***Meza v H. Muehlstein & Co*.**

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Conflict of interest; Substantial relationship test; common interest doctrine

Plaintiff was represented by the Metzger firm. She sued Joe's Plastics and numerous other defendants for exposure to toxic chemical products. In all, seventeen defendants were named, and each had separate counsel. Attorney Drouet represented Joe's.

At a Case Management Conference, Drouet provided a declaration to the court that the defense had engaged in two exhaustive and detailed conferences to produce a proposed CMC order. The order stated that defense counsel could exchange information regarding their common interests without waiving the attorney-client and attorney work product privileges. The Court adopted the order.

The defendants then entered into a Joint Defense Cost Sharing Agreement to create a common defense fund to share joint costs, including fees for depositions and expert witnesses. Drouet participated in many meetings with defense counsel and shared individual work product regarding the plaintiff's medical condition, analysis of lay and expert witnesses, assessment of plaintiff's litigation strategies, a site assessment, joint defense consultants, and other legal strategies.

Later, the trial court entered judgment in favor of defendants and against Meza on the ground she failed to show any admissible expert evidence establishing causation. Meza appealed, and while that appeal was pending, Drouet became an associate with the Metzger firm. He worked there for about eight months before leaving for another office.

The judgment was later reversed on appeal, and the defendants filed a motion to disqualify the Metzger firm because of Drouet's prior employment there. In a declaration in support of the Metzger opposition, Drouet stated that he never directly communicated with any defendants and that other defense counsel never disclosed any communications they had with their

clients. The trial court granted the motion to disqualify the Metzger firm and this appeal followed.

The Legislature has codified the attorney work product doctrine in Code of Civil Procedure section 2018.010. An attorney's work product includes the results of his or her own work, and the work of those employed by him or her. It applies to investigation of both favorable and unfavorable aspects of the case and the legal theories and plan of strategy developed by the attorney. (*BP Alaska Exploration v Superior Court* (1988) 199 Cal.App.3d 1240)

An attorney has a ***qualified privilege*** against the discovery of general work product and an ***absolute privilege*** against disclosures of writings containing an attorney's impressions, conclusions, opinions or legal theories. When an attorney successively represents clients with adverse interests, the attorney has a potential conflict of interest. If there is a "substantial relationship" between the subjects of the prior and current representations, the attorney must be disqualified. (*Flatt v Superior Court* (1994) 9 Cal 4th 275)

The substantial relationship test mediates between the interest of the subsequent client to counsel of choice and the interest of the former client to ensure permanent confidentiality. Where the requisite substantial relationship between the subjects of the prior and the current representations can be demonstrated, access to confidential information is presumed and disqualification of the attorney's representation of the second client is mandatory.

Under the substantial relationship test, Drouet was clearly disqualified from representing Meza. This was a per se conflict of interest. (Rules of Prof. Conduct, rule 3-310(C)(2). As a general rule in California, **where an attorney is disqualified from representation, the entire law firm is vicariously disqualified as well.** This is especially true where the attorney's disqualification is due to his prior representation of the opposing side during the same lawsuit. (*Henriksen v Great American Savings & Loan* (1992) 11 Cal.App.4th 109)

An "***ethical wall"*** between an attorney with confidential information and his or her firm will generally not preclude the disqualification of the firm. Instead there is a presumption that each member of the firm has imputed knowledge of the confidential information. (*People ex rel. Dept. of Corporations v SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135) Here, Drouet engaged in numerous oral and written communications with counsel for the defense, wherein substantial confidential and privileged work product was revealed. The Metzger law firm knew of the court order allowing the defense sharing before it hired Drouet, and chose to hire him anyway.

Meza argues that because the defendants had separate, dissimilar, and at times, adverse interests, defendants' attorneys could not disclose work product to each other without waiving the work product privilege. The Second DCA disagreed, stating that the disclosure of work product relating to the defendants' common interests does not result in a waiver, so long as the elements of the common interest doctrine are satisfied.

An attorney can disclose work product to an attorney representing a separate client without waiving the attorney work product privilege if (1) the disclosure relates to a common interest of the attorneys' respective clients, (2) the disclosing attorney has a reasonable expectation that the other attorney will preserve confidentiality and (3) the disclosure is reasonably necessary for the accomplishment of the purpose for which the disclosing attorney was consulted. (*OXY Resources California LLC v Superior Court* (2004) 115 Cal.App.4th 874)

Here all defendants had ***common interests*** in Meza's medical condition, and in anticipating litigation strategies and retaining defense consultants, so the first requirement is satisfied. In light of the CMC order, defendants' attorneys ***reasonably expected*** that co-defendants' counsel would preserve the confidentiality of the attorney work product disclosed in communications regarding common interests, satisfying the second requirement. Finally, the communications were "***reasonably necessary***" to accomplish the purpose of better preparing for trial. As such, under the

common interest doctrine, the attorney work product privilege was not waived.

The order granting the motion to disqualify the Metzger firm is affirmed.

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