

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

COLE ASIA BUSINESS CENTER, INC., a Philippines corporation,)	Case No. CV 12-00956 DDP (Cwx)
)	
Plaintiff,)	ORDER GRANTING DEFENDANT AND COUNTER/THIRD PARTY CLAIMANT DEEBTORWISE'S MOTION TO DISQUALIFY AURORA TALAVERA AND THE AURORA LAW GROUP AS COUNSEL FOR THIRD PARTY DEFENDANT ACCESS COUNSELING, INC.
v.)	
ROBERT D. MANNING, an individual; DEBTORWISE FOUNDATION, a Delaware corporation,)	[Dkt. No. 57]
)	
Defendants.)	
)	
)	

Presently before the court is Defendant and Counterclaimant/Third Party Claimant DebtorWise Foundation ("DebtorWise")'s Motion to Disqualify Aurora Talavera and the Aurora Law Group as Counsel of Record for Third Party Defendant Access Counseling, Inc. ("Access"). Having considered the submissions of the parties, including the documents submitted by DebtorWise for in camera review, and heard oral argument, the court grants the motion and adopts the following order.

///

1 **I. Background**

2 The following background facts are not in dispute:

3 DebtorWise provides online and telephonic credit counseling
4 and debtor education courses required by the Federal Courts to
5 obtain bankruptcy discharge. In September 2010, DebtorWise entered
6 into a written agreement with Cole Asia, who agreed to provide
7 credit counseling services to DebtorWise clients through a call
8 center in Makati City, Philippines. DebtorWise alleges a number of
9 problems with Cole Asia's performance, including language
10 deficiencies of the counselors and overbilling. (Compl. ¶¶ 13-20.)

11 Access became an approved provider of credit counseling
12 courses around March 2011.

13 On December 30, 2011, Cole Asia filed a complaint against
14 Manning and DebtorWise for breach of contract, book account,
15 account stated, and quantum meruit, claiming that DebtorWise had
16 failed to pay for services provided and for an agreed-upon
17 termination fee. DebtorWise filed a counterclaim against Cole
18 Asia, Cole Group, Inc., Sevan Aslanyan, Roes 1-10, and Access
19 Counseling. (Counterclaim and Party Complaint ("Counterclaim")
20 Debtorwise alleged that Aslanyan himself had opened the competing
21 business Access, which "poached" DebtorWise clients in violation of
22 an agreement not to compete and copied some of DebtorWise's
23 materials. (Countercl. at ¶ 23.) Access, through its attorney
24 Aurora Talavera, denied all allegations and denied that Aslanyan is
25 or ever has been a corporate officer or Board member of access.
26 (Answer by Access Counseling Inc. to Counter Claim, passim.)

27 Attorney Talavera, principal and sole attorney for The Aurora
28 Law Group, represented DebtorWise on two occasions. (Opp. at ¶ 3.)

1 First, on May 12, 2011, Talavera signed a letter to Sage Personal
2 Finance stating that her firm served as DebtorWise's California
3 counsel. (Motion to Disqualify Aurora Talavera and the Aurora Law
4 Group as Counsel of Record for Third party Defendant Access
5 Counseling ("Motion"), Decl. of Robert D. Manning ("Manning
6 Decl."), Exh. A.) The letter stated that the Adair Law Firm had
7 sent Sage a letter demanding that it cease any wrongful use of the
8 DebtorWise name and any trademark violations. The letter repeated
9 the cease-and-desist demand and requested confirmation of receipt
10 and compliance with the demand. It threatened legal action if the
11 Aurora Law Group did not receive a response. The parties do not
12 indicate whether this letter settled the matter in question.

13 The second representation appears to have been more sustained.
14 On July 25, 2011, Talavera signed a letter to James David Johnson
15 P.A., stating that the Aurora Law Group was representing DebtorWise
16 Foundation in a licensing agreement dispute with Start Fresh Today
17 Inc. ("Start Fresh"). (Mot., Manning Decl., Exh. B.) On October
18 26, 2011, Talavera wrote to Manning stating that she had received a
19 letter about arbitration of the Start Fresh dispute in Chicago and
20 requesting additional clarification on the arbitration to
21 "determine what the status of the 'case' is." She stated that she
22 would contact the arbitrator Gilbert Camarena and requested all
23 additional correspondence to be forwarded to her. (Opp., Exh. 7.)
24 On November 22, 2011, Talavera emailed Manning regarding the
25 arbitration. (Mot., Manning Decl. Exh. D; Opp. Exh. 8.) In that
26 email, she stated that she had not received a response to her
27 October 26 letter and that "consequently, [her] office cannot
28 represent [Manning] or DebtorWise at this scheduled arbitration" on

1 November 30 and that "DebtorWise will have to make other
2 arrangements."

3 On May 14, 2012, Talavera filed a Motion to Quash Service of
4 Process as counsel to Access. Since then, Talavera has represented
5 Access in all proceedings in this case.

6 **II. Legal Standard**

7 "The trial court is vested with the power '[t]o control in
8 furtherance of justice, the conduct of its ministerial officers.'" Henriksen v. Great Am. Sav. & Loan, 14 Cal. Rptr. 2d 184, 186 (Ct.
9 App. 1992). The court's inherent power includes the power to
10 disqualify an attorney. Id. The court applies state law in
11 determining matters of disqualification. In re Cnty. of L.A., 223
12 F.3d 990, 995 (9th Cir. 2000).
13

14 The starting point for the court's analysis is California
15 Rules of Professional Conduct, Rule 3-310(e) ("Avoiding the
16 Representation of Adverse Interests").¹ It provides, in relevant
17 part, that "A member shall not, without the informed written
18 consent of the client or former client, accept employment adverse
19 to the client or former client where, by reason of the
20 representation of the client or former client, the member has
21 obtained confidential information material to the employment." "The
22 purpose of [this] rule is to protect the confidential relationship
23 which exists between attorney and client, a relationship which
24 continues after the formal relationship ends. The fiduciary nature
25 of that relationship requires the application of strict standards.
26

27 ¹ The Central District of California has adopted the Rules
28 of Professional Conduct of the State Bar of California, and the
decisions construing them, as the governing standards of
professional conduct. See C.D. Cal. L.R. 83-3.1.2.

1 For that reason, a former client may seek to disqualify a former
2 attorney from representing an adverse party" Henriksen, 14
3 Cal. Rptr. 2d at 186 (internal citations omitted).

4 In order to prevail on a motion to disqualify, the moving
5 party and former client must demonstrate either: (1) that the
6 former attorney actually possesses confidential information adverse
7 to the former client; or (2) that there is a "'substantial
8 relationship' between the former and current representation." H.F.
9 Ahmanson & Co. v. Salomon Bros., Inc., 229 Cal. App. 3d 1445, 1452
10 (Ct. App. 1991) ("Ahmanson").

11 **III. Discussion**

12 A. Actual possession of confidential information

13 There is no dispute that Talavera represented DebtorWise on
14 two occasions. First, on May 5, Talavera wrote a cease-and-desist
15 letter to stop Sage Personal Finance from using the DebtorWise name
16 and violating its trademark rights. Second, starting around July
17 2011, Talavera represented DebtorWise in its dispute with Start
18 Fresh. The parties disagree on whether any confidential
19 information was imparted and whether confidentiality was waived.

20 Manning and DebtorWise assert that Talavera came into actual
21 possession of confidential information adverse to them in the
22 current action. Based on the documents submitted under seal for in
23 camera review, the court agrees. The documents under seal contain
24 information about DebtorWise's business plan, account volume, and
25 litigation strategy, all of which is confidential. (Decl. Of Robert
26 D. Manning regarding Motion to Disqualify Aurora Talavera and the
27 Aurora Law Group as Counsel of Record for Third Party Defendant
28 Access Counseling, Inc., Exhs. 1-6.) Talavera is thus in possession

1 of confidential information about DebtorWise that is adverse to
2 DebtorWise in the current action, while also representing Access,
3 an opposing party in the action. This is a conflict and is barred
4 by the California Rules of Professional Conduct.

5 B. Waiver of Confidentiality

6 Talavera argues that Manning waived confidentiality because
7 "everything was shared with business associates who are now
8 involved in the case herein." (Opp. at ¶ 9.) She states that
9 Sevan Aslanyan, owner of Cole Asia, was present for all her
10 conversations with Manning and was copied on all their email
11 correspondence. (Opp. at ¶¶ 4-5).

12 Manning denies that all communications between himself and
13 Talavera were made in the presence of or copied to Aslanyan.
14 Manning declares that they did speak directly without Aslanyan and
15 that "some email messages were just between her and I, as
16 exemplified in the moving papers." (Reply, Manning Decl. ¶¶3-4).
17 Manning offered as an exhibit one such email, in which Talavara
18 informed Manning that she could not represent DebtorWise in the
19 Start Fresh arbitration. (Mot., Manning Decl., Exh.E) He further
20 declares that if Aslanyan participated on all phone calls, it was
21 unbeknownst to Manning. (Reply, Manning Decl. ¶ 3.)

22 Typically, communications disclosed to third parties are not
23 considered to be confidential communications between attorney and
24 client. Nonetheless, the California Evidence Code makes allowances
25 for the presence of certain third parties; it considers as
26 confidential all information transmitted "in confidence by a means
27 which, so far as the client is aware, discloses the information to
28 no third parties other than those who are present to further the

1 interest of the client in the consultation or those to whom
2 disclosure is reasonably necessary for the transmission of the
3 information or the accomplishment of the purpose for which the
4 lawyer is consulted." Cal. Evid. Code § 952. Thus "a communication
5 to a lawyer is nonetheless confidential even though it is made in
6 the presence of another person--such as a spouse, parent, business
7 associate, or joint client--who is present to further the interest
8 of the client in the consultation." Cal. Evid. Code § 952 (Law
9 Review Commission Comments). If Aslanyan can be considered a
10 business associate, then even if he was involved in all
11 communications between Talavera and Manning, those communications
12 would remain confidential.

13 California courts have been strict about how far the business
14 associate exception may be extended. While the presence of an
15 officer of a wholly owned subsidiary will not destroy
16 confidentiality, Ins. Co. of N. Am. v. Superior Court, 108 Cal.
17 App. 3d 758, 771 (Ct. App. 1980), communications within a "sellers
18 group" that were also shared with an attorney were not subject to
19 attorney-client privilege. McCaugherty v. Siffermann, 132 F.R.D.
20 234 (N.D. Cal. 1990). Here, Aslanyan and Manning were
21 representatives of different entities which were apparently
22 associated with each other only through a contractual relationship.
23 Absent additional facts, the court finds that Aslanyan was not a
24 business associate and that Manning did waive confidentiality when
25 communicating with his attorney in Aslanyan's presence.

26 Although Manning waived confidentiality of all communications
27 that he shared with Aslanyan, he has provided evidence of at least
28 one instance of an apparently private communication with his

1 attorney. The court finds that, lacking evidence to the contrary,
2 it is unlikely that Aslanyan was involved in all other
3 communications. The court therefore finds that Manning and
4 Debtorwise did not waive confidentiality with respect to all their
5 communications with their attorney Talavera. The court notes that
6 if an attorney wishes to involve a third party in all
7 communications with her client, that attorney would best fulfill
8 her duty of loyalty to the client by obtaining the client's express
9 consent and by explaining to the client any resulting waiver of
10 confidentiality.

11 **IV. Conclusion**

12 The court finds that Talavera was in possession of
13 confidential information adverse to a former client. The court
14 finds further that Manning and DebtorWise did not waive
15 confidentiality with respect to all his communications with
16 Talavera. Therefore, DebtorWise's motion is hereby GRANTED.
17 Aurora Talavera and The Aurora Law Group are disqualified and must
18 be withdraw from representing Access or any other party in the
19 current action.

20
21 IT IS SO ORDERED.

22
23
24 Dated: October 30, 2012


25 DEAN D. PREGERSON
26 United States District Judge
27
28