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MEMORANDUM

To: Paul Lozada

Re: Disqualification of Attorney Joe Spenser

Date: August 4, 2014

ALD

Good JOB

CONCISE, RELEVANT ANALYSIS

ANTICIPATES OPPOSITION RESPONSE!

Very Good!

Spenser has a duty of loyalty to his former client.

In *Zador (Zador Corporation, N.V., v. C.K. Kwan* (1995) 31 Cal.App. 4th 1285, 1290 [37 Cal. Rptr. 2d 754] .) (*Zador*) the court held that:

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“The relation between attorney and client is a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity –uberrima fides. Among other things, the fiduciary relationship requires that the attorney respect his or her client’s confidences. It also means that the attorney has a duty of loyalty to his or her clients.”

Because of this fiduciary relationship, it is improper for an attorney to assume a position which is inconsistent with the interests of present or former clients. Spenser knew his former client was the co-defendant in the case prior to his first appearance for Mr. Smith, therefore Spenser breached his duty of loyalty to his former client.

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“The breach occurs not when the attorney steps into court to represent the new client, but when he abandons the old client. In other words, once the attorney accepts a representation in which confidences disclosed by a former client may benefit the new client due to the relationship between the new matter and the old, he or she has breached a duty loyalty.” (*Benasra v. Mitchell Sillberber & Knupp LLP* (2004) 123 Cal. App. 4th 1179, 1189 [20 Cal. Rptr. 3d 621])

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Spenser has a duty of confidentiality to his former client.

Because Spenser formerly represented client; client consulted with Spenser and obtained Spenser’s professional advice on matters directly relating to his prior criminal charges. Client took Spenser to his covert cultivation sites, and divulged his plan to open dispensaries. Spenser was intimately involved and knows the ins and outs of client’s operations, and business dealings.

Good

In Spring of 2009, Spenser had client fill out forms to which client does not know current disposition of said forms nor does he recall what information the forms contained. The charges

Spenser defended Client on are and are closely related to the charges being brought in this action.

In the context of successive representation, "The chief fiduciary value jeopardized is that of client confidentiality, not loyalty." (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135,1146 [86 Cal. Rptr. 2d 816, 980 P.2d 371])(*SpeeDee*)

Inc. (1999) 20 Cal.4th 1135,1146 [86 Cal. Rptr. 2d 816, 980 P.2d 371](SpeeDee)

It is imperative that the former client's expectation of confidentiality be preserved to ensure "the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense." (*SpeeDee Oil, ibid*)

It is required that an attorney maintain those confidences and preserve them (*Bus. & Prof.*

Code § 6068 subd. e.)

What Happens if Former Client Signs a Waiver?

An attorney may represent a client with adverse interests providing the former client signs a waiver. Because it is unknown the contents of the signed 2009 forms, it is unclear if Client signed a waiver prior to Spenser's appearance on behalf of Smith. *Rule 3-310(C)(2)* of the Rules of Professional Conduct requires an attorney to obtain each client's informed written consent before accepting (or continuing) representation of more than one client in a matter in which the interest of the clients actually conflict. (*Zador, supra, 1295*) The standard for former client consent under the Rules of Professional Conduct *Rule 3-310(E)* requires the former client's "informed written consent" to any subsequent adverse representation implicating the duty of confidentiality. Such consent requires the former client's written agreement to the representation following written disclosure of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the former client. (Rule Prof. Conduct, rule 3-310(A).) as quoted in (*People v. Baylis* (2006) 43 Cal. Rptr. 3d 559, 570 [139 Cal. App. 4th 1054.]) Prior to appearance for Smith, Spenser did not provide client with written disclosure or relevant circumstances, nor did he advise him of any foreseeable adverse consequences to client. Client wasn't given any information about

how Spenser's representation of Mr. Smith could negatively impact his case. In *People v. Mroczko* (1983) 35 Cal.3d 86, 109-110 [197 Cal.Rptr. 52, 672 P.2d 835] the court held that when a client waives his counsel's conflict of interest, the waiver must be a knowing and intelligent act "done with sufficient awareness of the relevant circumstances and likely consequences." (*People v. Mroczko, Supra 110.*)

Spenser has a professional duty to avoid a conflict of interest.

Rules of Professional Conduct provide that an attorney is required to avoid representation of adverse interests and cannot "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." (Rule Prof. Conduct, rule 3-310(E). As discussed below, there is a substantial relationship between the subject of the past and current representation. Spenser's representation of Mr. Smith is a direct conflict of interest with Client, because Spenser will put the blame directly on client, and to support his claim, could use information he obtained confidentially when Spenser was council for our client.

A Substantial relationship exists between the representations.

"A substantial relationship exists whenever the subjects of the prior and current representation are linked in some rational manner." (*Flatt v. Superior Court of Sonoma County* (1994) 9 Cal. 4th 275, 283 [36 Cal. Rptr. 2d 537, 995 P.2d 950]) The court must disqualify Spenser, because there is a substantial relationship between the case at hand and the case when Spenser represented client. The charges brought against client in this case, are similar to the charges that Spenser defended him against in the last case. In *Jessen v. Hartford Casualty Insurance Company* (2003) 111 Cal. App. 4th 698 [3 Cal. Rptr. 3d 877] ...[The court considers] 'subject' of a representation as including information material to the evaluation, prosecution, settlement or accomplishment of the

litigation or transaction given its specific legal and factual issues. Thus, successive 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 current representation given its factual and legal issues. Spenser had like charges dismissed against client in 2009 case, Therefore Spenser is privy to confidential information regarding client, because the nature of the former representation is identical. Client does not need to prove actual possession of confidential information. In *H.F. Ahmanson v. Salomon Brothers* (1991) 229 Cal.App.3d 1445 [280 Cal. Rptr. 614] the court asked if confidential information MATERIAL to the current dispute would normally have been imparted to the attorney by virtue of the nature of the former representation. “[It is] Enough to show that a ‘substantial relationship’ existed between former and current representations. (*Global Van Lines, Inc. v. Superior Court* (1983) 144 Cal. App.3d 483, 489 [192 Cal. Rptr. 609].) If the former client can establish the existence of a substantial relationship between representations, the courts will conclusively presume the attorney possesses confidential knowledge and disqualification is automatic. *River West, Inc. v. Nickel* (1987) 188 Cal. App. 3d 1297, 1303 [234 Cal. Rptr. 33] (*River West*) (*Emphasis added*). As discussed above, like charges are being brought under this action, as the prior one.

The Court has the power to disqualify Spenser.

The trial court has the inherent power to “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.” *Code Civ. Proc. § 128; In re Complex Asbestos Litigation* 1991) 232 Cal. App. 3d 572,585 [283 Cal.Rptr. 732]

As discussed supra, “A substantial relationship exists between the representations and this relationship, creates a conflict of interest, therefore the disqualification must be ordered “...when

the substantial relationship of the matters is established, the inquiry ends and the disqualification should be ordered.” (*River West, Supra, 1304*) The Substantial relationship test decides whether client confidences were likely disclosed. If the relationship exists, then disclosure is presumed and disqualification is justified. (*Zador, Supra, 1294*)

Arguments Spenser may make for why not to be disqualified.

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Removal of Spenser from Smith’s case violates Smith’s constitutional rights to be represented by counsel of his own choice. Opposition to this argument is that 6th Amendment doesn’t include the unqualified right to be represented by a specific attorney, and that right doesn’t supersede the issue that Attorney has loyalty to a preexisting attorney-client relationship and confidences to uphold.

“The “essential aim” of the Sixth Amendment to the United States Constitution “Is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by lawyer he prefers.” (*Baylis, supra 572* quoting *Wheat v. United States* (1988) 486 U.S. 153, 159 [108 S. Ct. 1692, 100 L.Ed.2d 140].)

Conclusion:

Loyalty and confidentiality are core components to the attorney-client relationship and cornerstones of American Jurisprudence. The two duties overlap, and it’s very difficult to distinguish the two in most circumstances. It is imperative to apply the ‘substantial relationship test to the facts, and to protect the former clients confidentiality. Actual disclosure of the confidential information isn’t necessary, only if there is substantial risk that information would be used in a subsequent representation. This may be waived if the former client gives informed consent.