

Filed 8/1/18 Redstone v. Superior Court CA2/5

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.
---

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

SHARI REDSTONE et al.,

Petitioners,

v.

THE SUPERIOR COURT OF  
LOS ANGELES COUNTY,

Respondent;

MANUELA HERZER,

Real Party in Interest.

No. B288954

(Super. Ct. No. BC619766)

---

ORIGINAL PROCEEDING; petition for writ of mandate.  
Robert L. Hess, Judge. Writ denied.

Holland & Knight, Vivian L. Thoreen, Roger B. Coven,  
Robert Barton, for Petitioner Tyler Korff.

Hueston Hennigan, Robert N. Kleiger, Marshall A. Camp,  
Andrew K. Walsh, for Petitioner Shari Redstone.

No appearance for Respondent.

Bird, Marella, Boxer, Wolpert, Nessim Dooks, Lincenberg  
& Rhow, Ekwan E. Rhow, Thomas V. Richert, Hernan D. Vera,  
Nithin Kumar; Law Offices of Ronald Richards & Associates,  
Ronald Richards, Morani Stelmach, Justin N. Ibrahim, for Real  
Party in Interest.

## I.

### INTRODUCTION

This action was filed by Manuela Herzer, former girlfriend  
and confidante of Sumner Redstone (Sumner). She accuses  
Sumner's daughter Shari Redstone (Shari)<sup>1</sup> and grandson Tyler  
Korff (who is also Shari's son) of enlisting Sumner's nurses to spy  
on her and invade her privacy. Shari and Korff deny having  
anything to do with the nurses.

Herzer's attorneys previously represented the nurses,  
including with respect to a prior probate action in which Herzer  
contended the nurses spied on her. In this action, Shari and  
Korff moved to disqualify Herzer's attorneys due to their prior  
representation of the nurses. The trial court denied the  
disqualification motion because, on the facts before the court,  
Shari and Korff lacked standing to seek the attorneys'

---

<sup>1</sup> To avoid confusion, we refer to Sumner Redstone and Shari  
Redstone by their first names.

disqualification. Thereafter, Shari and Korff filed a petition for writ of mandate. We deny the petition.

## II. BACKGROUND

Sumner is the former executive chairman of Viacom, Inc. and CBS. In 1999, he met and began dating Herzer. Following a two-year-long romantic relationship, Herzer turned down Sumner's marriage proposal but remained in his life as a friend and confidante. According to Herzer, Sumner had a contentious relationship with his daughter Shari.

In 2013, shortly before Sumner's physical health began to decline, Herzer moved into his residence to help Sumner's then-girlfriend, Sydney Holland, coordinate his health care. Among other things, Herzer and Holland hired and supervised a team of nurses, including Jeremy Jagiello and Joseph Octaviano (the Nurses).

In June 2015, the Nurses hired Bonita Moore, a partner with the law firm of Bird, Marella, Boxer, Wolpert, Nessim, Drooks, Licenberg & Rhow, P.C. (Bird Marella), to advise them as they documented what they believed to be Herzer's and Holland's financial and emotional abuse of Sumner. Bird Marella represented the Nurses until January 15, 2016, when Moore left the law firm, taking the Nurses with her as clients.

In August 2015, Sumner removed Holland from his home and his estate plan after she confessed to having an affair. In October 2015, Sumner ended his friendship with Herzer and also removed her from his home and estate plan.

On November 25, 2015, Herzer filed a petition in probate court, contesting her removal as an agent to make health care

decisions under Sumner’s advance health care directive. In connection with the probate action, the Nurses produced documents, sat for deposition, and testified at trial—all while represented by Moore.

Herzer’s probate petition was dismissed on May 9, 2016. (*Herzer v. Redstone* (Jan. 2, 2018, B276191) [nonpub. opin.].) On the same day, Herzer filed this lawsuit against Shari and Korff (petitioners), as well as the Nurses. Herzer alleges the Nurses violated her right of privacy by surreptitiously listening to her private conversations and conducting covert surveillance of her while she lived in Sumner’s home. She claims petitioners directed and paid the Nurses to spy on her in order to gather information they then used to convince Sumner to remove her from his home and estate plan. In fact, Herzer alleges it was petitioners who connected the Nurses with Moore to assist them in preparing elder abuse complaints against Herzer, Holland, and Sumner’s estate planning lawyer.

On August 8, 2017, Bird Marella entered its appearance as co-counsel for Herzer in this action. One week later, Moore, who was then a partner with Faegre Baker Daniels and still represented the Nurses, wrote to Bird Marella’s general counsel, demanding Bird Marella’s withdrawal from the matter. Moore believed Bird Marella attorneys had received confidential information from the Nurses while previously representing them in a matter “substantially related” to this case. She wrote: “I . . . routinely discussed my cases with at least two named partners at Bird Marella, and I know that I sought advice from at least one of them on more than one occasion in connection with this representation.”

On September 5, 2017, Herzer dismissed the Nurses from the action with prejudice. In exchange, the Nurses agreed “not to seek to disqualify Bird Marella from representing Herzer” in this case or any future related cases. The parties also agreed that “Bird Marella shall not conduct any direct examination or cross-examination of [the Nurses] in any testimonial forum,” but any other counsel for Herzer may still do so.

Subsequently, petitioners each filed motions to disqualify Bird Marella from representing Herzer. On February 9, 2018, the trial court denied the motions, concluding that petitioners lacked standing to seek Bird Marella’s disqualification. Petitioners filed a petition for writ of mandate on March 23, 2018. We issued an order to show cause and now deny the petition.

### III.

#### DISCUSSION

##### A. Standard of Review

“Generally, a trial court’s decision on a disqualification motion is reviewed for abuse of discretion. [Citations omitted].” (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143.) “If the trial court resolved disputed factual issues, the reviewing court should not substitute its judgment for the trial court’s express or implied findings supported by substantial evidence.” (*Ibid.*) However, where the trial court’s ruling is based on a legal conclusion, such as lack of standing, we review the order de novo in light of the relevant legal principles. (*Great Lakes Construction, Inc. v. Burman* (2010) 186 Cal.App.4th 1347, 1354 (*Great Lakes*).)

## **B. Standing to Bring a Disqualification Motion**

“A ‘standing’ requirement is implicit in disqualification motions.” (*Great Lakes, supra*, 186 Cal.App.4th at p. 1356.) A party moving to disqualify counsel must have a “legally cognizable interest” that is or would be harmed by the attorney’s conflict of interest. (*Id.* at p. 1357.) Generally, to establish such injury, the moving party must have “had an attorney-client relationship with that attorney.” (*Id.* at p. 1356; see also *Strasbourger Pearson Tulcin Wolff Inc. v. Wiz Technology, Inc.* (1999) 69 Cal.App.4th 1399, 1404 [“An attorney-client relationship must have existed before disqualification is proper”].)

In limited cases, however, a moving party who was not a client may have standing based on a “legally recognizable expectation of confidentiality.” (*DCH Health Services Corp. v. Waite* (2002) 95 Cal.App.4th 829, 832 (*DCH Health*); see also *Lynn v. George* (2017) 15 Cal.App.5th 630, 636-637 [“Standing may arise from an attorney-client relationship between the moving party and targeted counsel or from a duty of confidentiality owed by the attorney to the moving party despite the absence of an attorney-client relationship’ [citations omitted]”; *Great Lakes, supra*, 186 Cal.App.4th at p. 1356 [standing may “arise[] from a breach of the duty of confidentiality owed to the complaining party, regardless of whether a lawyer-client relationship existed”].)

Standing may thus exist where the attorney and non-client moving party had “some sort of confidential or fiduciary relationship” that runs the risk of “the actual or potential disclosure of confidential information.” (*Dino v. Pelayo* (2006) 145 Cal.App.4th 347, 353 [no standing where movants

“concede[d] no attorney client or other fiduciary relationship existed between them and [attorney]”; see e.g., *Meza v. H. Muehlstein & Co., Inc.* (2009) 176 Cal.App.4th 969, 983 [standing for non-client movant where attorney had received privileged information from movant pursuant to a joint defense agreement].)

Standing may also exist where there is a close relationship between a client of the attorney sought to be disqualified and the non-client moving party such that the client and non-client movant should be treated as a single entity or as having shared confidences with one another. (See, e.g., *Acacia Patent Acquisition LLC v. Superior Court* (2015) 234 Cal.App.4th 1091, 1096 (*Acacia*) [client law firm and non-client corporation that previously hired that law firm]; *Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197, 1200-1201 [former client father and non-client daughter]; *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft* (1999) 69 Cal.App.4th 223, 248 [client corporate parent and non-client wholly owned subsidiary].)

Whether a confidential relationship exists is a question of fact. (*Dino v. Pelayo, supra*, 145 Cal.App.4th at p. 353.) The party seeking disqualification bears the burden to establish the attorney-client relationship or other “confidential nonclient relationship.” (*Lynn v. George, supra*, 15 Cal.App.5th at p. 638.)

### **C. Petitioners Have Not Established Standing**

It is undisputed petitioners never had an attorney-client relationship with Bird Marella. Petitioners also have submitted no evidence of any confidential or fiduciary relationship between themselves and Bird Marella. Nor have petitioners submitted evidence of any close relationship between themselves and the

Nurses. In fact, while Korff had not yet filed an answer at the time of the hearing on petitioners' motions to disqualify, Shari has denied any relationship with the Nurses. Accordingly, we hold petitioners lack standing to move for disqualification on the record presented because petitioners have not met their burden to put forth evidence to establish an attorney-client or other confidential relationship with Bird Marella, a legally cognizable expectation of confidentiality with Bird Marella arising from a close relationship with the Nurses (Bird Marella's client), or a realistic probability that confidential information obtained from the Nurses will be used to gain an unfair advantage and undermine the integrity of the judicial process. (*Lynn v. George*, *supra*, 15 Cal.App.5th 630, 636-638; see *Kennedy v. Eldridge*, *supra*, 201 Cal.App.4th at pp. 1207-1208.)

As a substitute for adducing evidence in support of their burden to establish standing, petitioners suggest they can rely on allegations in the Second Amended Complaint as purported judicial admissions by Herzer. It is true the complaint alleges petitioners "gave substantial assistance and encouragement" to the Nurses and "contemplated, initiated, and directed [the] invasion of Herzer's privacy" by the Nurses. Moreover, the complaint contains broad, conclusory allegations that petitioners and the Nurses were all "acting as the agent, servant, employee, partner, joint-venturer, or representative" of one another and that "each and all of [them] were the alter egos of one another, joint tortfeasors, and successors in interest such that each and all of [them] would be liable to Herzer." But these allegations do not constitute judicial admissions that may bind Herzer here. To begin with, a complaint's mere legal conclusions or "mixed factual-legal" conclusions, such as these in Herzer's Second



Amended Complaint, cannot be treated as binding judicial admissions on a plaintiff. (*Castillo v. Barerra* (2007) 146 Cal.App.4th 1317, 1324.) Moreover, to the extent any of Herzer’s allegations might be construed as factual admissions, petitioners must also agree to be bound by them in order for them to constitute binding judicial admissions. (*Barsegian v. Kessler & Kessler* (2013) 215 Cal.App.4th 446, 452.) Given Shari’s denial of any relationship with the Nurses, as well as no indication in the record petitioners would agree that, for example, they “directed” the Nurses and are “joint tortfeasors” as alleged, the allegations of the Second Amended Complaint do not assist petitioners in meeting their burden to establish standing.<sup>2</sup>

Petitioners also contend they have standing based on the fact that they may suffer injury “if confidential information obtained from the Nurses could be used to gain an unfair advantage over them in the present litigation.” This argument, however, conflates *any* injury or harm to petitioners with the “legally cognizable injury” that is required for petitioners to have standing. It may be that Bird Marella might use information it obtained from the Nurses against petitioners (e.g., to prove petitioners are liable to Herzer, either directly or derivatively), just as it could use information it has obtained from any other witness against petitioners. But injury or harm arising from use

---

<sup>2</sup> Relatedly, in their reply brief, petitioners assert they and the Nurses should be treated “as a single unity [*sic*] for conflict and disqualification analysis because the *claims* against Petitioners are based derivatively on the conduct of the Nurses.” (Italics added.) This, too, confuses reliance on mere allegations in the complaint with the burden to prove standing with actual evidence.

of information from the Nurses does not equate to injury resulting from a breach of confidentiality owed to petitioners. As noted above, petitioners have not demonstrated they have any sort of confidential or close relationship with either Bird Marella or the Nurses. Thus, petitioners have no “legally recognizable expectation of confidentiality” in any information between the Nurses and Bird Marella that would give rise to standing here. (*DCH Health, supra*, 95 Cal.App.4th at p. 832)

In this regard, *DCH Health, supra*, 95 Cal.App.4th 829 is instructive. There, a hospital foundation and several other plaintiffs sued a defendant, who was represented by attorney Randy Kramer. (*Id.* at p. 831.) Kramer was married to Ana Luna, a former member of the hospital foundation’s board of directors. (*Ibid.*) Several plaintiffs moved for Kramer’s disqualification. (*Id.* at p. 831.) Notably, the hospital foundation did not join the motion. (*Ibid.*) The court held the moving plaintiffs had no “legally recognizable expectation of confidentiality” and therefore lacked standing. (*Id.* at p. 832.) The court reasoned that the motion to disqualify Kramer “was based solely on confidential information allegedly imparted to Luna while she served as a director of the foundation,” and none of the plaintiffs asserted the existence of an attorney-client relationship with Kramer or “a confidential relationship between themselves and Luna” that would impose a duty of confidentiality on Luna to them. (*Id.* at p. 833.) By contrast, the court observed that, if the hospital foundation had moved to disqualify Kramer, it would have had standing because of the duty of confidentiality Luna owed to the hospital foundation. (*Id.* at p. 832.)

Here, Bird Marella owes a duty of confidentiality to its former clients, the Nurses. Like the hospital foundation in *DCH*

*Health*, *supra*, 95 Cal.4th 829, the Nurses would have had standing to seek Bird Marella’s disqualification.<sup>3</sup> But, like the moving plaintiffs in *DCH Health*, petitioners have not demonstrated any expectation of confidentiality vis-a-vis the attorneys they seek to disqualify or the Nurses. (See *id.* at p. 832.) Indeed, because petitioners deny any kind of conspiracy or principal-agent relationship with the Nurses, it necessarily follows that none of the information that Bird Marella gleaned from the Nurses is confidential *as to petitioners*.

Glossing over the crucial importance of the relationship between the non-client movant and either the attorney or former client, petitioners rely on language lifted from *Kennedy v. Eldridge*, *supra*, 201 Cal.App.4th 1197 to support their contention that any injury to them in the litigation (regardless of the source) should confer standing. In *Kennedy*, the court wrote: “[W]e conclude that where an attorney’s continued representation threatens an opposing litigant with cognizable injury or would undermine the integrity of the judicial process, the trial court may grant a motion for disqualification, regardless of whether a motion is brought by a present or former client of recused counsel.” (*Id.* at p. 1205.) Divorced from context, such language seemingly bolsters petitioners’ argument. But, in *Kennedy*, the court found standing based on the particular relationships between the non-client movant, the former client, and the disqualified attorney. Specifically, the movant was an ex-girlfriend, who sought to disqualify an attorney from representing that attorney’s son against movant in a custody

---

<sup>3</sup> The Nurses, however, have since waived their right to seek Bird Marella’s disqualification.

suit, because that attorney had previously represented the movant's father in a family law matter during which movant had provided declarations per the request of that attorney's firm. (*Id.* at pp. 1201-1202.) The movant had also previously worked for that attorney's firm. (*Id.* at p. 1202.) In holding the ex-girlfriend movant had standing as a non-client and ultimately affirming the grant of the disqualification motion, the court noted that the attorney almost certainly learned confidential facts, through his prior representation of the ex-girlfriend's father, about the ex-girlfriend's family situation that could be used against her in a custody dispute. (*Id.* at pp. 1205, 1207-1208.) The court further explained that, "[b]ecause of the close relationship between [the ex-girlfriend] and her father, the similarity between the two cases and the overlapping factual issues common to both, we also conclude that [the ex-girlfriend] and her father should be treated as a single unit for purposes of determining whether an ethical conflict exists." (*Id.* at p. 1208.)

Thus, despite the broad language in *Kennedy*, it was ultimately the attorney's possession of confidential information the non-client had shared confidentially,<sup>4</sup> as well as the close

---

<sup>4</sup> Petitioners also have not adduced evidence that any of *their* confidential or privileged information has been given to Bird Marella. Even in her letter requesting Bird Marella's withdrawal from the case, the Nurses' attorney did not say she had learned—or shared with Bird Marella's attorneys—any confidential information with respect to petitioners. Petitioners argue Bird Marella presumptively obtained confidential information by virtue of representing the Nurses, citing *Flatt v. Superior Court* (1994) 9 Cal.4th 275. That may very well be true, but the presumption simply means we would presume Bird Marella

relationship between the non-client and the attorney's former client, that justified disqualification. (See *Acacia*, *supra*, 234 Cal.App.4th at p. 1100 [observing *Kennedy v. Eldridge*'s "holding was tethered to messy interfamilial squabbles and was not based solely on the receipt of confidential information"].) Here, by contrast, the record contains no evidence of any relationship between petitioner and either Bird Marella or the Nurses such that standing due to cognizable injury should be conferred in accordance with *Kennedy*.<sup>5</sup>

Finally, recognizing this is not the law in California, petitioners cite various cases outside of our jurisdiction in which the courts held disqualification proper when the attorneys had a so-called "informational advantage" over their adversaries by

---

possesses confidential information as to its former clients, the Nurses. That presumption does not logically extend to petitioners, because they have not established the existence of any relationship with Bird Marella or the Nurses.

<sup>5</sup> Because petitioners have failed to make out any legally cognizable injury to them, we also do not find disqualification is necessary to address any purported undermining of the "integrity of the judicial process." Petitioners further assert Bird Marella's representation of Herzer will "undermine the integrity of the judicial process" because "[w]hen and if this case goes to trial, Bird Marella will have to examine and cross-examine its former clients." The explicit terms of the Nurses' agreement with Bird Marella, however, prohibit the firm from conducting such examination, and our decision is necessarily confined to the record before us, as opposed to Petitioners' speculation. If facts are uncovered later in this litigation that materially change the foundation of our analysis, further examination by the trial court of the issue of disqualification might be warranted.

virtue of a prior representation. (See, e.g., *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n* (Wis. 2011) 797 N.W.2d 789 (*Foley-Ciccantelli*) [condominium association could disqualify law firm from representing plaintiffs who sought to hold association liable for property manager's actions, where the law firm previously represented property manager in condominium-related matters]; *State Farm Mut. Auto. Ins. Co. v. K.A.W.* (Fla. 1991) 575 So.2d 630, 633 (*State Farm*) [insurer may disqualify attorney who previously represented its insured from representing the insured's family/passenger in action against the insured; the prior representation gives the family an "informational advantage" against the insurer, who must defend the insured's alleged negligence].)

We have found no reported decision in California in which a court has found standing based upon some "informational advantage" in the absence of a showing that the movant had an attorney-client relationship or other confidential or close relationship, discussed *ante*.<sup>6</sup> And while we acknowledge there may have been good reason to permit the disqualification motions in the particular cases cited by petitioners, we decline under the circumstances of this case to depart from our jurisdiction's precedent and carve out an exception on this record. As an initial matter, we should proceed with caution in matters of attorney

---

<sup>6</sup> Even in the cases cited by petitioners, there is some pre-existing and substantial relationship giving rise to the disqualification. (See, e.g., *Foley-Ciccantelli, supra*, 797 N.W.2d at p. 789 [condominium association and property manager for the condominium]; *State Farm, supra*, 575 So.2d at p. 630 [insurer and insured].) Here, the record indicates petitioners have no relationship.

disqualification in light of public policy favoring a party's right to choose its own counsel. (See *Dino v. Pelayo*, *supra*, 145 Cal.App.4th at p. 351; *Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 300 ["disqualification usually imposes a substantial hardship on the disqualified attorney's innocent client, who must bear the monetary and other costs of finding a replacement. A client deprived of the attorney of his choice suffers a particularly heavy penalty where . . . his attorney is highly skilled in the relevant area of the law"].) Here, in particular, we see no need to depart from that important policy consideration where petitioners disavow any relationship whatsoever with the attorneys they seek to disqualify or their former clients. In such circumstances, it is difficult to see how competing policy considerations that might justify disqualification—i.e., a client's right to confidentiality or the public's interest in the integrity of the proceedings<sup>7</sup>—come into

---

<sup>7</sup> Indeed, we are mindful that "motions to disqualify counsel often pose the very threat to the integrity of the judicial process that they purport to prevent. [Citation.] Such motions can be misused to harass opposing counsel [citation], to delay the litigation [citation], or to intimidate an adversary into accepting settlement on terms that would not otherwise be acceptable. [Citations.] In short, it is widely understood by judges that 'attorneys now commonly use disqualification motions for purely strategic purposes . . . .' [Citations.]" (*Gregori v. Bank of America*, *supra*, 207 Cal.App.3d at pp. 300-301.) Our adherence to the established rules for standing safeguard against such abuse. (*Great Lakes*, *supra*, 186 Cal.App.4th at p. 1358 ["[I]mposing a standing requirement for attorney disqualification motions protects against the strategic exploitation of the rules of

play here. (See *Dino v. Pelayo*, *supra*, 145 Cal.App.4th at p. 351.)

Accordingly, we hold petitioners lacked standing to bring their motions to disqualify Bird Marella as Herzer's attorneys.

#### **IV. DISPOSITION**

We deny the petition for writ of mandate and affirm the trial court's order denying petitioners' motions to disqualify Bird Marella.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KIN, J.\*

We concur:

BAKER, Acting P. J.

MOOR, J.

---

ethics and guards against improper use of disqualification as a litigation tactic"].)

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