

DEC 12 2023

Superior Court of California David W. Slayton, Executive Officer/Clerk of Court
County of Los Angeles By: A. Rodriguez, Deputy
Department 36

WILLIAM MITCHELL,
Plaintiff,

v.

TWIN GALAXIES, LLC,
and DOES 1-200
Defendants.

Case No.: 19STCV12592

Hearing Date: 12/01/2023

RULING RE:

**PLAINTIFF'S MOTION TO DISQUALIFY
DEFENDANT'S COUNSEL**

**NOTICE OF OSC RE: POTENTIAL
DISCIPLINARY REFERRAL FOR
FURTHER VIOLATIONS OF THE
RULES OF PROFESSIONAL CONDUCT**

Date: December 1, 2023

I. SUMMARY

Plaintiff William James Mitchell (Plaintiff or Mitchell) is a long-time celebrity in the video gaming community. Defendant Twin Galaxies (Twin Galaxies or Defendant) has maintained public lists of record score holders in vintage video games since the 1980s. Defendant recognized Plaintiff for long periods between 1999 and 2018 as the world record holder for high scores in the arcade game "Donkey Kong."

In February 2018, Defendant publicly declared its determination that Mitchell obtained his record scores by cheating. It removed Mitchell's scores from its record lists and banned him from participating in its competitive leaderboards.

1 Plaintiff sued Defendant on April 11, 2019. He filed his operative first amended
2 complaint (FAC) on March 12, 2020. His operative FAC alleges causes of action for (1)
3 defamation and (2) false light.

4 On December 1, 2023, the Court informally conferred with the parties regarding their
5 ongoing discovery disputes, and the Court heard the following matters: (1) Plaintiff's motion to
6 seal lodged exhibits; (2) an order to show cause why the parties' stipulated protective order
7 should not be extended to all materials produced in discovery; (3) Defendant's motion for the
8 Court to impose issue sanctions against Plaintiff based on alleged discovery abuses; and (4)
9 Plaintiff's motion to disqualify Defendant's counsel based on alleged discovery abuses and
10 professional misconduct.

11 All matters except the motion to disqualify are addressed in a separate order on this same
12 date.

13 As to Plaintiff's motion to disqualify based upon the case law cited below, the Court
14 denies Plaintiff's motion, without prejudice. However, based on the evidence submitted in
15 support of Plaintiff's motion, the Court sets an Order to Show Cause hearing Re: Potential
16 Disciplinary Referral of Defense Counsel for Violations Of The Rules Of Professional Conduct
17 for January 11, 2024 at 8:30 a.m. in Dept. 36, concurrent with the hearing on the Motion for
18 Sanctions of that same date.

19 **II. FACTUAL BACKGROUND**

20 Plaintiff bases his motion, and the Court bases its ruling, on facts that have arisen during
21 the parties' extensive disputes over discovery.

22 Throughout this case, Plaintiff has accused Defendant's counsel of improperly releasing
23 materials obtained in discovery to third parties. (See Mot., 8:1-12 and 15:17-17:14.) ; P.Exs. G,
24 L, V.) A YouTube personality named Karl Jobst and a blogger writing under the handle
25 "Ersatz_Cats" have both covered this suit extensively and posted deposition transcripts and
26 materials produced by Plaintiff during discovery online. (P.Exs. L, V.)

27 Plaintiff also accuses Defendant's counsel of aggressively harassing witnesses, during
28 depositions and in private communications. (Mot., 8:22-12:23; P.Exs. A, C, D, and F.) One

1 witness has submitted a sworn declaration that he does not feel comfortable cooperating with
2 discovery efforts because of Defendant's counsel's behavior and the unwelcome public attention
3 online journalists have paid to those who become involved with Plaintiff's case. (Johnson Decl.,
4 ¶ 4.)¹

5 Finally, Plaintiff accuses Defendant's counsel of a pattern of discovery abuses which,
6 though perhaps not outrageous standing alone, arguably justify his disqualification when
7 considered along with his other conduct. (Mot., 20:7-24:6.)

8 Defendant's counsel denies some of Plaintiff's allegations that he disseminated discovery
9 materials, though he concedes he disclosed Plaintiff's depositions and the depositions of two
10 other witnesses to YouTuber Karl Jobst. (Tashroudian Decl., ¶¶ 4 and 26; see also Jobst Decl., ¶
11 9.) Counsel claims he properly contacted witnesses in the course of his vigorous investigation
12 because the witnesses are complicit in misleading the Court and concealing evidence.
13 (Tashroudian Decl., ¶¶ 5-12 [witness Isaiah Johnson], 14-20 [witness Jerry Byrum], ¶ 26
14 [witness Walter Day].) Counsel denies witnesses are unwilling to sit for deposition.² And he
15 protests that he has complied with all discovery orders. (*Id.*, ¶ 29.)

16 17 **III. PLAINTIFF'S MOTION TO DISQUALIFY COUNSEL**

18 **1. Legal Standard**

19 Under Code of Civil Procedure section 128, the trial court has the inherent authority to
20 "control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in
21 any manner connected with a judicial proceeding before it, in every matter pertaining thereto."
22 (Code Civ. Proc., § 128, subd. (a)(5).) "A court's authority to disqualify a lawyer in a pending
23 proceeding derives from its inherent power to regulate the conduct of court officers, including
24

25
26 ¹ Plaintiff also submitted a sworn declaration attesting to a second witness's unwillingness to cooperate due
27 to Defendant's counsel's conduct. (Mitchell Decl., ¶ 3.) Plaintiff's testimony relaying the statements of witness's
28 counsel is hearsay. The Court does not consider it. The Court will consider this evidence if it is submitted in
admissible form prior to a future OSC, with Defendant's counsel given appropriate opportunity to respond.

² Counsel bases this assertion on hearsay statements by Isaiah Johnson and by Robert Childs' attorney.
Plaintiff did not object to this evidence; nonetheless, as with Plaintiff's testimony relaying Childs' attorney's
statements, the Court has not considered hearsay evidence in the instant ruling.

1 attorneys, in furtherance of the sound administration of justice.” (*City of San Diego v. Superior*
2 *Court* (2018) 30 Cal.App.5th 457, 469-470 (*San Diego*); see also *People ex rel. Dept. of*
3 *Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145.)

4 “Disqualification may be ordered as a prophylactic measure against a prospective ethical
5 violation likely to have a substantial continuing effect on future proceedings.” (*Doe v. Yim* (2020)
6 55 Cal.App.5th 573, 581.) Not every instance of unprofessional conduct or bad judgment by an
7 attorney warrants disqualification (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 309
8 (*Gregori*)); disqualification is preventative, not punitive (*Neal v. Health Net, Inc.* (2002) 100
9 Cal.App.4th 831, 844). The decision to disqualify demands a “delicate balancing of competing
10 policy considerations” (*San Diego, supra*, 30 Cal.App.5th at p. 470) that requires the court to weigh
11 the effect of an attorney’s misconduct on the proceedings against the “substantial hardship
12 [imposed] on the disqualified attorney’s innocent client “ (*Gregori, supra*, 207 Cal.App.3d at
13 p. 300; *Lyle v. Superior Court* (1981) 122 Cal.App.3d 470, 481 (*Lyle*) “[T]he client has an interest
14 in competent representation by an attorney of his or her choice.”].)

15
16
17 “[D]isqualification motions involve a conflict between the clients’ right to counsel of their
18 choice and the need to maintain ethical standards of professional responsibility. [Citation.] The
19 paramount concern must be to preserve public trust in the scrupulous administration of justice and
20 the integrity of the bar. The important right to counsel of one’s choice must yield to ethical
21 considerations that affect the fundamental principles of our judicial process.” (*Great Lakes*
22 *Construction, Inc. v. Burman* (2010) 186 Cal.App.4th 1347, 1355, quoting *People ex rel.*
23 *Department of Corporations v. Speedee Oil Change* (1999) 20 Cal.4th 1135, 1145-1146.)

24
25 A motion to disqualify counsel is reviewed for an abuse of discretion. (*San Diego, supra*,
26 30 Cal.App.5th at p. 470.) “In exercising discretion, the trial court is required to make a reasoned
27 judgment which complies with applicable legal principles and policies.” (*In re Marriage of*
28 *Zimmerman* (1993) 16 Cal.App.4th 556, 561.)

1 **2. Evidentiary Rulings**

2 Defendant's Objections Nos. 1-16 are OVERRULED in their entirety. Sworn deposition
3 testimony and verified discovery responses are not subject to the cited grounds for objection.
4 Counsel laid foundation for all exhibits, and none apart from deposition testimony and discovery
5 responses have been offered for the truth of the matters asserted therein.

6 Defendant's Objection No. 17 is OVERRULED. The statement is of inference, not of
7 fact.

8 Defendant's Objection Nos. 18-19 are SUSTAINED. The witness offers out of court
9 statements to prove the truth of matters asserted therein.

10 Defendant's Objections No. 20-24 are OVERRULED in their entirety.

11 **3. Discussion**

12 a. Disqualification of Defendant's counsel would cause substantial prejudice to
13 Defendant at this stage of the proceedings.

14 The Court is mindful of the posture of this motion – a party is seeking to disqualify the
15 attorney for his adversary. The law has demonstrated a reluctance to do so, for obvious reasons,
16 and the published cases appear to do so only where the opposing attorney has in their possession
17 improperly obtained confidential information that belongs to the moving party, which could be
18 used against them inappropriately. (See, e.g. *Kennedy v. Eldridge* (2011) 201 Cal. App. 4th
19 1197; *O'Gara Coach Co., LLC v. Ra* (2019) 30 Cal. App. 5th 1115.)

20 A court must balance its reasons for disqualifying counsel against the unavoidable
21 prejudice that disqualification would cause to his client. (See *Gregori, supra*, 207 Cal.App.3d at
22 p. 300.) A litigant is entitled to counsel of its choice; a court may not lightly infringe on that
23 right. (*Lyle v. Superior Court, supra*, 122 Cal.App.3d at p. 481 (*Lyle*); *People ex rel. Younger v.*
24 *Superior Court* (1978) 86 Cal.App.3d 180, 201 (*Younger*).) Removing a litigant's chosen counsel
25 "often pose[s] the very threat to the integrity of the judicial process that [it] purport[s] to
26 prevent." (*Gregori, supra*, at p. 301.) If nothing else, disqualification causes a litigant
27 inconvenience and expense that should not be imposed if it can be avoided. (*Lyle, supra*, at p.
28 481; *Younger, supra*, at p. 201.)

1 Defendant's counsel has represented it since the outset of this case more than four years
2 ago, through anti-SLAPP proceedings and a subsequent appeal. Until the Court continued the
3 trial at the December 1, 2023 hearing, trial was less than two months away. The matter is in its
4 final year of litigation and by statute, must reach trial no later than October 11, 2024. (Code of
5 Civil Proc. §583.310; Emergency Rule 9.) Discovery remains complicated and hotly contested.

6 The prejudice of denying Defendant its counsel of choice at this late stage would be
7 considerable. Defendant would have to locate new counsel, who would have to get up to speed
8 on the case, get familiar with all discovery, review depositions, and interview witnesses – many
9 of whom already appear reluctant to communicate with counsel for either party. Given the
10 looming statutory mandatory deadline to try this case, new counsel would be up against a ticking
11 clock.

12 Defendant would incur substantial inconvenience, disadvantage, and duplicative costs
13 were the Court to disqualify its counsel at this stage.

14 *b. Plaintiff has presented substantial evidence of Defendant's counsel's misconduct.*

15 Against Defendant's right to counsel of choice, Plaintiff presents evidence that defense
16 counsel committed ethical misconduct in the course of investigation and discovery such that it
17 has prejudiced Plaintiff's case.

18 **1. Jerry Lee Byrum**

19 Jerry Lee Byrum, a witness understood to be favorably inclined toward the Plaintiff,
20 authenticates text messages wherein Counsel identified himself as "David the snake"; asks "you
21 really think I am going to believe [or] a jury will believe" Byrum's statements about the location
22 of evidence; and threatens "[t]his conspiracy is going to destroy your organization" (Byrum
23 Decl., ¶ 2 and Ex. 1, p. 1.)

24 Counsel follows up later: "Have you decided to tell the truth yet?" and "I was hoping
25 yourd [sic] come around." (*Id.*, at p. 2.)

26 Mr. Byrum asked that Counsel desist his harassment: "[Y]ou are harassing me on
27 evenings and weekends and this is the last opportunity you get to stop or I will do it legally".
28 (*Id.*, at p. 4.)

1 Instead of desisting, Counsel replied: "I was hoping your morals would kick in sometime.
2 ... I'll see you soon." (*Id.*, at p. 3, italics added.) When Byrum replied again "Stop harassing me",
3 Counsel replied again: "I hope you'll tell me the truth the next time you're asked." (*Ibid.*, italics
4 added.) Even after Byrum calls Counsel a stalker, Counsel continued. Counsel sent at least
5 sixteen (16) more text messages afterward to which Byrum did not respond.

6 Those messages include the admonition "Submitting false evidence and concealing
7 evidence is a crime"; two screenshots of the California Penal Code; and, qualifying: "I am an
8 ethical person and am not threatening you with prosecution." (*Ibid.*, at pp. 4-7.)

9 Counsel appears to have attempted to influence the evidence presented at trial and/or to
10 discourage Mr. Byrum from testifying and/or trying to intimidate him into testifying in a certain
11 way. It also appears, notwithstanding his single message stating otherwise, that Counsel's
12 citation of the penal code to a lay person would likely be perceived as threatening prosecution.

13 These are potential violations of Rules Prof. Conduct, rule 3.4(a), (b), (c); Rule 3.10.)

14 2. Isaiah "TriForce" Johnson

15 Defendant's counsel also sent a series of emails to witness Isaiah Johnson. The emails
16 contain similar exhortations to testify favorably to Defendant. Counsel also suggested Johnson, a
17 Rastafarian, has a religious obligation to testify to certain facts on the stand. (Johnson Decl., Ex.
18 1.)

19 Counsel made the following comments:

20 On July 22, 2023 at 5:21 p.m.³: "Billy [Plaintiff]'s Babylon throne is being held up with
21 lies. You know it. And you know the [*sic*] rasta [*sic*] way. We will win with rasta [*sic*] and there
22 will be no more war. Billy will always have to fight again." (*Id.*, Ex. 1 at p. 3.)

23 The same day, at 6:57 p.m. "Praise be to the most high. Tell me what there is more to
24 this. Let me know which side of this you stand on. (*Id.*, Ex. 1 at pp. 2-3.)

25 The same day, at 7:29 p.m.: "The fake plaques [an ongoing evidentiary dispute between
26 the parties] are not the truth. You and I both know this. The story about you finding plaques ... is
27

28 ³ The timestamps on the emails between Johnson and Defendant's counsel sometimes seem in illogical,
perhaps because Johnson and Defendant's counsel were located in different time zones when the exchanges took
place.

1 not the truth. You and I both know this. The story about you mailing the plaques ... is also not the
2 truth. Are you willing to send me the pictures [purportedly disproving Plaintiff's evidence]? That
3 will be the truth." (*Id.* Ex. 1 at p. 1.)

4 The same day, at 9:04 p.m.: "I really don't think great men like Haile Sellasie or Marcus
5 Garvey [respected figures within the Rastafari religion] would support fraud. These great men,
6 and all great men, stand up for the truth." (*Id.* Ex. 1 at p. 2.)

7 The following day, having received no response: "?????" and "The bottom is falling out.
8 Are you willing to tell me the truth yet sir?" Four days later, seemingly unprompted: "Babylon
9 throne gone down, gone down..." And also unprompted, on August 9: "Are you ready to tell me
10 the truth?" (*Id.*, Ex. 1 at pps. 1, 5, and 8.)

11 In his declaration, Johnson refers to counsel's comments about his religion as
12 "unsolicited and questionable". (*Id.*, ¶ 3.) And he testifies that because of material that has been
13 published about him on the Internet – including by Karl Jobst, to whom Counsel admits sending
14 footage of deposition testimony – that he "decline[s] to sit for deposition in this litigation"
15 (*Id.*, ¶ 4.)

16 These are potential violations of Rules Prof. Conduct, rule 3.4(a), (b), (c); Rule 8.4.1.)

17 **3. Reluctance of Witnesses to Testify**

18 There is no dispute that Defense counsel has provided Plaintiff's deposition transcript to
19 an internet personality, Karl Jobst, who then posted footage on the internet with derisive
20 commentary. (Motion Exh. L.) Mr. Jobst acknowledges he has also received deposition materials
21 for two other witnesses, and that he "slightly" embellishes his reporting to "make it more
22 interesting to viewers." (Opp., Decl. Jobst ¶¶8-10.) "My youtube videos often contain
23 hyperbole, sarcasm, parody, and humor to make them interesting to viewers. When talking on
24 facts I generally show evidence within the video. If this evidence isn't shown, my comments
25 should not be misconstrued as factual." (*Id.* ¶11.)

26 Another online source, as discussed above, Ersatz_Cats, has mocked witnesses.

27 In the closed gaming community, to the extent that such online attention and ridicule may
28 intimidate other potential other witnesses who seek to avoid a similar fate, this could violate Cal.

1 Rules Prof. Conduct Rule 3.4(a) and 3.6(a). To the extent that Defense counsel's effort to court
2 the public attention seeks to reach a potential jury pool, this would violate Cal. Rules Prof.
3 Conduct Rule 3.6.

4 The parties dispute whether Counsel's conduct has actually dissuaded witnesses from
5 testifying.

6 Plaintiff and Defendant's Counsel offer competing hearsay accounts of one witness's
7 (Robert Childs') unwillingness to participate in this litigation. The Court has not considered this
8 inadmissible evidence for purposes of this ruling.

9 Isaiah Johnson, however, testifies to his own unwillingness to participate: "I decline to sit
10 for deposition in this litigation to preclude myself from receiving online attacks and harassment."
11 (Johnson Decl., ¶ 4.)

12 The Court also considers Counsel's text messages to Jerry Byrum, in which he warns
13 "This conspiracy is going to destroy your organization", the International Video Game Hall of
14 Fame (Byrum Decl., Ex. 1 at p. 1.), suggesting Byrum will suffer professional and reputational
15 repercussions if he does not cooperate with Defendant's litigation strategy.

16 The blogger Ersatz_Cats (Cats), has posted copies of Counsel's texts to Byrum online,
17 commenting derisively that "poor old Jerry won't cooperate, because of 'harassment' from mean
18 old Mr. Tash [Defendant's counsel]" and "[a]h, so it's really *Tash's fault* that Byrum won't
19 cooperate ... all while [Tash] *does* cooperate". (D.Ex. V, pp. 16-19, italics in original.) Cats goes
20 on to deride the integrity of potential witnesses Walter Day, Isaiah Johnson, and David Bishop,
21 at length. (*Id.*, pp. 38-59.)

22 In disputes over discovery, Counsel has sought to withhold communications with Cats
23 based on his assertion that the blogger is a member of his research team.

24 Counsel's conduct is a potential violations of Rules Prof. Conduct, rule 3.4.

25 **4. Counsel's misconduct during depositions.**

26 **a. Deposition of Walter Day**

27 "Counsel should not inquire into a deponent's personal affairs or question a deponent's
28 integrity where such inquiry is irrelevant to the subject matter of the deposition. Counsel should

1 refrain from repetitive or argumentative questions or those asked solely for purposes of
2 harassment.” (L.A. Sup. Ct. Rules, Appx. 3.A(e)(5)-(6).) “Counsel for all parties should refrain
3 from self-serving speeches during depositions.” (*Id.*, subd. (e)(10).) “Counsel should not engage
4 in any conduct during a deposition that would not be allowed in the presence of a judicial
5 officer.” (*Id.*, subd. (e)(11).)

6 Particularly in combination with Counsel’s other conduct, his conduct in deposition raises
7 concerns about Counsel’s conduct and its effect on the integrity of the profession and the judicial
8 system.

9 During the deposition of Walter Day, founder of Twin Galaxies and Plaintiff’s former
10 cross-defendant, Counsel questioned Day in the following repetitive, argumentative manner:

11 Tashroudian [DC]: Do you recall what the award looked like, Mr. Day?

12 Witness’s Counsel [WC]: ... [O]bjection.

13 DC: What’s the big secret here, Mr. Day?

14 WC: Same objection.

15 DC: What’s the big secret, Rob [WC]?

16 WC: Same objection.

17 DC: What are you guys hiding? What are you hiding, Mr. Day?

18 WC: Same objection.

19 Plaintiff’s Counsel [PC]: Are you serious, David?

20 DC: Yes.

21 PC: I call that kind of harassing. I call it a little bit argumentative. And
22 I call it entirely improper.

23 DC: What did the award that Mr. Mitchell showed you last week look
24 like, Mr. Day?

25 WC: Same objection. Let’s not do this anymore ‘cause it’s getting
26 harassing, so that’s the end of that.

27 DC: All right. I just want to make sure, though, Mr. Mitchell sent you
28 an award last week that’s different from –

WC: Okay. You know what, this is getting too much. It’s really --
you’re moving into harassing territory and I won’t allow it.

DC: Just let me finish the last question and we will be done.

WC: No, I won’t.

(Dep. of Walter Day, 65:13-66:21.)

Later in the deposition, Counsel improperly testified to the merits of his client’s case:

DC: ... it never happened. He put those -- he put those performances on as a
show to legitimize the score performance, but at all times he had these
world record scores ready by tape. And you haven’t heard the

1 deposition of the mortgage brokers lady when she said that Billy
2 Mitchell achieved his score in 15 or 20 minutes after the -- the event
3 had opened. You didn't hear the testimony of Josh Ryan, the guy that
4 set it up, saying there was absolutely no way that any recording
5 performance -- any recording equipment was set up and that any
6 performance could be recorded out of that machine. You didn't hear
7 that testimony. You also -- I don't know if you're familiar with the fake
8 board slot video on the Boomers score. I don't know if you're familiar
9 with the technical evidence regarding the orientation of these two tapes
10 from 1047 and 1050. I don't know if you're familiar with the
11 significant MAME girder transitions that show up in Billy Mitchell's
12 tapes. It's not like we are saying that there was a MAME computer
13 inside of his arcade cabinets. These performances, Walter, they never
14 happened. He has been lying about it to everybody for 12 or 15 years.
15 It needs to stop. Somebody needs to tell Billy Mitchell this needs --

16 PC: Objection.

17 DC: -- to stop.

18 (*Id.*, 222:20-223:23.)

19 Counsel engaged in repetitive and argumentative questioning and delivered a long, self-
20 serving speech, neither of which would have been permitted had Counsel been conducting his
21 examination during a judicial proceeding.

22 b. Deposition of Robert Mruczek

23 “While a question is pending, counsel should not, through objections or otherwise, coach
24 the deponent or suggest answers.” (L.A. Sup. Ct. Rules, Appx. 3.A(e)(8).) “Counsel should not
25 direct a deponent to refuse to answer questions unless they seek privileged information or are
26 manifestly irrelevant or calculated to harass.” (*Id.*, subd. (e)(9).)

27 Third-party witness Robert Mruczek, understood to be favorable to Defendant’s case,
28 testified at deposition on July 21, 2023. Counsel for both parties were present. Mr. Mruczek was
unrepresented.

After lodging an objection that one of Plaintiff’s counsel’s questions to the witness was
argumentative, the following exchange took place (edited for brevity):

DC: [To the witness] I don’t have to -- you don’t have to answer that.
You don’t have to.

PC: You are not his attorney. He has to answer that.

DC: No, I’m instructing him not to answer. That’s fine.

PC: You are going to instruct somebody that’s not your client not to
answer?

1 DC: I'm telling him he doesn't have to answer that argumentative
2 question. So, yeah, he doesn't have to answer.
3 PC: ... You're instructing this witness not to answer a question.
4 DC: Yeah. I'm telling him he doesn't have to answer this question.

5 (Dep. of Robert Mruczek, 145:24-146:9.)

6 Counsel appears, from this record, to have instructed a witness (who was not his client)
7 not to answer properly posed questions at a deposition.

8 Later, Counsel appears to have advised the witness on the record that he should disregard
9 Plaintiff's counsel's request to preserve relevant documents:

10 PC: If I asked you [the witness] to not delete any [possibly discoverable text
11 messages] after today until you've produced them, could you produce them to us,
12 any that you do have still?

13 DC: I'm going to object

14 W: I can -

15 DC: No one has subpoenaed you to produce any documents. You're not under
16 any obligation to produce any documents, Robert.

17 PC: ... I'm not telling him he is under obligation. I'm asking if he would.

18 DC: Well, you are under no obligation to produce any documents, Robert,
19 unless you're subpoenaed.

20 PC: ... [H]owever, ... if you destroy or delete any emails from this date
21 forward, which is obviously evidence, there could be repercussions. ...

22 W: Okay. I'll talk to [Defendant's counsel], but at present I'm inclined to
23 follow his advice that I'm under no obligation to provide anything

24 (*Id.*, 153:19-154:17.)

25 Counsel appears to have attempted – successfully – to advise a nonparty witness
26 that he need not produce relevant evidence to his opponent.

27 5. Counsel's misuse of privileged information

28 "Where it is reasonably apparent to a lawyer who receives a writing related to a
lawyers' representation of a client that the writing was inadvertently ... produced, and the
lawyer knows or reasonably should know that the writing is privileged ... , the lawyer
shall (a) refrain from examining the writing any more than is necessary to determine that
it is privileged ... and (b) promptly notify the sender. (Rules Prof. Conduct, rule 4.4)

During Jerry Byrum's deposition, the following line of questioning took place
(with omissions for brevity):

DC: "Mr. Byrum, have you shared any of the text messages that you and I have

had with Mr. Mitchell?

...

Well, the reason I asked is, while [Plaintiff's counsel] was sharing her screen, a message popped up from [Plaintiff], and that message said that you told me that you've seen pictures of [his] awards. How would he know that –

...

W: I'm sorry. What did it say, exactly?

DC: I'm trying to recall exactly Maybe Ms. Ross will share it with us, but what it says –

PC: That's not gonna happen.

DC: That's not gonna happen?

PC: No.

DC: Okay. Well, what it appeared to say, Mr. Byrum, is that [Plaintiff] knew that you had told me you had seen pictures or copies of his award?

PC: Counsel, object.

PC [Ellrod]: Are you testifying as to what you viewed as an attorney-client communication between [Plaintiff] and [Plaintiff's counsel], and you're communicating with this witness? There are rules to deal with inadvertent attorney-client communication. ...

DC: I don't know it was inadvertent. ...

PC [Ellrod]: We'll deal with inadvertent later. Let me make it clear for the record that that's what you're doing. You're questioning this witness about a [sic] attorney-client communication that you observed.

DC: Well, the witness is lying to me.

(Dep. of Jerry Byrum, 38:9-40:7.)

This is a potential violation of Rule of Professional Conduct Rule 4.4.

c. Plaintiff has not shown a genuine likelihood of substantial effect on the proceedings sufficient to outweigh the prejudice to the Defendant should counsel be disqualified.

“Since the purpose of a disqualification order must be prophylactic, not punitive, the significant question is whether there exists a genuine likelihood that the status or misconduct of the attorney in question will affect *the outcome of the proceedings* before the court.” (*Gregori, supra*, at pp. 308-309, italics added.) “‘[T]he trial court can disqualify counsel only where it is confronted with manifest interests which it must protect from palpable prejudice.’ [Citation.]” (*Geringer v. Blue Rider Finance* (2023) 94 Cal.App.5th 813, 822.) “Disqualification is inappropriate .. simply to punish a dereliction that will likely have no *substantial continuing effect* on future judicial proceedings.” (*Chronometric, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597, 607, italics added.)

1 As discussed above, disqualification of opposing counsel appear to be limited where
2 counsel's conduct vested his client with an unfair, continuing advantage through wrongful
3 possession of confidential information. In *San Diego* and *Gregori, supra*, the Court of Appeal
4 demanded "a 'reasonable probability' and 'genuine likelihood' that opposing counsel ha[d]
5 'obtained information the court believe[d] would likely be used advantageously against an
6 adverse party' " (*San Diego, supra*, at p. 462, quoting *Gregori, supra*, at p. 309.) Plaintiff's
7 cited case, *Ceramco, Inc. v. Lee Pharmaceuticals* (2d Cir. 1975) 510 F.2d 268 (*Ceramco*), only
8 reinforces this point. In *Ceramco*, attorney for defendant Lee Pharmaceuticals phoned the
9 plaintiff's employees, without identifying himself, and probed them for facts relevant to the case.
10 (*Id.*, at pp. 269-270.) (See also *Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597
11 (*Chronometrics*), where an attorney for a cross-complainant contacted the represented cross-
12 defendant repeatedly, deriding his counsel and inducing him to reveal facts relevant to the
13 litigation.)

14 There are no facts before the Court that Defendants have improperly obtained
15 confidential information that would place the facts of this case within the case law authorizing
16 disqualification of opposing counsel.⁴ Thus, the Court has no alternative but to deny Plaintiff's
17 motion to disqualify, without prejudice.

18 **4. OSC RE POTENTIAL DISCIPLINARY REFERRAL OF DEFENSE COUNSEL**
19 **FOR VIOLATIONS OF THE RULES OF PROFESSIONAL CONDUCT**

20 The Court is duty-bound to take corrective action where an attorney commits misconduct
21 (Cal. Code Jud. Ethics, canon 3D(2); see also *Amjadi v. Brown* (2021) 68 Cal.App.5th 383, 390-
22 391.) "Whenever a judge ... concludes in a judicial decision, that a lawyer has committed
23 misconduct or has violated any provision of the Rules of Professional Conduct, the judge *shall*
24 take appropriate corrective action, which may include reporting the violation to the appropriate
25 authority." (*Ibid.*, italics added.)

26 While the Court is compelled to deny the motion for disqualification without prejudice
27

28 ⁴ Plaintiff's counsel separately characterizes Defendant's counsel's general conduct in the course of litigation as
evidence of "inappropriate emotional involvement" with the case. (Mot., 24:25-27.) Such is a matter between
defense counsel and his client.

1 based upon the case law, Plaintiff has placed substantial evidence of Defense Counsel's conduct
2 that is deeply troubling to the Court.

3 Exacerbating his conduct, Defense Counsel does not appear to this Court recognize his
4 inappropriate behavior. Rather, Defense Counsel justifies his conduct because he says he is
5 searching for the truth and he says the witnesses are liars. In opposition to the motion, Counsel
6 submitted a ten-page, thirty-two paragraph declaration. Eight paragraphs – a quarter of his
7 declaration – addresses Jerry Byrum. Counsel argues he contacted Byrum because he is “a
8 percipient witness” who “flippantly refused to produce any documents” or to comply with a
9 subpoena, so Counsel “contacted the hostile witness to learn the truth.” (Tashroudian Decl., ¶¶
10 18-20.) Counsel suggests, though he does not argue, that his behavior toward Byrum was
11 justified because Byrum has insulted Counsel personally a number of times. (*Id.*, ¶ 17.)

12 Another quarter of Counsel's declaration in opposition to Plaintiff's motion to disqualify
13 discusses Mr. Johnson. Those eight paragraphs are devoted to accusations that, among other
14 things, Johnson is Plaintiff's “shill”, (¶5), that he has “attempt[e]d to temper [*sic*] evidence”, (¶9)
15 he indirectly contributed to a professional acquaintance's suicide, (¶8), that he has had
16 “untraceable ... call[s]” with Plaintiff, (¶9) and that Defendant suspected Johnson “would secrete
17 [*sic*] [evidence] away to Jamaica,” (¶12.)

18 Counsel reiterated his position many times at oral argument, telling the Court to “get
19 real” before eventually stating to the Court that he “would be a good boy.”

20 There are no exceptions to the Rules of Professional Conduct based on witnesses'
21 purported bad behavior or lack of candor. Nor is there an exception where counsel believes an
22 opponent is engaged in a bad-faith, frustrating litigation strategy. An attorney is bound to behave
23 ethically in all aspects of his practice. Every day, lawyers in this country successfully litigate
24 zealously and aggressively on behalf of their clients – within the bounds of the ethics rules.

25 This Court, at the December 1, 2023 hearing, and again in this ruling, has detailed to
26 Defense Counsel the impropriety of past conduct, citing to corresponding ethics rules. While the
27 Court is under no obligation to give notice of a potential or actual referral to the State Bar of
28 California, the Court provides it here – Defense Counsel must conform his conduct to that which

1 is required by the California Rules of Professional Conduct and related ethics authorities.
2 Defense Counsel is on notice that future conduct of a similar vein may result in a referral to the
3 State Bar of California.

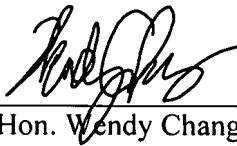
4 **5. ORDERS OF THE COURT**

5 The Court DENIES Plaintiff's motion to disqualify Defendant's counsel, without
6 prejudice.

7 The Court sets an Order to Show Cause hearing Re: Potential Disciplinary Referral of
8 Defense Counsel for Violations Of The Rules Of Professional Conduct for January 11, 2024 at
9 8:30 a.m. in Dept. 36, concurrent with the hearing on the Motion for Sanctions of that date.

10 **IT IS SO ORDERED.**

11
12
13 DATED: December 11, 2023



Hon. Wendy Chang
Los Angeles Superior Court