confidential information, disbelieves the reports.

not speak in opposition to the project; he expressed his opinion on good government practices. His position was that as a matter of good government, someone seeking a signature on a referendum petition -- any referendum petition -- should not have to lug 15 pounds of material from door to door. Such a requirement might have helped Oasis by making it more difficult to obtain signatures on the referendum petition, but that is of no moment. It is all too easy to imagine instances where a former client could be harmed, or helped, by such things as public participation in government hearings, or public input on rule-making, or by voter registration drives. A lawyer may take a position, pro or con, on any of those issues, or any issue like that, without concern for the needs of former clients.

However, when Goldman asked his neighbors to sign the petition (indeed, when he signed it himself) he unquestionably acted against the interest of his former client, on the issue on which he was retained. Did this breach the duty of loyalty?

"Attorneys have a duty to maintain undivided loyalty to their clients to avoid undermining public confidence in the legal profession and the judicial process. (See *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 547-548, fn. 6 and accompanying text.) The effective functioning of the fiduciary relationship between attorney and client depends on the client's trust and confidence in counsel. (*Flatt [v. Superior Court]* (1994) 9 Cal.4th 275] at pp. 282, 285.) The courts will protect clients' legitimate expectations of loyalty to preserve this essential basis for trust and security in the attorney-client relationship." (*SpeeDee Oil Change, supra*, 20 Cal.4th at pp. 1146-1147.)

Our Supreme Court has said, and it is often quoted, that "an attorney is forbidden to do either of two things after severing his relationship with a former client. He may not do anything which will injuriously affect his former client in any matter in which he formerly represented him nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship." (*Wutchumna Water Co., supra*, 216 Cal. at pp. 573-574.)

This is a sweeping statement, and read literally would bar Goldman not only from circulating the petition, but from signing it, indeed, from voting against Measure H. However, all the cases which recite this rule do so in the context of subsequent representations or employment. None involve the acts an attorney takes on his or her own behalf. For that reason, although the statement is sweeping, we cannot see that those courts made any holding applicable to these facts. Cases are not authority for propositions not considered therein. (*People v. Burnick* (1975) 14 Cal.3d 306, 317.)

Our Supreme Court has also said that "'It is . . . an attorney's duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent By virtue of this rule an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests.'" (*Anderson v. Eaton* (1930) 211 Cal. 113, 116.)" (*Santa Clara County Counsel Attys. Assn. v. Woodside, supra*, 7 Cal.4th at p. 548.) Yet, that case held that the duty of loyalty did not prevent government attorneys from organizing and engaging in collective bargaining or from exercising the (then-existing) statutory right to sue their client for breach of the duty to bargain in good faith, as long as representation of the client was not compromised. (*Id.* at p. 553.)

As appellants argue, Oasis seeks to impose something like a rule against the appearance of impropriety, but California has not adopted such a rule. "Most courts seem, at least implicitly, to recognize that, as one commentator has put it, the appearance of impropriety test is no more than 'a simple and soulful rubric that seems to make intuitive sense' but whose alluring charms 'are only surface.'" (*Wolfram, Modern Legal Ethics* (1986) § 7.1.4, at p. 319.) The standard is too imprecise to furnish a reliable judicial guideline." (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 307.)

One law professor has written that "Those who claim that there is some sort of conflict in situations involving friendship or public statements about policy matters do not refer to any rules, regulations, case law, or ethics opinions to support their charge.

That is because the law on this subject all points the other way. Consequently, those who raise this charge are left with asserting that something must be wrong, even if they cannot explain why. They rely on the 'appearance of impropriety.'" (Rotunda, *Alleged Conflicts of Interest Because of the "Appearance of Impropriety"* (2005) 33 Hofstra L.Rev 1141, 1143.) The article concludes by quoting Professor Geoffrey C. Hazard, Jr., the reporter for the original ABA Model Rules, who referred to the appearance of impropriety standard as a "garbage standard."

"Loyalty to a client requires subordination of a lawyer's personal interests when acting in a professional capacity. But loyalty to a client does not require extinguishment of a lawyer's deepest convictions; and there are occasions where exercise of these convictions -- even an exercise debatable in professional terms -- is protected by the Constitution." (*Johnston v. Koppes* (9th Cir. 1988) 850 F.2d 594, 596.)

There is, perhaps surprisingly, little other relevant authority. *Johnston, supra*, which we have just quoted, concerned a lawyer, working for the federal government, who used her vacation time to attend a public hearing on the use of state funds for abortion. She was known to have views on the subject which were contrary to the policy of her agency and she attended the hearing against the wishes of her supervisors. She was disciplined as a result. She sued under section 1983 of title 42 of the United States Code. The issue in the case was the defendants' claim of qualified immunity, on the theory that they had not violated any constitutional rights. The court found that the lawyer's conduct was protected under the First Amendment right to assemble and to petition.

Appellants cite an ethics opinion of the Association of the Bar of the City of New York, which concludes that "A lawyer may espouse a personal viewpoint adverse to the interest of a former or present client in a pending matter as long as client confidences and zealous representation of the client are not compromised." (NYC Eth. Op. 1997-3.)

Both sides cite comments to the Restatement (Third) of the Law Governing Lawyers, section 125. Section 125 provides that "Unless the affected client consents to the representation . . . a lawyer may not represent a client if there is a substantial risk that

the lawyer's representation of the client would be materially and adversely affected by the lawyer's financial or other personal interests." Comment b explains the rationale:

"Personal interests of a lawyer that are inconsistent with those of a client might significantly limit the lawyer's ability to pursue the client's interest."

Comment e concerns, "A lawyer openly expressing public-policy views inconsistent with a client's position." It begins, "In general, a lawyer may publicly take personal positions on controversial issues without regard to whether the positions are consistent with those of some or all of the lawyer's clients. Consent of the lawyer's clients is not required. Lawyers usually represent many clients, and professional detachment is one of the qualities a lawyer brings to each client. Moreover, it is a tradition that a lawyer's advocacy for a client should not be construed as an expression of the lawyer's personal views. Resolution of many public questions is benefited when independent legal minds are brought to bear on them. For example, if tax lawyers advocating positions about tax reform were obliged to advocate only positions that would serve the positions of their present clients, the public would lose the objective contributions to policy making of some persons most able to help."

Oasis likes the second paragraph of the comment: "However, a lawyer's right to freedom of expression is modified by the lawyer's duties to clients. Thus, a lawyer may not publicly take a policy position that is adverse to the position of a client that the lawyer is currently representing if doing so would materially and adversely affect the lawyer's representation of the client in the matter. The requirement that a lawyer not misuse a client's confidential information . . . similarly applies to discussion of public issues."

These authorities stand for the proposition that a lawyer may take positions adverse to a client, as long as current representation is not compromised, something which does not concern us, and as long as confidentiality is not compromised.

We thus see no authority for a rule which would bar an attorney from doing what Goldman did here: signing a petition in opposition to the Hilton project, and asking his

neighbors to sign such a petition, when he had once represented the developer concerning the project. To the extent that Oasis asks us to create such a rule, we decline the invitation. We cannot find that by representing a client, a lawyer forever after forfeits the constitutional right to speak on matters of public interest.

Once a moving defendant on a special motion to strike meets its burden to demonstrate that the complaint arises out of protected acts, the burden shifts to the plaintiff to establish that there is a probability that he will prevail on the claim. (§ 425.16, subd. (b)(1).) In order to establish a probability of prevailing, a plaintiff must "state[] and substantiate[] a legally sufficient claim." (*Briggs v. Eden Council for Hope & Opportunity, supra*, 19 Cal.4th at p. 1123.) Because there was no breach of duty, Oasis did not show a legally sufficient claim. Moreover, while Oasis alleged that Goldman's activities caused it \$4 million in damages, the total amount it spent as a result of the petition and referendum, it presented no evidence that Goldman caused those damages.

Disposition

The judgment is reversed. Appellants to recover costs on appeal.

CERTIFIED FOR PUBLICATION

ARMSTRONG, J.

We concur:

TURNER, P. J.

KRIEGLER, J.

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California and over the age of eighteen years. I am not a party to the within action. My business address is 500 N. Brand Boulevard, Suite 2210, Glendale, California 91203.

I am readily familiar with the practice of Esner & Chang for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, the same day I submit it for collection and processing for mailing. I served the document(s) listed below by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, addressed as follows:

Date Served: April 12, 2010

Document Served: Petition for Review

Parties Served:

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(BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Glendale, California.

Executed on April 12, 2010, at Glendale, California.

(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Carol Miyake