Filed 8/26/19 Loera v. O'Gara Coach Co., LLC CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JORGE LOERA, Plaintiff and Appellant, v. O'GARA COACH COMPANY, LLC, et al., Defendants and Respondents.	B289719 (Los Angeles County Super. Ct. No. BC674515)

APPEAL from an order of the Superior Court of Los Angeles County, Richard L. Fruin, Judge. Reversed.

Brown, Neri, Smith & Khan, Ethan J. Brown, Rowennakete P. Barnes and James F. Warren IV for Plaintiff and Appellant.

Fisher & Phillips, Wendy McGuire Coats, Christopher J. Boman and Sean T. Kingston for Defendants and Appellants.

In *O'Gara Coach Co., LLC v. Ra* (2019) 30 Cal.App.5th 1115 (*Ra*) this court reversed the trial court's order denying O'Gara Coach Company LLC's motion to disqualify Richie Litigation, P.C. and its attorneys from representing former O'Gara Coach senior executive Joseph Ra in litigation that included cross-actions between O'Gara Coach and Ra. We held O'Gara Coach was entitled to insist that Darren Richie, its former president and chief operating officer and a principal of Richie Litigation, honor his ethical obligation as a member of the California State Bar to maintain the integrity of the judicial process by refraining from representing former O'Gara Coach employees in litigation against O'Gara Coach when Richie possessed confidential attorney-client privileged information materially related to the matters at issue, even though that information had been obtained by Richie in his capacity as an officer of the client, not its lawyer. (See *id.* at pp. 1128-1129.)

Anticipating our holding in *Ra* at least in part, the trial court in the case at bar granted O'Gara Coach's motion to disqualify Richie Litigation and all its attorneys from representing Jorge Loera, a former sales advisor at O'Gara Coach Bentley, in Loera's lawsuit against O'Gara Coach for wrongful termination, failure to prevent discrimination and harassment and other employment-related misconduct. The trial court ruled Richie, as the former president and chief operating officer of O'Gara Coach, possessed O'Gara Coach's confidential and privileged information and, as a consequence, Richie Litigation's representation of Loera against O'Gara Coach "undermines the integrity of the judicial system and the litigation process."

On appeal Loera argues the order disqualifying Richie Litigation should be reversed because, unlike the situation in *Ra*,

here O'Gara Coach failed to present evidence that Richie possessed any confidential attorney-client privileged information material to the employment dispute between Loera and O'Gara Coach. We agree and reverse the order.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Loera's Lawsuit*

On September 1, 2017, represented by Robert K. Lu of Richie Litigation, Loera sued O'Gara Coach and several of its senior management employees for wrongful termination, harassment, failure to prevent discrimination and harassment, intentional and negligent infliction of emotional distress and negligent hiring, retention and supervision. According to the operative first amended complaint, filed November 30, 2017, Loera worked from August 2014 to mid-March 2016 as a sales advisor at O'Gara Coach Bentley in Beverly Hills, one of O'Gara Coach's family of dealerships. In addition to O'Gara Coach, the first amended complaint named Llewyn Jobe, Loera's former supervisor at O'Gara Coach Bentley, as a defendant in the cause of action for harassment.

Loera alleged Jobe, who is gay, created a hostile work environment for employees who did not share his sexual orientation by frequently making sexually offensive remarks and providing preferential treatment to other members of the sales staff at the dealership who were also gay. Loera also alleged Jobe made racially insensitive remarks about the dealership's Asian clientele. According to Loera, he told Jobe directly he objected to the inappropriate comments and also repeatedly complained about Jobe's conduct to Jobe's supervisor. Not only was no action taken to correct the hostile work environment created by Jobe, but also, according to Loera, Thomas O'Gara, the

owner of the company, himself fostered a pervasive culture of vulgar and sexually explicit remarks.

Loera's employment was terminated on March 17, 2016, purportedly for lack of performance. Loera alleged his discharge was in actuality in retaliation for his objections to the hostile work environment that had been created at O'Gara Coach Bentley. He asserted he had never been reprimanded for any performance-related issues and, for the months preceding his termination, had performed as well as many other sales advisors who were not terminated.

2. *The Motion To Disqualify Richie Litigation*

O'Gara Coach and Jobe jointly answered the first amended complaint on January 16, 2018 and the following day moved to disqualify Richie Litigation and each of its attorneys from representing Loera. The motion argued disqualification was appropriate because Richie is a key percipient witness whose testimony would be adverse to his client and because he had been privy to confidential and privileged documents and information during his employment at O'Gara Coach that were directly related to the issues in the case.

a. *Richie's role at O'Gara Coach*

O'Gara Coach hired Richie in September 2013 as general manager for its Westlake Village location. He was subsequently promoted to director of sales operations for the company and then in November 2014 to president and chief operating officer.

According to the declaration of Thomas O'Gara in support of the motion to disqualify, as president and chief operating officer Richie was charged with creating, implementing and enforcing workplace policies and practices for all of the company's various dealership locations, including O'Gara Coach Bentley

where Loera worked. In addition, Richie was the person to whom employee complaints were to be reported, including violations of the company policy against harassment and discrimination. Several O'Gara Coach employees submitted declarations in support of the motion indicating Loera had complained directly to Richie about Jobe's conduct and Richie had direct involvement in investigating and responding to the complaint.

In his declaration Thomas O'Gara also explained O'Gara Coach does not employ in-house lawyers and, while serving as president, Richie was a primary point of contact for the company's outside counsel on many legal matters: "Mr. Richie would regularly engage and direct legal counsel on O'Gara Coach's behalf, regarding day-to-day advice on a litany of subjects, the development, implementation, and enforcement of policies and procedures, and on all aspects of pending litigation, and pre and post-litigation functions."

When Richie was initially hired by the company, Thomas O'Gara knew Richie had graduated from law school and had experience overseeing legal matters. (Richie graduated from law school in 2003.)[1] According to O'Gara, it was this "legal education and professed experience that provided me comfort in assigning to him decision-making authority during his tenure, including without limitation engaging outside legal counsel and overseeing (on a companywide basis) all legal matters affecting the company."

---

[1] Richie successfully sat for the California bar examination in February 2017, a year after he left O'Gara Coach. He was admitted to the bar on August 27, 2017 and formed Richie Litigation that same summer.

Richie's employment with O'Gara Coach was terminated on February 10, 2016. In his declaration Thomas O'Gara stated O'Gara Coach and Richie executed a severance agreement in which Richie agreed not to file claims against O'Gara Coach or to assist others in bringing claims against the company. That document, which is described as subject to confidentiality provisions, was not filed with the trial court, but counsel offered to make it available to the court for in camera inspection.

b. *Richie's communications with outside counsel*

Usama Kahf, a partner with Fisher & Phillips LLP, submitted a declaration in support of the motion to disqualify stating his firm has provided labor and employment advice to O'Gara Coach for many years. According to Kahf, "[b]etween November 2014 and February 2016, Richie was my primary point of contact with [O'Gara Coach] on various litigation and non-litigation employment matters, because he was the President and Chief Operating Officer during that period." Kahf exchanged more than 600 emails and took part in at least 50 telephone conversations with Richie relating to Fisher & Phillips's representation of the company during that period.

Kahf described the matters he discussed with Richie as including strategy and activity in pending litigation pertaining to former and current employees; compliance with wage and hour laws and regulations; termination and severance issues related to O'Gara Coach employees; "responding to various complaints made by [O'Gara Coach] employees about a litany of workplace issues"; and "investigations of employee misconduct and complaints."

Kahf's declaration also stated Richie directed Kahf and his law firm regarding the development, drafting and/or revision of

the O'Gara Coach policy prohibiting discrimination and harassment. "As my primary point of contact at [O'Gara Coach], and due to his direct involvement in policy drafting and implementation and in his role of decision-maker, Richie had direct knowledge and possession of [O'Gara Coach's] confidential, business proprietary, and trade secret information, attorney-work product, and attorney-client privileged communications. Moreover, Mr. Richie, as [O'Gara Coach's] President and COO, was the primary individual responsible for implementing and enforcing [O'Gara Coach's] workplace policies and procedures."

Halbert Rasmussen, formerly a partner at Arent Fox LLP, stated in his declaration in support of the motion that between November 2014 and February 2016 he "regularly communicated with Mr. Richie in the course of my representation of O'Gara Coach in various legal matters, as did other attorneys at Arent Fox LLP who were assisting me with our representation of O'Gara Coach." Rasmussen had at least 40 telephone calls with Richie during that period, virtually all of which in his view constituted communications subject to the attorney-client privilege in favor of O'Gara Coach.

Keith D. Kassan, who serves as outside general counsel to O'Gara Coach, in his declaration in support of the motion described Richie as a "primary point of contact" for O'Gara Coach on 28 litigated and nonlitigated matters affecting its sales and service departments. Kassan exchanged more than 300 emails and at least 40 telephone conversations with Richie relating to his representation of O'Gara Coach.

According to Kassan, due to Richie's "direct involvement in policy drafting, implementation, and enforcement, and in his role as decisionmaker, Richie had direct knowledge and possession of

O'Gara Coach's confidential, business proprietary, and trade secret information, attorney-work product, and attorney-client privileged communications." In addition, "Richie was the primary person responsible for developing, implementing and enforcing O'Gara Coach's workplace policies and practices, during which time Plaintiff Jorge Loera's allegations arose."

c. *The grounds advanced for disqualification*

O'Gara Coach advanced three grounds in support of its motion to disqualify Richie Litigation and the three lawyers then affiliated with the firm: First, citing former rule 5-210 of the State Bar Rules of Professional Conduct,[2] O'Gara Coach argued Richie would be a key percipient witness in the case and permitting him (or another attorney in his firm) to serve as an advocate, while Richie was also a witness, would result in a clear detriment to O'Gara Coach. Second, implicitly referring to former rules 3-100 and 3-310 requiring protection of a client's confidential information and avoiding the representation of adverse interests, O'Gara Coach argued Richie, during his

---

[2] Effective November 1, 2018, former rule 5-210 was replaced by rule 3.7 as part of a comprehensive revision of the State Bar Rules of Professional Conduct. Both former rule 5-210(C) and rule 3.7(a)(3) permit a lawyer to act as an advocate in a trial in which he or she is likely to be a witness with the informed written consent of the client. Rule 3.7(b) allows a lawyer to act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by the rules relating to duties owed to current clients (rule 1.7) or former clients (rule 1.9).

All references to rules and to former rules are to the State Bar Rules of Professional Conduct unless otherwise stated.

employment at the company, had been directly involved with, and oversaw, matters related to the claims Loera was asserting and had been privy to confidential and privileged documents and information. Because there was a substantial relationship between those matters in which Richie had participated and Leora's lawsuit, disqualification was necessary to protect O'Gara Coach's privileged information. Finally, as a former senior executive of O'Gara Coach, Richie owed continuing fiduciary duties to the company, including a duty to maintain the confidentiality of its privileged information.

3. *Loera's Opposition to the Motion To Disqualify*

In his opposition Loera explained he had been fully informed about Richie's potential role as a percipient witness and had already consented to it. He also emphasized another firm lawyer, not Richie, was representing him in his lawsuit against O'Gara Coach. Accordingly, the first ground advanced by O'Gara Coach for disqualification of Richie Litigation was misplaced.

Disqualification because of the purported relationship between Richie's work at O'Gara Coach and the subject matter of Leora's lawsuit was similarly unwarranted, Loera argued. Disqualification based on a duty of loyalty (avoiding conflicts of interest, current or successive) or the duty to protect confidential information is dependent on the existence of an attorney-client relationship between the individual (or law firm) to be disqualified and the party moving for disqualification. Here, Richie had never represented O'Gara Coach in any legal capacity and had not even been a lawyer when he was employed at the company. That Richie might have some form of continuing fiduciary duties to O'Gara Coach, Loera finally contended, is not

a cognizable ground for disqualification of a nonlawyer; the existence of an attorney-client relationship is essential.

4. *The Trial Court's Ruling*

At the March 1, 2018 hearing on the motion to disqualify, the court indicated in its tentative ruling that it was inclined to grant the motion and that, in its view, the critical issue was whether Richie in his role as president of the company had acquired so much information about O'Gara Coach and its employment policies that it would inappropriately burden the company and undermine the integrity of the litigation process for his law firm to represent Loera against his former employer. Responding to the court, Loera's counsel argued Richie was not the direct supervisor of Loera and was not alleged to have been involved in any of the unlawful practices committed by O'Gara Coach at issue in the lawsuit. In reply O'Gara Coach's counsel pointed to declarations before the court detailing Richie's involvement in developing, implementing and enforcing the company's employment policies and noted Richie had participated in a meeting between Leora and Jobe in an attempt to resolve their dispute.

Following argument the court stated it would stand by its tentative. It directed counsel for O'Gara Coach to prepare an order granting the motion.

The order, as signed by the court, states, Richie "had access to and possesses [O'Gara Coach's] confidential and privileged information; . . . Richie is intimately familiar with the development, implementation, and enforcement of [O'Gara Coach's] employment policies, practices, and history of [O'Gara Coach], including the confidential and privileged information, not through the discovery process and not obtained in accordance

with the Rules of Professional Conduct; and . . . Richie Litigation's representation of [Leora] against [O'Gara Coach] discredits the fairness of litigation by utilizing that information or having it available to utilize against Richie's former employer, [O'Gara Coach], and its employees and agents." The order additionally states Richie Litigation's involvement in the litigation "imposes an inappropriate burden on [O'Gara Coach], and its employees and agents."

DISCUSSION

1. *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; *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 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, *Ra*, *supra*, 30 Cal.App.5th at p. 1124; *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.)

2. *Ra*

In *Ra*, *supra*, 30 Cal.App.5th 1115 we reviewed O'Gara Coach's unsuccessful motion to disqualify Richie Litigation in a different lawsuit involving claims between O'Gara Coach and one of its former employees, Joseph Ra. At the outset of our analysis, quoting the Supreme Court's decision in *SpeeDee Oil*, *supra*, 20 Cal.4th at p. 1145, we explained, "When deciding a motion to disqualify counsel, '[t]he 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.'" (*Ra*, at p. 1124; see *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 818 (*Rico*) ["'[a]n attorney has an obligation not only to protect his client's interests but also to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice'"].)

Recognizing, as had the trial court, that Richie had never acted as counsel for O'Gara Coach and, therefore, that the general rules regarding disqualification based on successive representation did not apply (*Ra*, *supra*, 30 Cal.App.5th at p. 1128),[3] we considered cases in which disqualification had been

---

[3] Disqualification is required in successive representation cases if the current representation involves the legal services performed by the attorney for the former client (e.g., *Henriksen v. Great American Savings & Loan* (1992) 11 Cal.App.4th 109, 111; *Dill v. Superior Court* (1984) 158 Cal.App.3d 301, 306) or, even if not the same matter, if a substantial relationship exists between the former representation and the current representation.

based on the acquisition of an adversary's privileged communication by means other than a prior attorney-client relationship. (*Id.* at pp. 1126-1127.) In particular, we discussed *In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, in which the court had held disqualification was proper because counsel's newly hired paralegal had access to confidential information relating to pending litigation while working for opposing counsel, and *Shadow Traffic Network v. Superior Court* (1994) 24 Cal.App.4th 1067, in which the court held disqualification was warranted when an expert witness hired by a law firm had previously consulted with, and obtained confidential information from, opposing counsel regarding the pending litigation.

We also analyzed *Rico*, *supra*, 42 Cal.4th 807, in which the Supreme Court held, when a lawyer comes into possession of materials that clearly appear to be protected by the attorney-client privilege or work product doctrine and it is reasonably apparent the materials were disclosed without the holder of the privilege intending to waive it, the lawyer receiving the material is prohibited from using them. Instead, the lawyer may examine the materials no more than necessary to ascertain their privileged status and then must immediately notify the party entitled to the privilege about the situation. (*Id.* at pp. 816-818.) It is proper to disqualify counsel who fails to act in accord with these ethical responsibilities and makes use of the inadvertently disclosed confidential information. (*Id.* at pp. 810, 819; accord, *McDermott Will & Emery LLP v. Superior Court* (2017)

(*SpeeDee Oil*, *supra*, 20 Cal.4th at p. 1146; *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283).

10 Cal.App.5th 1083, 1120 ["'[d]isqualification is proper as a prophylactic measure to prevent future prejudice to the opposing party from information the attorney should not have possessed'; an affirmative showing of existing injury from the misuse of privileged information is not required"]; see *Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 43-44, 54-55 [attorney received opponent's privileged documents from his own client, who had stolen them when fired, rather than through inadvertent production by opposing party or its counsel; disqualification was proper prophylactic remedy based on evidence attorney had reviewed the documents more than minimally necessary to determine their privileged nature and had affirmatively used some of the substantive information in the privileged documents].)

Applying the principles articulated in these cases, we reversed the order denying the motion to disqualify Richie Litigation and its attorneys, holding disqualification was required as a prophylactic measure because the firm was in possession of confidential information, protected by O'Gara Coach's attorney-client privilege, concerning Ra's allegedly fraudulent activities at issue in the pending litigation. (*Ra*, *supra*, 30 Cal.App.5th at pp. 1128-1129; see *Roush v. Seagate Technology, LLC* (2007) 150 Cal.App.4th 210, 219 [although the "classic disqualification case involves the attorney switching sides, . . . [¶] [i]n other cases, counsel may be disqualified where counsel has obtained the secrets of an adverse party in some other manner"; "[d]isqualification is warranted in these cases, not because the attorney has a duty to protect the adverse party's confidences, but because the situation implicates the attorney's ethical duty to maintain the integrity of the judicial process"].)

We explained that O'Gara Coach had presented evidence to the trial court, undisputed by Ra, that Richie, while employed as a senior executive at the company, participated in meetings, phone calls and email communications with outside counsel investigating Ra's activities "that developed theories material to O'Gara Coach's defense and forming the basis for its cross-claims [against Ra] in this litigation and that are protected by the lawyer-client privilege." (*Ra*, *supra*, 30 Cal.App.5th at p. 1129.) That privilege belonged to O'Gara Coach; and Richie, even though no longer an officer of the company, had no right to disclose the protected information without O'Gara Coach's consent. (*Ibid.*, citing *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 732 ["'[t]he attorney-client privilege, set forth at Evidence Code section 954, confers a privilege on the client "to refuse to disclose, and to prevent another from disclosing a confidential communication between client and lawyer"'"].) Now that Richie was a member of the California State Bar, we concluded, "O'Gara Coach is entitled to insist that he honor his ethical duty to maintain the integrity of the judicial process by refraining from representing former O'Gara Coach employees in litigation against O'Gara Coach that involve matters as to which he possesses confidential information." (*Ra*, at p. 1129.)[4]

---

[4] In the final section of our opinion in *Ra*, we observed no evidence had been presented that Richie had been screened from any of the attorneys at Richie Litigation who had worked on the case and held that Richie Litigation, not just Richie, must be disqualified under established rules for vicarious disqualification. (*Ra*, *supra*, 30 Cal.App.5th at pp. 1131-1132.)

3. *O'Gara Coach Failed To Present Evidence Richie Possessed Privileged Information Materially Related to the Pending Litigation*

As discussed, central to our holding in *Ra* was undisputed evidence, based on the declaration of one of O'Gara Coach's outside attorneys, that Richie possessed attorney-client privileged information directly related to O'Gara Coach's defense of the claims being asserted against it in the litigation then before us and to O'Gara Coach's prosecution of its cross-claims against Ra in that lawsuit. Here, in contrast, the declarations in support of the motion to disqualify Richie Litigation, although describing in general Darren Richie's participation in numerous attorney-client telephone calls and receipt of privileged emails while president and chief operating officer of O'Gara Coach, do not identify any communications with counsel regarding investigation of Loera's claims of unlawful employment practices, issues relating to his discharge or the company's strategy in defending against Loera's lawsuit.

To be sure, outside counsel's declarations in support of the motion establish, as the trial court found, that Richie was the primary client contact for the company's lawyers involved in the development, implementation and enforcement of O'Gara Coach's workplace policies and practices, including how the company should respond to employee complaints. And based on a declaration from O'Gara Coach's former controller, Richie participated in a meeting in approximately October 2015 with Loera, Jobe and two other O'Gara Coach employees to discuss Loera's concerns about Jobe's inappropriate behavior and management style.

That Richie might be called as a percipient witness to testify at trial about O'Gara Coach's employment policies and complaint procedures or his meeting with Loera and Jobe, however, does not, without more, warrant disqualification of other lawyers at Richie Litigation. Under rule 3.7(a)(3) a lawyer is prohibited from acting as an advocate in a trial in which that lawyer is likely to be a witness unless "the lawyer has obtained informed written consent from the client." Loera submitted a declaration in the trial court averring he had given his informed consent to Richie Litigation's representation of him, recognizing that Darren Richie might be called as a witness at trial by O'Gara Coach, thereby invoking the exception to the prohibition set forth in the advocate-witness rule. (See *Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 619, fn. 9 ["the State Bar has concluded that a fully informed client's right to chosen counsel outweighs potential conflict or threat to trial integrity posed by counsel's appearance as witness"], disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) While that exception does not necessarily preclude disqualification of an attorney who may act as both advocate and witness when there has been "'a convincing demonstration of detriment to the opponent or injury to the integrity of the judicial process'" (*Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 579; see *Lyle v. Superior Court* (1981) 122 Cal.App.3d 470, 482), rule 3.7(b) now provides a lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless that representation is barred by separate ethical rules relating to a lawyer's duties to

current or former clients.[5] (See ABA Model Rules Prof. Conduct, rule 3.7(b) ["[a] lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 ['Conflict of Interest: Current Clients'] or Rule 1.9 ['Duties to Former Clients']"]; see also Rest.3d Law Governing Lawyers, § 108, com. f & i, pp. 152 & 153 [other lawyers in a testifying lawyer's firm may serve as advocates for a party in the proceeding, despite disqualification of one or more firm lawyers as advocates, if the representation would not involve a conflict of interest with the client; if testimony adverse to the client is anticipated, the client must consent to the firm continuing as advocate].)

What then of Richie's possession of presumptively privileged information regarding O'Gara Coach's development, implementation and enforcement of its workplace polices, as well as his knowledge of other confidential information regarding the company, its operations and its general litigation strategies, the bases for the trial court's disqualification order? That question raises the problem of what has sometimes been referred to in

---

[5] Rule 3.7 states in full, "(a) A lawyer shall not act as an advocate in a trial in which the lawyer is likely to be a witness unless: [¶] (1) the lawyer's testimony relates to an uncontested issue or matter; [¶] (2) the lawyer's testimony relates to the nature and value of legal services rendered in the case; or [¶] (3) the lawyer has obtained informed written consent from the client. If the lawyer represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the lawyer is employed. [¶] (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by rule 1.7 or rule 1.9."

case law and scholarly literature as "playbook" information. (See, e.g., *Khani v. Ford Motor* Co. (2013) 215 Cal.App.4th 916, 921-922; *Fremont Indemnity Co. v. Fremont General Corp*. (2006) 143 Cal.App.4th 50, 69 (*Fremont Indemnity*); Painter, *Advance Waiver of Conflicts* (2000) 13 Geo.J. Legal Ethics 289, 319; Wolfram, *The Vaporous and the Real in Former-Client Conflicts* (1996) 1 J. Inst. for Study of Legal Ethics 133, 138.)

As described by Professor Charles Wolfram, the typical playbook problem involves a claim by a former client that the lawyer learned confidential information of a general kind during the prior representation: "Common variants on the claim are assertions that the lawyer learned the former client's settlement strategy and philosophy, or what sequence of demands or other tactics the former client uses in negotiating business deals, how the former client generally conducts its business, how the client deals with the stresses of litigation, what quirks of personality the client possesses or suffers from, or, in general, what 'hot buttons' can be pushed to cause panic or confusion to the former client. Confidential information about any one of those elements, it is claimed, would give the lawyer significant advantage were it permissible to represent an adversary against the former client, regardless of the factual dissimilarities between the two representations in other respects. Hence, it is claimed, confidential information protected by the substantial relationship test should include such playbook information." (Wolfram, *Former-Client Conflicts* (1997) Geo.J. Legal Ethics 677, 723, fns. omitted).

Under California law a law firm is not subject to disqualification because one of its attorneys possesses information concerning an adversary's general business practices

or litigation philosophy acquired during the attorney's previous relationship with the adversary. (*Banning Ranch Conservancy v. Superior Court* (2011) 193 Cal.App.4th 903, 918 ["[m]erely knowing of a former client's general business practices or litigation philosophy is an insufficient basis for disqualification based upon prior representation"].) To be protected through a disqualification order, "'the information acquired during the first representation [must] be "material" to the second; that is, it must be found to be directly at issue in, or have some critical importance to, the second representation.'" (*Fremont Indemnity*, *supra*, 143 Cal.App.4th at p. 69; accord, *Khani v. Ford Motor Co*., *supra*, 215 Cal.App.4th at pp. 921-922 [attorney's acquisition of general information about Ford's policies, practices and procedures while defending the company in lemon law cases did not require his disqualification in a lemon law case against Ford on behalf of the purchaser of a defective Lincoln Navigator]; see *Farris v. Fireman's Fund Ins. Co.* (2004) 119 Cal.App.4th 671, 680; see generally ABA Model Rules Prof. Conduct, rule 1.9, comment [3] ["[i]n the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation"]; Rest.3d Law Governing Lawyers, § 132, com. (d)(iii), p. 382 [only when information concerning a former client's policies and practices "will be directly in issue or of unusual value in the subsequent matter will it be independently relevant in assessing a substantial relationship"].)

The trial court's disqualification order in this case necessarily rests on implied findings that Richie acquired

confidential and privileged information as a result of his prior position at O'Gara Coach that is material to his law firm's current representation of Loera. Yet the declarations submitted by O'Gara Coach describe only classic playbook information. Nowhere does O'Gara Coach demonstrate the required link between Richie's knowledge of the development and implementation of the company's workplace policies and the issues presented by Loera's lawsuit. While O'Gara Coach argues Richie was the primary point of contact at the company for its outside general labor and employment counsel regarding the handling of employee complaints, it identifies no category of information gained by Richie as a result of those contacts that is directly at issue in, or has some unusual value or critical importance to, Richie Litigation's representation of Loera. Unlike the situation in *Ra*, Richie did not assist O'Gara Coach's lawyers in their investigation of Loera's harassment and discrimination claims. Nor does Loera's complaint question the validity of the formal policies or internal procedures Richie implemented while president and chief operating officer at O'Gara Coach.

Whether viewed as a lack of substantial evidence to support its implied findings of fact or as an erroneous determination of the appropriate legal standard to apply in these unusual circumstances, the trial court's order disqualifying Richie Litigation and its attorneys other than Darren Richie must be reversed.[6]

---

[6] Although, based on the evidence submitted in support of O'Gara's motion to disqualify, we conclude the confidential attorney-client information Richie may possess is not material to

DISPOSITION

The order disqualifying Richie Litigation and its attorneys other than Darren Richie from representing Loera is reversed. Loera is to recover his costs on appeal.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.

---

the issues in Loera's lawsuit, Richie Litigation's apparent decision not to screen Richie from any participation in Loera's representation is troublesome. (See generally rule 1.10(a)(2).)