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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

STEVEN NEMEC,)	Case No. 5:14-cv-01343-PSG
)	
Plaintiff,)	ORDER DENYING NEMEC’S
v.)	MOTION TO DISQUALIFY
)	DEFENDANTS’ COUNSEL
FORREST DAVID LINEBARGER, ET AL.,)	
)	(Re: Docket No. 69)
Defendants.)	

Before the court is Plaintiff Steven Nemec’s motion to disqualify Defendants’ counsel, Gregory Klingsporn.¹ Defendants oppose.² Because the parties’ papers squarely present the issues, the court finds the motion suitable for disposition on the papers.³ After considering the arguments, the court DENIES Nemec’s motion to disqualify.

¹ See Docket No. 69.

² See Docket No. 71.

³ See Civil L.R. 7-1(b) (“In the Judge’s discretion, or upon request by counsel and with the Judge’s approval, a motion may be determined without oral argument or by telephone conference call.”).

I. BACKGROUND

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2 NemeC purchases debts and judgments from private individuals, business entities and
3 government agencies and collects upon them.⁴ Defendants are contractors against whom NemeC
4 seeks to enforce various debts purchased from Defendants’ subcontractors.⁵ In addition to his
5 breach of contract claims, NemeC alleges a fraudulent scheme in which Klingsporn has repeatedly
6 conspired with Defendants to insert illegal arbitration clauses into construction contracts so as to
7 deprive property owners of their right to trial in the event of a breach.⁶
8

9 On March 24, 2014, NemeC filed suit against the Defendants, alleging breach of contract,
10 account stated, conversion, violations of the Racketeer Influenced Corrupt Organization Act,⁷
11 unfair business practices and fraud.⁸ Following the Case Management Conference on May 16,
12 2014, NemeC filed this motion.⁹ NemeC pledges to call Klingsporn as a precipient witness and to
13 name him as a co-conspirator in his first amended complaint.¹⁰
14

II. LEGAL STANDARDS

15 Rule 5-210 of the California State Bar Rules of Professional Conduct states that, generally,
16 a member shall not advocate before a jury which will hear his or her testimony.¹¹ The rule contains
17 exceptions if (1) the testimony relates to an uncontested matter, (2) the testimony relates to the
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20 ⁴ See Docket No. 1 at 2.

21 ⁵ See Docket No. 1 at 7.

22 ⁶ See Docket No. 1 at 4, 10; Docket No. 69 at 3.

23 ⁷ 18 U.S.C. § 1961 et seq.

24 ⁸ See Docket No. 2.

25 ⁹ See Docket No. 69 at 1.

26 ¹⁰ See id. at 2.

27 ¹¹ Rule 5-210, Cal. State Bar Rules of Prof. Conduct.
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1 nature and value of legal services rendered to the client or (3) the member has the informed, written
2 consent of the client.¹² This rule “is a necessary corollary to the more fundamental tenet of our
3 adversarial system that juries are to ground their decisions on the facts of a case and not on the
4 integrity or credibility of the advocates.”¹³

5 Outright disqualification is generally disfavored because it drastically affects a number of
6 important interests: a client’s right to chosen counsel, an attorney’s interest in representing a
7 client, the financial burden on a client who must replace disqualified counsel and the possibility
8 that the disqualification motion is merely pursued for tactical reasons.¹⁴ The ethical rules are not
9 intended to allow a lawyer to disqualify opposing counsel merely by calling him or her as a
10 witness.¹⁵ Consequently, disqualification motions are subject to strict judicial scrutiny.¹⁶ The
11 principal considerations when determining if opposing counsel may be called to testify are (1)
12 whether an attorney “ought to be called” to testify on behalf of his client and (2) whether the
13 attorney may be called on behalf of a third party when his testimony would be prejudicial to his
14 client.¹⁷ Generally, only an attorney’s former or current clients have a sufficient stake in litigation
15 to have standing to move for disqualification unless “the ethical breach so infects the litigation in
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19 ¹² See *id.*

20 ¹³ *U.S. v. Prantil*, 764 F.2d 548, 553 (9th Cir. 1985).

21 ¹⁴ See *Concat LP v. Unilever, PLC*, 350 F. Supp. 2d 796, 814 (N.D. Cal. 2004) (holding that
22 disqualification is a “drastic” measure that should be used only when “absolutely necessary”); see
23 also *Yumul v. Smart Balance, Inc.*, Case No. 2:10-cv-00927-MMM-AJWx, 2010 WL 4352723, at
24 *3 (N.D. Cal. Oct. 8, 2010).

25 ¹⁵ See *Optyl Eyewear Fashion Int’l Corp. v. Style Cos., Ltd.*, 760 F.2d 1045, 1050 (9th Cir. 1985);
26 See also *Colyer v. Smith*, 50 F. Supp. 2d 966, 971 (C.D. Cal. 1999) (holding that a generalized
27 attorney interest in the integrity of the legal system is insufficient to support standing for an
28 attorney to move to disqualify opposing counsel).

¹⁶ See *Optyl Eyewear*, 760 F.2d at 1050.

¹⁷ See *id.* at 1048.

1 which disqualification is sought that it impacts the moving party's interest in a just and lawful
2 determination of her claims."¹⁸

3 III. DISCUSSION

4 NemeC contends that Klingsporn should be disqualified because he believes Klingsporn
5 was involved in underlying events. He plans to elicit Klingsporn's testimony on the contracts at
6 issue and intends to add Klingsporn as a defendant in his First Amended Complaint as a part of the
7 alleged fraud scheme.¹⁹ However, NemeC fails to tie his reasons for disqualification to legally
8 relevant standards.
9

10 NemeC is not a former or current client of Klingsporn.²⁰ Thus, in order to move for
11 Klingsporn's disqualification NemeC must demonstrate an ethical breach so severe that it impacts
12 his interest in a just and lawful determination of his claims.²¹ NemeC has made no such showing.
13 He conclusorily alleges that Klingsporn is involved in a conspiracy with Defendants that would
14 prejudice his representation of the Defendants.²² If that is so, then Defendants may bring a motion
15 at the appropriate time. However, it does not give NemeC standing to move for disqualification
16 now.²³
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19 ¹⁸ See Colyer, 50 F. Supp. 2d. at 971 (C.D. Cal. 1999). Although the Ninth Circuit has not
20 addressed this issue, courts in this district have adopted the view outlined in Colyer. See Sec. Exch.
21 Comm. v. Tuang, 831 F. Supp. 2d 1130, 1142 (N.D. Cal. 2011); Decaview Distribution Co., Inc. v.
Decaview Asia Corp., Case No. 3:99-cv-02555-MJJ-ME, 2000 WL 1175583, at *10 (N.D. Cal.
Aug. 14, 2000).

22 ¹⁹ See Docket No. 69 at 2-3.

23 ²⁰ See Docket No. 69 at 2.

24 ²¹ See Colyer, 50 F.Supp. 2d. at 971.

25 ²² See id. at 2-3.

26 ²³ The fact that a plaintiff intends to file an amended complaint that alleges a conspiracy between
27 defendants and their counsel does not indicate an ethical breach sufficiently severe to sever their
28 ties or justify the drastic measure of disqualification. See Optyl Eyewear, 760 F.2d at 1050; Concat
LP, 350 F. Supp. 2d at 814.

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Nemec's motion to disqualify is DENIED.

IT IS SO ORDERED.

Dated: July 21, 2014



PAUL S. GREWAL
United States Magistrate Judge