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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ESTATE OF SANDRA VELA, et al.,
Plaintiffs,
v.
COUNTY OF MONTEREY, et al.,
Defendants.

Case No. [5:16-cv-02375-BLF](#) (HRL)

**ORDER RE DISCOVERY DISPUTE
JOINT REPORT NO. 4**

Re: Dkt. No. 111

Discovery Dispute Joint Report #4 (“DDJR #4”),¹ erroneously captioned as DDJR #1, arises out of a dispute between counsel that arose just prior to the commencement of the deposition of defendant Barbara Fulkerson (“Fulkerson”). Plaintiffs’ counsel, as well as all counsel of record for the defendants (including Fulkerson’s), were convened and ready to proceed with the deposition when an attorney named Grant Winter (“Winter”) called in, stated he was Fulkerson’s privately retained counsel (although he had not appeared in the action), and said he was going to participate in the deposition by telephone.²

¹ This actually is the fifth DDJR filed by the parties, including one that eventually was resolved by stipulation.

² Fulkerson appears to be a key witness; her actions and inactions at the jail on the night of the suicide of plaintiffs’ decedent are important to the case.

1 All the lawyers present, except Fulkerson’s counsel of record, considered Winter to be an
2 unwelcome interloper and wanted him to go away. After some back and forth discussion, Winter
3 agreed he would not make objections or comments on the record but simply “monitor” the
4 deposition. That promise did not satisfy plaintiffs’ attorney, who also wanted Winter to promise
5 not to talk to Fulkerson during breaks and that, if he did, the attorney-client privilege would not
6 apply. Winter refused to agree, and the deposition was aborted until the court could weigh in.

7 The court now has DDJR #4.

8 Plaintiffs seek a protective order barring Winter from making objections or comments on
9 the record (he had already agreed to that) or communicating with Fulkerson during breaks, or
10 claiming attorney-client privilege as to any communications with her (seemingly intended to
11 include any past and future communications, not limited to just conversation during breaks in the
12 deposition). All defense counsel, except Fulkerson’s counsel of record, join in the request.³

13 Why the need for the protective order? The parties in favor of an order, which include all
14 the County defendants other than Fulkerson, worry that Winter will mess things up. Plaintiffs say
15 their “understanding” is that Winter’s law firm represents the Monterey County Deputy Sheriffs’
16 Association (“Association”) and that Winter’s refusal to acknowledge that his firm represents the
17 Association “is suggestive of undisclosed interests in influencing testimony....” Basically, they
18 are worried that Winters will “taint” Fulkerson’s testimony in order to advance someone else’s
19 agenda.

20 Winter’s law firm, Mastagni Holstedt, APC (“Mastagni”), gave its input into DDJR #4
21 under the heading “Deputy Barbara Fulkerson’s Position.” Since Winters had already agreed not
22 to make objections or comments on the record, Mastagni only took exception to the request that
23 Winters be barred from talking with Fulkerson during breaks in the deposition (perhaps not
24 realizing that the requested protective order, if fully adopted by the court, could open up all

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27 ³ The other defendants are the County of Monterey, the County Sheriff, and several members of
28 the Sheriff’s Department (all represented by County Counsel’s Office) and the California Forensic
Medical Group and two of its doctors (providers of medical services at the jail). Fulkerson is the
only County defendant with separate counsel, counsel selected and retained by the County to
defend her in this case.

1 communications between that firm and Fulkerson). Mastagni represented to the court it had been
2 retained as Fulkerson’s private counsel to monitor the litigation. The court believes that such an
3 arrangement is not unusual where the defendant’s counsel of record has been selected and is being
4 compensated by her former employer, the County, and that fact signals that her interests and those
5 of the County, while largely the same, do not necessarily align one hundred percent.

6 None of the authorities cited in DDJR #4 are on point or particularly illuminating, so the
7 court will exercise its discretion and best judgment in deciding the protective order request.

8 The basic question, which the proponents of a protective order raise but then seem to
9 concede, is whether there exists an attorney-client relationship between Fulkerson and the
10 Mastagni firm. Mastagni tells the court that she’s their client, that there exists “an attorney-client
11 relationship,” that they have been “retained on Ms. Fulkerson’s behalf as her own private counsel
12 to monitor the litigation.” It would have been nice to hear it from Fulkerson herself, but no one
13 even suggests that she in any way evidenced disagreement with the statements of Winters and the
14 Mastagni firm that they are privately retained attorneys to advise her concerning issues in this
15 litigation. Plus, it is hard to believe Mastagni would be so irresponsible and foolhardy as to
16 submit a written representation of their attorney-client relationship to the court if it were untrue.
17 Her counsel of record states in DDJR #4 that he has no objection to the Mastagni firm appearing at
18 the deposition, making objections, or speaking with her during breaks. In short, the court is
19 satisfied that an attorney-client relationship exists between Fulkerson and Winter/Mastagni.
20 Whether or not the Mastagni firm also represents the Association is not important to resolving the
21 current dispute. The firm owes its loyalty to Ms. Fulkerson and to her interests, and speculation
22 about hidden motives and secret agendas is just that: speculation.⁴

23 The court denies the requested protective order. Winter may appear either by telephone or
24 in person at the deposition of Fulkerson as a silent observer. During breaks in the deposition
25 (remember: no breaks while a question is pending or before a line of questioning is completed),
26 Fulkerson may speak with either or both of her attorneys. Fulkerson’s deposition is to be taken

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28 ⁴ If Winters and the Mastagni firm are going to take an active role in the litigation, they should
formally appear. No one has suggested that is necessary for Fulkerson’s deposition.

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forthwith.

SO ORDERED.

Dated: January 29, 2018



HOWARD R. LLOYD
United States Magistrate Judge