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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROBIN LOVE,
Plaintiff,
v.
PERMANENTE MEDICAL GROUP, et al.,
Defendants.

Case No. [12-cv-05679-WHO](#)

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISQUALIFY**

Re: Dkt. No. 61

INTRODUCTION

This is a wrongful termination suit. Defendants The Permanente Medical Group, Inc. (“TPMG”), Kaiser Foundation Hospitals, and Kaiser Foundation Health Plan, Inc., (“defendants”) and non-party Kenneth Shigematsu (collectively, “movants”), a manager at TPMG, move to disqualify plaintiffs’ counsel Stephen Schear of the Law Office of Stephen Schear due to his representation of and consultation for Shigematsu in a separate matter in 2003. They also move to disqualify Justice First, LLP (“Justice First”), because it is co-counsel with Schear for Love. Based on the parties’ briefs and argument, and for the reasons below, the Motion to Disqualify is GRANTED IN PART AND DENIED IN PART.

FACTUAL BACKGROUND

I. THE CURRENT CASE

Non-party Kenneth Shigematsu is a licensed clinical social worker at TPMG and is currently the Director of Psychiatry for the Kaiser South San Francisco Psychiatry Department, with managerial responsibility for all non-physician staff in the department and oversight of all mental health providers at the center; he has worked for TPMG since 1997. Shigematsu Decl. ¶ 1. He directly supervises the manager of Chemical Dependency Services (“CDS”) unit and has

1 overall responsibility for CDS’s staff.

2 Plaintiff Robin Love worked as a clinical licensed social worker at CDS from September
3 2008 until her termination on May 3, 2012, though she worked in another TPMG unit since March
4 2008. FAC ¶ 1; Shigematsu Decl. ¶ 3; Love Decl. ¶ 7. Prior to transferring to CDS, Love “heard
5 a lot of negative comments about [Shigematsu] and his management” and was told that he “was
6 very difficult to work with and that his management style contributed to making Adult Psychiatric
7 a very unhealthy environment in which to work.” Love Decl. ¶ 8. Nonetheless, she applied to
8 transfer there because of “very positive things” she had heard about the then-manager of CDS.
9 Love Decl. ¶ 11. For about three months in early 2011, Shigematsu assumed the responsibilities
10 of manager of CDS and “directly reviewed” Love’s work. Shigematsu Decl. ¶ 3.

11 Love alleges that on February 11, 2011, another therapist, Tanya Wisner, warned her that
12 one of Wisner’s patients, J.H., said that he wanted to “murder Robin Love.” FAC ¶ 16. Love
13 alleges that she asked the defendants to obtain a restraining order against J.H. for her safety, but
14 they refused. FAC ¶¶ 17-19, 22. Love pursued her request, but Shigematsu “demanded” that
15 Love “let it go.” Love Decl. ¶ 16. Because she has “had numerous other personal interactions
16 with Mr. Shigematsu regarding matters that are the basis of this lawsuit,” such as his “failure to
17 properly respond when [she] informed him about the death threat” and his “failure to comply with
18 Kaiser’s policies on workplace safety,” she “complained about Mr. Shigematsu to various
19 managers.” Love Decl. ¶¶ 15, 21. After her complaint, Love alleges that Shigematsu retaliated
20 against her by bringing false disciplinary charges against her, subjecting her to unlawful corrective
21 action, and then dismissing her without just cause. Love Decl. ¶ 20; FAC ¶¶ 28, 31, 32, 34. Love
22 then brought this suit. However, Love does not seek any damages or other relief from
23 Shigematsu. Love Decl. ¶ 31.

24 **II. SCHEAR’S RELATIONSHIP WITH SHIGEMATSU**

25 In 2003, Shigematsu retained Schear to assist him with “employment concerns” and a
26 “proposed reorganization of the Psychiatry Department of Kaiser South San Francisco [Medical
27 Center],” where Shigematsu was then a psychologist manager. Br. 1; Shigematsu Decl. ¶ 4.
28 Schear “specialize[s] in representing whistleblower healthcare providers who have suffered

1 retaliation by large private healthcare corporations.” Schear Decl. ¶ 5.

2 Shigematsu talked with Schear about 13 times over six months in 2003. Shigematsu Decl.
3 ¶ 4. Shigematsu also has four invoices reflecting Schear’s billing for services to Shigematsu from
4 January 24, 2003, to July 16, 2003. Shigematsu Decl. ¶ 4; Dkt. No. 70 Exs. 16-20. Shigematsu
5 ultimately did not file any lawsuit or administrative claim and resolved his concerns informally
6 with TPMG. Shigematsu Decl. ¶ 4.

7 When the defendants’ attorneys prepared Shigematsu for his May 29, 2013, deposition in
8 this case, he told them that that he had retained Schear in the past. Schear had not sought
9 Shigematsu’s consent to represent Love. Love’s counsel noted the potential conflict of interest to
10 Love’s counsel at the start of the deposition, where Schear was present, and met and conferred for
11 a month thereafter to try to resolve the issue. Rosenberg-Wohl Decl. ¶ 3; Palley Decl. ¶¶ 3-4, Exs.
12 5-10. While asserting that he did not remember anything about the case, Schear acknowledged
13 that Shigematsu had paid him \$1,145.50 for his services. Palley Decl. Ex. 5.

14 Shigematsu is a primary target of plaintiff’s case. He says that he is “concerned that Mr.
15 Schear may intentionally or inadvertently use confidential information that he learned during his
16 representation of me in his representation of Ms. Love in this lawsuit . . . [f]or example . . .
17 confidential information . . . about my job performance, complaints about me, the department’s
18 reorganization, problems or concerns that I had with my managers or employees.” Shigematsu
19 Decl. ¶ 8. Shigematsu asserts that Love claims that he has a history of retaliating against
20 employees and making unfounded complaints about them. Shigematsu Decl. ¶ 5. She allegedly
21 claims that many employees have complained about Shigematsu’s performance and behavior, and
22 that he has been disciplined many times. Shigematsu Decl. ¶¶ 5, 6; Br. 5 (citations omitted).
23 Shigematsu is “offended” by Schear’s representation of Love and objects to Justice First’s
24 representation of Love without his consent. Shigematsu Decl. ¶ 8.

25 Jenny Huang of Justice First is Love’s lead counsel. Schear and Huang have worked
26 together on cases in the past, and Schear has rented office space to her, which is how they first
27 met. Schear Decl. ¶ 9. He says that “[a]t the time Ms. Huang informed me about this case, I did
28 not remember that I had once consulted with Mr. Shigamatsu [sic],” nor did he recognize or

1 remember Shigematsu at Shigematsu’s deposition. Schear Decl. ¶¶ 20-22. After the deposition,
2 Schear searched his computer files and bookkeeping records for information related to Shigematsu
3 and only found that he received \$1,145.50 from Shigematsu in 2003. Schear Decl. ¶ 2003.
4 However, Schear did not search his paper archive and will not do so without a court order “in
5 order to avoid any possible exposure to confidential information concerning Mr. Shigematsu
6 [sic].” Schear Decl. ¶ 25. Schear claims that he still has no memory of Shigematsu or any
7 communications with him and, thus, he is literally unable to share any confidential information
8 with Huang about Shigematsu. Schear Decl. ¶¶ 29, 31. Nonetheless, he says that since he was
9 informed about his prior work for Shigematsu on May 29, 2013, he has not spoken with Huang
10 except with regard to the pending motion to disqualify. Schear Decl. ¶ 39.

11 Huang states that she never knew about Schear’s prior representation of Shigematsu until
12 Shigematsu’s deposition, nor did she receive confidential information about him. Huang Decl. ¶¶
13 14-15. Love asserts that her attorneys have never shared any information with her about Schear’s
14 prior representation of Shigematsu. Love Decl. ¶ 33.

15 PROCEDURAL HISTORY

16 Love filed this suit on November 5, 2012. Dkt. No. 1. On April 5, 2013, the Honorable
17 Yvonne Gonzales Rogers granted with leave to amend the first and fifth causes of action. Dkt.
18 No. 25. On April 30, 2013, Love filed an amended complaint, which is the subject of a motion to
19 dismiss and motion to strike pending before the Court. Dkt. Nos. 32, 37. On July 12, 2013, the
20 defendants and Shigematsu filed this Motion to Disqualify.

21 LEGAL STANDARD

22 District courts have inherent authority to disqualify counsel. *See United States v. Wunsch*,
23 84 F.3d 1110, 1114 (9th Cir. 1996). Civil Local Rule 11-4(a)(1) mandates that every attorney who
24 appears before this Court “comply with the standards of professional conduct required of the
25 members of the State Bar of California.” CIVIL L.R. 11-4(a)(1). Accordingly, this Court applies
26 California law to determine whether Love’s counsel should be disqualified. *In re Cnty. of Los*
27 *Angeles*, 223 F.3d 990, 995 (9th Cir. 2000).

28 California Rule of Professional Conduct 3-310(E) applies to this matter: “A member shall

1 not, without the informed consent of the client or former client, accept employment adverse to the
2 client or former client where, by reason of the representation of the client or former client, the
3 member has obtained confidential information material to the employment.” “[I]t is a violation of
4 that duty for him to assume a position adverse or antagonistic to [that] client without the latter’s
5 free and intelligent consent.” *Flatt v. Super. Ct. of Sonoma Cnty.*, 9 Cal. 4th 275, 289 (1994).

6 In addition, “[b]ecause of their susceptibility to tactical abuse, [m]otions to disqualify
7 counsel are strongly disfavored” and “should be subjected to particularly strict judicial scrutiny.”
8 *Oracle Am., Inc. v. Innovative Tech. Distrib., LLC*, 11-CV-01043-LHK, 2011 WL 2940313, at *4
9 (N.D. Cal. July 20, 2011) (quotation marks omitted). Courts must be cognizant of the “substantial
10 hardship” and the “monetary and other costs of finding a replacement” on parties whose counsel is
11 disqualified. *Gregori v. Bank of Am.*, 207 Cal. App. 3d 291, 300 (1989).

12 DISCUSSION

13 This case presents an unusual situation in which one side seeks to disqualify the other
14 side’s attorney because that attorney previously worked for the moving party’s employee, who is
15 not a party to this case. The Court is unaware of, and the parties have not identified, any cases
16 directly on point. However, because Shigematsu is now the primary target in a wrongful
17 termination case in which his former employment lawyer is adverse to him, the precedent in
18 successive representation cases demonstrates that the defendants and Shigematsu have met their
19 burden of showing that disqualifying Schear is warranted. Since there is no evidence or reason to
20 believe that Schear passed confidential information on to Justice First, disqualifying Justice First
21 is not warranted.

22 I. SCHEAR IS DISQUALIFIED.

23 “It is beyond dispute [that] a court may disqualify an attorney from representing a client
24 with interests adverse to those of a former client.” *H. F. Ahmanson & Co. v. Salomon Bros., Inc.*,
25 229 Cal. App. 3d 1445, 1451 (Ct. App. 1991) (citation omitted). “Disqualification in cases of
26 successive representation is based on the prohibition against employment adverse to a former
27 client where, by reason of the representation of the former client, the attorney has obtained
28 confidential information material to the employment.” *Id.* (quotation marks, brackets, and

1 ellipses omitted). Disqualification is automatic if the client does not consent, and “[t]he court does
2 not engage in a ‘balancing of equities’ between the former and current clients.” *Id.* The former
3 client bears the burden of proving that disqualification is warranted. *Id.* at 1452.

4 Actual possession of the former client’s confidential information is sufficient to warrant
5 disqualification, but there is no need to prove actual possession of confidential information
6 because “it is not within the power of the former client to prove what is in the mind of the
7 attorney.” *Id.*; *Global Van Lines, Inc. v. Super. Ct. of Orange Cnty.*, 144 Cal. App. 3d 483, 489
8 (Ct. App. 1983). Rather, all that is necessary is that “a substantial relationship has been shown to
9 exist between the former representation and the current representation.” *Id.* The “substantial
10 relationship” test requires examining the “similarities between the two factual situations, the legal
11 questions posed, and the nature and extent of the attorney’s involvement with the cases. As part of
12 its review, the court should examine the time spent by the attorney on the earlier cases, the type of
13 work performed, and the attorney’s possible exposure to formulation of policy or strategy.” *H. F.*
14 *Ahmanson*, 229 Cal. App. 3d at 1455.

15 Whether the facts or legal questions are similar depend on whether they are “material.”
16 *Jessen v. Hartford Cas. Ins. Co.*, 3 Cal. Rptr. 3d 877, 888 (Ct. App. 2003). For information to be
17 material, “it must be found to be directly at issue in, or have some critical importance to, the
18 second representation.” *Farris v. Fireman’s Fund Ins. Co.*, 119 Cal. App. 4th 671, 680 (2004).
19 Here, the movants do not allege that “any relevant confidences were in fact revealed.” *H. F.*
20 *Ahmanson*, 229 Cal. App. 3d at 1459. Thus, the Court applies the substantial relationship test.

21 The movants adequately show that the factual and legal issues in Schear’s consultation of
22 Shigematsu are substantially related to the issues here. The movants allege that Shigematsu
23 sought out Schear because his boss “was taking away his supervisor duties . . . [and] was
24 retaliating against him by making him report to another physician whom Shigematsu had filed a
25 complaint . . . [because of] his taking a vacation, his concerns over union involvement in
26 management, or his differences with other managers over duties.” Reply 3 (citations omitted).
27 Shigematsu claimed that there was “evidence of retaliation and hostility towards me and that I was
28 afraid for my safety,” and that he “stated concerns about subordinates’ patient care.” Reply 3.

1 Shigematsu also consulted Schear concerning “a dispute about a management reorganization of
2 the Psychiatry Department of Kaiser South San Francisco Medical Center.” Br. 1, 10.
3 Shigematsu’s concerns about retaliation from his supervisor is supported by Schear’s own billing
4 records stating that he “research[ed a] retaliation statute” for Shigematsu’s case. Dkt. No. 70, Ex.
5 16. Shigematsu’s declaration in support of the Motion to Disqualify states that he sought out
6 Schear “to assist me in pursuing my concerns with TPMG.” Shigematsu Decl. ¶ 4.

7 Although Shigematsu is not a defendant in this action, the movants argue that “plaintiff has
8 focused on the alleged conduct” of Shigematsu, making him “her main target,” and identifies
9 Shigematsu “as her main antagonist.” Rosenberg-Wohl Decl. ¶ 2; Br. 13. The movants point out
10 that “Love seeks to discover Shigematsu’s personnel file, any complaints against him, and any
11 Quality concerns either about him or submitted by him.” Br. 13. “While not suing [Shigematsu]
12 personally, Love has sued his employer, TPMG, on whose behalf Shigematsu let her go. She
13 accuses him of professional misconduct. . . .” Br. 15. They state that “[s]he admits that she is
14 now seeking his personnel records to show a pattern of retaliatory conduct” Reply 1.

15 The matters about which Shigematsu consulted Schear have “critical importance to” this
16 case, and thus they are substantially related. If Shigematsu sought out Schear’s counsel on
17 workplace matters and retaliation issues, Shigematsu likely would have disclosed to Schear
18 information about his behavior, character, and thoughts. Shigematsu would have explored
19 arguments and defenses that are likely to arise in an employment retaliation suit he might bring,
20 such as what complaints others might have had about him or how he and others perceived his job
21 performance. Shigematsu states that Schear learned “confidential information . . . about my job
22 performance, complaints about me, the department’s reorganization, problems or concerns that I
23 had with my managers or employees”—information that could support Love’s case against the
24 defendants. Shigematsu Decl. ¶ 8. Indeed, Love has sought Shigematsu’s records through
25 discovery to corroborate her claims that Shigematsu and the defendants were hostile towards and
26 retaliated against her.

27 The law requires that there be a substantial relationship between Schear’s prior
28 representation and his current one. The confidences that Shigematsu would have to share with his

1 attorney in exploring whether and why he may have been the subject of workplace retaliation, as
2 well as how he might bring suit and counter any response, is information that is relevant and
3 material to the issues in this case. Because Shigematsu informally resolved his issues with TPMG,
4 it is very likely that Schear had “possible exposure to formulation of policy or strategy” in doing
5 so. *H. F. Ahmanson*, 229 Cal. App. 3d at 1455. The defendants in this case, Shigematsu’s
6 employer, are the very ones Shigematsu was concerned about in 2003. Schear’s credibility in
7 claiming that he has no memory of Shigematsu or any matters related to him is not at issue here.
8 The Court cannot allow the possibility that Shigematsu’s confidential information may resurface.
9 There is a substantial relationship between the prior and current representations and Schear must
10 be disqualified.

11 Love argues that the movants have not shown how Shigematsu’s “employment concerns”
12 10 years ago are similar to this case. Opp’n 14. While defendants state that Love is seeking
13 information about complaints or disciplinary actions against Shigematsu, Love points to the fact
14 that Shigematsu testified at his deposition that he has never been subjected to discipline or
15 retaliation complaints. Opp’n 14. If Shigematsu testified truthfully, Love argues, then it is
16 “impossible for Mr. Schear ever to have learned confidential information from Mr. Shigematsu
17 about complaints made against [him] in 2003, since Mr. Shigematsu was not aware of any.”
18 Opp’n 14.

19 The mere fact that no formal complaints were ever filed against, or discipline imposed
20 upon, Shigematsu does not mean that Shigematsu never revealed to Schear potential complaints
21 that he thought could be brought against him. Or that he did not share with Schear potential areas
22 of vulnerability that could be exploited in litigation. Shigematsu’s credibility is at issue in this
23 case, and the law protects him from being attacked with confidential information he provided to
24 his former lawyer.

25 Love also argues that Schear should not be disqualified because he has no memory about
26 his representation of Shigematsu. However, as discussed above, the disqualification rule is
27 intended to prevent inquiry into the mind of the challenged attorney. If Schear suddenly
28 remembered confidential information about Shigematsu, it would be impossible for the movants to

1 prove it. Indeed, Schear allows for the possibility that his memory may be refreshed if he ever
2 saw documents related to his earlier representation. *See* Schear Decl. ¶ 25. Disqualification
3 prevents this.

4 A “distinct fundamental value of our legal system is the attorney’s obligation of loyalty.”
5 *People ex rel. Dept. of Corps. v. SpeeDee Oil Change Sys., Inc.*, 86 Cal. Rptr. 2d. 816, 824 (Ct.
6 App. 1999). While there is no evidence that Schear has acted unethically or disloyally in this case,
7 Shigematsu and the movants have adequately shown that the values underlying attorney-
8 disqualification might be compromised if Schear continues representing Love.¹ The risk of
9 revealing Shigematsu’s confidential information is substantial, and Shigematsu has a right to be
10 secure in his confidences when he entrusts them to an attorney. The Motion to Dismiss Schear is
11 GRANTED.

12 **II. JUSTICE FIRST IS NOT DISQUALIFIED.**

13 “[D]isqualification of one firm does not automatically compel disqualification of the firm’s
14 co-counsel.” *In re Airport Car Rental Antitrust Litig.*, 470 F. Supp. 495, 501 (N.D. Cal. 1979).
15 Indeed, “courts have declined disqualifying counsel even when the conflicted co-counsel did in
16 fact have confidential information but never shared it with the counsel being challenged.”
17 *FlatWorld Interactives LLC v. Apple Inc.*, 12-cv-01956-WHO, 2013 WL 4039799, at *9 (N.D.
18 Cal. Aug. 7, 2013). Such courts have found disqualification unwarranted if there was “no
19 evidence that [the attorney] shared any confidential information.” *Canatella v. Krieg, Keller,*
20 *Sloan, Reilley & Roman LLP*, 11-cv-05535-WHA, 2012 WL 847493, at *2 (N.D. Cal. March 13,
21 2012).

22 Here, there is no evidence that Justice First received any confidential information about
23 Shigematsu through Schear. Schear’s law office and Justice First are different firms and do not
24 have access to each other’s records. Schear Decl. ¶¶ 15-18. And Schear has credibly represented
25 that, to date, he cannot recall *any* information related to his representation of Shigematsu and thus
26 has no information that he could give to Justice First. Without a showing that confidential

27 _____
28 ¹ That said, Schear’s failure to perform a conflict check at the outset of this litigation falls below
the standard one would expect in this day and age.

1 information was passed on to it, Justice First need not be vicariously disqualified.

2 Moreover, California courts have held that a court ruling on a motion to disqualify may
3 consider whether disqualification “imposes a substantial hardship” or a “financial burden on a
4 client to replace disqualified counsel.” *SpeeDee Oil*, 86 Cal. Rptr. 2d. at 823. Here, the Court
5 finds that disqualifying Justice First would prejudice and impose a significant hardship on Love.
6 This case has undergone significant discovery and motion practice. Disqualifying both of Love’s
7 counsel would clearly prejudice Love by imposing a substantial hardship upon her due to the
8 replication of expended efforts and the delay disqualification would cause. The movants have not
9 met their burden of establishing that disqualifying Justice First is warranted.

10 **CONCLUSION**

11 Because the defendants and Shigematsu have shown that the factual and legal issues from
12 Schear’s prior relationship with Shigematsu are substantially related to the ones in this case, the
13 Motion to Disqualify Schear is GRANTED. However, because there is no evidence that Schear
14 shared confidential information about Shigematsu with Justice First and disqualifying Justice First
15 would prejudice Love, the Motion to Disqualify Justice First is DENIED.

16 At the case management conference after the hearing on this Motion, the Court indicated
17 that it was willing to adjust the case management deadlines in place in this case if the Motion was
18 granted. Accordingly, the parties are ORDERED to meet and confer and, if desired, to propose a
19 revised schedule to the Court within 30 days of the date of this Order.

20 **IT IS SO ORDERED.**

21 Dated: September 18, 2013



22
23 WILLIAM H. ORRICK
United States District Judge