O

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES AMERICA, Plaintiff, v. COUNTY OF LOS ANGELES et al., Defendants.	Case No. CV 15-05903 DDP (JEMx) **ORDER DENYING DEFENDANT'S MOTIONS FOR (1) REVIEW OF MAGISTRATE JUDGE'S ORDER AND (2) DISQUALIFICATION** [Dkt. Nos. 101, 102]

Presently before the court are two motions filed by Defendant. First, Defendant seeks to disqualify Plaintiff-Intervenors' counsel, Mark Rosenbaum, for alleged violations of rules of professional conduct related to Mr. Rosenbaum's discussion with Dr. Mitchell Katz, Director of the Los Angeles County Health Agency. Defendant also moves for review of Magistrate Judge McDermott's Minute Order allowing Plaintiff-Intervenors to depose Dr. Katz. Having considered the submissions of the parties and heard oral argument, the court denies both motions and adopts the following Order.

I. Background

Plaintiff and Defendant entered into a settlement agreement regarding various policies and practices in the Los Angeles County Jail system. Plaintiff-Intervenors ("Intervenors") allege that a portion of that agreement concerning inmate discharge procedures, Paragraph 34, violates the Americans with Disabilities Act, the Rehabilitation Act, and the constitutional rights of certain disabled, mentally ill inmates.

Intervenors' counsel, Mark Rosenbaum, attended a small social gathering at the home of Dr. Mitchell Katz, the Director of the Los Angeles County Health Agency. (Declaration of Mark Rosenbaum ¶ 3.) Mr. Rosenbaum informed Dr. Katz that he, Mr. Rosenbaum, is an attorney and is involved in a case against the County regarding the County's jail discharge planning practices. (Id. ¶ 4.) Mr. Rosenbaum stated that Dr. Katz was under no obligation to discuss the matter, and was free to consult an attorney. (Id.) Dr. Katz nevertheless engaged in conversation on the subject and, in response to Mr. Rosenbaum's description of certain practices, opined as to the propriety of those practices. (Id. ¶ 5.) Dr. Katz stated that he was not aware of or familiar with Paragraph 34, but "felt he could take care of putting into place proper protocols." (Id. ¶¶ 6, 8, 9.)

A few weeks later, Intervenors noticed Dr. Katz's deposition. Defendant declined to produce him, and Intervenors moved to compel. The Magistrate Judge granted Intervenors' motion, concluding that Mr. Rosenbaum did not engage in any unethical behavior and that, in light of Dr. Katz's conversation with Mr. Rosenbaum, the "apex doctrine" is not applicable to a deposition of Dr. Katz regarding Defendant's mental health-related discharge practices. Defendant

now moves for review of the Magistrate Judge's decision allowing the deposition, and moves separately to disqualify Mr. Rosenbaum for an alleged violation of California Rule of Professional Conduct 2-100.

II. Legal Standard

This court reviews non-dispositive discovery orders under a clearly erroneous or contrary to law standard. Rivera v. NIBCO, Inc., 364 F.3d 1057, 1063 (9th Cir. 2004); Fed. R. Civ. P. 72. "The 'clearly erroneous' standard applies to factual determinations and discretionary decisions." McAdam v. State Nat. Ins. Co., 15 F. Supp. 3d 1009, 1013 (S.D. Cal. 2014). "[L]egal conclusions are reviewed de novo to determine whether they are contrary to law." Perry v. Schwarzenegger, 268 F.R.D. 344, 348 (N.D. Cal. 2010). "When the court reviews the magistrate's determination of relevance in a discovery order . . . the standard of review in most instances is . . . abuse of discretion. The court should not disturb the magistrate's relevance determination except where it is based on an erroneous conclusion of law or where the record contains no evidence on which [the magistrate] rationally could have based that decision." Perry v. Schwarzenegger, 268 F.R.D. 344, 348 (N.D. Cal. 2010) (citations omitted). Discovery motions regarding depositions are subject to the clearly erroneous or contrary to law standard. Rockwell Int'l, Inc. v. Pos-A-Traction Indus., Inc. 712 F.2d 1324, 1325 (9th Cir. 1983) (per curiam).

In the Ninth Circuit, courts "apply state law in determining matters of disqualification." In re Cnty. of Los Angeles, 223 F.3d 990, 995 (9th Cir. 2000). This district has adopted "the standards of professional conduct required of members of the State Bar of

California and contained in the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and the decisions of any court applicable thereto." C.D. Cal. L.R. 83-3.1.2. This Court must also bear in mind that its "authority to disqualify an attorney or craft appropriate relief to punish or deter attorney misconduct derives from the court's equitable powers," and that, therefore, equitable considerations such as waiver, unclean hands, and estoppel apply. UMG Recordings, Inc. v. MySpace, Inc., 526 F. Supp. 2d 1046, 1062 (C.D. Cal. 2007).

III. Discussion

A. Motion to Disqualify

Defendant contends that, by discussing discharge practices with Dr. Katz, Mr. Rosenbaum violated California Rule of Professional Conduct 2-100, and should therefore be disqualified from this matter. Rule 2-100 provides that :

> (A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.
>
> . . .
>
> (C) This rule shall not prohibit:
> (1) Communications with a **public officer**, board, committee, or body; or
> (2) Communications initiated by a party seeking advice or representation from an independent lawyer of the party's choice; or
> (3) Communications otherwise authorized by law.

(emphasis added). The question this Court must resolve is whether Rule 2-100(C)(1)'s public officer exception applies to Mr. Rosenbaum's conversation with Dr. Katz, Director of the county health agency.

In 1977, the California State Bar Standing Committee on Professional Responsibility and Conduct ("the Committee") issued a Formal Opinion analogous to the facts here. CA Eth. Op. 1977-43, 1977 WL 15961. Addressing a rule essentially identical to that at issue here, the Committee opined that it would be acceptable for an attorney bringing suit against a city to meet with a city council member or city manager, even in private, to discuss the action. 1977 WL 15961 at *1-2 ("Public officers are vested with authority to exercise some sovereign power. To the extent they have that authority, they remain public officers off the job. For that reason, it makes no difference whether the attorney approaches the official publicly or privately. The subject of conversation (here, apparently, an attempt to influence the response to an action against the city) determines the capacity in which the individual acts. In either case, the restraints of rule 7-103 of the Rules of Professional Conduct do not apply.") (parenthetical in original).

Thus, pursuant to the Committee's formal opinion, Mr. Rosenbaum's discussion was proper. Defendant asserts, however, that the public officer exception is narrower than stated by the Committee, pointing instead to a discovery order in United States v. Sierra Pacific Industries, 759 F.Supp.2d 1206 (E.D. Cal. 2010) ("Sierra Pacific") (reconsideration denied by United States v. Sierra Pacific Indus., 759 F.Supp.2d 1215 (E.D. Cal. 2011). In Sierra Pacific, the defendant's attorney attended a public tour sponsored by the Forest Service. Sierra Pacific, 759 F.Supp.2d at 1208. While on the tour, the attorney questioned Forest Service employees about facts relevant to a pending case. Id. The

attorney never disclosed his status as opposing counsel, even when asked whether he was representing anyone. Id.

In analyzing whether the attorney's conduct fell within the public officer exception to Rule 2-100, the Sierra Pacific court relied heavily upon a proposed, but never adopted, state bar opinion regarding "line police officers." Id. at 1210. Under the proposed opinion, the public officer exception would apply to communications with "a person whom a communication would be constitutionally protected by the First Amendment right to petition the government. Such a person would be one who, for example, has the authority to address, clarify or alter governmental policy; to correct a particular grievance; or to address or grant an exemption from regulation." Id. at 1209 (quoting Proposed Formal Opinion Interim No. 98-0002 (internal quotation marks omitted)). Because the Forest Service employees were not "policy-making official[s] or persons with authority to change a policy or grant some specific request for redress," the Sierra Pacific court concluded that the public officer exception did not apply, and that the attorney therefore violated Rule 2-100. Id. at 1213-14; See also Guthrey v. California Dep't of Corrections and Rehabilitation, No. 10-cv-02177-AWI-BAM, 2012 WL 3249554 at *4-5 (E.D. Cal. Aug. 7, 2012) (adopting Sierra Pacific's reasoning and concluding that correctional employees are not public officers for Rule 2-100 purposes).

Defendant here argues that Mr. Rosenbaum's discussion with Dr. Katz is analogous to Sierra Pacific and falls outside the public officer exception because (1) Katz does not have the authority to alter Paragraph 34, and therefore does not qualify as a "public

officer" and (2) Rosenbaum was not "exercising his or his clients' First Amendment rights." (Motion to Disqualify at 8.) These arguments are not persuasive. As an initial matter, this Court is not bound by Sierra Pacific's interpretation of the public officer exception. Although the Sierra Pacific court cited to American Bar Association rules and the state bar's proposed interim order, the court made no mention of the 1977 Formal Opinion and its broad reading of the exception.

In any event, even under Sierra Pacific's narrower, First Amendment-focused framework, Mr. Rosenbaum's conduct is within the public officer exception. First, there is no dispute that Mr. Rosenbaum disclosed that he is an attorney and represents a party adverse to Defendant in an active case. The attorney in Sierra Pacific, in contrast, affirmatively concealed his role. Second, Defendant's contention that Dr. Katz does not have the requisite authority to qualify as a "public officer" is incorrect. Although Dr. Katz cannot unilaterally change Paragraph 34, Defendant appears to have conceded, as it must, that policymaking power extends well beyond the Board of Supervisors, and that, as the Director of the Los Angeles County Health Agency, Dr. Katz has extensive "authority to address, clarify or alter governmental policy [and] to correct a particular grievance." Sierra Pacific, 759 F.Supp.2d at 1209. See Declaration of Dr. Mitchell Katz in Support of Motion to Disqualify ¶ 1 ("The Health Agency is comprised of the Department of Health Services ("DHS"), the Department of Mental Health ("DMH"), and the Department of Public Health ("DPH") . . . . As head of the Health Agency, my duties include planning, organizing and directing the activities of the Agency.").

Furthermore, Defendant's assertion that Mr. Rosenbaum was gathering evidence for litigation purposes, and therefore could not have been exercising a First Amendment right, presents a false dichotomy. As suggested in Sierra Pacific and Guthrey, whether a public employee qualifies as a "public official" under Rule 2-100 depends upon that employee's particular duties. Those duties fall somewhere along a continuum of roles, ranging from line officers and ministerial workers at one end and legislators, senior executives, and other individuals who have meaningful input into matters of policy and public concern closer to the other. Although the conversation between Mr. Rosenbaum and Dr. Katz may have been relevant to this particular case, that is of secondary importance. The public's fundamental right to discuss any matter with a senior government official is paramount. Mr. Rosenbaum's conduct falls within the public officer exception of Rule 2-100(C)(1), and was entirely ethical. Accordingly, Defendant's Motion to Disqualify is DENIED.

B. Motion for Review of Order Granting Motion to Compel

Defendant refused to produce Dr. Katz for deposition under the "apex doctrine." In light of the conversation between Dr. Katz and Mr. Rosenbaum, the Magistrate Judge found the apex doctrine inapplicable, and allowed Intervenors to conduct a limited deposition of Dr. Katz. Defendant now seeks review of the Magistrate Judge's decision.

Under the apex doctrine, "[h]eads of government agencies are not normally subject to deposition." Kyle Engineering Co. v. Kleppe, 600 F.2d 226, 231 (9th Cir. 1979). "[T]he settled rule across the circuits is that absent extraordinary circumstances,

high-ranking officials may not be subjected to depositions or called to testify regarding their official actions." Coleman v. Schwarzenegger, No. CIV W-90-0520 LKK JFM P, 2008 WL 4300437 at *2 (E.D. Cal. Sept. 15, 2008). When a party seeks to depose "a high-level executive (a so-called 'apex' deposition)," the court can limit the discovery after considering "(1) whether the deponent has unique firsthand, non-repetitive knowledge of the facts at issue in the case and (2) whether the party seeking the deposition has exhausted other less intrusive discovery methods." In re Google Litigation, No. C 08-03172 RMW(PSG), 2011 WL 4985279 at *2 (N.D. Cal. Oct. 19, 2011). "A party seeking to prevent a deposition carries a heavy burden to show why discovery should be denied . . . ." Celerity, Inc. v. Ultra Clean Holding, Inc., No. C 05-4374 MMC(JL), 2007 WL 205067 at *4 n.3 (N.D. Cal. Jan. 25, 2007); See also Blankenship v. Hearst Corp., 519 F.2d 418, 429 (9th Cir. 1975).

Much of Defendant's argument is premised on the assumption that the conversation between Dr. Katz and Mr. Rosenbaum violated California Rule of Professional Conduct 2-100, and therefore cannot serve as the basis for granting Intervenors' Motion to Compel. As discussed above, Mr. Rosenbaum's conduct was not unethical, and the Magistrate Judge did not err in so concluding.

Defendant also argues that the Magistrate Judge erred in finding that Dr. Katz opined about Paragraph 34 because Rosenbaum himself acknowledged that Dr. Katz stated that he had never heard of Paragraph 34, let alone seen its contents. (Reply at 2; Rosenbaum Decl. ¶ 7.) This argument is not persuasive. First, Rosenbaum stated that he described "some of the practices that we

had documented in our investigation," and that Dr. Katz opined on those practices. (Rosenbaum Decl. ¶ 5.) The practices Intervenors are investigating, of course, are related to Paragraph 34. Furthermore, although Dr. Katz has stated that "[n]o portion of [the] discussion with Mr. Rosenbaum concerned current jail discharge planning policies pursuant to Paragraph 34" (Supplemental Declaration of Dr. Mitchell Katz ¶ 2), he also declared that "Mr. Rosenbaum spoke to me about this lawsuit, . . . Paragraph 34 of the Settlement Agreement in particular, jail discharge planning policies, and jail discharge practices . . . ." (Katz Decl. ¶ 2.) Notably, and contrary to Defendant's characterization, the Magistrate Judge did not conclude that Dr. Katz opined about Paragraph 34 in particular. Rather, the Magistrate Judge stated that Dr. Katz opined about "certain discharge planning practices as described to him by Mr. Rosenbaum [,] . . . chose to discuss the discharge planning practices at issue in this suit[, and] . . . purportedly expressed an opinion that may be inconsistent with the County's position on Paragraph 34." (Dkt. 99 at 2.) Those conclusions are well-supported by the record.

Defendant's final, and chief, contention is that the Magistrate Judge erred in his analysis of the apex doctrine and application of the relevant factors. This Court, however, concludes that the Magistrate Judge did not err in finding the apex doctrine inapplicable because Dr. Katz effectively waived any apex doctrine objection.

Dr. Katz, as Director of the Los Angeles County Health Agency, is a sophisticated, senior public official with significant responsibilities, decision-making power, and policy-making

influence. There is no dispute that Mr. Rosenbaum, who had never met Dr. Katz before, disclosed his own role as an attorney adverse to Defendant in an active case regarding mental health policies and jail discharge practices. Dr. Katz does not dispute that he was aware that he was free to consult with counsel if he so wished, and was under no obligation to discuss this matter of public import with Mr. Rosenbaum at all. Dr. Katz does not dispute that he represented himself as being capable of "putting into place proper protocols" and interested in doing so. (Rosenbaum Dec. ¶ 8.) Defendant now argues that it would be unduly disruptive to allow the deposition of a policymaker, even where that official has knowingly and voluntarily undertaken to discuss matters of public significance with an attorney known to be adverse to the County.

The primary purpose of the apex doctrine is not to gain a litigation advantage or to insulate officials from providing evidence in cases, but rather to "protect [] officials from discovery that will burden the performance of their duties, particularly given the frequency with which such officials are likely to be named in lawsuits." Coleman, 2008 WL 4300437 at *2. Under the circumstances here, application of the doctrine would in no way serve that goal. To the extent that questioning about Dr. Katz's opinions about jail discharge policies can be considered a burden, it is one that he has already volunteered to bear. Furthermore, rather than regard Dr. Katz's decision as a mistake, this Court views his willingness to receive input and discuss matters of public concern as entirely admirable and consistent with his responsibilities as a senior government official.

The Magistrate Judge's conclusion that the apex doctrine does not bar Dr. Katz's deposition was not erroneous. Defendant's Motion for Review is, therefore, DENIED.

IV. Conclusion

For the reasons stated above, Defendant's Motion to Disqualify and Motion for Review are DENIED. In light of the waiver of the apex doctrine objection, this Court declines to adopt the portion of the Magistrate Judge's decision limiting the scope and duration of the deposition. The court expects, however, that the parties will work collaboratively to ensure that the deposition is as brief and efficient as possible.

IT IS SO ORDERED.

Dated: July 27, 2016

DEAN D. PREGERSON
United States District Judge