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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

WINNIE WESHLER, as Trustee, etc., Plaintiff and Appellant, v. LINDA ROSENSWEIG, as Executor, etc., et al., Defendants and Appellants.	B287099 (Los Angeles County Super. Ct. Nos. BP138677, BP039256)

APPEALS from an order of the Superior Court of Los Angeles County, Lesley C. Green, Judge. Affirmed in part and reversed in part with directions.

Pettler & Miller and Mark A. Miller; Randall S. Rothschild for Plaintiff and Appellant.

Oldman, Cooley, Sallus, Birnberg, Coleman & Gold and David Coleman for Defendants and Appellants.

Lewis Brisbois Bisgaard & Smith, Kenneth C. Feldman, David D. Samani, and Allison A. Arabian for Defendant and Appellant Linda Rosensweig.

Winnie Weshler, as successor trustee of family trusts established by Robert and Betty Lee, brought a motion to disqualify two law firms—Oldman, Cooley, Sallus, Birnberg & Coleman, LLP (Oldman Cooley) and Lewis Brisbois Bisgaard & Smith LLP (Lewis Brisbois)—from representing interests adverse to the trusts. The trial court granted the motion to disqualify Oldman Cooley, but denied the motion to disqualify Lewis Brisbois.

As we discuss more fully below, we affirm the order as to Oldman Cooley, reverse it as to Lewis Brisbois, and order the trial court on remand to disqualify Lewis Brisbois from continued participation in this matter.

FACTUAL AND PROCEDURAL BACKGROUND

I.

Background

A. The Lee Trusts

The Lee Family Trust. Robert and Betty Lee established the Lee Family Trust (Family Trust) in 1976. Betty Lee died in 1979, and Robert Lee died in 1991. Upon Robert's death, the Family Trust was divided into two separate trusts for the benefit of Robert and Betty's sons, Ronald Lee and Steven Lee.[1]

When Ronald died in 2006, the assets of his one-half share were divided among his surviving children, Diana Rothschild,

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[1] Because many of the parties share the same last names, we sometimes refer to them by their first names, with no disrespect intended.

Michele Lee, and Robinne Zeliznat. Steven's share remained in trust until his death in 2014.

The 1977 Trust. Separately, Betty and Robert created the Robert and Betty Lee 1977 Trust (the 1977 Trust). The 1977 Trust was an irrevocable trust held for the benefit of Steven.

B. William Rosensweig's Appointment and Alleged Breaches of Fiduciary Duty

Until his death, William Rosensweig (William), an attorney, was the trustee of the Family Trust and the 1977 Trust (collectively, the trusts or the Lee trusts).

In 2013, William entered into an agreement to sell an interest in real property owned by the Family Trust. The sale price was $11 million, as memorialized in a promissory note. Under the terms of the note, the buyer was required to make interest-only payments to the Family Trust for 10 years. Interest for the first year was to be prepaid immediately in the amount of $660,000; thereafter, interest was to be paid in monthly installments of $55,000.

Steven Lee died in October 2014. Thereafter, between December 2014 and August 2015, William paid himself approximately $550,000 from the Family Trust, ostensibly as a trustee's fee for negotiating the sale of the real property.

C. The Oldman Cooley Firm's Representation of William

For many years, William was represented, both individually and in his capacity as trustee, by James Birnberg and David Coleman of Oldman Cooley. As relevant to this appeal, between November 2014 and August 2015, Oldman Cooley assisted William with various legal issues relating to distribution of the trust assets after Steven Lee's death. In this capacity, Oldman Cooley had privileged communications with

William regarding the administration of the Lee trusts. During approximately the same period of time, Oldman Cooley helped William and his wife draft their own estate plan, including by creating a family trust, and drafted a durable power of management for William's law practice.

D. The Breach of Trust Action

William died in August 2015. After his death, Weshler was appointed successor trustee of the Lee trusts.

In July 2016, Weshler filed petitions against Marilyn Rosensweig (Marilyn), trustee of William's family trust, and Linda Rosensweig (Linda), personal representative of William's estate (collectively, the Rosensweigs), alleging breach of trust by William in his management of the Lee trusts. Among other things, Weshler sought to recover from the Rosensweigs the $550,000 William paid himself from the Family Trust. Oldman Cooley appeared as counsel for Marilyn and Linda in their representative capacities, and Lewis Brisbois appeared for Linda with respect to the defense of claims that implicated William's law firm, Mathon & Rosensweig, P.C.

It appears undisputed that Oldman Cooley has turned over a copy of its "trust files" to Weshler, but has refused to turn over notes of meetings and telephone conferences between William and Oldman Cooley attorneys.

II.
Motion to Disqualify Counsel

In June 2017, Weshler moved to disqualify Oldman Cooley and Lewis Brisbois from representing the Rosensweigs in the breach of trust action. Weshler asserted that a party may seek to disqualify a former attorney from representing an adverse party if there is a "substantial relationship" between the former and

current representations. Here, Weshler said, Oldman Cooley had initially represented the former trustee, and then "switched sides and began representing clients directly adverse to the trustee of the exact same trusts on matters arising from their previous representation." Further, as the attorney for William individually and as trustee, Oldman Cooley had access to confidential information, including William's state of mind when he made the distributions at issue, and to confidential communications "regarding various legal maneuvers it directly participated in on behalf of the former trustee." Finally, Oldman Cooley attorneys might be material witnesses at trial. Thus, Weshler urged, the Oldman Cooley firm should be disqualified. Lewis Brisbois should also be disqualified because "[t]hey represent the same parties as [Oldman Cooley], jointly making court filings and propounding discovery on behalf of the same parties, and can be presumed to be 'working together' and sharing 'each other's, and their clients', confidential information.' "

The Rosensweigs opposed the motion to disqualify Oldman Cooley. They urged that Oldman Cooley had never represented Weshler, and thus Weshler lacked standing to seek the firm's disqualification. On the merits, the Rosensweigs urged that where an attorney's representation of opposing parties is successive, not simultaneous, disqualification is warranted only if the attorney learned something from the prior client that could be used against him in the subsequent litigation. In the present case, Oldman Cooley's and William's knowledge of private information was coextensive, and all privileged documents in Oldman Cooley's possession had already been turned over to Weshler. Thus, Oldman Cooley's continued participation in the

litigation did not threaten the attorney-client privilege. Finally, the Rosensweigs urged Weshler had waived any conflict by failing to raise it in a timely fashion.

Linda also opposed the motion to disqualify Lewis Brisbois. She urged that Lewis Brisbois never represented William; any confidentiality or privilege associated with the information in question had been waived by placing confidential information at issue through litigation; and Weshler waived the issue by failing to timely raise it.

The trial court granted the motion to disqualify Oldman Cooley, but denied the motion to disqualify Lewis Brisbois. It explained as follows.

First, the court concluded that Weshler had standing to bring the disqualification motion. Although it was undisputed that Weshler, individually, was not a former client of Oldman Cooley, pursuant to *Moeller v. Superior Court* (1997) 16 Cal.4th 1124, 1131 (*Moeller*), the powers of a trustee are not personal to any particular trustee, but rather are inherent in the office of trustee. Accordingly, Weshler had standing as the successor trustee of the Lee trusts to disqualify Oldman Cooley and Lewis Brisbois.

Next, on the merits, the court concluded that Oldman Cooley had conflicts of interest that required its disqualification. The court explained: "Oldman Cooley admit[s] that [it] represented William concurrently in his role as trustee and as an individual. Particularly where, as here, William was purportedly double dealing and breaching his fiduciary duties to the trust, the dual representation is untenable and places Oldman Cooley in a conflict situation which requires [its] disqualification. Indeed, Weshler contends that Oldman Cooley assisted William by

delaying providing information to beneficiaries which could have alerted them to his malfeasance."

Finally, the court said there was insufficient evidence of a basis to disqualify Lewis Brisbois. It said: "Lewis Brisbois never represented William as trustee. Indeed it never represented him in any capacity. Rather, it was hired by Linda as a representative of William's estate. . . . Weshler seeks to disqualify Lewis Brisbois solely on the ground that it has acted as co-counsel with Oldman Cooley and thus may have access to confidential information known to that firm. While this argument has some merit, in view of the policy considerations cited above in favor of allowing a party to choose its own counsel, the Court does not find this sufficient to disqualify Lewis Brisbois."

The Rosensweigs timely appealed from the order granting the motion to disqualify Oldman Cooley, and Weshler timely appealed from the order denying the motion to disqualify Lewis Brisbois.[2]

STANDARD OF REVIEW

"A trial court's decision to grant or deny a motion to disqualify counsel is generally reviewed for abuse of discretion. (*People v. Suff* (2014) 58 Cal.4th 1013, 1038; *In re Charlisse C.* (2008) 45 Cal.4th 145, 159 (*Charlisse C.*); *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999)

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[2] An order on a motion to disqualify counsel is directly appealable either as a denial of injunctive relief or as a collateral matter unrelated to the merits of the underlying litigation. (*Jarvis v. Jarvis* (2019) 33 Cal.App.5th 113, 128; *Lynn v. George* (2017) 15 Cal.App.5th 630, 633, fn. 1; *Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 300.)

20 Cal.4th 1135, 1143 (*SpeeDee Oil*).) 'As to disputed factual issues, a reviewing court's role is simply to determine whether substantial evidence supports the trial court's findings of fact . . . . As to the trial court's conclusions of law, however, review is de novo; a disposition that rests on an error of law constitutes an abuse of discretion.' (*Charlisse C.*, at p. 159; see *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711–712.) While the trial court's ' "application of the law to the facts is reversible only if arbitrary and capricious" ' (*Charlisse C.*, at p. 159), 'where there are no material disputed factual issues, the appellate court reviews the trial court's determination as a question of law.' (*SpeeDee Oil*, at p. 1144; accord, *California Self-Insurers' Security Fund v. Superior Court* (2018) 19 Cal.App.5th 1065, 1071; *Castaneda v. Superior Court* (2015) 237 Cal.App.4th 1434, 1443.)" (*O'Gara Coach Co., LLC v. Ra* (2019) 30 Cal.App.5th 1115, 1123–1124 (*O'Gara Coach*).)

APPEAL OF LINDA AND MARILYN ROSENSWEIG

In their appeal from the order disqualifying Oldman Cooley, the Rosensweigs urge there was never an attorney-client relationship between Weshler and Oldman Cooley, and thus Weshler had neither standing nor a substantive basis on which to seek Oldman Cooley's disqualification. Further, the Rosensweigs urge that disqualifying Oldman Cooley would not protect client confidences, and that Weshler sought Oldman Cooley's disqualification for an improper purpose.

Weshler contends she has standing to seek Oldman Cooley's disqualification because she stands in the shoes of the predecessor trustee. On the merits, she urges Oldman Cooley must be disqualified because it successively represented adverse

interests; its representation of the Rosensweigs makes likely a breach of the duty of confidentiality; Oldman Cooley's attorneys likely will be witnesses at trial; and substantial evidence supported the trial court's conclusion that the disqualification motion was not brought for an improper purpose.

As we discuss, we conclude that Weshler, in her capacity as successor trustee, stands in the shoes of the predecessor trustee. Thus, Oldman Cooley owes Weshler the duties owed a former client—namely, duties of confidentiality and loyalty. Because those duties are imperiled by Oldman Cooley's representation of the Rosensweigs in this action, the trial court did not abuse its discretion by concluding that Weshler had standing to bring the motion and by ordering Oldman Cooley's disqualification.

A. Legal Principles Governing Disqualification of Former Counsel

A trial court's authority 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, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.' [Citations.] Ultimately, disqualification motions involve a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility. [Citation.] The paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process." (*SpeeDee Oil*, *supra*, 20 Cal.4th at p. 1145; *Lynn v. George*, *supra,* 15 Cal.App.5th at p. 637, quoting *SpeeDee Oil*.)

An attorney's fiduciary obligations to current and former clients include twin duties of loyalty and confidentiality. " ' "[T]he effective functioning of the fiduciary relationship between attorney and client depends on the client's trust and confidence in counsel. [Citation.] The courts will protect clients' legitimate expectations of loyalty to preserve this essential basis for trust and security in the attorney-client relationship." ' " (*Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153, 1174.) Accordingly, even after severing a relationship with a client, an attorney " 'may not do anything which will injuriously affect his former client in any manner in which he formerly represented him nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship.' " (*O'Gara Coach*, *supra*, 30 Cal.App.5th at p. 1124; see also *Fremont Reorganizing Corp*., at p. 1174.)

The prohibitions against taking actions adverse to, and disclosing confidences of, former clients are set out in governing case law and rule 1.9(a) of the California Rules of Professional Conduct (formerly, rule 3-310(E)). Rule 1.9(a) provides: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent."

Rule 1.9(a) thus requires disqualification if four things are true: (1) the lawyer "formerly represented" an individual in a matter; (2) the former matter is the same or "substantially related" to a current matter; (3) the interests of the former and current clients are "materially adverse"; and (4) the former client

did not give "informed written consent" to the current representation.

There is no dispute in the present case that the interests of Weshler and the Rosensweigs are materially adverse in this litigation, or that Weshler has not consented to Oldman Cooley's representation of the Rosensweigs. What *is* disputed is whether Oldman Cooley "formerly represented" Weshler within the meaning of this rule, and, if so, whether the former representation is "substantially related" to Oldman Cooley's current representation of the Rosensweigs. We turn now to these issues.

B. In Her Capacity as Trustee, Weshler Has a Former-Client Relationship with Oldman Cooley; Thus, Weshler Has Standing to Seek Oldman Cooley's Disqualification

The Rosensweigs urge that Oldman Cooley owes no duties to Weshler because Weshler was never Oldman Cooley's client. They urge that Oldman Cooley's attorney-client relationship was with William, *not* with the "office of trustee," and thus although Weshler succeeded William as trustee of the Lee trusts, she did not succeed to William's attorney-client relationship with Oldman Cooley.

As we discuss, the Rosensweigs fundamentally misunderstand our Supreme Court's decisions concerning the duties owed by attorneys representing trustees. In two separate decisions, our Supreme Court has held that a new trustee succeeds to the rights and duties of her predecessors, including to the attorney-client relationships the predecessor, in his or her capacity as trustee, had with counsel. As applied to the present case, therefore, these cases compel the conclusion that Weshler

has a former-client relationship with Oldman Cooley and, as such, can seek the firm's disqualification in this case.

1. *Moeller v. Superior Court*

In *Moeller, supra,* 16 Cal.4th 1124, our Supreme Court considered whether a successor trustee could obtain documents reflecting attorney-client privileged communications between the predecessor trustee and the predecessor's attorney on matters of trust administration. There, after resigning as trustee, the predecessor trustee sought to recover various of its expenses from the trust. The successor trustee objected and demanded production of documents related to the predecessor's administration of the trust, including documents reflecting legal services provided to the predecessor by its attorney. The predecessor refused to produce the documents, asserting they were protected by the attorney-client privilege and therefore were not discoverable. (*Id.* at pp. 1127–1128.)

The Supreme Court held that the power to assert the attorney-client privilege with respect to communications between the predecessor and its attorney on matters of trust administration belonged to the successor trustee—*not* to the predecessor trustee—and thus the successor was entitled to discovery of the attorney-client privileged documents. The court explained that the powers of a trustee are not personal to any particular trustee but, rather, are inherent in the office of trustee. (*Moeller*, *supra*, 16 Cal.App.4th at p. 1131.) The power to assert the attorney-client privilege follows from the trustee's power to hire an attorney in order to obtain advice regarding trust property. (*Ibid.*) Therefore, "when a successor trustee takes office it assumes all of the powers of trustee, including the power to assert the privilege with respect to confidential

communications between a predecessor trustee and an attorney on matters of trust administration." (*Ibid.*)

The court explained that in performing their day-to-day duties, trustees regularly have confidential communications with their attorneys about trust business, such as potential acquisitions and dispositions of property, and lawsuits involving trust property. At any given time, therefore, many privileged communications concerning pending trust transactions may exist. To allow for effective continuous administration of a trust, "the right of access to these communications and the privilege to prevent their disclosure must belong to the person *presently acting as trustee*, because that person has the duty to conduct all pending trust business. Therefore, for a trust to continue to operate smoothly when a change in trustee occurs, the power to assert the attorney-client privilege must pass from the predecessor trustee to the successor." (*Moeller*, *supra*, 16 Cal.4th at p. 1133, italics added.)

The court acknowledged that under the rule it adopted, a trustee would have to consider the possibility that its confidential communications with an attorney about trust administration might someday be disclosed to a successor trustee. In light of the nature of a trust and a trustee's duties, the court said, this was not unfair: "A trust is a fiduciary relationship with respect to property in which the person holding legal title to the property—the trustee—has an equitable obligation to manage the property *for the benefit of another*—the beneficiary. [Citations.] A trustee must always act *solely* in the beneficiaries' interest. [Citations.] If the trustee violates *any* duty owed to the beneficiaries, the trustee is liable for breach of trust. ([Prob. Code,] § 16400.) . . . The office of trustee is thus by nature an onerous one, and the

proper discharge of its duties necessitates great circumspection. Liability to beneficiaries for mismanagement of trust assets is merely one of the burdens . . . trustees take on—for, presumably, an appropriate fee." (*Moeller*, *supra*, 16 Cal.4th at pp. 1133–1134, italics in original.)

The court noted, finally, that the successor trustee inherits the power to assert the privilege "only as to those confidential communications that occurred when the predecessor, *in its fiduciary capacity*, sought the attorney's advice *for guidance in administering the trust*. If a predecessor trustee seeks legal advice in its personal capacity out of a genuine concern for possible future charges of breach of fiduciary duty, the predecessor may be able to avoid disclosing the advice to a successor trustee by hiring a separate lawyer and paying for the advice out of its personal funds. [Citations.] . . . [¶] . . . [T]o require a trustee to distinguish, scrupulously and painstakingly, his or her own interests from those of the beneficiaries is entirely consistent with the purpose of a trust." (*Moeller*, *supra*, 16 Cal.4th at pp. 1134–1135, italics in original.)

2. *Borissoff v. Taylor & Faust*

The Supreme Court considered a related question in *Borissoff v. Taylor & Faust* (2004) 33 Cal.4th 523 (*Borissoff*)—namely, whether an estate's successor fiduciary had standing to bring a malpractice action against attorneys retained by the predecessor fiduciary to provide legal advice for the estate's benefit. The attorneys contended they had a duty, answerable in malpractice, only to the person who retained them and with whom they stood in privity of contract. They thus urged that when a fiduciary hires an attorney for guidance in administering

a trust, the fiduciary alone, in his or her capacity as fiduciary, is the attorney's client. (*Id.* at p. 529.)

The Supreme Court held that the attorneys had a duty not only to the predecessor fiduciary, but to the successor fiduciary as well. The court explained that the Probate Code "provides that a 'successor personal representative has the powers and duties in respect to the continued administration that the former personal representative would have had' (§ 8524, subd. (c)), including the power to '[c]ommence and maintain actions and proceedings for the benefit of the estate' (§ 9820, subd. (a))." (*Borissoff*, *supra*, 33 Cal.4th at p. 530.) Reading these provisions together, the court said, "the following two conclusions seem inescapable: First, a fiduciary who hires an attorney with estate funds to provide tax assistance to the estate (§ 10801, subd. (b)) may, if the attorney commits malpractice harming the estate, commence an action for the benefit of the estate to recover the loss (§ 9820, subd. (a)). Second, if the fiduciary who hired the attorney is replaced, the successor acquires the same powers the predecessor had in respect to trust administration (§ 8524, subd. (c)), including the power to sue for malpractice." (*Ibid.*)

In so concluding, the court rejected the attorneys' contention that a rule permitting a successor fiduciary to sue the predecessor's attorney for malpractice was unworkable because it created a potential conflict of interest if the attorney had advised the predecessor in both fiduciary and personal capacities. The court explained: "The problem defendants identify is not the result of the proposed rule, which would only permit a successor fiduciary to sue an attorney whose malpractice has harmed the estate. Instead, the problem arises when, and because, an attorney undertakes to represent a fiduciary in the latter's

personal and fiduciary capacities simultaneously, when that entails a conflict of interest. The situation is analogous to that presented when a corporation's officer seeks personal advice from corporate counsel. 'The attorney for a corporation represents it, its stockholders and its officers in their *representative* capacity. He in nowise represents the officers *personally*.' [Citation.] Thus, for example, corporate counsel may not advise an embezzling officer how to avoid personal liability to the corporation without thereby acquiring a conflict of interest with the corporation. Similarly, an attorney retained to advise a fiduciary in his or her official capacity, who is asked by the fiduciary for assistance in avoiding detection of and liability for misappropriation, faces a potential conflict of interest and may have no choice but to withdraw . . . ." (*Borissoff, supra*, 33 Cal.4th pp. 533–534, italics in original.)

3. *Moeller* and *Borissoff* Compel the Conclusion that Weshler Has Standing to Seek Oldman Cooley's Disqualification

As we have discussed, both *Moeller* and *Borissoff* stand for the proposition that when a successor trustee assumes office, he or she steps into the attorney-client relationship between the prior trustee, *in his or her capacity as trustee*, and the prior trustee's former counsel. Inherent in the attorney-client relationship is the client's right to seek to disqualify current or former counsel from representing an adverse party in a related matter. (E.g., *Lynn v. George, supra,* 15 Cal.App.5th at p. 636 [standing to seek disqualification arises out of present or former attorney-client relationship]; *Conservatorship of Lee C.* (2017) 18 Cal.App.5th 1072, 1083 [same].) Accordingly, the power granted a successor trustee necessarily includes the power to

seek to disqualify an attorney retained by the predecessor trustee to advise him or her on matters of trust administration.

It is undisputed in the present case that William, in his capacity as trustee, retained Oldman Cooley to advise him on administering the Lee trusts. As a matter of law, therefore, when Weshler succeeded to the office of trustee of the Lee trusts, she inherited, among other things, an attorney-client relationship with Oldman Cooley. She therefore has standing to disqualify Oldman Cooley from representing parties whose interests are materially adverse to hers.[3]

In urging that Weshler lacks standing to seek Oldman Cooley's disqualification, the Rosensweigs cite to a passage in the *Moeller* opinion that they urge stands for the proposition that Oldman Cooley represented *William*, not the "office of trustee." That passage says: "[The successor trustee] . . . argues the attorney-client privilege 'vest[s] in the office [of the trustee] and not in any particular individual or entity who at one time was the trustee . . . .' [The former trustee] interprets [the successor trustee's] argument to be that 'the "office of trustee" is the client when a trustee consults legal counsel about trust administration.' If this were [the successor trustee's] argument, it would fail simply as a matter of linguistics, for only a 'person' can be a 'client' (Evid. Code, § 951), and the definition of 'person' does not include 'office of trustee.' (See Evid. Code, § 175.) [¶] We do not, however, interpret [the successor trustee's] argument as [the

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[3] Because Weshler succeeded to an attorney-client relationship with Oldman Cooley when she was named trustee of the Lee trusts, it is irrelevant that, as the Rosensweigs repeatedly assert, Weshler "neither hired Oldman Cooley nor imparted any confidential information to it."

predecessor trustee] does. Rather, we understand [the successor trustee] to argue that the power to control the privilege belongs *to the current occupant of the office of trustee*, not to the office itself, so that the 'client' for purposes of the attorney-client privilege is the current trustee." (*Moeller*, *supra*, 16 Cal.4th at p. 1131 & fn. 2, italics in original.)

The Rosensweigs rely repeatedly on this passage to urge that Oldman Cooley did not represent the "office of trustee" and, therefore, could not have succeeded to an attorney-client relationship with Weshler. Their contention is based on a fundamental misunderstanding of the *Moeller* decision. While *Moeller* said that counsel could not represent the "office of trustee" (a nonperson), it held that counsel *could* represent the trustee "*qua* trustee" (16 Cal.4th at p. 1129), such that if a new individual succeeded to the office of trustee, the power to control the attorney-client privilege belonged to the current occupant of the office, not to the former occupant. Stated differently, although the attorney represented the *trustee*, not the *office of trustee*, the right to control the attorney-client relationship was "not personal to any particular trustee but, rather, [was] inherent in the office of trustee." (*Moeller*, *supra*, 16 Cal.4th at p. 1131.) As relevant to the present case, therefore, because Oldman Cooley had an attorney-client relationship with William in his capacity as trustee, Weshler, as a matter of law, succeeded to the rights inherent in that relationship when she assumed the office of trustee—including the rights of a former client to insist that counsel honor its duties of loyalty and confidentiality. Accordingly, Weshler unquestionably had standing to bring the present motion to disqualify.

C. The Prior and Current Representations Are "Substantially Related"

As we have said, a client seeking to disqualify former counsel must demonstrate that the former matter in which the attorney represented the client is "substantially related" to the current matter. A substantial relationship exists between prior and current representations " ' "whenever the 'subjects' of the prior and the current representations are linked in some rational manner. [Citation.]" [Citation.]' [Citation.] 'Thus, successive representations will be "substantially related" when the evidence before the trial court supports a rational conclusion that information material to the evaluation, prosecution, settlement or accomplishment of the former representation given its factual and legal issues is also material to the evaluation, prosecution, settlement or accomplishment of the current representation given its factual and legal issues.' [Citation.]" (*Fiduciary Trust Internat. of California v. Superior Court* (2013) 218 Cal.App.4th 465, 480 (*Fiduciary Trust*).)

The evidence produced in the trial court demonstrates that Oldman Cooley represented William, in his capacity as trustee, at the time William transferred $550,000 from the trust to himself. The propriety of that transfer, among other things, is at issue in this litigation. Thus, the subject of Oldman Cooley's representation of William, and the subject of the firm's current representation of the Rosensweigs, are not only substantially related, but involve the identical subject.

The Rosensweigs do not dispute that Oldman Cooley's prior representation of William was substantially related to the current dispute. They urge, however, that their communications with their own client relating to the administration of the trust

are not "confidential" for purposes of this action, and thus disqualifying Oldman Cooley will not accomplish the goal of the successive representation prohibition, which they characterize as protecting client confidences.[4]

The Rosensweigs's contention has at least two fundamental flaws. First, our Supreme Court has held that "[w]here the requisite substantial relationship between the subjects of the prior and the current representations can be demonstrated, access to confidential information by the attorney in the course of the first representation (relevant, by definition, to the second representation) is *presumed*. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283; *Kim v. The True Church Members of Holy Hill Community Church* (2015) 236 Cal.App.4th 1435, 1454 (*Kim*).) Thus, "if the substantial relationship test is satisfied by the former client, ' ". . . the discussion should ordinarily end. The rights and interests of the former client will prevail. *Conflict would be presumed*; disqualification will be ordered. . . ." ' " (*In re Marriage of Zimmerman* (1993) 16 Cal.App.4th 556, 563, italics added; see also *Henriksen v. Great American Savings & Loan* (1992) 11 Cal.App.4th 109, 114 ["In order to seek disqualification, the former client need not establish that the attorney actually possesses confidential information. It is enough to show that there was a 'substantial relationship' between the former and the

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[4] The Rosensweigs contend: "Oldman Cooley only could have privileged trust communications that were known, or could have been known, by William. An attorney has a duty to inform his client of all relevant facts. [Citations.] Therefore, the lawyer cannot learn something relevant about the trust which cannot be imparted to the trustee. The direct corollary of this statement is that the lawyer's factual knowledge of the case, in theory, is never greater than the trustee's knowledge."

current representation. If the former client establishes the existence of a substantial relationship between the two representations the court will *conclusively presume* that the attorney possesses confidential information adverse to the former client and order disqualification." (Italics added.])

As applied here, these cases suggest that to prevail, Weshler need not demonstrate that Oldman Cooley actually possessed confidential information—rather, Oldman Cooley's possession of confidential information is *presumed* if its prior representation of the trustee and current representation of the Rosensweigs are substantially related. Here, they unquestionably are, and thus we are required to presume that Oldman Cooley possesses confidential information.

Second, even if Oldman Cooley's representation of the Rosensweigs did not put client confidences at risk, its disqualification nonetheless would be required because its representation of an interest contrary to a former client runs afoul of the duty of loyalty.[5] "Although the California Supreme

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[5] The Rosensweigs contend that our conclusion that Oldman Cooley owes Weshler a duty of loyalty creates an intractable conflict with the duty of loyalty Oldman Cooley owes Linda and Marilyn. They suggest: "Oldman Cooley would breach its ethical duties if it were to show any loyalty to Weshler that would imperil Linda or Marilyn. [Unless Linda and Marilyn waive the duty of loyalty], there cannot be any attorney-client relationship between Oldman Cooley and Weshler . . . . Oldman Cooley cannot be on both sides of this litigation; it has to be on Linda's and Marilyn's side."

To paraphrase *Borissoff*, the problem the Rosensweigs identify "is not the result of the proposed rule." (*Borissoff*, *supra*, 33 Cal.4th at p. 533.) Instead, the problem arises "when, and

Court has emphasized the duty of maintaining client confidences in successive representation cases (see, e.g., *Flatt*, *supra*, 9 Cal.4th at p. 283), the duty of loyalty also plays a role, as recognized in the long-standing rule that ' "an attorney is forbidden to do *either* of two things after severing his relationship with a former client. He may not do anything which will injuriously affect his former client in any manner in which he formerly represented him *nor* may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship." ' (*People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150, 155–156, quoting *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 573–574.)" (*Kim*, *supra*, 236 Cal.App.4th at p. 1456, second italics added.) In short, the ethical bar against acting in a manner adverse to a former client's interests implicates "not just the duty to maintain client confidences, but *the duty of loyalty,*" as well. (*Ibid*., italics added.)

The Court of Appeal relied on the duty of loyalty owed a former client to order attorney disqualification in *Fiduciary Trust*, *supra*, 218 Cal.App.4th 465, concluding that even if a lawyer's representation of an interest adverse to a former client did not endanger client confidences (and thus did not violate the lawyer's duty of confidentiality), it nonetheless was an impermissible violation of the lawyer's duty of loyalty. There, a law firm drafted wills and trusts for a husband and wife. After

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because, an attorney undertakes to represent a fiduciary in the latter's personal and fiduciary capacities simultaneously, when that entails a conflict of interest. . . . [T]he law 'requires a trustee to distinguish, scrupulously and painstakingly, his or her own interests from those of the beneficiaries . . . .' [Citation.] *Obviously, an attorney representing a fiduciary must observe the same distinction*." (*Borissoff*, pp. 533–534, italics added.)

the death of both spouses, a dispute arose between the wife's personal representative and the trustees of the marital trust (represented by the law firm that previously represented husband and wife) regarding whether the terms of the husband's will required the marital trust to pay estate and inheritance taxes due on the wife's assets. The wife's personal representative moved to disqualify the law firm, urging that the firm's prior representation of the wife precluded it from representing the trustees. The trial court denied the request to disqualify, and the wife's representative filed a petition for writ of mandate. (*Id.* at p. 470.)

The Court of Appeal granted the petition and ordered the trial court to disqualify the law firm, concluding that although any attorney-client communications would not have been privileged as between the husband and wife, who were joint clients of the firm, the firm's duty of loyalty to the wife as a former client precluded its representation of an interest adverse to hers. The court relied heavily on *Western Continental Operating Co. v. Natural Gas Corp*. (1989) 212 Cal.App.3d 752, in which the court had noted that the rule against representing conflicting interests was broader than the attorney-client privilege because " ' " ' "[t]he duty not to represent conflicting interests . . . is an outgrowth of the attorney-client relationship itself, which is confidential, or fiduciary, in a broader sense. Not only do clients at times disclose confidential information to their attorneys; they also repose confidence in them. The privilege is bottomed only on the first of these attributes, the conflicting-interests rule, on both." ' " ' " (*Fiduciary Trust*, *supra*, 218 Cal.App.4th 465, 485.)

The *Fiduciary Trust* court agreed: "In explaining the standard for evaluating whether representation adverse to the interests of a former client is prohibited, the California Supreme Court has 'broadly . . . explained "an attorney is forbidden to do either of two things after severing his relationship with a former client. He may not do anything which will injuriously affect his former client in any matter in which he formerly represented him nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship." [Citation.] The prohibition is in the disjunctive. An attorney "may not use information *or* 'do anything which will injuriously affect his [or her] former client.' " [Citation.]' [Citations.] In this case, [the attorney's] conduct falls squarely within the prohibition. Although the firm previously represented both [wife] and [husband] in the estate planning matters, it is now asserting (on behalf of [husband's] representatives) that the documents it prepared during the joint representation should be interpreted in a manner that would substantially reduce the value of [wife's] estate (or her trust), thereby harming her interests.

"The California Supreme Court has . . . repeatedly held that the disqualification rules are not merely intended to protect client confidences or other 'interests of the parties'; rather, '[t]he paramount concern . . . [is] to preserve public trust in the scrupulous administration of justice and the integrity of the bar.' [Citation.] In light of these significant public interests, we do not agree that matters of disqualification should be determined solely by reference to [rules governing joint representation]." (*Fiduciary Trust*, *supra*, 218 Cal.App.4th at pp. 485–486.)

The present case is analogous. As counsel for the Rosensweigs, Oldman Cooley will necessarily take the position in

this action that William's transfer of $550,000 from the trust to himself was not a breach of duty. That position is directly contrary to that of the trustee and, if successful, will substantially reduce the value of the trust. Because Oldman Cooley's representation of the Rosensweigs therefore requires it to advocate a position injurious to the trustee, it necessarily violates the duty of loyalty the firm owes a former client and, as such, requires the firm's disqualification in this action.

D. The Rosensweigs's Remaining Contentions Are Without Merit

Notwithstanding the foregoing, the Rosensweigs contend that requiring Oldman Cooley's disqualification is unjust because it "presumes [William's] guilt." According to the Rosensweigs, "[t]he former trustee is not betraying the 'office of trustee' if the charges are false. Likewise, there is no conflict of interest between the personal and fiduciary interests of the trustee if the fiduciary is wrongly accused." We do not agree. There is no dispute that William transferred $550,000 from the trust to his own accounts; what is at issue is whether he did so lawfully. If he did, his estate is entitled to keep the $550,000; if not, his estate will be compelled to return it. The interests of the trust and the interests of the Rosensweigs, therefore, are fundamentally at odds. Under these circumstances, disqualification does not "presume the guilt or liability of the accused"—it merely ensures that the parties' competing interests are fairly represented by counsel whose loyalties are not divided.

The Rosensweigs next contend that disqualifying Oldman Cooley will do nothing to protect client confidences because, as the client, William " ' still has the information and may pass it on to new counsel, leaving the adversary in the same position.' " Not

so. As a factual matter, because William is deceased, he cannot pass on confidential information to new counsel. Under these circumstances, disqualifying Oldman Cooley will have real teeth—namely, it will protect the attorney-client privilege by preventing the sharing of confidential information with the trustee's litigation adversaries.

Next, the Rosensweigs cite *Ontiveros v. Constable* (2016) 245 Cal.App.4th 686, 700, for the proposition that only the duty of confidentiality, *not* the duty of loyalty, is implicated in a successive representation context. Whatever the merits of this conclusion in the context of a dispute between shareholders of a closely held corporation, we decline to apply it in the present dispute between a predecessor and successor trustee. As we have said, under Supreme Court precedent, an attorney " ' "is forbidden to do either of *two things* after severing his relationship with a former client. He may not do anything which will injuriously affect his former client in any matter in which he formerly represented him nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship." [Citation.] *The prohibition is in the disjunctive*. An attorney "may not use information *or* 'do anything which will injuriously affect his [or her] former client.' " [Citation.]' (*City National Bank v. Adams* (2002) 96 Cal.App.4th 315, 323–324, fn. omitted, quoting & citing *Wutchumna Water Co. v. Bailey*[, *supra,*] 216 Cal. 564, 573–574 and *People ex rel. Deukmejian v. Brown*[, *supra,*] 29 Cal.3d 150, 156.)" (*Fiduciary Trust*, *supra*, 218 Cal.App.4th at p. 485, first and second italics added.) This dual prohibition is consistent with the current version of the Rules of Professional Conduct, which prohibit an attorney from representing a person with interests materially

adverse to the interests of a former client in a substantially related matter, *without regard to* the attorney's acquisition of confidential information. (See Rules Prof. Conduct, rule 1.9(a).) Accordingly, because Oldman Cooley previously represented the trustee as trustee, and because the Rosensweigs are now adverse to the trustee in this litigation, Oldman Cooley's representation of the Rosensweigs is inconsistent with its duty to Weshler as a former client.

The Rosensweigs urge, finally, that the disqualification motion should not have been granted because "[t]he record in this matter shows that Weshler's motions to disqualify were brought *only* for an improper purpose." In support, the Rosensweigs do not cite any authority for the proposition that a motion may be denied if the moving party seeks disqualification for an improper reason, nor do they cite any evidence suggesting Weshler's motives were suspect. We therefore do not address the merits of this contention. (E.g., *Consumer Advocacy Group, Inc. v. ExxonMobil Corp.* (2008) 168 Cal.App.4th 675, 694 [if appellate brief does not cite legal authority on each point made, the court may " ' " 'pass it without consideration' " ' "].)

For all of the foregoing reasons, we conclude that the trial court did not abuse its discretion in granting Weshler's motion to disqualify Oldman Cooley as counsel for the Rosensweigs, and we thus affirm this aspect of the court's disqualification order.

APPEAL OF WINNIE WESHLER,
AS TRUSTEE OF THE LEE TRUSTS

Weshler appeals from the trial court's order allowing Lewis Brisbois to remain counsel of record for Linda, as personal representative of William's estate. Weshler contends that the trial court erred as a matter of law because "[t]he Oldman Cooley

lawyers' conflicts (including their breaches of their duties of confidentiality and loyalty, the attorney-client privilege, and their violation of the prohibition against representing conflicting interests), also taint co-counsel Lewis Brisbois under the imputed knowledge doctrine." For the reasons that follow, we agree.

It is undisputed that Lewis Brisbois never represented William or Weshler, and thus the duties of loyalty and confidentiality owed former clients are not *directly* implicated. Under principles of *vicarious* disqualification, however, a conflict of interest may be imputed to other attorneys with whom the disqualified attorney associated if confidential information was, or is likely to have been, shared. (*Pound v. DeMera DeMera Cameron* (2005) 135 Cal.App.4th 70 (*Pound*); *Beltran v. Avon Products, Inc.* (C.D. Cal. 2012) 867 F.Supp.2d 1068, 1083; *Advanced Messaging Technologies, Inc. v. Easylink Services Intl. Corp.* (C.D. Cal. 2012) 913 F.Supp.2d 900, 910.)

The court discussed vicarious disqualification in *Pound*. There, the plaintiffs were represented by Attorney Jones, and the defendants were represented by Attorney Smith. On behalf of the defendants, Smith met with a third attorney, Bradley, for about an hour, during which time Smith "discussed the case in specific terms, including issues, personalities, vulnerabilities, and other topics properly described as attorney work product." (*Id.* at p. 74.) Ultimately, however, Smith did not retain Bradley. Three years later, plaintiff's attorney, Jones, consulted with Bradley on a couple of occasions. Bradley asserted that he could not recall any information he might have received from Smith, and therefore he could not, and had not, shared any such information with Jones. (*Ibid.*)

The Court of Appeal characterized the case as one of "successive" representation, in which Bradley entered an attorney-client relationship with the defendants when he met with Smith, and subsequently with the plaintiffs when he met with Jones. (*Pound, supra*, 135 Cal.App.4th at p. 76.) Because the two actions were substantially related, Bradley's disqualification was mandatory. Further, Bradley was *presumed* to have shared the defendants' confidential information with Jones during their cocounsel relationship, and thus Jones's disqualification was also required. (*Id.* at p. 78.) The court explained: "The need to maintain client confidences, as well as our obligation to maintain public confidence in the legal profession and the judiciary, would be defeated if we permitted Jones's continued representation of plaintiffs after his having hired Bradley to assist in a case where Bradley previously represented defendants and, in the course of this representation, obtained confidential information. The distinction between hiring Bradley as an associate or partner, on the one hand, and associating him as counsel, on the other hand, does not change the need to protect defendants' confidences. The only effective method to protect defendants' confidences from the possibility of inadvertent disclosure is also to disqualify Jones." (*Ibid.*)

Weshler urges that the present case is analogous to *Pound*, and thus Lewis Brisbois must be disqualified because of its association with Oldman Cooley. We agree. Oldman Cooley is presumed to possess confidential information as to which Weshler holds the attorney-client privilege. Oldman Cooley and Lewis Brisbois represent the same party (Linda), and by Oldman Cooley's own admission, the two firms have "been working closely" together to defend this action. Thus, under the principles

articulated in *Pound*, Lewis Brisbois is presumed to have confidential information from Oldman Cooley—a presumption that Lewis Brisbois conceded at oral argument it had not rebutted. As in *Pound*, therefore, Lewis Brisbois must be disqualified as a result of its association with Oldman Cooley.

Linda contends that Lewis Brisbois's possession of confidential information is not disqualifying because, as William's personal representative, she "stands in the shoes of her father as a matter of law." This is true only in part. While Linda, as William's personal representative, properly holds the attorney-client privilege as to *William's* confidential information, she can have no claim through William to the *trust's* confidential information. That privilege, as we have said, is held by Weshler. Accordingly, since William cannot claim the attorney-client privilege as to the trust's confidential information, Linda, as his personal representative, can have no right to do so.

DISPOSITION

We affirm the attorney disqualification order as to Oldman Cooley and reverse it as to Lewis Brisbois. On remand, we direct the trial court to enter a new and different order disqualifying Lewis Brisbois. Weshler is awarded her appellate costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

EGERTON, J.

HANASONO, J.*

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