

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA
VENTURA DIVISION**

TENTATIVE RULINGS

EVENT DATE: 10/16/2020 EVENT TIME: 08:20:00 AM DEPT.: 20
JUDICIAL OFFICER: Matthew P. Guasco

CASE NUM: 56-2018-00513957-CU-MM-VTA
CASE TITLE: BRAZIER VS. FREY MD

CASE CATEGORY: Civil - Unlimited CASE TYPE: Medical Malpractice

EVENT TYPE: Motion - Other (CLM) - for order disqualifying
CAUSAL DOCUMENT/DATE FILED: Motion - Other, 03/03/2020

Notice Regarding Courtroom 20 Law & Motion Procedures: The law and motion calendar in Courtroom 20 before Judge Matthew P. Guasco starts promptly at 8:30 a.m. Ex parte applications will be heard at the same time as matters on the law and motion calendar. Parties appearing by Court Call must check in with the Judicial Assistant by 8:20 a.m. No notice of intent to appear is required. Parties wishing to submit on the tentative decision must so notify the Court by e-mail at Courtroom20@ventura.courts.ca.gov or by fax to Judge Guasco's secretary, Lori Jacques at (805) 477-5892. **Do not call in lieu of sending an e-mail or fax.** If a party submits on the tentative decision without appearing, but another party appears, the hearing will be conducted in the absence of the non-appearing party. Effective February 13, 2018, all cases assigned to Courtroom 20 are assigned for all purposes (including trial) to Judge Guasco.

COVID-19 NOTICE: Pursuant to the administrative orders of the Presiding Judge and the Civil Reopening Plan, effective June 10, 2020, and until further notice, all attorneys and self-represented parties in law and motion hearings must appear telephonically via Court Call; there shall be no personal appearances in the courtroom without the prior express approval of Judge Guasco. You may contact Court Call as follows: www.courtcall.com or call 888-882-6878.

The following is the Court's tentative decision concerning the motion of plaintiff, Nicole Brazier ("plaintiff"), to disqualify Kimberly Offenbacher, Esq. ("Offenbacher"), and counsel of record for defendants, Robert Joseph Frey, M.D., and Pacific Pain Management, Inc. ("defendants"), the law firm of Schaeffer Cota Rosen, LLP ("SCR"):

Request for Judicial Notice

The Court GRANTS plaintiff's request for judicial notice of documentation from the State Bar website, as well as records of this Court. (Evid. Code, § 452, subds. (c), (d).)

Ruling on Motion

For the following reasons, the Court GRANTS the motion to disqualify Offenbacher, but DENIES the motion to disqualify the SCR firm as counsel of record for defendants:

(1) Rule 3-310 of the Rules of Professional Conduct prohibits a lawyer from representing a client whose interests are adverse to those of a former client. In the classic "successive adverse representation" situation, the trial court has the broad discretion to disqualify the attorney in the interests of protection of the attorney/client relationship and confidential communications attendant thereto, as well as preservation of the fairness and integrity of the judicial process. (*H. F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1451, 280 Cal.Rptr. 614.)

(2) Here, it is undisputed that Offenbacher was employed by plaintiff's counsel of record, DK Law Group, at the time the Complaint was filed. Offenbacher participated in the preparation of the Complaint, although she has no independent recollection of this case or that work. Shortly after that work on this case, Offenbacher left DK Law Group and worked for several months with the Manning Kass firm in Los Angeles. She joined the SCR firm as an associate on December

17, 2018.

(3) It is undisputed that Offenbacher had no involvement in SCR's handling of the defense in this action from the time she became employed by SCR to the present. Plaintiff's counsel notified SCR on February 26, 2019, that a potential conflict of interest exists with regard to SCR's employment of Offenbacher. Upon learning of this concern, SCR took immediate steps to establish a separation or "firewall" shielding Offenbacher from any information or involvement in this action. These measures include limiting the work performed by SCR for defendants to two partners and a designated legal assistant, instituting password protected access to information and records concerning the case, locking Offenbacher out of such password access, and establishing a firm directive that Offenbacher shall not have any involvement in or receive any information concerning the action.

(4) The Court finds that plaintiff has established a "substantial relationship" between Offenbacher's work on behalf of plaintiff at DK Law Group, and the work of SCR in this action: the prior representation was of the plaintiff in this case in which Offenbacher's employer represents the defendants. This creates a conclusive presumption that Offenbacher received confidential information from her former client, plaintiff, whether Offenbacher remembers doing so or not. (*H. F. Ahmanson & Co. v. Salomon Brothers, Inc.*, *supra*, 229 Cal.App.3d at p.1451, 280 Cal.Rptr. 614.)

(5) The Court finds, therefore, that Offenbacher must be disqualified from having any involvement in the defense of this action or divulging to SCR any information she may have gained about this case while working for DK Law Group. Accordingly, the Court GRANTS the motion to disqualify Offenbacher from representing or having any role in the defense of defendants in this action. Additionally, the Court ORDERS that the "firewall" procedures SCR has put in place to shield the firm from information Offenbacher may have learned while working on this matter at DK Law Group, and to shield Offenbacher from any information or involvement in this case, shall remain in effect for the course of SCR's involvement as counsel of record for defendants.

(6) The Court finds that plaintiff, through her counsel of record, DK Law Group effectively and expressly waived any conflict of interest concerning SCR remaining as counsel of record. This waiver is memorialized in an email from Mr. Karen to Mr. Schaeffer, dated March 20, 2019, which reads in pertinent part as follows: "In light of the understanding that you have effectively 'fire-walled' Kim [Offenbacher] from any access or involvement in this matter, upon confirmation that no file-related information has been shared or discussed with Kim, our client is amenable to waving [sic] the conflict provided those protections remain in place through the conclusion of the litigation." (Ex. A, Decl. of J. Schaeffer.)

(7) Further, the timing of this motion after plaintiff received the above-described assurance of the establishment of the "fire-wall" strongly, and made the waiver in reliance thereon, suggests this motion is made for tactical, not objectively fair or just, considerations. For example, Mr. Schaeffer declares, and Mr. Karen does not declare to the contrary, that Mr. Karen indicated plaintiff's interest in participating in an early mediation after advising Mr. Schaeffer that the "fire-wall" protocol would be acceptable to plaintiff. This strongly suggests the filing of the motion to disqualify after the waiver and when no mediation occurred is a form of tactical leverage without regard to the substantive or objective justness or fairness of the motion itself. If there is a conflict of interest substantial enough to warrant the bringing of this motion, it would not have vanished with the advent of a mediation; the same conflict would have prevented SCR's representation of defendants in a mediation, according to plaintiff's arguments in the motion. Moreover, the motion occurs many months after filing of the Complaint and following extensive litigation by the parties. The totality of the circumstances suggest a tactical, and not an objectively fair or just, motivation for bringing the motion at this late date. (*River West, Inc. v. Nickel* (1987) 188 Cal.App.3d 1297, 1310-11, 234 Cal.Rptr. 33.)

(8) The Court, therefore, DENIES the motion to disqualify the SCR law firm from being counsel of record for defendants herein. The Court is satisfied that the "fire-wall" procedure implemented by SCR, which the Court has made its Order going forward, provides the prophylactic assurances demanded by the Rules of Professional Conduct, the governing published appellate authorities, and the interests of justice here. (See *Kirk v. First American Title Ins. Co.* (2002) 183 Cal.App.4th 776, 108 Cal.Rptr.3d 620.)

Counsel for plaintiff shall serve and file a notice of ruling and proposed order consistent with the above and in conformity with the Code of Civil Procedure and the California Rules of Court. A copy of this tentative decision (if adopted by the Court as its final ruling) may be attached to any such proposed order in lieu of copying the same verbatim in the body of the document.