

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

**ANTELOPE VALLEY GROUNDWATER
CASES**

Included Consolidated Actions:

Los Angeles County Waterworks District No.
40 v. Diamond Farming Co.
Superior Court of California
County of Los Angeles, Case No. BC 325 201

Los Angeles County Waterworks District No.
40 v. Diamond Farming Co.
Superior Court of California, County of Kern,
Case No. S-1500-CV-254-348

Wm. Bolthouse Farms, Inc. v. City of Lancaster
Diamond Farming Co. v. City of Lancaster
Diamond Farming Co. v. Palmdale Water Dist.
Superior Court of California, County of
Riverside, consolidated actions, Case Nos.
RIC 353 840, RIC 344 436, RIC 344 668

Rebecca Lee Willis v. Los Angeles County
Waterworks District No. 40
Superior Court of California, County of Los
Angeles, Case No. BC 364 553

Richard A. Wood v. Los Angeles County
Waterworks District No. 40
Superior Court of California, County of Los
Angeles, Case No. BC 391 869

Judicial Council Coordination
Proceeding No. 4408

Lead Case No. BC 325 201

**ORDER AFTER HEARING ON
DECEMBER 7, 2016**

**Motion by AVEKWA to Disqualify
Best Best & Krieger as Legal Counsel**

Judge: Honorable Jack Komar, Ret.

Motion by AVEK to disqualify Best, Best & Krieger, LLP, from representing Los Angeles County Water District 40 or any other party in the JCCP 4408 proceedings on the grounds that it has breached its duty of loyalty to AVEK by simultaneously representing clients with competing and adversarial interests in the ground water litigation, in contravention of California Rule of Professional Conduct 3-310 (C).

The motion was heard in open court pursuant to notice on December 7, 2016 at 9:00 a.m. in Room 222 of the Superior Court of California, County of Los Angeles. Counsel appearing in person and by telephone are listed in the Minutes of the court.

The matter having been briefed and orally argued by the parties, the court being fully apprised in the matter, the motion is hereby denied

I. FACTS

The Antelope Valley East Kern Water Agency (AVEK) is a governmental chartered agency formed for the purpose of selling California State Water Project water at wholesale to public water producers and certain private enterprises. Los Angeles County Water District 40 (District 40) is a Los Angeles County Water District which provides water to the residents in its district from both Antelope Valley pumped ground water and water which it purchases at wholesale from the State Water Project though, in part, AVEK.

As found by the court in this matter, the Antelope Valley basin aquifer has become a diminishing water resource and is and was in a state of overdraft for many years. Ground water was produced at a rate exceeding annual recharge, causing damage and detriment to the aquifer and the valley generally, with subsidence of land and loss of water storage space, and jeopardizing the basin as a future source of water for human uses.

In 1970, the concern that there was continuing depletion of the water supply from the ground water in the valley led to a written agreement between District 40 and AVEK which provided that in the event of an adjudication of the ground water basin, AVEK agreed to assist District 40 and Rosamond Community Services District (another water producer and seller at retail) (and others) in retaining their rights to the ground water supply. This agreement was

entered into prior to the time that Best, Best & Krieger, LLP, was engaged to act as general counsel.

In 1987, Best, Best & Krieger, LLP (BB&K) was engaged to act as General Counsel to AVEK, and the law firm designated Michael Riddell, Esquire, a member of the firm, with an office located in Riverside, California, to be general counsel to AVEK. Mr. Riddell (and thus BB&K) so served until the relationship was terminated on January 19, 2016. At various times, other law firms were retained to represent AVEK with regard to other specific matters and Mr. Riddell continued as counsel for the functions for which the firm was retained originally until terminated. BB&K at no time acted as counsel for AVEK in the instant coordinated case. There is no competent evidence offered that Mr. Riddell ever advised AVEK concerning any of the issues in the case.¹

In 1999, litigation was commenced by private parties to preserve their ground water rights. AVEK was not a named defendant in the early litigation because it was not a water producer. The action was solely to preserve the private party's right to produce water on its own land. As new complaints were filed and other parties were added, District 40 was named as a defendant. In 2004, District 40 engaged BB&K to represent it in the litigation because the law firm had extensive experience in ground water litigation. AVEK was not a party to the litigation at the time and there was no actual conflict in BB&K's representation of District 40. AVEK publicly stated that it would not participate in the litigation.

District 40 and its counsel initiated a basin wide adjudication alleging a need for an effective solution to the overdraft problem. District 40 filed a complaint, and ultimately, its Cross-Complaint, naming all parties claiming water rights either by name or as unnamed defendants, including the federal government, seeking to both preserve its ground water rights

¹ Based on the AVEK Board decision not to participate in the ground water adjudication the was initiated by private parties seeking to protect their ground water rights by initiating action against District 40 and others, that there was no conflict with BB & K representing District 40.

and to obtain a physical solution to the overdraft condition it believed existed. Additional actions were initiated in the form of class actions against the public water producers so that all parties claiming actual or potential water rights were included in the comprehensive adjudication.

AVEK was not named by District 40 in its complaint or cross-complaint. Pursuant to the written agreement, AVEK was bound to cooperate with District 40 in protecting District 40's rights water rights. AVEK, however, was subsequently named by another party and, with knowledge that BB&K was its general counsel and also District 40's counsel in the Antelope Valley litigation; it engaged the law firm of Brunick, McElhaney, and Kennedy to represent it in the coordinated litigation. The Brunick firm then filed both an answer and a cross-complaint on behalf of AVEK - essentially for declaratory relief concerning its rights, naming other claimants and District 40 as cross-defendants, thereby creating an actual conflict. Ultimately, in 2005, all existing matters were ordered coordinated in this action, JCCP 4408, and ultimately consolidated by the court to permit entry of a single judgment which could be recorded and enforced in all jurisdictions from which the cases came.

Intense, complex litigation among the parties continued for more than ten years, culminating in a judgment on December 23, 2015, following 6 phases of trial, multiple motions and pretrial activities of almost every sort, and a stipulated settlement and judgment agreed to by nearly all the parties to the litigation, which included two class actions of large numbers of parties who could not otherwise be joined without enormous expense and time consumption.

District 40 and AVEK were on the same side of virtually every issue in the case except certain class action attorneys fee issues later in the proceedings (District 40 thought AVEK and other parties should share in the award of attorneys' fees (if any) to class counsel) and a theory proposed by AVEK seeking "return flows" from state water project water it sold to water districts like District 40. AVEK's claim to return flows from unsold water it spread and banked was never at issue and was agreed to and confirmed in the stipulated settlement agreement and judgment which also settled the issue of attorneys fees so far as AVEK was

concerned.² Because those retail customers of the water districts generated return flows, AVEK contended a right to pump such amounts from the ground water.³

Neither AVEK nor its litigation counsel raised any objection to BB&K's representation, either as to the representation of AVEK as general counsel or the representation of District 40 by BB&K (counsel (of record here) who were from a different geographical office (Irvine) than Mr. Riddel (Riverside). District 40 itself did not object to the fact that a BB & K lawyer was acting as general counsel for AVEK although unavoidably aware that there was an actual conflict once the Brunick firm sued District 40 on behalf of AVEK. No request was made during the entirety of the adjudication process that BB&K withdraw from either the Antelope Valley coordinated matters or as general counsel until after the stipulation and judgment were entered. The Brunick law firm and AVEK was well aware throughout the pendency of the proceedings that both the potential and the actual conflict existed and failed to act in any way to raise the issue or to object to the continued representation.

During the adjudication process, BB&K also represented Rosamond Community Services District (Rosamond) for a period of time so long as the parties were aligned on the issues and when that ceased to be true, BB&K withdrew and Rosamond sought and obtained other counsel. It is noteworthy that BB&K requested a waiver by AVEK of conflict as to Rosamond and District 40. The request as to Rosamond was denied but no response was ever made as to District 40 by AVEK until the formal motion long after the request was made.

II. RULES OF PROFESSIONAL CONDUCT FOR LAWYERS

California Rules of Professional Conduct, 3-310 C) provides that a member shall not, without the informed written consent of each client:

- (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

² There apparently was no conflict between the parties as to the banking of water by AVEK of State Water Project water it received or of return flows from its own wells.

³ AVEK sought such rights by summary adjudication which District 40 opposed. The motion was denied by the court.

(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or

(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

(D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.

(E) A member 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.

III. DISCUSSION

There is no dispute that in a matter where an attorney by reason of representation of a client finds himself in conflict with another client, because the case is related to a former case, or the attorney has confidential information from the former client which is implicated in or affects the representation of the client, the attorney must promptly disclose the conflict and withdraw or seek a written waiver. That situation may arise in successive cases, where an attorney represented a party in the past and now finds that he is representing a new client in opposition to the former client where the cases may be related or if not directly related the attorney has acquired confidential information from the former client which could be used to the former client's detriment. It may also arise in what may be described as a simultaneous or concurrent representation.

A concurrent or simultaneous case conflict of interest may occur where an attorney is asked to represent two separate clients who are in conflict in whole or in part with each other.

There are obviously multiple circumstances giving rise to conflicts between clients which implicate an attorney's ability to represent a client under the rules. The rules of professional conduct apply equally in both successive and simultaneous situations. The matter before the court here partakes of both circumstances.

Rule 3-310 treats both successive or consecutive and concurrent conflict of interest situations the same: Both require full disclosure to both clients, withdrawal as counsel, rejection of the new client, or a written waiver signed by the clients. A primary duty of counsel in successive representation cases is said to be one of protection of confidential information acquired in the first representation. A primary duty implicated in contemporaneous or concurrent representation cases is said to be one of loyalty. *Flatt v. Superior Court* (1994) 9 Cal. 4th 275. Both confidentiality and loyalty may be present in simultaneous or concurrent representation cases.

The facts here are unique. BB & K was counsel for AVEK as general counsel. BB & K was also trial counsel for District 40 in the Antelope Valley Ground Water litigation (JCCP 4008). There was an agreement to cooperate with District 40 by AVEK in this litigation. There was no actual conflict of interest. Then, AVEK created a conflict by suing District 40 in the ground water litigation. It may be note worthy that District 40 did not counter sue AVEK.

Flatt, supra, held that the simultaneous representation of adversaries who take adverse and conflicting positions in a lawsuit results in per se or automatic disqualification of counsel. In a foot note, however, the Supreme Court notes that even that rule is subject to some exceptions. "The principle of loyalty is for the client's benefit; most courts thus permit an attorney to continue simultaneous representation of clients whose interests are adverse as to unrelated matters provided full disclosure is made and both agree in writing to waive the conflict." *Flatt, supra*, Footnote 4.

By the express terms of the Rules of Professional Conduct, when the Brunick firm filed its action against District 40, Mr. Riddle could have been removed as general counsel for AVEK and BB & K could have been disqualified from representing District 40 in its conflict with AVEK (its then would-be former client).- but neither AVEK nor its new counsel nor

District 40 took any such action until the litigation was virtually completed, many years later, after a global resolution and a stipulation for judgment had been signed.

A motion to disqualify counsel is a motion in equity. A court considering such a motion must ensure that “literalism does not deny the parties substantial justice.” See *People ex rel Department of Corporations v. Spee Dee Oil Change Systems, Inc., et al* (1999) 20 Cal. 4th 1135, citing *Comden v. Superior Court* (1978) 20 Cal. 3rd 906.

A court must consider client’s right to counsel of its choice, an attorney’s interest in representing a client, the financial burden on a client to replace counsel, and interests beyond the interests of the parties.

Once AVEK discharged BB & K as general counsel, the risk of divided loyalties was gone based upon the global settlement, stipulation, and judgment. It is also noteworthy that District 40 and BB & K never sought positive relief in its pleadings against AVEK. What remained of concern is the confidential information which was acquired by BB & K during its representation of AVEK. In the Speedee Oil Systems case, the court was concerned about the duty to protect client confidences post-termination or withdrawal, where there was still an ongoing litigation by the parties against each other. Here, there was no evidence of confidences disclosed as to the Antelope litigation. Totally separate attorneys were involved in that representation in different geographical offices. The court is assured that there has been no exchange of confidential information between the two BB & K offices or attorneys

A party seeking equity must use reasonable diligence in seeking relief in equity. See *River West v. Nickel* (1987) 188 Cal. App. 3d 1297, citing an example of the effect of a four years delay in seeking disqualification. While *River West* involved successive representation cases, the court held that the delay was so egregious that the defendant should be estopped from asserting the motion to disqualify counsel for conflict.

Counsel have cited multiple cases in their briefs which help to establish equitable bases for declining or granting disqualification motions where conflicts arise in “successive” or “consecutive” representation situations. In such cases, in equity, courts have declined to disqualify counsel if the facts were known to the parties and there was *extreme* delay in seeking

disqualification, or if disqualification would cause *great prejudice* to the second client and no actual prejudice is incurred by the previous client. Prejudice may include great cost and expense to obtain new counsel as well as other damages. The potential deprivation of right to counsel of one's choosing may be another consequence to be avoided. In cases involving public lawyers and entities, the increased burdens on taxpayers may be a sufficient harm to weigh in favor of denying a motion to disqualify a lawyer.

Other theories which may result in a denial of disqualification include implied waiver where the conflict is known and no objection is made to the continued representation over an extended period of time. Some language in the commentaries discusses the concept of laches in equity.

Where the conflict is simultaneous or concurrent as described above, courts have often stated as a matter of policy that such conflict is automatically or *per se* disqualifying. The general principle seems to be that simultaneous or concurrent conflict representation is *per se* disqualifying absent a written waiver, "*with few exceptions.*" *People ex rel Dept. of Corporations v. Spee Dee Oil Change Systems* (1999) 20 Cal. 4th 1125. However, no case has been cited that is completely on point with the instant case. In many ways the case has characteristics of a successive case as well as a simultaneous case.

In one case of simultaneous or concurrent representation, at least one case has opined that a significant factor may be that the dual representation has ended and no confidential information was obtained by counsel. Although it is stated that a lawyer cannot relieve himself of the violation of the Rules by withdrawing but certainly when the actual conflict no longer exists because the representation no longer exists, the circumstances should be considered.

As Justice Chin quoted, "literalism should not deny the parties substantial justice." *People ex rel Spee Dee Oil Systems, supra*. In a concurring opinion in California, a Court of Appeal Justice opined that that the concept of excessive delay and implied consent might be relevant to more than successive representation cases. *State Farm Mutual Auto Insurance v. Federal Insurance Co.* (1999) 72 Cal. App. 4th 1050 (concurring opinion in a successive representation case).

The court makes the following findings:

1. At all times herein AVEK and District 40 acted cooperatively together with the principal purpose being to preserve and restore the Antelope Valley basin and to create a physical solution to the overdraft problem until the settlement was reached and Mr. Riddel was discharged. .

2. The parties were bound by a 1970 written agreement the terms of which are still in existence. Article 3a of the agreement provides for AVEK to assist District 40 (and other customers) to retain their water rights in the event there is an adjudication of the ground water basin.

3. At the time that District 40 retained Best, Best & Krieger to represent it in the ground water litigation, there was neither potential nor actual conflict, as evidenced by AVEK'S reiteration in its various public statements, that AVEK "maintained a neutral stance" on the issues in the litigation and did not intend to become involved in the dispute. No actual conflict of interest between the parties occurred until AVEK was sued by a third party which led to its naming District 40 on its cross complaint. District 40 did not counter sue AVEK.

4. AVEK engaged separate counsel to represent it after having been named by a third party in the coordinated actions. Brunick, McElhaney, and Kennedy, filed a cross complaint for declaratory and injunctive relief against multiple parties in the JCCP 4008 litigation, including a naming District 40 as a cross defendant on behalf of AVEK. At the time the cross-complaint was filed by AVEK seeking return flows from water sold to water providers, which in part may have been a breach of contract by AVEK, a conflict of interest arose between District 40 and AVEK.

5. Notwithstanding the cross-complaint, AVEK acted cooperatively with District 40 and the other public water producers, with the sole exception of issues concerning attorneys' fees and cost claims by the Willis and Wood Class attorneys and regarding a determination of AVEK'S right to seek return flows generated from District 40's and other Public Water Producers 'retail customers water use (which claim may have been contrary to the 1970 cooperation agreement.

6. With the exception of several small land owners who for a variety of reasons failed to join the settlement, all claims were settled by written agreement, stipulation, and judgment, approved by the court on December 23, 2015 and thereafter entered by the court.

7. Only after the judgment was entered and all issues resolved by the parties did AVEK decide to terminate Michael Riddel from his representation of AVEK and then seek on August 17, 2016, by motion to the court, seek to have the Best, Best and Krieger firm disqualified from further representing District 40.

8. The settlement and judgment resolved all differences between AVEK and District 40, and further resulted in an agreement for District 40 to lease from AVEK all its overlying water rights to ground water which AVEK had under the stipulated physical solution and judgment. The stipulation and judgment also specifically provided that the only parties against whom the court could potentially award class attorneys were the Public Water Producers, which did not include AVEK, and which eliminated that aspect as a conflict between the parties.

9. AVEK has not appealed the judgment entered in the adjudication and has not objected to any of its terms. AVEK's interest in preserving the judgment is identical to District 40's (and all others parties to the settlement).. AVEK currently benefits from District 40's efforts to support the settlement.

10. There is no competent evidence presented that Best, Best & Krieger acquired or used any confidential information of AVEK in the litigation on behalf of District 40 in this case, nor that there was any transmittal of confidential information from Mr. Riddel or any other person to counsel who represented District 40 in these proceedings.

11. It is also noteworthy that the parties here are both governmental agencies who do have an obligation to be transparent in virtually all of their records and that virtually all of their records are available upon request consistent with the government code and the constitution of the state of California.

12. BB&K never represented AVEK in connection with the Antelope Valley coordinated cases and ceased representing AVEK as general counsel. It currently has no

connection (other than the agreement of cooperation from 1970 with AVEK). The only concurrent conflict between AVEK and District 40 relates to a purported disagreement as to the rules for selection of the landowner Watermaster representatives, the resolution of which has no impact of any kind on AVEK since the approved rules adopt the principles of the settlement.

IV. CONCLUSION

AVEK impliedly consented to BB&K's representation of District 40 throughout the 10 plus years of litigation. Given its knowledge of the conflict and its failure to take any steps to bring it to the court's attention during the entire period of the adjudication until after judgment has been entered, the motion is untimely and extremely prejudicial to District 40 and to the court system.

The evidence establishes *implied in fact* consent to the continued representation of District 40 by BB&K throughout the adjudication process. AVEK's board was well aware of its claims and that District 40 was represented by BB&K and that BB&K was its general counsel for other matters. AVEK is estopped from denying it consented to the continued representation once the conflict occurred. Attorneys who represented AVEK as general counsel and attorneys involved in the Antelope Ground Water Coordinated cases are ordered not to exchange any information obtained in the course of their respective representation with the other.

Having presided over the coordinated cases from 2005 to judgment and post-judgment continuously to the present time it is the court's opinion that Best, Best, and Krieger, and in particular, Jeffrey Dunn, Esquire, Eric Garner, Esquire, Wendy Y. Wang, Esquire, Stefanie Morris, Esquire, and their staff, performed professionally and ethically, with expertise, in representing their client, as did many other counsel in the case whose performance is not at issue here, including the Brunick firm and its lawyers. District 40 was instrumental as a lead party in the matter proceeding through 6 phases of trial and in the resulting stipulation by every major party in the proceedings.

The court is of the opinion that both District 40, AVEK, and all others who have entered into the settlement and judgment in this case will benefit greatly from the continued representation by BB&K of District 40 in this remarkable case and that all would suffer serious detriment were BB&K to be disqualified. Any court reviewing the settlement, stipulation and judgment, as well as the post judgment litigation, will also benefit from the continued representation of respondents on appeal by BB&K. AVEK sat on its hands for many years and should not be heard to complain many years later having benefitted from the settlement which was led on AVEK's side of the case by BB&K.


Disqualification would serve no useful purpose and would act adversely on all parties who support the stipulation for judgment and the physical solution which the court independently approved. The special facts here justify a departure from the by rote application of the per se or automatic disqualification in a simultaneous or concurrent conflict case.

V. ORDER

The motion to disqualify the law firm of Best, Best & Krieger is denied.

SO ORDERED.

Dated: December 9, 2016



Hon. Jack Komar (Ret.)
Judge of the Superior Court