

I. ISSUE PRESENTED

Did the Trial Court abuse its discretion when it granted Plaintiff/Respondent's Motion to Disqualify Defense Counsel in a case involving the dissolution of a small, limited family partnership, where defense counsel had previously provided legal advice and representation to Respondent (both individually and as a limited partner), where defense counsel is also a limited partner in the family partnership, a party to the underlying action, and where defense counsel is the nephew of the Plaintiff/Respondent and the son of the Defendant/Appellant?

II. SUMMARY OF ARGUMENT

In this case, the Trial Court concluded that a substantial relationship exists between the subject matter of the prior and current representation of the parties by THANASI K. PREOVOLOS and PREOVOLOS & ASSOCIATES, ALC. The Trial Court had a sufficient and reasonable basis for reaching its conclusion. The Trial Court reviewed the facts of this case – most of which were, to one degree or another, disputed by Appellant, THANASI K. PREOVOLOS and PREOVOLOS & ASSOCIATES, ALC – and resolved those issues in favor of Respondent. The Trial Court's decision, absent abuse of discretion, should not be disturbed by this Court.

Because the Trial Court found that a substantial relationship exists between THANASI K. PREOVOLOS' prior representation and the current representation at issue in this dispute, access to Respondent's privileged, confidential information is presumed. Therefore, despite Appellant's arguments to the contrary, Respondent was not required to prove that he had *actually* divulged privileged, confidential information to THANASI K. PREOVOLOS or PREOVOLOS & ASSOCIATES, ALC. Even if Respondent were required to prove that he had

actually divulged privileged, confidential information, however, Respondent still carried his burden of proof before the Trial Court by demonstrating that he consulted with THANASI K. PREOVOLOS on at least two occasions (in 2002 and 2004) about his rights and interests in the partnership that is the subject of this dispute, including how to dissolve the partnership. Respondent also clearly relied on THANASI K. PREOVOLOS' duty of confidentiality to Respondent because Respondent engaged THANASI K. PREOVOLOS to prepare his estate plan, an estate plan that Respondent continues to use today. Moreover, THANASI K. PREOVOLOS fostered this reliance in a letter to Respondent dated November 23, 2004 wherein he referred to THANASI K. PREOVOLOS as a "client" and assured him of his and his firm's duty of confidentiality to Respondent.

In addition, after reviewing Respondent's evidence, the Trial Court concluded that THANASI K. PREOVOLOS has a direct, financial interest in the outcome of this litigation, creating a conflict of interest under Rules of Prof. Conduct, Rule 3-310. THANASI K. PREOVOLOS is the Successor Trustee and beneficiary of a trust that is, itself, a limited partner in the partnership that is the subject of this dispute. THANASI K. PREOVOLOS and PREOVOLOS & ASSOCIATES, ALC participated directly in the conduct that gave rise to this dispute; namely, the transfer of the partnership's sole asset without Respondent's authorization. THANASI K. PREOVOLOS and PREOVOLOS & ASSOCIATES, ALC benefitted financially from the transfer of the partnership's asset.

Finally, Respondent did not waive his right to seek disqualification of THANASI K. PREOVOLOS or PREOVOLOS & ASSOCIATES, ALC. Respondent moved for disqualification of counsel approximately six months after he filed his Complaint and only a

little more than one month after the pleadings were at issue. Respondent did not unreasonably delay in seeking to disqualify THANASI K. PREOVOLOS or PREOVOLOS & ASSOCIATES, ALC, and Appellant presented no credible evidence to the Trial Court that he would be prejudiced by disqualification.

III. STATEMENT OF FACTS

Plaintiff/Respondent THEODORE PREOVOLOS (“MR. PREOVOLOS”) is a limited partner in the PREOVOLOS FAMILY LIMITED PARTNERSHIP (the “FAMILY PARTNERSHIP”). (CT 038)¹ Defendant/Appellant PETER PREOVOLOS (“Appellant”) is the last-remaining general partner in the FAMILY PARTNERSHIP. (CT 038) When the FAMILY PARTNERSHIP was established on October 14, 1994, its sole purpose was to hold title to a certain piece of real property located at 50 Cameo Way in the City and County of San Francisco (the “Cameo Way” property). (CT 038, 044-056) The FAMILY PARTNERSHIP continued to hold title to the Cameo Way property until May 20, 2005. (CT 041, 126)

On May 20, 2005, the Cameo Way property was either sold or exchanged with a third party, the identity of which remains unknown. (CT 041, 126) Under the terms of the FAMILY PARTNERSHIP, a 100% vote of the limited partners was required in order to (1) “transfer...all or substantially all of the assets of the partnership,” and (2) to effect a “change in the nature of the partnership’s business.” (CT 050) MR. PREOVOLOS never consented to the transfer of the Cameo Way property. (CT 040-041, 106-107) MR. PREOVOLOS contends that the transfer of

¹For the convenience of the Court, and unless otherwise noted, all references to the Clerk’s Transcript are designated with “CT” and the corresponding page number. All references to the Reporter’s Transcript are designated with “RT” and the corresponding page and line numbers. Throughout, “RT” refers to the Reporter’s Transcript from the proceedings held on January 12, 2006 because the Trial Court (sitting with a different judge) made no express or implied findings on December 21, 2005.

the Cameo Way property without a 100% vote of the limited partners breached the partnership agreement. (CT 041-042)

On June 28, 2005, MR. PREOVOLOS filed a verified Complaint against Defendant, seeking dissolution of the FAMILY PARTNERSHIP, an accounting of partnership assets, and damages for breach of contract, breach of fiduciary duty and fraud.² (CT 012) Appellant answered MR. PREOVOLOS' Complaint on or about August 15, 2005. (CT 012) Defendant is represented by PREOVOLOS & ASSOCIATES, ALC. Specifically, Defendant is represented by THANASI K. PREOVOLOS, a principal of PREOVOLOS & ASSOCIATES, ALC and Pajman Jassim, an associate of the PREOVOLOS firm. (CT 037)

THANASI K. PREOVOLOS is the son of Appellant, and the nephew of MR. PREOVOLOS. (CT 038) Under the original FAMILY PARTNERSHIP agreement, THANASI K. PREOVOLOS was named as a limited partner. (CT 038, 046, 154) Upon the death of FOFO D. PREOVOLOS on December 9, 2005, the PREOVOLOS FAMILY CHILDREN'S TRUST (the "CHILDREN'S TRUST") succeeded to the status of a limited partner in the FAMILY PARTNERSHIP. (CT 213) THANASI K. PREOVOLOS is believed to be a beneficiary of the CHILDREN'S TRUST as well as the Successor Trustee. (CT 216-218) The basis of this belief is that THANASI K. PREOVOLOS prepared a "First Amendment" to the FAMILY PARTNERSHIP in which he refers to himself and two other individuals (presumably his siblings) as being the "Successor Trustee of the CHILDREN'S TRUST dated October 11, 1979. (CT 113)

²Initially, when this action was commenced, FOFO D. PREOVOLOS was also named as a co-defendant because he was a general partner of the FAMILY PARTNERSHIP. (CT 044) Pursuant to an agreement of the parties, FOFO D. PREOVOLOS was later dismissed without prejudice. (CT 003, Register of Action for November 15, 2005) Subsequently, FOFO D. PREOVOLOS died on December 9, 2005. (CT 217-218)

For a number of years, THANASI K. PREOVOLOS and PREOVOLOS & ASSOCIATES, ALC represented the FAMILY PARTNERSHIP in its legal matters, including its legal dealings with the residential tenant that occupied the Cameo Way property. (CT 038, 058-069) Title records also confirm that PREOVOLOS & ASSOCIATES, ALC handled the transfer of the Cameo Way property, and profited financially from its transfer. (CT 126)

In addition to representing the FAMILY PARTNERSHIP, THANASI K. PREOVOLOS also provided individual legal representation to MR. PREOVOLOS, a fact THANASI K. PREOVOLOS disputed both at the Trial Court and in this Appeal. (CT 038, 144; See Appellant's Opening Brief, page 12) Beginning in 1997, THANASI K. PREOVOLOS prepared MR. PREOVOLOS' estate plan, for which THANASI K. PREOVOLOS was paid \$800. (CT 038, 217, 219-220) In April 2001, THANASI K. PREOVOLOS amended MR. PREOVOLOS' estate plan. (CT 038, 071-072) At the time of the hearing on MR. PREOVOLOS' Motion to Disqualify Defense Counsel (and to this date), MR. PREOVOLOS was utilizing the estate planning device – a revocable living trust – prepared and amended by THANASI K. PREOVOLOS. (CT 217, 221-224)

Most significantly, however, THANASI K. PREOVOLOS provided legal advice to MR. PREOVOLOS regarding MR. PREOVOLOS' interests in the FAMILY PARTNERSHIP. (CT 039) Beginning in 2002, MR. PREOVOLOS began to suspect some improprieties regarding the management of the FAMILY PARTNERSHIP, and he wrote to THANASI K. PREOVOLOS seeking information about his rights and interests in the FAMILY PARTNERSHIP. (CT 039) On November 18, 2004, MR. PREOVOLOS had another conversation with THANASI K. PREOVOLOS regarding how to distribute the assets of the FAMILY PARTNERSHIP upon the

death of FOFO D. PREOVOLOS. (CT 039) THANASI K. PREOVOLOS cannot reasonably dispute that he at least counseled MR. PREOVOLOS about his interests in the FAMILY PARTNERSHIP because he acknowledged doing so in a letter to Attorney Martin Goodman on January 18, 2005. (CT 109)

On November 23, 2004, THANASI K. PREOVOLOS sent MR. PREOVOLOS a letter on PREOVOLOS & ASSOCIATES, ALC letterhead. (CT 039) In this letter, THANASI K. PREOVOLOS expressly refers to MR. PREOVOLOS as being a “client” of the firm and requested financial information from MR. PREOVOLOS, which THANASI K. PREOVOLOS assured MR. PREOVOLOS would remain confidential. (CT 076-077) In reliance on these representations, and on the belief that THANASI K. PREOVOLOS was his attorney, MR. PREOVOLOS did, in fact, send confidential, financial information to THANASI K. PREOVOLOS and PREOVOLOS & ASSOCIATES, ALC. (CT 039, 217)

The partnership relationship between Appellant and MR. PREOVOLOS began to seriously deteriorate beginning in January 2005. On or about January 4, 2005, MR. PREOVOLOS visited with Appellant in San Diego. (CT 040) During that visit, Appellant told MR. PREOVOLOS that he was going to evict the tenant at the Cameo Way property, sell the Cameo Way property, and invest in storage facilities. (CT 040) Appellant gave MR. PREOVOLOS written information about the storage facilities. (CT 040, 081-104) MR. PREOVOLOS was concerned by the information, and had an attorney, Martin Goodman, contact THANASI K. PREOVOLOS to express MR. PREOVOLOS’ objection to selling the Cameo Way property. (CT 040, 106-107) On January 18, 2005, THANASI K. PREOVOLOS replied

by letter, and for the first time, indicated that he was solely representing Appellant, Fofa Preovolos, and the Partnership. (CT 040, 109-111)

IV. THE TRIAL COURT PROCEEDINGS

Following defense counsel's refusal to cease representing Appellant, MR. PREOVOLOS filed a Motion to Disqualify Defense Counsel and Request for Sanctions on October 20, 2005. (CT 007-008, 025, 028-029, 033) Simultaneously, MR. PREOVOLOS also filed a Motion for Leave to Amend, seeking leave to name THANASI K. PREOVOLOS, PREOVOLOS & ASSOCIATES, ALC, and the CHILDREN'S TRUST as co-defendants.

After a continuance on December 21, 2005, the matter was heard by Judge James L. Warren on January 12, 2006. The Court granted MR. PREOVOLOS' Motion for Leave to Amend the Complaint. (RT page 23, line 27) MR. PREOVOLOS filed a First Amended Complaint, naming THANASI K. PREOVOLOS, PREOVOLOS & ASSOCIATES, ALC, and THE CHILDREN'S TRUST as co-defendants.

Judge Warren also granted MR. PREOVOLOS' Motion to Disqualify Defense Counsel, stating in pertinent part:

“[O]n the question of disqualification, I am very concerned. I have 3.310 in front of me here. It appears from the record before that Court – and that is all I am adhering to...That there is a substantial relationship that matters between Theodore and Thanasi. It is a relationship that relates to the subject matter of this case. Theodore has not given his approval. Thanasi is in a situation where he has a personal relationship with the entity that he is representing, namely the partnership, and he knows under 3.310(3) that that relationship will be affected substantially by the resolution of this case. And his relationship there is not only being the lawyer who advised them but also a beneficiary under the children's trust...[T]he family relationship here, that's a very minor concern. Basically...Thanasi has a direct personal relationship in the subject matter, which is the...partnership of which Theodore, the plaintiff, is a partner. He may be a limited partner but he's a partner. And not

only on the personal level but also on the entity level, there is a conflict of interest here. The motion to disqualify is granted.”

(RT, page 23, line 28 - page 24, line 23)

Appellant appeals only the Trial Court’s granting of MR. PREOVOLOS’ Motion to Disqualify Defense Counsel, and not the Trial Court’s granting of MR. PREOVOLOS’ Motion for Leave to Amend. The Trial Court also denied MR. PREOVOLOS’ request for sanctions, from which neither side appeals.

V. STANDARD OF REVIEW

When the Appellate Court reviews the granting of a Motion to Disqualify counsel in those cases where the Trial Court resolved disputed factual issues, the Appellate Court reviews the Trial Court’s order for abuse of discretion. (*City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 848 [43 Cal.Rptr.3d 771, 135 P.3d 20.]; *People v. Speedee Oil Change Sys.* (1999) 20 Cal.4th 1135, 1143 [86 Cal.Rptr.2d 816, 980 P.2d 371].) If the Trial Court resolves disputed factual issues, the Appellate Court should not substitute its judgment for the Trial Court’s express or implied findings that are supported by substantial evidence. (*Id.*) Instead, a reviewing court “must consider the evidence in the light most favorable to the prevailing party and take into account *every reasonable inference* supporting the trial decision.” (*Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft* (1999) 69 Cal.App.4th 223, 230 [81 Cal.Rptr.2d 425].) (Emphasis added.) The Trial Court’s findings based on conflicting evidence are conclusive on appeal. (*Id.*) Moreover, while the Trial Court’s ruling “is limited by the applicable legal principles[.]” it is subject to reversal only “when there is *no reasonable basis* for the action.” (*Id.*) (Emphasis added.)

In this case, in order to reach its conclusion, the Trial Court resolved a number of significant, factual disputes. First, the Trial Court resolved whether THANASI K. PREOVOLOS had ever provided legal advice or representation to MR. PREOVOLOS individually.³ Second, the Trial Court resolved whether THANASI K. PREOVOLOS had ever represented the FAMILY PARTNERSHIP.⁴ Third, the Trial Court resolved whether THANASI K. PREOVOLOS had any interest in the FAMILY PARTNERSHIP that would give rise to a conflict of interest under Rules of Prof. Conduct, Rule 3-310.⁵ Because the Trial Court resolved these significant, factual disputes, the Appellate Court’s review is limited to an “abuse of discretion” review.

Appellant ignores the record and asks this Court to conduct a *de novo* review while continuing to dispute facts already resolved by the Trial Court in MR. PREOVOLOS’ favor. (See, e.g., Appellant’s Opening Brief, page 7, seeking “de novo review.”) Appellant’s approach does not transform the factual issues in this case into pure questions of law. Moreover, the authorities cited by Appellant in support of its request for a more far-reaching review by this Court do not compel this Court to second-guess the Trial Court. As an example, Appellant cites

³“I have lots of letters here and so forth where Thanasi has done Theodore’s estate planning, he’s done some letter work for him and so forth – even if there isn’t an actual conflict – frankly, I think there is – the appearance of a conflict is overwhelming.” (RT, page 4, lines 15-19)

⁴In a colloquy between Attorney Jassim and the Court where Attorney Jassim asserted that “this firm has not consistently represented the partnership in the past,” the Court replied, “I think he did pass the Bar I believe at least very close to that time. His firm has been representing the client.” (RT, page 12, lines 8-17) Later, the Court directed Attorney Jassim back to its focusing, saying: “I don’t think it’s a problem if Thanasi did something back in, you know, 1996 or 2002 or something like that. What I am most concerned about here – and it’s not simply Thanasi saying I represent Peter and I represent Fofu. It’s I represent Peter, I represent Fofu *and* I represent the *partnership*.” (RT, page 15, lines 20-26)

⁵“[A]s I understand it...the children’s trust, which is a separate legal entity, is also an owner of 26.2 percent of the [FAMILY PARTNERSHIP]. Thanasi is one of those children. Thanasi is now representing his father Peter in this lawsuit in a situation where he is a direct beneficiary of the assets in question.” (RT, page 4, lines 5-13)

Hetos Investments, Ltd. v. Kurtin (2003) 110 Cal.App.4th 36 [1 Cal.Rptr.3d 472] for the proposition that this Court should review the Trial Court’s order independently as a matter of law. (See, Appellant’s Opening Brief, page 7.) *Hetos* does not support that argument because, in *Hetos*, the issue on appeal was based on a “limited point” where there were “no material disputed factual issues.” (*Id.* at 45.) Similarly, *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17 [18 Cal.Rptr.3d 403] does not aid Appellants because that case was characterized as a “first impression case” wherein the Court was called upon to determine whether disqualification of one city attorney extended vicariously to the entire city attorney’s office.⁶ (*Id.* at 22.)

Accordingly, the Trial Court’s Order disqualifying defense counsel should be affirmed because the Trial Court resolved significant, disputed facts and had a reasonable basis in this case for disqualifying THANASI K. PREOVOLOS and PREOVOLOS & ASSOCIATES, ALC.

VI. ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISQUALIFYING DEFENSE COUNSEL BECAUSE A SUBSTANTIAL

⁶In fact, the California Supreme Court expressly distinguished and limited *City of Santa Barbara* (at least factually) in its more recent decision in *Cobra Solutions*, stating that *City of Santa Barbara* was distinguishable because that case only involved one assistant or deputy city attorney whereas *Cobra Solutions* involved the publicly-elected City Attorney. (*Cobra Solutions, supra*, 38 Cal.4th at 853.) As an aside, this case, of course, does not involve the public v. private concerns present in either *City of Santa Barbara* or *Cobra Solutions*. However, this case does involve the disqualification of the principal of PREOVOLOS & ASSOCIATES, ALC and not a junior associate. To that extent, this case is more closely analogous to *Cobra Solutions*.

**RELATIONSHIP EXISTS BETWEEN THE SUBJECT MATTER OF THE
PRIOR AND CURRENT REPRESENTATIONS AT ISSUE**

Rules of Prof. Conduct, Rule 3-310 provides, in pertinent part:

“(B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:

(1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or

(2) The member knows or reasonably should know that:

(a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and

(b) the previous relationship would substantially affect the member’s representation; *or*

(3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; *or*

(4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.

(C) A member shall not, without the informed written consent of each client:

(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; *or*

(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict...

(E) 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. ...”

Members of the bar who violate Rule 3-310 are subject to disqualification.

On June 5, 2006, the California Supreme Court reiterated the principle that disqualification orders constitute an important means of protecting client confidentiality and attorney ethics. (*Cobra Solutions, supra*, 38 Cal.4th at 846.) The power of the Trial Court “to disqualify an attorney derives from the power inherent in every court ‘[t]o control in furtherance of justice, the conduct of its ministerial officers’.” (*Id.*, citing *SpeeDee Oil Sys., supra*, 20 Cal.4th at 1145.) While disqualification motions involve a conflict between the clients’ right to counsel of their choice and the need to maintain ethical standards of professional responsibility, the “paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar’.” (*Ibid.*)

These basic tenets of professional integrity are grounded in Rule of Professional Conduct, Rule 3-310, which prohibits attorneys without the consent of the former client from accepting “employment adverse to the...former client where, by reason of the representation of the...former client, the [attorney] has obtained confidential information material to the employment.” Thus, when an attorney undertakes to successively represent clients with adverse interests, and where the subjects of the two representations are substantially related, the need to protect the first client’s confidentiality requires that the attorney be disqualified from the second representation. (*SpeeDee Oil Sys., supra*, 20 Cal.4th at 1146.) This rule also enforces the

lawyer's duty of fidelity to the former client. (*River West v. Nickel* (1987) 188 Cal.App.3d 1297, 1302-03 [234 Cal.Rptr. 33].)

“To determine whether there is a substantial relationship between successive representations, the Court must first determine whether the attorney had a direct professional relationship with the former client in which the attorney personally provided legal advice and services on a legal issue that is closely related to the legal issue in the present representation.” (*Cobra Solutions, supra*, 38 Cal.4th at 847, citing *Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 710-711 [3 Cal.Rptr.3d 877].) If such is the case, the former client need not prove that the attorney possesses *actual* confidential information. (*Id.*, citing *Jessen, supra*, at page 709.) (Emphasis added.) “Instead, the attorney is presumed to possess confidential information... .” (*Id.*)

This presumption of access to privileged and confidential matters relevant to subsequent representation extends vicariously to the disqualified lawyer's entire law firm. (*SpeeDee Oil Sys., supra*, 20 Cal.4th at 1146; see also *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283 [36 Cal.Rptr.2d 537, 885 P.2d 950].) This presumption makes good sense: this presumption prevents far-ranging “mini trials” which would force the former client to prove that his rights to confidentiality have been violated, a burden the former client would bear while (1) standing in an adverse posture to his former counsel, and (2) facing the risk of disclosing those very confidences in the process. (*Benasra v. Mitchell, Silverberg & Knupp, LLP* (2002) 96 Cal.App.4th 96, 114 [116 Cal.Rptr.2d 644].) [approving summary nature of disqualification proceedings.]

Applying Rule 3-310 to conflicts analysis in successive representation cases, the California Supreme Court has held that, absent written consent, an attorney and his law firm are precluded from successively representing clients with *potential or actual* adverse interests. (*Flatt, supra*, 9 Cal. 4th at 283-284.) *Flatt* established the governing test, holding that, upon a showing of a substantial relationship between the subjects of the initial and current representation, neither the conflicted lawyer nor his office may represent any party adverse to the former client. (*Id.*) The California Supreme reaffirmed its holding seven years ago in *SpeedDee Oil Sys.*, and reaffirmed its holding on June 5, 2006 in *Cobra Solutions*.

A. The Trial Court Had A Sufficient, Reasonable Basis For Granting MR. PREOVOLOS' Motion To Disqualify Defense Counsel, And That Decision Should Not Be Second-Guessed On Appeal

As stated previously, and as reflected by the moving and opposing papers, significant, disputed factual issues were presented to the Trial Court. The Trial Court resolved those issues in MR. PREOVOLOS' favor, and it is clear from the Reporter's Transcript that Judge Warren gave considerable thought to the factual and legal issues presented by this case. This Court should not, under the authorities listed, *supra*, at pages 6-8, second-guess the Trial Court's decision to grant MR. PREOVOLOS' Motion to Disqualify Defense Counsel.

As he did at the Trial Court, Appellant urges this Court to apply *Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717 [20 Cal.Rptr.2d 756] and conclude that, just because THANASI K. PREOVOLOS and PREOVOLOS & ASSOCIATES, ALC represent a partnership does not "necessarily" mean that they represent any of the individual partners. (See, Appellant's Opening Brief, page 12.) Although it is true that *Responsible Citizens* did hold that an attorney's representation of a partnership does not automatically mean that the attorney also represents the

individual partners, Appellant fails to fully examine the *Responsible Citizens* opinion. A full examination of that opinion leads to the inescapable conclusion that the Trial Court properly granted MR. PREOVOLOS' Motion to Disqualify Defense Counsel.

In *Responsible Citizens*, the Court wrote that the facts before it did not involve “a controversy between the two owners of a closely held business, which was referred to as the ‘focus’ of the marital dissolution,” expressly contrasting the facts before it with the facts of *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185] [disqualification held proper in case where attorney represented small family corporation, provided estate planning services to wife, and then attempted to represent husband in dissolution of marriage proceedings where the focus of the proceedings was division of the small family corporation], cited in Discussion following Rule 3-310. Unlike *Responsible Citizens*, this case *does* involve a dispute between two owners of a small, family partnership. The dispute seeks dissolution of that small, family partnership as well as damages related to wrongful taking of property owned by that small, family partnership. To that extent, the “focus” of this case is the FAMILY PARTNERSHIP, making this case more closely analogous to *Woods* than it is to *Responsible Citizens*.

In addition, the *Responsible Citizens* Court set forth a number of factors the Court should examine to determine if an attorney's representation of a partnership creates an attorney-client relationship with individual partners. Each of those factors weighs strongly in favor of disqualifying THANASI K. PREOVOLOS and PREOVOLOS & ASSOCIATES, ALC. The first factor announced in *Responsible Citizens* pertains to the size of the partnership. The *Responsible Citizens* Court wrote that the smaller the partnership, the more likely there is an

attorney-client relationship with the individual partners. (*Responsible Citizens, supra*, 16 Cal.App.4th at 1732-1733.)

The factor of size makes good sense because it recognizes that partnerships come in many different sizes, and are organized for many different purposes. In this case, however, the FAMILY PARTNERSHIP is a small, family-owned business that initially consisted of the parties' mother, Appellant, MR. PREOVOLOS, and their children. Now, the FAMILY PARTNERSHIP consists solely of Appellant, MR. PREOVOLOS, and the CHILDREN'S TRUST. (See, Appellant's Certificate of Interested Entities or Persons.) Because this case involves a small, family-owned partnership, the factor of size announced in *Responsible Citizens* supports disqualification.

The second factor announced by the *Responsible Citizens* Court is the nature of the attorney's representation of the partnership. An individual partner has a justifiable expectation of loyalty from the attorney in matters of partnership affairs, but not necessarily in matters "unrelated to partnership affairs." (*Responsible Citizens, supra*, 16 Cal.App.4th 1733.) Here, the matter pending before the Court is one that is related to partnership affairs. Specifically, this matter involves the alleged wrongful transfer of the FAMILY PARTNERSHIP's *only* asset – the Cameo Way property – in breach of the partnership agreement. (CT 012) In this case, there is no credible dispute that THANASI K. PREOVOLOS and PREOVOLOS & ASSOCIATES, ALC have represented the FAMILY PARTNERSHIP since 1996 because Appellant admitted as much in their Opposition to MR. PREOVOLOS' Motion to Disqualify Defense Counsel. (CT 130) A party is bound by the description of facts contained in his own memorandum of points and authorities. (*Hetos, supra*, 110 Cal.App.4th at 41.)

Here, MR. PREOVOLOS also presented competent and credible evidence to the Trial Court that THANASI K. PREOVOLOS and PREOVOLOS & ASSOCIATES, ALC participated in the wrongful transfer of the Cameo Way property, and benefitted from the transfer financially at a time when they already knew that MR. PREOVOLOS objected to the transfer of the Cameo Way property. (CT 126)

The third factor of importance to the *Responsible Citizens* Court was “the kind and extent of contacts, if any, between the attorney and the individual partner...” (*Responsible Citizens, supra*, 16 Cal.App.4th 1733.) In this case, MR. PREOVOLOS presented evidence to the Trial Court that he consulted with THANASI K. PREOVOLOS on at least two occasions, in 2002 and in November 2004, regarding his rights and interest in the FAMILY PARTNERSHIP. In 2002, MR. PREOVOLOS specifically consulted with THANASI K. PREOVOLOS because he began to suspect some improprieties with the way the FAMILY PARTNERSHIP was being managed. (CT 039)

In addition to these contacts, contacts which have direct bearing on the matter now at issue, MR. PREOVOLOS presented evidence to the Trial Court that THANASI K. PREOVOLOS prepared MR. PREOVOLOS’ estate plan in 1997 and amended it for MR. PREOVOLOS in 2001. (CT 038, 071-072, 217, 219-220) On November 23, 2004, not long before the FAMILY PARTNERSHIP began to deteriorate, THANASI K. PREOVOLOS also wrote MR. PREOVOLOS a letter requesting financial records from MR. PREOVOLOS. In this letter, written on the letterhead of PREOVOLOS & ASSOCIATES, ALC, THANASI K. PREOVOLOS referred to MR. PREOVOLOS as a “client” and assured him that both he and the firm would maintain his confidentiality. (CT 076-077) In reliance on these representations, MR.

PREOVOLOS did, in fact, send confidential, financial information to THANASI K.

PREOVOLOS. (CT 039, 217)

This last communication bears directly on the final factor announced in *Responsible Citizens*. “One of the most important facts involved in finding an attorney-client relationship is ‘the expectation of the client based on how the situation appears to a reasonable person in the client’s position’.” (*Responsible Citizens, supra*, 16 Cal.App.4th 1733.) In this case, MR. PREOVOLOS had a reasonable expectation of confidentiality and loyalty from THANASI K. PREOVOLOS and PREOVOLOS & ASSOCIATES, ALC. THANASI K. PREOVOLOS’ November 23, 2004 letter reassured MR. PREOVOLOS that any information he shared with PREOVOLOS & ASSOCIATES, ALC would be kept in the strictest confidence. A reasonable client in the same position would not expect an attorney to, shortly thereafter, become the advocate for the client’s adversary.

Responsible Citizens also does not take into account the fact that THANASI K. PREOVOLOS is also a limited partner in the FAMILY PARTNERSHIP. As a limited partner, THANASI K. PREOVOLOS has a direct, pecuniary interest in the outcome of this litigation. In addition, although the Trial Court referred to it as a “minor concern,” this Court should not necessarily overlook the familial relationship between all of the parties. (RT, page 24, lines 17-18) THANASI K. PREOVOLOS is the son of the Appellant and the nephew of MR. PREOVOLOS. A reasonable person viewing this matter would likely have great concerns about the propriety of THANASI K. PREOVOLOS’ representing his father against his uncle in a matter, particularly because THANASI K. PREOVOLOS is, himself, financially interested in the outcome of this litigation. Permitting THANASI K. PREOVOLOS and PREOVOLOS &

ASSOCIATES, ALC to continue as Appellant's attorney impugns the integrity of the judicial process and calls into question the ethics of the bar.

Virtually all of these facts were disputed to one degree or another by THANASI K. PREOVOLOS and Appellant. The moving and opposing papers submitted to the Trial Court reflect these disputes. Nevertheless, the Trial Court considered these disputes and resolved them in favor of MR. PREOVOLOS. Absent abuse of discretion, the Trial Court's order must be affirmed.

Finally, the holdings of *McPhearson v. The Michaels Company* (2002) 96 Cal.App.4th 843 [117 Cal.Rptr.2d 489] and *Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719 [135 Cal.Rptr.2d 415] do not compel a different result. In *McPhearson*, an employment discrimination case, the Court reversed an order disqualifying a plaintiff's attorney, who had previously represented an employee against the defendant, from representing another employee of the defendant. In part, the Court reversed the Trial Court's order disqualifying the plaintiff's attorney because both of the employee-clients had already signed written waivers of any conflict of interest posed by the case. (*McPhearson, supra*, 96 Cal.App.4th at 845.) No such written waiver was ever signed by MR. PREOVOLOS. Similarly, in *Koo*, the Court reversed a disqualification order in an employment law class action case because the *only* evidence submitted in support of the motion to disqualify was defense counsel's admittedly erroneous declaration stating that he represented both the entity defendant and the managerial employees. In this case, MR. PREOVOLOS submitted much more evidence that justified the Trial Court in disqualifying THANASI K. PREOVOLOS and PREOVOLOS & ASSOCIATES, ALC.

B. Because The Trial Court Found That A Substantial Relationship Exists Between THANASI K. PREOVOLOS'

**Prior Representation And The Current Representation
At Issue, Access To Confidential Information By THANASI
K. PREOVOLOS and PREOVOLOS & ASSOCIATES, ALC
Is Presumed**

As stated previously, once the Court determines that a “substantial relationship” exists between the prior representation and the representation at issue, the former client is relieved of *any* burden to prove that *actual* confidential or privileged information was given to the attorney. It is presumed that such information was, indeed, given. (*Cobra Solutions, supra*, 38 Cal.4th at 847, citing *Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 710-711.) In this case, Appellant argues that the Trial Court erred because there was no evidence that THANASI K. PREOVOLOS or PREOVOLOS & ASSOCIATES, ALC were provided with any confidential information material to the present action. (See, Appellant’s Opening Brief, page 13.) Appellant argues that “even if this Appellate Court were to conclude the Trial Court somehow made a finding there was ‘successive representation,’ material confidential information was never obtained.” (See, Appellant’s Opening Brief, page 13.)

Appellant’s argument is misguided. Once the Trial Court determined that there was a substantial relationship between the prior representation by THANASI K. PREOVOLOS and PREOVOLOS & ASSOCIATES, ALC and the representation at issue here, the divulging of confidential, privileged information was presumed. Therefore, Appellant’s argument on this point must fail.

**C. This Court Must Affirm The Trial Court’s Decision
If It Is Correct Under Any Theory Even If The Trial
Court’s Statements On The Record Indicate A
Misunderstanding Or Misapplication Of The Law**

Generally, an appeal taken from a judgment or order correct on any theory will be affirmed, even though the Trial Court's reasoning may have been erroneous. In fact, California law has long recognized that Appellate Courts will not review the reasons for the Trial Court's decision. (*Davey v. South. Pacific Co.* (1897) 116 Cal. 325, 329-330 [48 P. 117]) [stating that no rule of law is better or more firmly established]; see also, *Marriage of Burgess* (1996) 13 Cal.4th 25, 32 [51 Cal.Rptr.2d 444]; *Day v. Alta Bates Med. Ctr.* (2002) 98 Cal.App.4th 243, 252 [119 Cal.Rptr.2d 606] [stating that the Appellate Court is required to uphold the ruling if it is correct on any basis, regardless of whether such basis was actually invoked].) The rationale underlying this well-established principle is that there can be no prejudicial error from erroneous logic or reasoning if the decision itself is correct. (*Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 610 [92 Cal.Rptr.2d 897].)

In this case, Appellant refers often to *perceived* mistakes or inaccuracies stemming from Judge Warren's comments from the bench at the hearing on January 12, 2006 as a basis for this Court overruling the Trial Court's order disqualifying THANASI K. PREOVOLOS and PREOVOLOS & ASSOCIATES, ALC. (See, e.g., Appellant's Opening Brief, pages 8, 9, 11.) However, a judgment or order will not be reversed simply because the Trial Court's oral comments from the bench or even written comments in a statement of decision indicate that the decision was based on a misunderstanding or misapplication of the law.⁷ So long as the ruling can be supported by any legal theory, the ruling will be affirmed even if the record below demonstrates that the Trial Court's legal reasoning was unsound. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980-981 [35 Cal.Rptr.2d 669]; *Whyte v. Schlage Lock Co.* (2002) 101

⁷Here, MR. PREOVOLOS contends that no such misunderstanding or misapplication is reflected by the record below.

Cal.App.4th 1443, 1451 [125 Cal.Rptr.2d 277]; *Mayflower Ins. Co. v. Pellegrino* (1989) 212 Cal.App.3d 1326, 1332 [261 Cal.Rptr. 224].)

**THE TRIAL COURT DID NOT ERR IN NOT FINDING AN
“IMPLIED WAIVER” OF THE ISSUE OF CONFLICT OF
INTEREST WHERE MR. PREOVOLOS OBJECTED ON
TWO OCCASIONS TO DEFENSE COUNSEL’S
REPRESENTATION OF APPELLANT AND FILED A MOTION
TO DISQUALIFY SIX MONTHS AFTER THE COMPLAINT
WAS FILED**

Appellant argues that the Trial Court erred in not finding that MR. PREOVOLOS waived any conflict of interest issue in this case by not raising the issue timely. Appellant raises virtually the same argument, based on the same legal authorities, that he raised before the Trial Court only there the argument was cast in terms that MR. PREOVOLOS “consented” to the conflicted representation rather than he waived the issue of conflict of interest. (CT 137-138)

In support of this proposition, Appellant relies on *Zador Corp. v. Kwan* (1995) 31 Cal.App.4th 1285 [37 Cal.Rptr.2d 754]. Admittedly, *Zador Corp.* remains good law, but it is no more persuasive now than it was when the Trial Court heard this matter on January 12, 2006 because the facts of *Zador Corp.* are completely distinguishable from the facts of this case.

In *Zador Corp.*, the moving party sought to disqualify a firm that had jointly represented the moving party and another party in a real property dispute. Before the firm had undertaken the joint representation, however, the firm had presented the moving party with a *written* waiver and consent form which the *Zador Corp.* Court described as “detailed.” (*Zador Corp.*, *supra*, at 1300.) The moving party signed the written waiver and consent form after studying it, agreeing to the joint representation “notwithstanding any adversity that may develop.” (*Id.* at 1301.)

Even after an adversity did develop, the moving party “reaffirmed his agreement to the consent form and to [the law firm’s] continued representation of [the other party].” (*Id.*)

Such is not the case here. In this case, unlike *Zador Corp.*, MR. PREOVOLOS never signed any written waiver and consent form because none was ever presented to him. Unlike *Zador Corp.*, THANASI K. PREOVOLOS and PREOVOLOS & ASSOCIATES, ALC simply elected to stop representing MR. PREOVOLOS’ interests (despite their history of providing legal advice and services to him on partnership matters and estate planning matters) and chose to solely represent Appellant, FOFO D. PREOVOLOS, and the FAMILY PARTNERSHIP. (CT 109) In that way, this case is far more analogous to a situation where an attorney drops a former client “like a hot potato” in favor of the current client, something that attorneys are not permitted to do.⁸ (*Truck Ins. Exchange v. Fireman’s Fund* (1992) 6 Cal.App.4th 1050, 1059 [8 Cal.Rptr.2d 228].) This case is nothing like the factual situation presented in *Zador Corp.*

MR. PREOVOLOS also did not unreasonably delay in filing his Motion to Disqualify Defense Counsel. In *White v. Superior Court* (1979) 98 Cal.App.3d 51 [159 Cal.Rptr.2d 278], the Court found that a motion to disqualify that was delayed until “six months after [the attorney] had served notice of a motion for summary judgment” was an unreasonable delay and a litigation tactic. (*Id.* at 55.) Similarly, in *River West, Inc. v. Nickel* (1987) 188 Cal.App.3d 1927 [234 Cal.Rptr. 33], the party seeking disqualification waited some 47 months before filing the motion

⁸MR. PREOVOLOS concedes that this was after he had Attorney Martin Goodman write to THANASI K. PREOVOLOS and PREOVOLOS & ASSOCIATES, ALC on his behalf. (CT106-107) Nevertheless, MR. PREOVOLOS only had Mr. Goodman write to THANASI K. PREOVOLOS and PREOVOLOS & ASSOCIATES, ALC after he discovered Appellant’s plan to transfer the Cameo Way property and, more importantly, after he had asked for THANASI K. PREOVOLOS’ advice regarding dissolving the FAMILY PARTNERSHIP and not receiving a reply. (CT 039)

to disqualify plaintiff's counsel. Up to that point, plaintiff's counsel had engaged "in over 3,000 hours of litigation effort at a cost of \$387,000..." (*Id.* at 1313.)

In this case, MR. PREOVOLOS filed his Motion to Disqualify Defense Counsel approximately six months after his Complaint was filed. At the time his Motion to Disqualify Defense Counsel was filed, the pleadings in this case had only been at issue slightly more than one month. No motion for summary judgment or other dispositive motion was filed before MR. PREOVOLOS sought to disqualify THANASI K. PREOVOLOS and PREOVOLOS & ASSOCIATES, ALC. Moreover, before he filed his Motion to Disqualify Defense Counsel, MR. PREOVOLOS objected on two, separate occasions to defense counsel's continued representation in this matter, and THANASI K. PREOVOLOS and PREOVOLOS & ASSOCIATES, ALC refused to cease representing Appellant or provide proof of MR. PREOVOLOS' written consent to their representation. (CT 028-029, 033) Thus, this case is nothing like the "11th-hour" litigation tactics presented in both *White* and *River West*.

VII. CONCLUSION

For the foregoing reasons, the Trial Court did not err in granting MR. PREOVOLOS' Motion to Disqualify Defense Counsel. Ample evidence exists in this case to support the Trial Court's conclusion that a substantial relationship exists between THANASI K. PREOVOLOS and PREOVOLOS & ASSOCIATES, ALC's prior representation of the parties and the representation at issue in this dispute. Coupled with the fact that MR. PREOVOLOS consulted with THANASI K. PREOVOLOS on at least two occasions about his rights and interests in the FAMILY PARTNERSHIP, THANASI K. PREOVOLOS has a direct, financial interest in the outcome of this litigation as the Successor Trustee and beneficiary of the CHILDREN'S

TRUST. THANASI K. PREOVOLOS, PREOVOLOS & ASSOCIATES, ALC, and the CHILDREN'S TRUST have each been named as a co-defendants in the underlying litigation. Moreover, irrefutable evidence was presented to the Trial Court demonstrating that THANASI K. PREOVOLOS and PREOVOLOS & ASSOCIATES, ALC participated in the transfer of the Cameo Way property – the event that gave rise to the underlying lawsuit – and that they benefitted financially from the transfer.

Finally, because MR. PREOVOLOS moved in a timely fashion to disqualify THANASI K. PREOVOLOS and PREOVOLOS & ASSOCIATES, ALC, the Trial Court also did not err in not finding that MR. PREOVOLOS has “impliedly waived” the conflict of interest that is so ever-present in this case. This is not a case where a party signs an express waiver and then seeks to disqualify the conflicted attorney, nor is this a case where a party waits long into the litigation and then seeks to disqualify counsel solely as a means to gain a tactical advantage in the litigation. Here, the facts demonstrate that MR. PREOVOLOS – through his attorneys – objected on two occasions to the representation of Appellant by THANASI K. PREOVOLOS and PREOVOLOS & ASSOCIATES, ALC. Only after counsel refused to cease representing Appellant, or show any proof that MR. PREOVOLOS had provided his consent to the representation, did MR. PREOVOLOS seek the Court's order disqualifying counsel.

Therefore, MR. PREOVOLOS respectfully requests that this Court affirm the Trial Court's decision to grant MR. PREOVOLOS' Motion to Disqualify Defense Counsel.

Respectfully submitted,

Dated: August 28, 2006

LAW OFFICES OF ERIC G. YOUNG

By: _____

Eric G. Young, Attorney for Plaintiff

and

Respondent THEODORE PREOVOLOS