UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASCADE YARNS, INC., a Washington corporation, Plaintiff, v. KNITTING FEVER, INC., a New York corporation, et al.,\ Defendants.	CASE NO. C10-861RSM ORDER ON MOTION TO DISQUALIFY COUNSEL

This matter is before the Court for consideration of a motion by plaintiff Cascade Yarns, Inc., ("Cascade") to disqualify defense counsel from further participation in this matter. Dkt. # 28. Plaintiff asserts that disqualification of both defendants' pro hac vice counsel and local counsel is required, but for different reasons. Defendants have opposed the motion, arguing that disqualification is not necessary under the applicable ethical rules. After careful consideration of the parties' memoranda and the Washington Rules of Professional Conduct, the Court has concluded that the motion should be denied.

BACKGROUND

The parties are familiar with the facts of this dispute and they need only be briefly summarized here. Plaintiff Cascade filed this action for unfair competition, false advertising, and business injury by a racketeer influenced and corrupt organization, naming as defendants Knitting Fever, Inc., a New York corporation, and seven other individual and corporate defendants. Complaint, Dkt. # 1. The same eight defendants are named in a suit filed in the United States District Court for the Eastern District of Pennsylvania in 2008, *The Knit With v. Knitting Fever*, et al, Cause No. C08-4221RB. Both lawsuits arise from the allegation that defendants have misrepresented the amount of cashmere fiber contained in the yarns that they market to hand knitters.

All defendants are represented in both actions by Joshua Slavitt of the Pepper Hamilton LLP law firm of Philadelphia, Pennsylvania. Mr. Slavitt and co-counsel Deirdre McInerney, also of the Pepper Hamilton firm, appear *pro hac vice* in this action. Three attorneys from the Seattle office of Davis Wright Tremaine serve as local counsel in this matter, as required by Local Rule GR 2(d). Plaintiffs in both actions are represented by Robert Guite of the San Francisco law firm of Squire Sanders & Dempsey L.L.P. Mr. Guite is a member of the Washington State Bar Association, but appears *pro hac vice* in the Pennsylvania action.

Plaintiff has moved to disqualify both local and *pro hac vice* counsel, and their law firms. The bases for the motion will be addressed separately.[1]

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[1] Defendants have opposed the motion to disqualify in two separate memoranda, one addressed to the motion to disqualify local counsel, and one addressed to the motion to disqualify *pro hac vice* counsel. Dkt. ## 44, 47. Plaintiff asserts in the reply brief that defendants have "flaunt[ed] the Local Rules" by "submitting overlength briefs without permission." Plaintiff's Reply, Dkt. # 51, p. 1. Plaintiffs have moved to strike defendants' "25 pages of opposition brief." *Id.* However, the Court notes that each of the opposition briefs is itself twelve pages.

DISCUSSION

I. Motion to disqualify Pepper Hamilton Law Firm

Plaintiff has moved to disqualify Mr. Slavitt and the entire firm of Pepper Hamilton, on the basis of an alleged conflict among the eight clients who are the defendants in this action and the Pennsylvania action. Plaintiff contends that counsel cannot possibly "provide competent and diligent representation to each affected client", and that continued representation "calls into question the fair or efficient administration of justice." Dkt. # 51, p. 2; Dkt. # 28, p. 5. The allegation of a conflict among the eight defendants arises from a statement by Mr. Slavitt at a Rule 26 conference in the Pennsylvania action, that "KFI [Knitting Fever, Inc.] is a victim too of others' improper labeling." Motion to Disqualify, Dkt. # 28, pp. 6-7. Plaintiff argues that this statement indicates that defendant Knitting Fever, Inc., will seek to defend itself by "blaming its foreign suppliers, presumably Pepper Hamilton's other clients. . . ." Id., p. 7.

Assuming, without deciding, that plaintiff has standing to assert a conflict among defense counsel's clients, the Court finds no basis for disqualification in this statement. Plaintiff has presented this statement without context, and the contention that one defendant will seek to defend itself by blaming others is speculative at best. Mr. Slavitt has filed an affidavit which explains the circumstances of the alleged statement and refutes plaintiff's speculation. The motion to disqualify on the basis of a conflict among counsel's clients will therefore be denied.[2]

The submission of two separate briefs to address the very different arguments raised by plaintiff with respect to each type of counsel does not clearly violate the local rules. Plaintiff's motion to strike is accordingly DENIED.

[2] In the event the Pennsylvania district court, which is more familiar with the circumstances surrounding the alleged statement, grants a similar motion to disqualify now pending in that court, this ruling may be revisited.

Plaintiff also contends that counsel should be disqualified for engaging in the unauthorized practice of law, because Mr. Slavitt wrote to plaintiff's counsel on July 2, 2010, stating that he represented defendants in this action, before he was admitted to practice in this Court *pro hac vice*. Mr. Slavitt's affidavit satisfies the Court that his pre-admission communication was simply for the reasonable purpose of coordinating a response to the complaint by his clients, whom he already represented in the Pennsylvania action. He anticipated at that time filing for *pro hac vice* admission, and in fact did so shortly thereafter. Under these circumstances, it cannot be said that counsel's July 2 statement that he represented his clients in this action amounted to the unauthorized practice of law. Plaintiff's motion to disqualify counsel on this basis shall be denied.

II. Motion to Disqualify Davis Wright Tremaine

Plaintiff's motion to disqualify the firm of Davis Wright Tremaine is based on Washington Rules of Professional Conduct 1.9 and 1.10, and the assertion that Cascade is a former client of that firm. Plaintiff explains that in 2009, Cascade's in-house counsel, Robert Dunbabin, Jr., contacted attorney Michael Killeen[3] of the Davis Wright Tremaine law firm for the purpose of obtaining representation in a lawsuit against Cascade by a former employee. They communicated by telephone and e-mail while Mr. Killeen ran a conflicts check, and then held a telephone conference involving Mr. Killeen, Mr. Dunbabin, and Cascade's "control group." Declaration of Robert Dunbabin, Jr., Dkt. # 29, ¶¶ 2-5, 9. Shortly after the conference, Mr. Killeen sent Mr. Dunbabin an e-mail in which he declined to undertake the representation. Id, ¶ 12. However, prior to that e-mail, it was Mr. Dunbabin's "understanding that Mr. Killeen

[3] Mr. Killeen is not one of the three Davis Wright Tremaine attorneys serving as local counsel for defendants.

undertook representation." Id., ¶ 3. On the basis of that "understanding", Cascade contends that it is a former client of Davis Wright Tremaine, and the entire law firm should be disqualified.

This Court is primarily responsible for controlling the conduct of lawyers practicing before it. *See, e.g., Trone v. Smith*, 621 F.2d 994, 999 (9th Cir.1980). In deciding whether to disqualify counsel, the Court looks to the local rules regulating the conduct of the members of its bar. *United States ex rel. Lord Elec. Co. v. Titan Pac. Constr. Corp*., 637 F.Supp. 1556, 1560 (W.D.Wash.1986) (*citing Paul E. Iacono Structural Engineer, Inc. v. Humphrey*, 722 F.2d 435, 439 (9th Cir.1983)). According to the Local Rules of this court, attorneys practicing in this district, including attorneys practicing *pro hac vice*, shall abide by the Rules of Professional Conduct ("RPC") promulgated by the Washington State Supreme Court. Local Rule GR 2(e).

Washington RPC 1.9 states, in relevant part,

> Conflict of interest; former client. A lawyer who has formerly represented a client in a matter shall not thereafter: (a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents in writing after consultation and a full disclosure of the material facts; or (b) Use confidences or secrets relating to the representation to the disadvantage of the former client ...

Washington RPC 1.9. Pursuant to this rule, an attorney who has formerly represented a client cannot thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to those of the former client, unless the former client consents; nor use confidences or secrets relating to the representation to the disadvantage of the former client. *Sanders v. Woods*, 121 Wn.App. 593, 597 (2004), citing RPC 1.9. The first prong does not require proof of disclosure of confidences if the matters are substantially related. *See Oxford Systems, Inc. v. CellPro, Inc.*, 45 F.Supp.2d 1055, 1066 (W.D.Wash.1999).

Washington RPC 1.10, states, in relevant part,

> Imputed disqualification; general rule: Except as provided in paragraph (c), while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

Washington 1.10(a). Plaintiff relies on this "imputation" rule in moving to disqualify Mr. Killeen's entire law firm.

"In determining whether a violation of Rule 1.9 requires disqualification, the burden of proof rests 'upon the firm whose disqualification is sought.' " *FMC Tech., Inc. v. Edwards*, 420 F.Supp.2d 1153, 1158 (W.D.Wash.2006) (*quoting Amgen, Inc. v. Elanex Pharms., Inc*., 160 F.R.D. 134 (W.D.Wash.1994)). To ascertain whether a conflict exists under RPC 1.9(a), "the significant elements are (1) that the conflict involves a former client; (2) that the subsequent representation is materially adverse to the former client; and (3) that the matters are substantially related." *Id*.

The threshold inquiry here is whether Cascade is a former client of Davis Wright Tremaine. In Washington, the essence of the attorney/client relationship is whether the attorney's advice or assistance is sought and received on legal matters. *Bohn v. Cody*, 119 Wash.2d 357, 363 (1992); *citing* 1 R. Mallen & J. Smith *Legal Malpractice* § 11.2 n. 18; 7 Am.Jur.2d *Attorneys at Law* § 118 (1980). The relationship need not be formalized in a written contract, but rather may be implied from the parties' conduct. *In re McGlothlen*, 99 Wash.2d 515, 522 (1983). Whether a fee is paid is not dispositive. *Id.* The existence of the relationship "turns largely on the client's subjective belief that it exists". *Bohn v. Cody,* 119 Wash. 2d at 363; *quoting McGlothlen*, 99 Wash. 2d at 522. A client's subjective belief, however, does not control

the issue unless "it is reasonably formed based on the attending circumstances, including the attorney's words or actions." *Id.*

Here, plaintiff has not presented any affidavit or declaration confirming that Cascade Yarn's principles believed that an attorney-client relationship had been formed between Mr. Killeen and Cascade. While Mr. Dunbabin states that it was his "understanding" that Mr. Killeen undertook the representation, that understanding was not reasonable in light of the total circumstances. Mr. Killeen's affidavit establishes that the communications described by Mr. Dunbabin all took place within a period of less than twenty-four hours; during that time all Mr. Killeen did was run a conflicts check and then engage in the conference call. Declaration of Michael Killeen, Dkt. # 45, ¶¶ 3-10. He states that he "never accepted any engagement to represent Cascade Yarns, Inc." *Id.*, ¶ 3.

It is not necessary for the Court to reconcile the differences between Mr. Dunbabin's "understanding" and Mr. Killeen's unequivocal denial of representation, as Mr. Dunbabin's own description of the conference call resolves any possible doubt about the formation of an attorney-client relationship. He states,

> In this telephone conference, which lasted 45 minutes to an hour, Mr. Killeen's tone began to take an edge as the time progressed. He took a very different attitude than he had in our earlier telephone calls. I found him to be patronizing and dismissive of me, to the point of provoking raised eyebrows and hand gestures from the three other people in the room. From the perspective of the people in the room, he became abusive and condescending, and brushed aside some key facts that we offered to explain our defense. To me, it became obvious that he had not put aside the $5,000 discovery sanction that the Court ordered in the *McAllister* matter.[4] Two of the people in the room urged me to hang the telephone up on Mr. Killeen and retain another attorney. I did terminate the call,

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[4] Mr. Dunbabin explained in his declaration that he and Mr. Killeen had previously been opposing counsel in the *McAlister* case, a class action filed in King County Superior Court. Mr. Dunbabin sought and obtained a $5,000 sanction from Mr. Killeen's client for failure to comply with a discovery order. Declaration of Robert Dunbarin, Dkt. # 29, ¶¶ 7-8.

> though I do not recall the exact means other than I did not simply just hang-up on him. I believe that someone had finally said "hang up on him" and that I told Mr. Killeen that I would have to call him back, or something else unconvincing to that effect.

Declaration of Robert Dunbabin, Dkt. # 29, ¶ 11. From this description of the call, it is clear that the clients themselves (as opposed to in-house counsel Mr. Dunbabin) did not believe that an attorney-client relationship existed, nor did they want one. Based on both Mr. Killeen's actions and those of the "control group" of Cascade, Mr. Dunbabin's subjective belief that Cascade had retained Mr. Killeen was not reasonable. The Court finds that no attorney-client relationship was formed between Cascade and the Davis Wright Tremaine law firm, and disqualification under RPC 1.9 and 1.10 is not necessary. *Bohn v. Cody,* 119 Wash. 2d at 363.

Plaintiff also contends that disqualification is required because in the conference call, Cascade's control group shared information such as their approach to litigation, risk aversion, decision-making authority, and other matters with Mr. Killeen. Davis Wright Tremaine has responded to this contention with a description of the screening procedure in place at the firm. Declaration of John Reed, Dkt. # 46. Mr. Killeen has also stated under penalty of perjury that he has not disclosed any information he received from Cascade to the attorneys in his firm who now represent defendants. The Court is satisfied that the screening procedure and Mr. Killeen's compliance with his ethical obligations are sufficient to protect whatever information he may have learned about Cascade and its approach to litigation.

CONCLUSION

"Disqualification of counsel is a drastic remedy that exacts a harsh penalty from the parties as well as punishing counsel; therefore, it should be imposed only when absolutely

1 necessary." *In Re Firestorm 1991*, 129 Wn.2d 130, 140 (1996); *accord, U.S. ex rel Lord Elec.*
2 *Co., Inc. v. Titan Pac. Const. Corp.*, 637 F.Supp. at 1562. As set forth above, the Court has
3 determined that disqualification is not necessary or appropriate in this case. Plaintiff's motion to
4 disqualify the law firms of Pepper Hamilton and Davis Wright Tremaine is accordingly
5 DENIED.
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7 Dated August 30, 2010.
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11 RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

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