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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JAMES E. MOORE,

Plaintiff and Appellant,

v.

EDWARD P. HAYES, individually
and as Personal Representative,
etc.,

Defendant and Respondent;

JAMES P. GRIFFITH,

Objector and Appellant.

B283112

(Los Angeles County
Super. Ct. No. BC610221)

APPEAL from order of the Superior Court of Los
Angeles County, Gail Ruderman Feuer, Judge. Affirmed.

Law Offices of James P. Griffith and James P. Griffith,
in pro. per.

Law Offices of James P. Griffith and James P. Griffith,
for Plaintiff and Appellant.

Law Offices of David M. Sloan and David M. Sloan, for
Defendant and Respondent.

Plaintiff and appellant James E. Moore appeals the trial court's order disqualifying his attorney, objector and appellant James P. Griffith. In his capacity as personal representative of the estate of Barbara Jean Hayes (Barbara), defendant and respondent Edward P. Hayes (Hayes) moved for Griffith's disqualification based on his prior representation of Barbara with respect to issues raised in the underlying litigation against her estate.

Appellants elected to file an appendix under California Rules of Court rule 8.124 rather than reporter's transcripts of the disqualification hearing or a suitable substitute. We ordered briefing on the issue of whether their failure to provide a reporter's transcript or a suitable substitute warrants affirmance based on the inadequacy of the record. Appellants assert that the record on appeal is adequate for review, and contend that the trial court erred in granting the motion for disqualification.

We affirm on the basis that the record is inadequate to establish reversible error. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295–1296 (*Maria P.*)). Even if we deemed the appendix adequate for our review, however, we would

conclude that the trial court did not abuse its discretion on the record before us.

FACTS AND PROCEDURAL HISTORY

The Underlying Litigation

On February 16, 2016, Moore sued Hayes as an individual, as co-trustee of a revocable trust established in 1996 (the 1996 trust), and as the personal representative of Barbara's estate. He alleged breach of fiduciary duty, breach of oral contract, and elder financial abuse (Welf. & Inst. Code, § 15657.5).¹

The complaint alleges that in 1994, Moore, Barbara, and Hayes entered into an oral agreement to purchase, improve, and sell a property, and split the profits (the joint venture agreement).² Per the joint venture agreement, Moore would find the property, which Barbara and Hayes (collectively referred to as the Hayeses) would purchase. Moore would improve the property for below-market compensation, and then the three would sell the property and divide the profits equally. Moore agreed not to have his

¹ Moore later dismissed the elder financial abuse cause of action as to Barbara's estate.

² Barbara and Hayes were married in 1988. Moore, who was a close friend of Barbara's in high school, developed a friendship with Hayes as well.

name on the title to the property in return for Barbara and Hayes's promise that Barbara and Hayes would hold title to the property in a trust they had established in 1993 (the 1993 trust). Barbara and Hayes were co-trustees of the 1993 trust, which named Moore as sole residuary beneficiary.

Also in 1994, Barbara and Hayes purchased a property located at 4162 Sea View Drive in Los Angeles (Sea View). They took title of Sea View as co-trustees of the 1993 trust. Moore fulfilled his obligations under the joint venture agreement, designing and building a house on Sea View for de minimis compensation.

In 1996, Barbara and Hayes executed a second revocable joint trust that named Hayes's children from a prior marriage as residuary beneficiaries (the 1996 trust).

The house on Sea View was completed in 1999. It was placed on the market shortly thereafter, but did not sell. Moore and the Hayeses agreed to rent the house out until the market improved. The Hayeses would collect rents and pay taxes and other expenses, and Moore would manage the property.

In 2002, the Hayeses executed an amendment to the 1993 trust, confirming the trust's ownership of Sea View and establishing Moore's status as primary residuary beneficiary, with the 1996 trust as the secondary residuary beneficiary.

In 2003, Barbara, Hayes, and Moore met and orally agreed to modify the joint venture. They agreed not to sell the house, and to keep Sea View permanently and

irrevocably in the 1993 trust. “[T]he ‘last man standing’” would receive the unencumbered title following the deaths of the other two joint venturers. In 2005, the Hayeses ratified and reaffirmed the joint venture agreement and the 2003 modification.

In 2009, Barbara and Hayes revoked the 1993 trust and re-conveyed Sea View to themselves as co-trustees of the 1996 trust. They did so without Moore’s knowledge.

In August 2014, Moore became aware that he was no longer a beneficiary of the trust in which Sea View was being held.

On September 15, 2014, Barbara revoked the 1996 trust. Barbara’s “pour-over” will contained a savings clause that provided if the 1996 trust was revoked, her estate would be distributed to her personal representative as trustee, for distribution according to the terms of the 1996 trust.

Barbara died on August 12, 2015. Hayes was appointed personal representative of Barbara’s estate with general powers under Probate Code section 8545. As a consequence, Hayes owned Barbara’s one-half interest in Sea View.

In the answer, Hayes denied entering into the joint venture agreement to develop Sea View with Moore. He admitted that he and Barbara purchased Sea View as co-trustees of the 1993 trust and that they amended the 1993 trust in 2002, but denied that they did so pursuant to any agreement with Moore. They also executed the 1996 trust, of which his children were beneficiaries. The 1996 trust did

not initially include Sea View. Barbara revoked the 1996 trust on September 15, 2014, but her pour-over will contained a savings clause providing that if the 1996 trust was revoked, her estate would be distributed to her personal representative as trustee, for distribution according to the terms of the 1996 trust. Barbara died on August 12, 2015. Hayes was appointed personal representative of her estate.

Moore's Deposition

Moore's deposition was taken on December 20, 2016. He stated that he learned Sea View had been transferred from the 1993 trust to the 1996 trust for the first time in August of 2014. He discovered the breach of their joint venture agreement when Barbara sent him "the documents pertaining to Sea View and to their trust agreement, all of their paperwork," which included the 1996 trust. She asked Moore to look at the documents because she feared that Hayes was attempting to divest her of community property.

Around Labor Day of 2014, Barbara visited Moore in Santa Barbara and discussed having Griffith, who was Moore's attorney, review the documents. They showed the documents to Griffith and he photocopied them. Barbara and Moore met with Griffith twice in September 2014 to "discuss the situation." Barbara wanted to be sure that she still had community property rights to Sea View. The second time they met in Griffith's office and "talked about the trust, what the trust meant, and that sort of thing." Griffith

“outlined what he could do or what he was able to say without violating his client-attorney thing” with Moore. They discussed the transfer of Sea View from the 1993 trust to the 1996 trust. “[T]hat was the subject.” Barbara may have brought it up by asking, “What does this mean?” “[I]t was a continuous topic with her.” Moore did not recall what Griffith told Barbara regarding the 1993 and 1996 trusts. Barbara paid Griffith in cash after each meeting. Moore believed that she paid him around \$200 for the first visit and \$300 for the second visit.

To Moore’s knowledge, no one other than Griffith and John Hannon, Barbara’s divorce lawyer, reviewed the documents. Moore did not believe that Griffith ever met with him and Barbara again. There was no telephone conversation between himself, Griffith, and Barbara.

Motion to Disqualify Counsel

The day after Moore’s deposition was taken, Hayes’s counsel David Sloan called Griffith and requested that he recuse himself from the action due to his prior representation of Barbara. On December 22, 2016, Griffith informed Sloan that he did not believe his prior representation of Barbara disqualified him from representing Moore, and that he did not intend to recuse himself.

Hayes filed the motion to disqualify counsel that day. The motion alleged that in August 2014, Barbara personally

handed Hayes a letter dated August 26, 2014, which Griffith drafted on Moore's behalf. The letter informed the Hayeses that they had breached the joint venture agreement, demanded that the Sea View property be placed back in the 1993 trust or alternatively conveyed to Moore and the Hayeses as joint tenants, and threatened litigation if Sea View was not returned to the trust.

Also in August 2014, Barbara sent Moore several documents, including the Sea View deed. Shortly thereafter, she went to Santa Barbara to visit Moore and discuss having his attorney review the documents. At the meetings, Barbara, Moore, and Griffith discussed the transfer of Sea View from the 1993 trust to the 1996 trust. Barbara paid Griffith \$200 in cash following the first meeting and \$300 in cash following the second meeting.

Barbara initiated divorce proceedings against Hayes on September 24, 2014. Barbara was ordered to leave the family home on October 16, 2014, based on physical violence against Hayes. She lived with Moore in Santa Barbara from that time until her death on August 15, 2015. No judgment of dissolution was ever entered in the divorce proceedings.

Hayes argued that Griffith should be disqualified. Griffith's duty of confidentiality survived Barbara's death. Hayes held her attorney-client privilege as the personal representative of Barbara's estate. There was an actual conflict of interest between Barbara and Moore before, during, and after Griffith's representation of her. Griffith did not provide Barbara with a written disclosure of his

representation of Moore concerning Sea View or obtain her informed written consent at the time he accepted employment or prior to initiating the present action against her estate. Griffith's representation of Barbara concerned her interest in Sea View and the meaning of the transfer from the 1993 trust to the 1996 trust. It was substantially related to Griffith's representation of Moore. Griffith's disqualification from the underlying litigation was required.

Opposition

On March 2, 2017, Moore filed an opposition to the motion to disqualify. Moore first argued that disqualification was discretionary and unwarranted because Hayes was using it as a procedural weapon.

Moore next argued the estate had no legitimate interest in the litigation because Moore had dismissed his allegation of elder abuse against Barbara's estate. The only remedy Moore sought in the remaining two causes of action was "quasi-specific performance" of the joint venture agreement. Citing to cases in which the plaintiffs sought to compel a contract to make a will, Moore asserted that where a plaintiff seeks a constructive trust rather than a monetary award, it is merely a stakeholder and not a real party in interest. As a stakeholder, the estate lacked standing to object to Griffith's representation of Moore.

Moore maintained that even if the estate had standing, Barbara had no reasonable expectation of confidentiality as

against Moore.³ Barbara received Griffith's letter to the Hayeses demanding that they place Sea View in the 1993 trust prior to his representation of her. She knew Griffith was Moore's attorney, and Moore attended the meetings between Griffith and Barbara in 2014. Because Barbara had actual knowledge of Griffith's representation of Moore with respect to Sea View, she could have no expectation of confidentiality as against Moore.

Moore argued that Barbara's interests were not adverse to his. They attended the meetings together and Barbara expressly supported Moore's claim. Her community property rights were unaffected by his claim with respect to the joint venture agreement.

Moore claimed there was no evidence of a substantial relationship between Griffith's representations of Moore and Barbara. Moore's claim concerned breach of the oral joint venture agreement, whereas Barbara's concern was her community property rights. Barbara's community property rights were never "directly in issue or of critical importance" to Moore's joint venture agreement claim.

Finally, Moore argued that hiring new counsel would impose an unreasonable financial burden on him.

³ Appellants conceded that Griffith did not require Barbara to sign a written conflict waiver prior to meeting with her.

Reply

Hayes filed a reply on March 8, 2017. He argued that the estate had standing to bring the disqualification motion. Although Barbara revoked her interest in the 1996 trust, by the terms of her will her property was to be distributed as provided in the 1996 trust. Barbara's will expressed her intent, and as personal representative of her estate Hayes had a duty to protect the estate's assets from all illegitimate claims. Hayes argued the cases Moore relied on in support of his argument that the estate lacked standing were inapposite and concerned different subjects. He reiterated the arguments for standing as set forth in the motion to disqualify Griffith.

Hayes argued that Moore's presence at the meetings between Griffith and Barbara did not vitiate Griffith's obligation to inform Barbara of the conflict or to obtain her express written consent. He relied on *Knight v. Ferguson* (2007) 149 Cal.App.4th 1207 (*Knight*), which held that even absent an adverse relationship between the parties at the times when they met with counsel together, the attorney could not represent both sides absent full written disclosure and a signed written waiver of the conflict.

Hayes asserted that there was a substantial relationship between Griffith's representations of Barbara and Moore. A substantial relationship exists whenever the subjects of the prior and current representations are linked in some rational manner. Where a substantial relationship

is proved, it is presumed that the attorney received confidential information. Griffith discussed the impact of the transfer of Sea View from the 1993 trust to the 1996 trust in his representation of both clients. It could be presumed that he received confidential information in the course of his representation.

Although the disqualification might place a financial burden on Moore, the weightier concern was preserving public trust in the administration of justice and the integrity of the bar.

Finally, Hayes argued that Moore had committed fraud upon the court. Moore repeatedly testified that he only met with Griffith and Barbara twice, but Hayes had recently come into possession of e-mails between Griffith and Barbara's divorce lawyer, Hannon, which proved additional meetings took place in January 2015.

The first e-mail, dated January 5, 2015, was sent from Griffith to Hannon. It stated: "I just met with Barbara and Jim in my office . . . and Barbara showed me your motion papers, including your declaration dated 1/2/15. There are a few points Barbara wanted to ask you about on the phone but you were not in, and so Barbara asked me to e-mail you to cover these points." Griffith's e-mail discussed multiple documents relating to Barbara and Hayes's many trusts, including the 1996 trust. It stated that "a Third Amendment [to the 1996 trust] was executed in 2009. Barbara does not recall the contents of the Third Amendment, and I have never seen it. That document should be high on your list for

discovery when you get to that point.” Griffith mentioned that the purpose of the e-mail was to ensure that Barbara and Hannon “have the full benefit of the considerable time I have spent going over the documents.”

The second e-mail, dated January 22, 2015, was also sent from Griffith to Hannon. It stated that Griffith met with Barbara and Moore in his office that day “to discuss various matters, and Barbara asked me to convey a few things.” At that meeting, Barbara told Griffith that Hannon asked her to be available on the phone for a hearing on January 29, 2015. Griffith had agreed that Barbara could come to his office for the hearing so that he could assist her with any questions or instructions Hannon might have.

Sur-reply

Moore filed a sur-reply on March 13, 2017, addressing Hayes’s new argument that he had committed fraud upon the court. He asserted that he had not committed fraud—he chose not to go beyond the scope of the motion and address facts not included in Hayes’s opposition. In fact, Hayes committed fraud upon the court by stating that the will was Barbara’s only existing testamentary instrument at the time of her death. Hayes knew that Barbara had a holographic will. Moreover, the e-mails did not provide any new support for Hayes’s position, as they indicated that Moore was present at all of Barbara’s meetings with Griffith.

Moore reiterated his arguments that there was no substantial relationship between Griffith's representation of Barbara and his representation of Moore and that Moore and Barbara were not adverse to each other.

Disqualification Hearings

At a hearing on the motion to disqualify Griffith on March 15, 2017, Moore raised the possibility of dismissing Barbara's estate to avoid any conflict. The court continued the hearing to April 14, 2017, and allowed the parties to submit briefing on the issue.⁴ The second hearing was held on April 14, 2017 as scheduled. Prior to each hearing, the trial court issued tentative rulings granting the motion to disqualify, which were nearly identical to its final ruling on the matter.

Trial Court's Ruling

The trial court concluded that Hayes had standing to bring the disqualification claim as the personal representative of Barbara's estate. It distinguished the instant action from *Ludwicki v. Guerin* (1961) 57 Cal.2d 127 (*Ludwicki*), which Moore cited in support of his argument that the estate was a mere stakeholder because Moore

⁴ We do not discuss the substance of the briefing here, as the issue of the impact of dismissal of the estate is not before us on appeal.

sought only quasi-specific relief against it. The court explained that *Ludwicki* examined whether an action to impress a trust on certain estate property was barred by the statute of limitations. Unlike Moore, the plaintiff in *Ludwicki* sought to compel a contract to make a will. *Ludwicki* held that such an action is not postponed until after the distribution of the estate at probate. It did not stand for the proposition that an estate in an action such as Moore's was not a true party to the litigation and could not move to disqualify plaintiff's counsel. To the contrary, the attorney-client privilege belonged only to the client, and passed to the personal representative of the estate of the client upon death under Evidence Code section 953, subdivision (c).

The court ruled that Griffith's disqualification was mandatory. Griffith was prohibited from accepting employment adverse to Barbara, a former client, absent informed written consent. Hayes met the burden to establish a conclusive presumption that Barbara and Griffith exchanged confidences. First, the representations were substantially related. Griffith discussed the transfer of the Sea View property with both clients, the same documents and their legal effect were at issue in both cases, and his representation of Barbara took place during the "relevant time frame" of the underlying action. Second, the nature of Barbara and Griffith's relationship was such that confidences could and normally would have been exchanged between them. Barbara met with Griffith four or five times

during which they discussed the legal effect of the documents at issue.

The court found that Moore's presence at some or all of the meetings between Barbara and Griffith did not defeat the motion to disqualify. It relied on *Knight, supra*, 149 Cal.App.4th 1207, in which the Court of Appeal affirmed the trial court's grant of a motion to disqualify plaintiffs' attorney despite the fact that plaintiffs were present when the attorney met with the defendant and there was no proof that confidential information was actually exchanged.

The trial court also relied on the *Knight* court's holding that even if the attorney-client privilege did not apply, the result would be the same because separate and apart from the evidentiary attorney-client privilege, an attorney may not represent clients with adverse interests without obtaining prior written waivers.

Finally, the trial court concluded that regardless of whether Griffith breached his duty of loyalty in the earlier meetings with Moore and Barbara, the dual relationship now mandated that he not represent Moore in the underlying litigation. Griffith would be violating his duty of loyalty to Barbara if he represented Moore in the lawsuit. Whether Barbara would have moved to disqualify Griffith if she was still alive was speculative.

Although the court noted its sensitivity to the practical issues surrounding disqualification, it found hardship was not controlling in this case.

DISCUSSION

Standard of Review

““Generally, a trial court’s decision on a disqualification motion is reviewed for abuse of discretion. [Citations.] 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. [Citations.] . . . However, the trial court’s discretion is limited by the applicable legal principles. [Citation.] Thus, where there are no material disputed factual issues, the appellate court reviews the trial court’s determination as a question of law. [Citation.]” [Citation.]’ (*City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 848.)” (*Kim v. True Church Members of Holy Hill Community Church* (2015) 236 Cal.App.4th 1435, 1451 (*Kim*).)

Inadequate Record

Appellants argue that the record on appeal is adequate for review because (1) the issues raised do not “require[] consideration of the oral proceedings in the superior court;” (2) the facts are undisputed; (3) there is no reporter’s transcript; and (4) appellants’ appendix contains the court’s disqualification order, which gives the factual and legal bases for its ruling. These arguments are without merit.

““A judgment or order of the lower court is *presumed correct.*”” (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1201, quoting *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) An appellant bears the burden of overcoming this presumption by affirmatively showing error on an adequate record. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140–1141.) Under rule 8.120(b) of the California Rules of Court, “[i]f an appellant intends to raise any issue that requires consideration of the oral proceedings in the superior court, the record on appeal must include a record of these oral proceedings in the form of one of the following: [¶] (1) A reporter’s transcript under rule 8.130; [¶] (2) An agreed statement under rule 8.134; or [¶] (3) A settled statement under rule 8.137.” “[I]n the absence of a required reporter’s transcript and other [relevant] documents, we presume the judgment is correct.” (*Stasz v. Eisenberg* (2010) 190 Cal.App.4th 1032, 1039.)

“A necessary corollary to this rule [is] that a record is inadequate, and appellant defaults, if the appellant predicates error only on the part of the record he provides the trial court, but ignores or does not present to the appellate court portions of the proceedings below which may provide grounds upon which the decision of the trial court could be affirmed.’ [Citation.]” (*Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435.)

Contrary to appellants’ assertions, the issues they have presented “require[] consideration of the oral proceedings in the superior court.” (Cal. Rules of Court, rule 8.120(b).)

There were disputed facts in this case, notably how many meetings took place between Barbara and Griffith, and whether Moore attended all or some of the meetings. We affirm on the basis the record is inadequate to establish reversible error. (*Maria P.*, *supra*, 43 Cal.3d at pp. 1295–1296.) Even if we deemed the appendix adequate for our review, however, we would conclude that the trial court did not abuse its discretion on the record before us.⁵

Merits

On appeal, appellants raise multiple issues that Moore did not raise below. Although Moore cited to rule 3-310(E) of the Rules of Professional Conduct as the applicable law in his opposition, appellants now argue that rule 3-310(E) is inapplicable, as two of its requirements were not met: Barbara was not a “former” client and Griffith did not “accept” employment from Moore by representing him in the underlying lawsuit because Moore was already a client. Appellants also argue for the first time that Barbara impliedly consented to waive any conflict with Moore, that there was no realistic chance that Barbara imparted confidential information to Griffith, and that Griffith’s duty of loyalty could not be invoked by her estate, which lacks standing as to that issue. We do not address these new arguments, as they were not raised in the trial court and

⁵ Our conclusion would be the same if the standard of review were de novo as appellants claim.

have therefore been forfeited. (See *In re Alexandria P.* (2014) 228 Cal.App.4th 1322, 1346 “[a] claim of error is forfeited on appeal if it is not raised in the trial court”].)

Appellants’ remaining contentions are that: (1) Barbara supported Moore’s claim and could not have had a reasonable expectation of confidentiality under the circumstances; (2) there was not a substantial relationship between Griffith’s representation of Moore and his representation of Barbara; and (3) there was no actual conflict because Griffith’s representation of Moore was not adverse to Barbara. Appellants do not contest that Griffith neglected to obtain a written waiver of the conflict from Barbara or her estate at any juncture. We conclude the trial court did not abuse its discretion in disqualifying Griffith.

Law Governing Attorney Disqualification

“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.” (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145.)

“The State Bar Rules of Professional Conduct provide that an attorney ‘shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.’ (Rules Prof. Conduct, rule 3–310(E).) An attorney risks violating rule 3–310(E) in two different scenarios: ‘(1) in cases of successive representation, where an attorney seeks to represent a client with interests that are potentially adverse to a former client of the attorney; and (2) in cases of simultaneous representation, where an attorney seeks to represent in a single action multiple parties with potentially adverse interests.’ (*In re Charlissee C.* (2008) 45 Cal.4th 145, 159.)

“Case law has developed different standards for attorney disqualification depending on whether the conflict arises out of successive representation or simultaneous representation.’ (*Montgomery v. Superior Court* (2010) 186 Cal.App.4th 1051, 1055 (*Montgomery*).) Where an actual conflict of interest stems from *simultaneous* adverse representation, the rule almost automatically requires disqualification “regardless of whether the simultaneous

representations have anything in common or present any risk that confidences obtained in one matter would be used in the other. [Citation.]” [Citation.]’ (*In re Charlissee C.*, *supra*, 45 Cal.4th at p. 160.) Where the conflict ‘is one that arises from the *successive* representation of clients with potentially adverse interests, the governing test requires that the client demonstrate a “*substantial relationship*” between the subjects of the antecedent and current representations.’ (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283 (*Flatt*).) ‘[A] “substantial relationship” exists whenever the “subjects” of the prior and the current representations are linked in some rational manner.’ (*Jessen v. Hartford Cas. Ins. Co.* (2003) 111 Cal.App.4th 698, 711 [(*Jessen*)].) . . . ‘When a substantial relationship has been shown to exist between the former representation and the current representation, and when it appears by virtue of the nature of the former representation or the relationship of the attorney to his former client confidential information material to the current dispute would normally have been imparted to the attorney . . . , the attorney’s knowledge of confidential information is presumed.’ (*Global Van Lines, Inc. v. Superior Court* (1983) 144 Cal.App.3d 483, 489.) In such cases, disqualification of the attorney’s representation of the second client is mandatory. (*Flatt, supra*, at p. 283.)” (*Kim, supra*, 236 Cal.App.4th at pp. 1453–1454.)

Analysis

In the instant case, there was sufficient evidence to satisfy both requirements for attorney disqualification for successive representations. First, there was a substantial relationship between Griffith's representation of Moore and his representation of Barbara. Appellants attempt to avoid the similarities by characterizing the subject of Moore's representation as an action to enforce an oral contract and Barbara's as an evaluation of her community property in a divorce proceeding. "We . . . ascribe to the word 'subjects' (*Flatt, supra*, 9 Cal.4th at p. 283) a broader definition than the discrete legal and factual issues involved in the compared representations." (*Jessen, supra*, 111Cal.App.4th at p. 712.) "[S]uccessive 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." (*Id.* at p. 713.)

In his deposition, Moore stated that he, Griffith and Barbara "talked about the trust, what the trust meant, and that sort of thing." They discussed the transfer of Sea View from the 1993 trust to the 1996 trust. "[T]hat was the subject." Barbara may have brought it up by asking, "What

does this mean?” “[I]t was a continuous topic with her.” Griffith’s e-mails to Hannon also indicated that he was reviewing the 1993 and 1996 trusts on Barbara’s behalf. The e-mail stated: “a Third Amendment [to the 1996 trust] was executed in 2009. Barbara does not recall the contents of the Third Amendment, and I have never seen it. That document should be high on your list for discovery when you get to that point.” The e-mail mentioned that he wanted Barbara to receive the “full benefit” of “the considerable time [Griffith had] spent going over the documents.”

The Sea View deed, 1993 trust, 1996 trust, and the transfer between the trusts were vital to both representations. Griffith represented Moore in his action for breach of the joint venture agreement, which allegedly occurred when the Hayeses moved Sea View from the 1993 trust to the 1996 trust without his knowledge. Griffith’s representation of Barbara involved explaining the effect of her various marital trusts—including the 1993 and 1996 trusts—on her share of the Hayeses’ community property. This evidence is sufficient to show that the subjects of the representations were substantially related.

Second, there was evidence that Barbara would normally have imparted confidential information material to the current dispute to Griffith. “If the relationship between the attorney and the former client is shown to have been direct—that is, where the lawyer was personally involved in providing legal advice and services to the former client—then it must be presumed that confidential information has

passed to the attorney and there cannot be any delving into the specifics of the communications between the attorney and the former client in an effort to show that the attorney did or did not receive confidential information during the course of that relationship.” (*Jessen, supra*, 111 Cal.App.4th at p. 709.)

In his deposition, Moore stated that he and Barbara met with Griffith twice in September 2014, and that the transfer between the trusts was a topic of discussion. Moore saw Barbara pay Griffith for his services in cash following each of these meetings. The e-mails between Griffith and Hannon revealed that Barbara, Moore, and Griffith had two additional meetings, and that Barbara planned to participate in a telephonic hearing in Griffith’s office so that he would be on hand to answer her questions. The e-mails indicated that there was a fluid exchange of information between Barbara and Griffith regarding the trusts and other financial documents, which Griffith spent “considerable time” reviewing. Under the circumstances, it was more than reasonable for the trial court to find that Griffith and Barbara had a direct relationship in which he provided her legal advice. Given this direct relationship, we presume that Barbara imparted confidential information to Griffith during the time he represented her.

Under such circumstances, whether Barbara had a reasonable expectation of confidentiality is easily answered. Griffith gave Barbara legal advice on several occasions in exchange for payment. He was duty bound to protect her

confidences as a client, and she had every reason to believe that he would honor that duty. Moore's presence at some or all of the meetings between them does not alter Griffith's duty to Barbara, as we will discuss *post*.

We reject appellants' arguments that Barbara and Griffith's interests were not adverse because she supported his position. Moore implicitly conceded their adversity when he testified in deposition that during one meeting with Barbara, Griffith outlined the limits on what he could do for or say to Barbara given his attorney-client relationship with Moore. As the trial court recognized, this case is analogous to *Knight, supra*, 149 Cal.App.4th 1207. In *Knight*, the Fergusons, who were Knight's sister and brother-in-law, attended meetings between Knight and the Ferguson's attorney regarding Knight's partnership with a potential investor to open a branch of her restaurant and assume a bankrupt business's ground lease as the location. (*Id.* at pp. 1210–1211.) The deal fell through, and the Fergusons took the investor's place. (*Id.* at pp. 1211, 1214.)

Knight later sued the Fergusons for breach of contract, alleging, among other things, that they had improperly removed her from managing and overseeing the operations of the restaurant. (*Knight, supra*, 149 Cal.App.4th at p. 1211.) The Fergusons cross-complained, alleging Knight had mismanaged the restaurant and run it as a sole proprietorship instead of a corporation as promised. (*Ibid.*) The Ferguson's attorney, who had previously consulted with Knight, substituted in as counsel for the Fergusons in the

litigation. Knight moved to disqualify him. The trial court granted the motion and the court of appeal affirmed. (*Id.* at pp. 1210–1211.)

The *Knight* court determined the attorney’s brief representation of Knight was substantially related to the lawsuit between Knight and the Fergusons because both matters involved the identical subject and issues: a business arrangement to create Knight’s restaurant and assume a ground lease for its location. (*Knight, supra*, 149 Cal.App.4th at p. 1213.) It rejected the Ferguson’s argument that their attorney’s representation could not prejudice Knight because the Fergusons were present during all of the attorney’s consultations with Knight and were therefore privy to all of the information that Knight shared with him. (*Id.* at pp. 1214–1215.) The court held that “[w]here an attorney acquires knowledge about the former client’s ‘attitudes,’ practices, business customs, ‘litigation philosophy,’ strengths, weaknesses or strategy, disqualification may be required for that reason alone.” (*Id.* at p. 1215, citing *Jessen, supra*, 111 Cal.App.4th at p. 712.)

The court further held that even if the attorney-client privilege did not apply, it would reach the same result: “[T]he pertinent issue is the propriety of an attorney’s representation adverse to a former client. Our courts have distinguished the rule against representing conflicting interests from the attorney-client evidentiary privilege noting that the former is broader than the latter.” [Citation.] Thus, even where the issue of disclosure of privileged

information is absent, an attorney is properly disqualified for violating the separate and independent duty not to represent conflicting interests. [Citation.] “““The evidentiary privilege and the ethical duty not to disclose confidences both arise from the need to encourage clients to disclose all possibly pertinent information to their attorneys, and both protect only the confidential information disclosed. The 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.” [Citation.]” [Citations.]’ [Citation.] A lawyer has a duty not to “do anything which will injuriously affect his former client.” [Citation.]” (*Knight, supra*, 149 Cal.App.4th at p. 1215–1216.)

As *Knight* illustrates, it is irrelevant that a former client and a current client were once allied, even if the former client always met with the current client’s attorney in the current client’s presence. If the alliance later changes in the course of the attorney’s representation of his current client, the attorney is disqualified from representing the current client in an action adverse to the former client. Even if Barbara was always accompanied by Moore when she met with Griffith and unequivocally supported his claim to enforce the joint venture contract, that position clearly changed when Hayes became Barbara’s personal

representative and the holder of her attorney-client privilege with Griffith.⁶ Absent an informed written waiver by either Barbara or the estate, the trial court did not abuse its discretion in granting the motion to disqualify Griffith.

DISPOSITION

The order is affirmed. Costs are awarded to Hayes on appeal.

MOOR, J.

We concur:

BAKER, Acting P.J.

KIM, J. *

⁶ Evidence Code sections 953 and 954 “unambiguously provide that . . . a personal representative may claim the attorney-client privilege in the case of a deceased client.” (*HLC Properties, Ltd. v. Superior Court* (2005) 35 Cal.4th 54, 65.)

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