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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CENTRAL CALIFORNIA MEDICAL
IMAGING INC. et al.,

Plaintiffs and Respondents,

v.

FRESNO IMAGING CENTER et al.,

Defendants and Appellants.

F064746

(Super. Ct. No. 08CECG03208)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Alan M. Simpson, Judge.

McCormick, Barstow, Sheppard, Wayte & Carruth, Marshall C. Whitney, Timothy J. Buchanan, Todd W. Baxter, and Scott M. Reddie for Defendants and Appellants.

Wild, Carter & Tipton and Steven E. Paganetti for Plaintiffs and Respondents.

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One attorney at a law firm has represented the plaintiffs in this business litigation since at least 2008. In 2011, another attorney at the law firm agreed to represent the former Chief Executive Officer (CEO) of one of the defendants in the business litigation in a separate matter. When defendants' counsel learned of the adverse representations, they moved to disqualify plaintiffs' attorney and his law firm. The law firm terminated

the CEO as a client and opposed the disqualification motion. The trial court denied the motion and defendants appeal. There are two issues on appeal: (1) whether defendants have standing to move to disqualify plaintiffs' counsel and (2) whether the trial court abused its discretion in denying the motion. We affirm.

FACTS AND PROCEDURAL HISTORY

Background and Underlying Disputes

Trinity Health (Trinity) is the parent company of Saint Agnes Medical Center (SAMC). SAMC is the parent company of defendant Professional Office Corporation (POC), which is a general partner of defendant Fresno Imaging Center (FIC).

In August 2005, Teresa Chan, M.D., on behalf of Central California Medical Imaging Inc. (CCMI and collectively, the radiologists), contracted to provide inpatient radiology services to SAMC and outpatient radiology services to SAMC's subsidiaries, FIC and POC. Mathew Abraham, the CEO of SAMC and POC, negotiated, executed and managed the contracts. In 2006, SAMC and POC, with Abraham, terminated the contracts before their terms ran. Chan and CCMI filed three lawsuits that alleged breach of contract, fraud in the inducement, and interference with prospective economic relations. The first action, which involved the radiologists' contract claims against SAMC, was resolved by arbitration in the radiologists' favor. The second action, which involved the radiologists' tort claims against SAMC, was settled in 2011. This third action involves the contract SAMC signed on behalf of FIC with CCMI and alleges contract and tort claims against the outpatient service providers POC and FIC. It alleges defendants induced Chan to leave her practice to work for defendants without any intention of performing their promises under the contract, and competed with and interfered with her attempts to recruit additional radiologists to join the CCMI practice to provide the contracted services. The third action was filed in September 2008 but defendants' answer was not filed until February 2010. Although the first two actions involved a separate contract, plaintiffs' allegations of wrongdoing and damages in the three actions are interrelated and overlapping. Steven E. Paganetti of the Wild, Carter & Tipton firm has represented plaintiffs Chan and CCMI in all three actions.

Defendants initially retained attorney Terese Beluris of the law firm McDermott, Will & Emery LLP in December 2006 to represent them in the three lawsuits. McDermott, Will & Emery continues to represent SAMC in the arbitration proceeding, but is no longer defendants' counsel in this third case. During the representation, Beluris met with Abraham three times to discuss the litigation. They discussed confidential matters including the relationship between Abraham and the radiology contracts. Abraham was the "key person with knowledge of material facts and executive authority to direct the handling of the parties' claims and counterclaims and the positions the entities wanted to take in prosecuting or responding to them." Between September 2005 and May 2008, Abraham exchanged more than 100 emails with legal counsel related to the radiologists' matters.

In September 2011, McCormick, Barstow, Sheppard, Wayte & Carruth LLP associated in this litigation for defendants with cocounsel, Alan E. Friedman of the Jones Day law firm.

Abraham was SAMC's CEO from January 2005 until July 2008. As CEO of SAMC, Abraham was also CEO of POC, which was the sole general partner of FIC, a limited partnership. On July 25, 2008, Trinity elected to terminate Abraham's employment agreement "with cause," based on performance issues. However, Trinity and Abraham executed a settlement agreement that characterized the termination as "without cause" for purposes of benefit programs. One benefit included the potential right to a bonus under the "At Risk Compensation Program" for executives, which was determined in October of each year based on performance criteria. Trinity determined Abraham was not entitled to a bonus because of performance concerns including his handling of significant contractual relationships. In July 2011, Abraham retained attorney Monrae English, a shareholder in Wild, Carter & Tipton, to represent him regarding his right to the 2008 bonus. In late November 2011, English wrote Trinity: "[O]ur office anticipates that Mr. Abraham's claim will be in excess of \$150,000.00. Wild, Carter & Tipton's litigation history with Trinity Health has been extensive, expensive and not particularly favorable in the long run to Trinity Health."

Abraham acknowledged in the settlement agreement with Trinity that he had acquired confidential information involving matters that may be litigated and he had a legal obligation to keep that information confidential. He also agreed to cooperate in the defense or prosecution of any lawsuits that related to matters occurring during the time he was employed.

According to Trinity's general counsel, Catherine F. Wenger, her review of Abraham's personnel file and her knowledge of the issues considered in determining Abraham should be terminated "with cause," Abraham's claim that he was entitled to a bonus implicated his total job performance including his credibility, his interaction with third-party vendors, and his relations with third parties, including the plaintiff radiologists. As a result, to assert his claim through Wild, Carter & Tipton, Abraham would have to share with counsel his version of what happened with the radiologists' contract for professional services. Full disclosure would require Abraham to divulge to plaintiffs' counsel attorney-client privileged confidential communications and other proprietary and confidential information he had agreed to keep confidential pursuant to the settlement agreement, which could irreparably harm FIC's and POC's defense in this case.

In early December 2011, defendants' counsel learned that English and the Wild, Carter & Tipton law firm were representing Abraham in connection with his claim for the unpaid bonus. English's reference to other litigation with Trinity caused defense counsel to fear that Abraham may have shared confidences that he was contractually bound not to disclose or that he was seeking to align himself with plaintiffs in this lawsuit to vindicate his past conduct in dealing with plaintiffs to strengthen his claim to a bonus.

Defense counsel wrote Paganetti that POC and FIC held any attorney-client communication privilege and work product protection arising from Abraham's communication with and work with counsel for SAMC, POC and FIC. They asserted that privilege and objected to Wild, Carter & Tipton's representation of Abraham. They also objected to Paganetti and his firm continuing to represent plaintiff radiologists

because both had been exposed to sensitive, material, attorney-client privileged communications relating to two related contract disputes.

Paganetti initially responded that he was unaware of any time when his firm had represented a party where Abraham “was named as an adverse party in the legal action.” Abraham had been represented by the Davis Wright Tremaine law firm when he was deposed in the radiologists’ earlier related lawsuits. Thus, Paganetti was “unaware of any California case law which create[d] any type of conflict of interest given the facts and circumstances concerning Mathew Abraham.” In response, defendants’ counsel pointed out that Abraham possessed critical and confidential information regarding the decisions giving rise to the radiologists’ litigation. Therefore, Wild, Carter & Tipton’s representation of him exposed defendants to “significant risk that critical attorney client communications have been presumptively disclosed to [their] adversary.” In other words, by representing both the plaintiff radiologists and the former CEO of a defendant, who had negotiated the contract and was involved in the decisions leading up to its termination, Wild, Carter & Tipton had access to privileged discussions on both sides of the dispute.

Motion to Disqualify Counsel

Defendants moved to disqualify Paganetti and the law office of Wild, Carter & Tipton as counsel for plaintiffs. The motion was made on the ground that counsel had prejudicially obtained access to defendants’ attorney-client confidences by representing the former CEO of defendant POC.

Plaintiffs opposed the motion on the ground no conflict of interest existed because the two matters were unrelated and the law firm had received no confidential information that would have any adverse effect on FIC’s and POC’s defense of the present case. They also contended the radiologists’ first two cases that were already resolved were separate from this case. That Abraham had been involved in the defense of those cases, was not relevant here. In support of their opposition, they pointed out that FIC and POC did not file an answer in this litigation until February 2010, more than 18 months after Abraham was terminated as CEO. Further, Abraham contacted employment attorney

English in July 2011 to assist him regarding a claim for breach of the settlement agreement with SAMC. English provided legal assistance regarding this claim between August and December 2011 when the law firm terminated Abraham as a client. The only documents English reviewed relating to Abraham's bonus claim were the settlement agreement and waiver and the employment agreement. She had returned all documents to Abraham. English did not disclose any of the information she reviewed regarding the wage claim to any other attorney in the law firm nor did she assist Paganetti with this lawsuit. And, English did not discuss with Abraham any facts or circumstances concerning negotiation of the contracts with the radiologists, or any position or claim SAMC took or was taking with regard to the radiologists' claims. English's reference in the letter to other litigation with Trinity was based on her medical malpractice and employment law practice and had nothing to do with the radiologists' business lawsuit.

When Paganetti deposed Abraham in the earlier lawsuits regarding the inpatient radiology contract in June 2010 and April 2011, Abraham was represented by Mary Haas of the law firm of Davis Wright Tremaine LLP. Paganetti was unaware that Abraham had consulted with another attorney at Wild, Carter & Tipton until defense counsel informed him of the representation. He had not communicated with English regarding any of the radiologists' claims in any of the three cases and English had not assisted him in the radiologists' cases.

Abraham also provided a declaration. He stated English had ceased representing him on December 21, 2011; he had never had any conversation with Paganetti regarding his wage claim; he had never discussed the facts or circumstances of the radiologists' claims against FIC and POC; in fact, he was unaware of the third lawsuit and "do[es] not know anything about" the radiologists' claims against FIC and POC and had not discussed the negotiation of those contracts with English. In addition, he had not communicated with English regarding any position SAMC took or was taking in the radiologists' litigation. Finally, his bonus claim was not related to and did not involve the disputes with the radiologists.

The trial court denied the motion to disqualify without explanation.

DISCUSSION

The issues on appeal are (1) whether defendants have standing to bring the motion to disqualify plaintiffs' counsel and (2) whether the trial court abused its discretion in failing to disqualify plaintiffs' counsel.

Standard of Review

We review a trial court's decision on a disqualification motion for abuse of discretion. (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143 (*Speedee Oil*)). If the trial court resolved disputed factual issues, we determine whether substantial evidence supports the trial court's findings of fact. (*In re Charlisse C.* (2008) 45 Cal.4th 145, 159; *Sabbah v. Sabbah* (2007) 151 Cal.App.4th 818, 822.) "Where the trial court has drawn reasonable inferences from the evidence, we have no power to draw different inferences, even though different inferences may also be reasonable." (*Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197, 1203.) When the trial court's factual findings are supported by substantial evidence, we review the conclusions based on those findings for abuse of discretion. (*Speedee Oil, supra*, 20 Cal.4th at p. 1144.) The abuse of discretion standard measures whether the trial court's action falls within the permissible range of options set by the legal criteria. (*Robbins v. Alibrandi* (2005) 127 Cal.App.4th 438, 452.)

In this case, the declarations submitted by the parties conflict on the issue of whether Abraham's bonus claim is related to the radiologists' litigation. The declarations also raise conflicting inferences as to whether Abraham had confidential information regarding this third lawsuit and whether that information was disclosed to English and Paganetti. In ruling for plaintiffs, the trial court, by inference, resolved the credibility issue in plaintiffs' favor. On review, we determine whether substantial evidence supports the trial court's findings of fact and whether the conclusions based on those findings fall within the permissible range of options set by the legal criteria.

Attorney Disqualification

1. Standing

As a preliminary matter, plaintiffs assert defendants lack standing to move to disqualify their counsel. They contend the complaining party must have or have had an attorney-client relationship with the challenged attorney. Because plaintiffs' counsel has never represented defendants, defendants have no legally cognizable interest in Wild, Carter & Tipton's undivided loyalty to its clients. (*Great Lakes Construction, Inc. v. Burman* (2010) 186 Cal.App.4th 1347, 1351.) We disagree.

No California case has held that only a client or former client may bring a disqualification motion. (*Kennedy v. Eldridge, supra*, 201 Cal.App.4th at p. 1204.) Instead, standing generally requires that the complaining party be able to allege injury—an invasion of a legally protected interest. Absent an attorney-client relationship, the moving party must have an expectation of confidentiality. Some sort of confidential relationship must exist or have existed before a party may disqualify an attorney predicated on the actual or potential disclosure of confidential information. (*Great Lakes Construction, Inc. v. Burman, supra*, 186 Cal.App.4th at p. 1356.) Thus, where an attorney's continued representation threatens an opposing party with cognizable injury or would undermine the integrity of the judicial process, the trial court may disqualify counsel, regardless of whether a motion is brought by a present or former client of the challenged counsel. (*Kennedy v. Eldridge, supra*, 201 Cal.App.4th at p. 1205.)

In this case, disqualification is sought by the opposing parties, who are personally interested in the alleged access to confidential information created by the Wild, Carter & Tipton firm's representation of former CEO Abraham. Defendants FIC and POC assert that Abraham owes a fiduciary duty to his former employer—POC's parent company, to continue to cooperate with the defense of the radiologists' lawsuit and to protect confidential information he acquired with respect to the litigation. As such, he was "unified in interest" with defendants in protecting confidences with respect to this litigation. Wild, Carter & Tipton, as counsel for plaintiffs, had a duty not to insert itself into that confidential relationship by taking Abraham as a client, albeit in a separate

matter. By taking Abraham as a client, Wild, Carter & Tipton placed itself in a position to acquire defendants' confidential information and also cloaked itself in its own attorney-client privilege that prevented defendants' inquiry into the law firm's communications with Abraham. Under the circumstances, defendants have alleged the potential invasion of a legally protected interest and have standing to move to disqualify plaintiffs' counsel.

2. Disqualification Principles

Disqualification motions involve a conflict between the client's right to counsel of choice and the need to maintain ethical standards of professional responsibility. (*SpeeDee Oil, supra*, 20 Cal.4th at p. 1145.) The paramount concern is to preserve public trust in the scrupulous administration of justice and the integrity of the bar. Thus, the right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process. (*Ibid.*)

Conflicts of interest generally arise in three situations: (1) in cases of successive representation, where an attorney seeks to represent a client with interests that are potentially adverse to a former client; (2) in cases of simultaneous representation, where an attorney or law firm seeks to represent multiple parties with potentially adverse interests (*In re Charlissee C., supra*, 45 Cal.4th at p. 159); and (3) in cases where an attorney has acquired confidential information of an adverse party that may be useful in the attorney's representation of his or her client in the action. (*Oaks Management Corporation v. Superior Court* (2006) 145 Cal.App.4th 453, 464.)

A. Successive Representation of Clients with Adverse Interests

Where the potential conflict arises from an attorney's successive representation of clients with potentially adverse interests, the primary fiduciary value jeopardized is client confidentiality. (*In re Charlissee C., supra*, 45 Cal.4th at p. 161.) The disqualification standard focuses on the former client's interest "in ensuring the permanent confidentiality of matters disclosed to the attorney in the course of the prior representation." (*Id.* at p. 160.) Thus, where a former client seeks to have a previous attorney disqualified from serving as counsel to a successive client in litigation adverse to

the interests of the first client, the former client must demonstrate a “substantial relationship” between the subject matter of the previous and the current representation. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283.) The client need not prove the attorney actually has confidential information. Rather, where a substantial relationship between the subject matter of the two representations is demonstrated, the court presumes the attorney had access to confidential information in the first representation and the attorney will be disqualified from representing the second client. (*Ibid.*; *Adams v. Aerojet-General Corp.* (2001) 86 Cal.App.4th 1324, 1331.) And, once the attorney is shown to have had probable access to former client confidences, the court will impute that knowledge to the entire firm, prohibiting all members of the firm from participating in the case. (*Flatt v. Superior Court, supra*, 9 Cal.4th at p. 283.)

B. Simultaneous Representation of Clients with Adverse Interests

Where the potential conflict arises from an attorney’s or law firm’s simultaneous representation of clients with adverse interests, the primary value jeopardized is the attorney’s duty of loyalty. The duty of loyalty requires attorneys to maintain undivided loyalty to their clients to avoid undermining public confidence in the legal profession and the judicial system. (*SpeeDee Oil, supra*, 20 Cal.4th at p. 1146.) A conflict involving an attorney’s duty of loyalty is the most flagrant kind of conflict, so a more stringent standard has developed for simultaneous representation cases. If an attorney or a law firm simultaneously represents clients who have conflicting interests, a rule of per se disqualification applies. With few exceptions, disqualification follows automatically regardless of whether the simultaneous representations have anything in common or present any risk that confidences obtained in one matter will be used in the other. (*Id.* at p. 1147.) The attorneys’ actual intentions and motives are immaterial. (*Ibid.*)

The duty of loyalty to an existing client is so important that the attorney or law firm cannot exonerate itself by withdrawing from the representation of one of the adverse clients. For example, in *Truck Ins. Exchange v. Fireman’s Fund Ins. Co.* (1992) 6 Cal.App.4th 1050, a subrogation action by several insureds and their insurers was brought against another carrier. A law firm representing plaintiff insurer A sought to

avoid disqualification by withdrawing from a simultaneous representation of a subsidiary of defendant insurer B in an unrelated litigation. (*Id.* at pp. 1052-1054.) The trial court properly applied the per se rule of disqualification for cases of simultaneous representation, rather than the discretionary standard applicable to cases of former representation. (*Id.* at p. 1055.) The principle that precludes a law firm from representing an interest adverse to those of a current client is based on the need to assure the attorney's undivided loyalty and commitment to the client. (*Id.* at p. 1056.) As such, the automatic disqualification rule could not be avoided by simply converting a present client into a former client. (*Id.* at p. 1057.) Such maneuvering would undermine public confidence in the legal profession and in the judicial process. (*Ibid.*)

In this case, the Wild, Carter & Tipton law firm did not simultaneously represent opposing parties because Abraham was never a party to plaintiffs' lawsuits. And while Abraham's interest, if any, in the radiologists' lawsuit is aligned with defendants, he is not a party to the lawsuit and no longer serves as CEO of a defendant. More significantly, there is no complaint that the law firm has violated a duty of loyalty. Plaintiff radiologists, the parties who could complain that Wild, Carter & Tipton is violating a duty of loyalty owed to them by simultaneously representing a client with adverse interests, did not bring the motion. It is the opposing party defendants who challenge the law firm's ability to continue to represent the plaintiff radiologists because the firm potentially has been exposed, through its representation of Abraham, to defendants' confidential information. The fiduciary duty jeopardized is confidentiality. As such, this case does not fall neatly within either the successive or simultaneous representation situations.

C. Attorney Exposed to Adverse Party's Confidential Information

A potential conflict may also arise when an attorney or law firm is exposed to an adverse party's confidential information. The exposure may occur in a number of ways: a law firm hires an attorney or other employee of the firm that represents the adverse party (*Pound v. DeMera DeMera Cameron* (2005) 135 Cal.App.4th 70 [attorney consulted by defense counsel was subsequently hired by plaintiff's counsel]; *In re*

Complex Asbestos Litigation (1991) 232 Cal.App.3d 572, 598-599 [paralegal who had worked for asbestos litigation defense counsel was hired by asbestos litigation plaintiffs' counsel]), a party inadvertently discloses privileged information to the opposing party (*Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 819); counsel obtains confidential information from an expert with whom opposing counsel has consulted (*Shadow Traffic Network v. Superior Court* (1994) 24 Cal.App.4th 1067, 1087-1088) or counsel agrees to represent a second client who potentially possesses confidential information about an adverse party's case (*Neal v. Health Net, Inc.* (2002) 100 Cal.App.4th 831, 834, 841). Disqualification may be warranted in these cases, not because the attorney has a direct duty to protect the adverse party's confidences, but because the situation implicates the attorney's ethical duty to maintain the integrity of the judicial process. (*Roush v. Seagate Technology, LLC* (2007) 150 Cal.App.4th 210, 219.)

Several legal principles apply. First, mere exposure to an adversary's confidential information is insufficient, by itself, to warrant disqualification. If mere exposure were enough, one party could nullify his opponent's right to representation by counsel of choice by disclosing confidences—either inadvertently or by devious design—to the opposing side. However, in an appropriate case, disqualification might be justified if an attorney inadvertently receives confidential materials and fails to conduct himself or herself in an ethical manner, and other factors compel disqualification. (*Rico v. Mitsubishi Motors Corp.*, *supra*, 42 Cal.4th at p. 819, citing *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 650-651, 657 [law firm inadvertently sent privileged documents to opposing side, who unethically used information to its own advantage].)

Second, the appearance of impropriety, by itself, does not support an attorney's disqualification. (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 305-306.) Although Canon 9 of the American Bar Association Model Code of Professional Responsibility provides that a lawyer should avoid the appearance of professional impropriety, California did not adopt this canon. (*Oaks Management Corporation v. Superior Court*, *supra*, 145 Cal.App.4th at p. 471.) Further, there is no California case in

which an attorney has been disqualified solely because his or her behavior created an appearance of impropriety. Instead, courts have disqualified counsel only where the appearance of impropriety arises in connection with a tangible dereliction. (*Gregori v. Bank of America, supra*, 207 Cal.App.3d at p. 306.)

For example, in *DCH Health Services Corp. v. Waite* (2002) 95 Cal.App.4th 829, plaintiffs moved to disqualify defendant's attorney Kramer based on confidential information allegedly imparted by Kramer's spouse, Luna, a superior court judge, who had served on the board of directors of plaintiff hospital. Although Luna had received confidential information pertaining to the underlying action, there was no evidence she had disclosed any information to Kramer. Nevertheless, the trial court ordered disqualification to avoid the appearance of impropriety arising from the "unique nature of the marital relationship." (*Id.* at p. 831.) The court of appeal reversed. Unlike judicial recusals, the appearance of impropriety alone did not support an attorney's disqualification. Moreover, the court would presume that, unless proven otherwise, lawyers behave in an ethical manner. (*Id.* at p. 834.)

Third, the purpose of disqualification is prophylactic, not punitive. Thus, disqualification is inappropriate simply to punish a dereliction that is not likely to have substantial effect on judicial proceedings. The relevant question is whether there is "a genuine likelihood that the status or misconduct of the attorney in question will affect the outcome of the proceedings before the court." (*Gregori v. Bank of America, supra*, 207 Cal.App.3d at pp. 308-309.) Accordingly, disqualification is proper where "there is a reasonable probability counsel has obtained information the court believes would likely be used advantageously against an adverse party during the course of the litigation." (*Id.* at p. 309.) Because the information "cannot be unlearned, and the lawyer who obtained it cannot be prevented from giving it to others, disqualification ... eliminat[es] from the case the attorney who could most effectively exploit the unfair advantage." (*Ibid.*) On the other hand, when an attorney cannot use the confidential information to the adversary's disadvantage, the adversarial system is not compromised by allowing the attorney to represent the opposing party. A "no harm, no foul" rule applies, and a party

seeking disqualification is required to show prejudice. (*Oaks Management Corporation v. Superior Court, supra*, 145 Cal.App.4th at p. 468 [because counsel did not wrongfully obtain confidential information and there was little likelihood counsel could use it to the adverse party's disadvantage, disqualification served no useful purpose].)

Neal v. Health Net, Inc., supra, 100 Cal.App.4th 831 is instructive. Neal and Brockett had both worked for Health Net. Neal was the human resources manager and Brockett was a legal secretary. (*Id.* at p. 834.) After Neal was terminated, attorney Michael Traylor agreed to represent her in a wrongful termination lawsuit against Health Net. (*Ibid.*) Two months later, Brockett was terminated after she surreptitiously accessed a Health Net computer file containing attorney-client information about Neal's lawsuit. (*Id.* at pp. 834-835.) Traylor agreed to represent Brockett in her separate discrimination lawsuit against Health Net. (*Id.* at p. 834.)

Health Net moved to disqualify Traylor as counsel for Neal. Health Net contended that Traylor met with and began representing Brockett, a member of Health Net's legal department, who had admitted reviewing Neal's litigation file. The file contained confidential documents including attorney notes and memoranda and privileged communications. (*Neal v. Health Net, Inc., supra*, 100 Cal.App.4th at pp. 834-835.) Neal opposed the motion on the ground there was no evidence that Brockett actually accessed confidential information or passed it on to Traylor. Brockett denied having seen any attorney notes or correspondence in the Neal litigation file and maintained she had accessed the file to get the name of Neal's attorney for the lawsuit she planned to file. Further, Traylor had advised Brockett that it was unethical for her to disclose any confidential information in the Neal file. (*Id.* at p. 836.) The trial court credited Health Net's assertions that Brockett had access to Neal's litigation file, which contained confidential information. And although there was no direct evidence of disclosure, the trial court presumed that Brockett disclosed the information she reviewed in the files to Traylor, which required his disqualification as Neal's counsel. (*Id.* at p. 839.)

On appeal, the court assumed the truth of Health Net’s factual assertions that Brockett had accessed the file that contained confidential information. (*Neal v. Health Net, Inc.*, *supra*, 100 Cal.App.4th at p. 839.) But the court declined to presume anything regarding the confidential information. First, Brockett, who allegedly possessed the confidential information, was not an attorney nor had she become associated with Traylor’s law office. She was a client. The Supreme Court had never held that the presumption of possession of confidential information and the automatic disqualification rule applied when a nonlawyer client, who may have had access to privileged matters, retains an attorney. (*Id.* at p. 841.) Further, there was no evidence that Brockett had provided any information—confidential or not—to Traylor regarding Neal’s case. (*Id.* at p. 843.) Finally, to the extent a reasonable inference could be made that confidential information was disclosed, there was no applicable legal standard that supported disqualification of Traylor as Neal’s attorney as a sanction for Brockett’s actions. (*Ibid.*; see also *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 302-304; *Maruman Integrated Circuits, Inc. v. Consortium Co.* (1985) 166 Cal.App.3d 443, 447-451 [disqualification not warranted although attorney may have been exposed to an adverse party’s confidential information through a client].)

Analysis

The conflict at issue here arises from counsel for plaintiffs’ potential exposure to defendants’ confidential information through Wild, Carter & Tipton’s representation of defendant POC’s former CEO. The following principles apply. As previously stated, mere exposure to defendants’ confidential information is insufficient, by itself, to warrant disqualification unless counsel has failed to act in an ethical manner or other facts compel disqualification. (*Rico v. Mitsubishi Motors Corp.*, *supra*, 42 Cal.4th at p. 819.) And the appearance of impropriety, by itself, does not warrant disqualification absent “tangible dereliction.” (*Gregori v. Bank of America*, *supra*, 207 Cal.App.3d at p. 306.) Under these principles, English’s representation of Abraham in his bonus dispute with Trinity

does not compel disqualification of Paganetti and Wild, Carter & Tipton from representing plaintiffs absent demonstrated ethical breaches, tangible dereliction, or other facts compelling disqualification.

Although the Wild, Carter & Tipton law firm erred in agreeing to represent Abraham, there is no evidence of unethical conduct or tangible dereliction. English's declaration stated she ran a conflicts check before agreeing to represent Abraham, which apparently did not disclose the conflict. Paganetti declared he was unaware that Abraham was a client of the firm until defendants told him so. The firm terminated Abraham as a client shortly after learning of the conflict, at the same time the motion to disqualify was filed, and returned to Abraham the documents he had provided to English. Under the circumstances, there is no evidence the Wild, Carter & Tipton attorneys failed to conduct themselves in an ethical manner or engaged in tangible dereliction thereby warranting disqualification on those grounds. Accordingly, we now determine whether other facts compel disqualification.

To determine whether disqualification is required for prophylactic rather than punitive effect, the relevant issue is whether there is a genuine likelihood the representation of Abraham by the Wild, Carter & Tipton law firm will affect the outcome of the proceedings before the court. Specifically, did the evidence before the trial court establish there was a reasonable probability Paganetti had obtained information that would likely be used advantageously against FIC and POC during this litigation?

The trial court, in denying the motion, impliedly found there was not a reasonable probability that Paganetti had obtained information that would likely be used to defendants' disadvantage. That finding is supported by substantial evidence. Plaintiffs' declarations asserted that Abraham's bonus dispute with Trinity was not related to or did not involve the radiologists' contract dispute with FIC and POC, Abraham had not disclosed any of his former employers' confidential information to English and English had not discussed any aspect of the radiologists' contracts or lawsuit with Abraham,

Abraham was not aware that the radiologists' lawsuit was still pending when he contacted English, English had not discussed Abraham's dispute with Paganetti nor assisted him in any manner with this litigation, and Paganetti had not discussed the radiologists' lawsuit with English. In ruling against defendants, the trial court rejected their evidence and proffered inferences to the contrary. The record supports the trial court's finding that disqualification was not warranted.

Defendants' urge this court to presume that Paganetti had access to their confidential information through English's representation of Abraham in his dispute with SAMC regarding his right to a bonus. If this were a case of successive representation, and if the evidence had established the two matters were substantially related, a presumption may be warranted. However, that is not this case. This is a case in which plaintiffs' law firm was potentially exposed to defendants' confidential information. Under the legal principles that apply in this third situation, the test is as set out above: whether there is a reasonable probability that Paganetti obtained information that would likely be used to defendants' disadvantage.

Defendants cite three cases to support their contention that the trial court erred in denying the motion to disqualify plaintiffs' counsel. All three involve complex factual situations and two are nonpublished federal district court cases. In *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft* (1999) 69 Cal.App.4th 223 (*Morrison Knudsen*), Morrison's subsidiary, Centennial, contracted with the water district (District) to act as on-site construction manager for project A. Morrison contracted with the District to act as resident engineer for project B. Problems arose with project A and the District retained the law firm of Hancock, Rothert & Bunshoft (Hancock) to assist with potential claims against Centennial and others. (*Id.* at p. 227.)

Hancock had never represented Centennial but had represented its parent, Morrison, in the past and was then representing the underwriters of Morrison's primary comprehensive insurance policy to monitor defense attorneys Morrison retained on errors

and omissions claims. Morrison was not Hancock's client, the underwriters were. However, as "monitoring counsel," Hancock received detailed confidential communications from Morrison's defense counsel concerning the progress of cases and Morrison's potential liability. (*Morrison Knudsen, supra*, 69 Cal.App.4th at p. 227.)

The trial court granted Morrison's and Centennial's motion to disqualify Hancock from representing the District. (*Morrison Knudsen, supra*, 69 Cal.App.4th at pp. 227-229.) On appeal, the court concluded that the per se disqualification rule of simultaneous representations did not apply nor did the case fit neatly under the successive representation rule. Nevertheless, the court adopted a version of the "substantial relationship" test to determine whether the information Hancock received as the underwriters' counsel disqualified it from representing the District in this lawsuit. (*Id.* at pp. 230-231, 234.) The court concluded that the record supported the findings that there was a substantial relationship between the District's current litigation and the matters Hancock handled on behalf of Morrison and its underwriters and the liability issues were similar. (*Id.* at pp. 234-235.) Further, as monitoring counsel, Hancock had been exposed to confidential information that would be useful to the District in its claim against Morrison and its subsidiaries, including the identity of all the key decision makers in the company, the litigation philosophy of Morrison, and the financial impact of pending and existing claims against Morrison and its subsidiaries. (*Id.* at p. 236.) Under the circumstances, the trial court did not abuse its discretion in deciding that Hancock should be disqualified. (*Id.* at p. 253.)

Morrison Knudsen is not particularly helpful to defendants in light of the applicable abuse of discretion and substantial evidence standards of review. In *Morrison Knudsen*, substantial evidence supported the trial court's conclusion that the cases were substantially related and that Hancock had been exposed to Morrison's confidential information that would be useful to District in its claim against Morrison and its subsidiaries. In this case, substantial evidence supported the trial court's implied

conclusions that the cases were not substantially related and that Wild, Carter & Tipton had not been exposed to defendant's confidential information that would be useful to plaintiffs' in this litigation. Nothing in *Morrison Knudsen* compelled the trial court in this case to rule for defendants and disqualify plaintiffs' counsel.

Defendants also cite *Cargill Inc. v. Budine* (E.D. Cal., June 22, 2007, No. CV-F-07-349-LJO-SMS) 2007 U.S. Dist. LEXIS 48405 (*Cargill*) and *Packard Bell NEC, Inc. v. Aztech Systems Ltd.* (C.D. Cal., Jan. 22, 2001, No. CV 98-7395 DT (Ex)) 2001 U.S. Dist. LEXIS 11194 (*Packard Bell*). Appellants acknowledge the cases are not binding precedent in California courts, but assert they are persuasive. In *Cargill*, a group of dairy farmers, represented by attorney Roy Payne, sued Cargill alleging that Cargill's dairy pellets led to various problems with their cows and monetary losses (Burford case). Budine was Cargill's general manager and met with counsel and aided Cargill with the defense of the dairy farmers' lawsuit. While the Burford action was pending, Budine left Cargill and formed a competing business, Progressive Dairy Solutions (collectively Progressive defendants). Cargill sued the Progressive defendants for misappropriation of trade secrets, breach of contract, unfair competition, and related claims. (*Cargill, supra*, at pp. *2-*15.) The Progressive defendants retained Payne, who was representing the plaintiff dairy farmers in the Burford case, to represent them. (*Id.* at pp. *16-*17.)

Cargill moved to disqualify Payne and his firm as counsel in the Burford case and as counsel for the Progressive defendants on the ground that his concurrent representation of the Progressive defendants created an appearance of impropriety. (*Cargill, supra*, 2007 U.S. Dist. LEXIS 48405 at pp. *17-*18.) The court agreed. Payne's participation in both lawsuits placed him in a position where there was a presumed risk that Budine would share Cargill's confidential information, which would in turn create the risk of an unfair advantage to Budine against Cargill. The representation also created an appearance of impropriety, threatened the integrity of the trial process and impugned the integrity of the judicial proceedings. (*Id.* at pp. *31-*35, *40, *42-*44.)

Cargill is distinguishable, first, because the disqualification order was based on the appearance of impropriety, which is legally sufficient for disqualification in the federal district court but is not under California law. Second, as in *Morrison Knudsen*, the district court found Cargill's evidence that the Progressive defendants had confidential information that would likely be disclosed to their counsel more convincing than it found the Progressive defendants' evidence that they did not have and would not divulge confidential information. That was the trial court's prerogative, but it does not compel the same result in this case that involves different evidence.

In *Packard Bell*, the trial court disqualified counsel under the following circumstances. Aztech agreed to supply component parts to Packard Bell (PB) that would qualify for duty-free treatment. (*Packard Bell, supra*, 2001 U.S. Dist. LEXIS 11194 at pp. *3-*5.) A subsequent customs audit disclosed that the components did not qualify for duty-free treatment and PB was assessed substantial back duties, interest and penalties. PB sued Aztech for breach of warranty and fraud. (*Id.* at pp. *6-*10.)

Jake Metzler was PB's former Chief Technology Officer and had been involved in the specifications of the component parts at issue. He had participated in meetings with PB's counsel where PB's litigation strategies against Aztech were discussed. (*Packard Bell, supra*, 2001 U.S. Dist. LEXIS 11194 at pp. *14-*15.) While the litigation was pending, PB terminated Metzler for breaching his employment agreement by divulging PB's attorney-client communications to Aztech. (*Id.* at p. *15.) PB contended that Aztech's defense to the action revolved around Metzler. Metzler testified in his deposition that he was aware that a certain component part was manufactured in Mexico, which disqualified it from duty-free status. Aztech claimed that PB could not have justifiably relied on its duty-free representations because PB, through Metzler, was aware of that information. (*Id.* at p. *16.)

After he was terminated, Metzler hired the law firm of Levy, Small & Lallas (Levy) to represent him as a witness in this litigation. During discovery, PB protected its

attorney-client communications by instructing Metzler not to disclose confidential information to Aztech. (*Packard Bell, supra*, 2001 U.S. Dist. LEXIS 11194 at pp. *13-*14.) Before trial, Aztech associated the Levy firm as additional counsel of record. (*Id.* at p. *12.) PB moved to disqualify the Levy firm on the ground the firm was privy to attorney-client communications of PB in this action through its former employee Metzler. (*Id.* at pp. *13-*14.) PB argued that Aztech was prohibited from conducting ex parte interviews with Metzler and obtaining PB's privileged information. Therefore, Aztech could not accomplish the same result by hiring Metzler's lawyer, the Levy firm. (*Id.* at pp. *17-*18.)

The district court agreed; disqualification was warranted. Metzler had a continuing duty to PB to protect privileged and confidential information he learned while at PB even though his employment terminated. Metzler could not waive PB's attorney-client privilege, only PB could. Thus, the Levy firm, as Metzler's attorney and agent, was obligated to maintain the confidentiality of the information learned by Metzler while at PB. (*Packard Bell, supra*, 2001 U.S. Dist. LEXIS 11194 at pp. *20-*21.) Moreover, it was the duty of the attorney to avoid a position where, at least potentially, he may use privileged information concerning the other side through prior representation, thus giving his present client an unfair advantage. (*Id.* at pp. *20-*22.) The court found Metzler's and the law firm's sworn statements that no confidential information was disclosed unavailing. It was the potential for disclosure of confidential information in light of the status of the Levy firm that was the concern. (*Id.* at pp. *21-*23.) The situation constituted a violation of the rule against simultaneous representation of clients with interests that potentially conflict and created the appearance of professional impropriety. The Levy firm represented parties with adverse interest in the same lawsuit. Under the circumstances, disqualification of the Levy firm was warranted. (*Id.* at pp. *24-*26.) That is not the situation here.

In summary, the trial court resolved the disputed factual issues regarding the alleged conflict of interest by drawing reasonable inferences from the evidence. We have no power to draw different inferences. Plaintiffs' declarations provide substantial evidence to support the trial court's implied finding that Paganetti did not wrongfully acquire an unfair advantage that undermines the integrity of the judicial process. (*Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1725.) The trial court did not abuse its discretion when it denied the motion to disqualify counsel for plaintiffs.

DISPOSITION

The order of February 15, 2012, denying the motion to disqualify counsel, is affirmed. Respondents are awarded costs on appeal.

DETJEN, J.

WE CONCUR:

WISEMAN, Acting P.J.

LEVY, J.