

**Tentative Rulings for December 15, 2021**  
**Department 403**

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**There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)**

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**The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.**

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# **Tentative Rulings for Department 403**

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**Tentative Ruling**

Re: ***Barracuda Construction Inc. v. Wilmoth***  
Superior Court Case No. 21CECG01766

Hearing Date: December 15, 2021 (Dept. 403)

Motion: by defendant to disqualify plaintiff's counsel

**Tentative Ruling:**

To deny without prejudice.

**Explanation:**

The Allegations

On June 18, 2021, Plaintiff Barracuda Construction, Inc. filed a verified complaint against Defendant Sharon Wilmoth, trustee to the Harry Wilmoth, Jr. and Sharon Wilmoth Trust ("Junior Trust") to recover certain sums paid to Harry Wilmoth, Jr. for the benefit of the Harry Wilmoth Sr. and Doris Wilmoth Trust ("Senior Trust")<sup>1</sup> Plaintiff formed in 2006 between William Van Erickson dba Van Erickson Contractor, Junior, and Roxy Lewis. Van Erickson Contractor had previously been in operation since the 1960s. (Verified Complaint, ¶ 6, 10.)

The verified complaint alleges that Junior was the trustee of the Senior Trust, and was acting in his capacity as trustee in securing the sums of money from Van Erickson Contractor, and plaintiff, from a combined period from 2002 to 2008. (Verified Complaint, ¶¶ 8-14.) At some point, Van Erickson Contractor orally assigned its portion of the arrangement to plaintiff, who thereon continued the arrangement. (*Id.*, ¶ 11.) In or about December 2020, Junior is alleged to have transferred the assets of the Senior Trust into the Junior Trust. (*Id.*, ¶ 15.) Junior is alleged to have been a trustee of the Junior Trust. (*Ibid.*) The Junior Trust is alleged to have assumed all liabilities of the Senior Trust. (*Id.*, ¶ 16.) On March 8, 2021, Junior passed away, leaving defendant as the surviving trustee to the Junior Trust. (*Id.*, ¶ 18.) Plaintiff now brings suit to recover \$218,942.75 in monies owed.

Defendant now challenges Glen Gates' representation of plaintiff due to his prior representation of the Senior Trust in 2008 in defense from a breach of contract claim by an unrelated party, Robert Schlegel, and representation of Stacy Schlegel in a dissolution action.

Disqualification

Each court has the 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

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<sup>1</sup> For ease of reference, with respect, Harry Wilmoth Jr. will be referred to as Junior, and Harry Wilmoth Sr., as Senior.

proceeding before it, in every matter pertaining thereto." (Code Civ. Proc. § 128, subd. (a)(5).) This power permits courts to disqualify an attorney based upon a conflict of interest on the motion of another party. (*In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, 585.)

Defendant moves on the basis of conflict arising under successive representation. In successive representation cases, a party may obtain the disqualification of an attorney by establishing that the targeted attorney (1) has actual knowledge of material confidential information, or (2) is presumed to have acquired confidential information because of the relationship between the prior and current representation. (*Faughn v. Perez* (2006) 145 Cal.App.4th 592, 603.) Here, defendant only argues that Gates "undoubtedly became privy to material, confidential information related to the [Senior] Trust," but otherwise makes no argument, and submits no evidence, that Gates has actual knowledge of material confidential information.

A targeted attorney is presumed to have obtained confidential information in a prior attorney-client relationship in one of two ways: where the attorney was personally and directly providing legal advice and services to the former client; or where there is a substantial relationship between the two matters. (*Ibid.*)

#### *Direct and Personal Relationship to Former Client*

Defendant presents evidence of the 2008 breach of contract claim to demonstrate that Gates' former representation of the Senior Trust was direct and personal to the present action, and the dissolution action in representing Stacy Schlegel.<sup>2</sup> Such evidence does not demonstrate a direct and personal relationship to defendant.

Because a trust is not a legal entity, title to trust assets is held by the trustee, on behalf of the beneficiaries. (*Boshernitsan v. Bach* (2021) 61 Cal.App.5th 883, 891.) Thus where a trust holds a claim, the trustee is the real party in interest. (*Ibid.*; see Prob. Code §§ 16010, 16249, Code Civ. Proc. § 369, subd. (a)(2).) Thus, Gates' representation of the Senior Trust in the 2008 claim was actually a representation of Junior, as trustee to the Senior Trust. The present action however, despite being against the Junior Trust, is against Sharon Wilmoth as trustee of the Junior Trust. For the same reason that Junior was the represented party in the 2008 claim against the Senior Trust, Sharon Wilmoth is the only party in the present action. As the present action is not against Junior as trustee of the Junior Trust, there is no direct and personal relationship of former clients to the 2008 breach of contract claim.

Defendant does not argue any other relationship to the 2008 breach of contract claim to establish a connection between the former and current representation, such as an imputation of responsibility to Sharon Wilmoth the responsibilities and obligations of Junior as trustee of the Senior Trust. Neither does defendant argue any connection of represented parties to Stacy Schlegel in the dissolution action, who is alleged as merely

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<sup>2</sup> Plaintiff's Objection to the Declaration of Michelle Jorgensen, Nos. 1 through 3, are sustained. Nevertheless, as counsel for plaintiff affirms its existence (Declaration of Glen E. Gates, ¶ 4), the court takes judicial notice of the existence of Fresno County Superior Court Case Number 08CECG04505, Case Number 08CEFL03019, and the parties thereto. (Evid. Code § 452, subd. (d).)

