

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES S. GORDON, JR., an individual
residing in Benton County, Washington,

Plaintiff,

v.

IMPULSE MARKETING GROUP, INC., a Nevada
Corporation,

Defendant.

IMPULSE MARKETING GROUP, INC.,

Third-Party Plaintiff,

v.

BONNIE GORDON, JAMES S. GORDON, III,
JONATHAN GORDON, JAMILA GORDON, ROBERT
PRITCHETT and EMILY ABBEY,

Third-Party Defendants.

No. CV-04-5125-FVS

ORDER

BEFORE THE COURT is Impulse Marketing's Motion to Compel and Motion for Sanctions (Ct. Rec. 235); Motion to Compel and Request for Sanctions brought by Third-Party Defendants James Gordon, III, (Ct. Rec. 298), Jonathan Gordon (Ct. Rec. 300), Bonnie Gordon (Ct. Rec. 256), Robert Pritchett (Ct. Rec. 259); Amended Motion to Compel and Request for Sanctions brought by Bonnie Gordon (Ct. Rec. 274), and Jamila Gordon (Ct. Rec. 270); Defendant's Motion to Strike portions

1 of the declarations the Third-Party Defendants submitted in support
2 of their motions. (Ct. Rec. 325).

3 Third-Party Plaintiff Impulse Marketing ("Impulse Marketing") is
4 represented by Floyd Ivey, Sean Moynihan, and Peter Glantz. Third-
5 Party Defendants are proceeding *pro se*.

6 ***Motions to Disqualify Counsel***

7 Although the motions brought by Third-Party Defendants Bonnie
8 and Jamila Gordon are captioned as motions to compel, these motions
9 also request the Court disqualify Impulse Marketing's attorney Floyd
10 Ivey. Bonnie and Jamila Gordon are the wife and daughter,
11 respectively, of the Plaintiff, James Gordon, Jr. Both Bonnie and
12 Jamila Gordon allege Mr. Ivey previously represented the Plaintiff in
13 legal matters and that this previous representation amounts to a
14 conflict of interest. Thus, they contend Mr. Ivey should be
15 disqualified from representing Impulse Marketing because such
16 representation places Mr. Ivey in conflict with the interests of
17 Plaintiff.

18 **1. Standing**

19 Before the Court addresses whether Mr. Ivey's representation of
20 Impulse Marketing presents a conflict of interest, the Court must
21 address the threshold question of standing. Standing is a
22 jurisdictional matter that goes to the power of a federal court to
23 decide an issue placed before it. The standing doctrine "embraces
24 several judicially self-imposed limits on the exercise of federal
25 jurisdiction, such as the general prohibition on a litigant's raising
26 another person's legal rights...." *Allen v. Wright*, 468 U.S. 737,

1 750-51, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). Neither the United
2 States Supreme Court nor the Ninth Circuit has addressed the
3 particular issue of whether the standing doctrine bars a nonclient
4 party from moving to disqualify the opposing party's counsel on the
5 grounds of a conflict of interest. See *FMC Techs., Inc. v. Edwards*,
6 -- F. Supp. 2d --, 2006 WL 624454, *2 (W.D. Wash. 2006). There is a
7 split of authority on this issue. *Id.* (citing *Colyer v. Smith*, 50
8 F.Supp.2d 966, 969 (C.D. Cal. 1999)).

9 In *Colyer*, the district court noted that under the majority view
10 on this issue "only a current or former client of an attorney has
11 standing to complain of that attorney's representation of interests
12 adverse to that current or former client." *Colyer*, 50 F.Supp.2d at
13 969 (citing *In re Yarn Processing Patent Validity Litig.*, 530 F.2d
14 83, 88 (5th Cir. 1976) (stating that "courts do not disqualify an
15 attorney on the grounds of conflict of interest unless the former
16 client moves for disqualification.")). However, the *Colyer* court
17 acknowledged the possibility of nonclient standing where an
18 "unethical change of sides was manifest and glaring" or an ethical
19 violation was "open and obvious," confronting the court with a "plain
20 duty to act." *Colyer*, 50 F.Supp.2d at 969 (citing *Yarn Processing*,
21 530 F.3d at 89). Similarly, the minority view is that a nonclient
22 litigant may bring a motion to disqualify. See *Colyer*, 50 F.Supp.2d
23 at 970-71 (citing *Kevlik v. Goldstein*, 724 F.2d 844 (1st Cir. 1984)).
24 "Like the exception to the majority view, the minority view relies in
25 part on the 'court's well recognized power to control the conduct of
26 the attorneys practicing before it.'" *FMC Techs., Inc.*, 2006 WL

1 624454,*2 (citing *Colyer*, 50 F.Supp.2d at 970).

2 In addressing the standing question, the *Colyer* court held that
3 a nonclient litigant "must establish a personal stake in the motion
4 to disqualify sufficient to satisfy the irreducible constitutional
5 minimum of Article III." *FMC Techs., Inc.*, 2006 WL 624454, *3
6 (citing *Colyer*, 50 F.Supp.2d at 971). Further, the *Colyer* court
7 noted that "where an ethical breach so infects the litigation in
8 which disqualification is sought that it impacts the moving party's
9 interest in a just and lawful determination of her claims, she may
10 have the constitutional standing needed to bring a motion to
11 disqualify based on a third-party conflict of interest or other
12 ethical violation." *FMC Techs., Inc.*, 2006 WL 624454, *3. Like the
13 court in *Colyer*, the district court in *FMC Technologies, Inc.* adopted
14 the rule that "nonclient litigants may, under proper circumstances,
15 bring motions to disqualify counsel based on conflicts of interest."
16 2006 WL 624454, *3.

17 Although the Ninth Circuit has not decided the issue before the
18 Court, the question was presented in *Kasza v. Browner*, 133 F.3d 1159
19 (9th Cir. 1998). In *Kasza*, the court noted that as "a general rule,
20 courts do not disqualify an attorney on the grounds of conflict of
21 interest unless the former client moves for disqualification."
22 *Kasza*, 133 F.3d at 1171 (quoting *United States v. Rogers*, 9 F.3d
23 1025, 1031 (2d Cir. 1983) (quoting in turn *In re Yarn Processing*
24 *Patent Validity Litig.*, 530 F.2d 83, 88 (5th Cir. 1976))). However,
25 the *Kasza* court did not decide the issue because it held there was no
26 basis for disqualification even if the court assumed the plaintiff

1 had standing. 133 F.3d at 1171.

2 In the present case, without making a final determination on
3 whether it should adopt the majority or minority view, the Court is
4 mindful of the outcome under each view. If the Court adopts the
5 majority view, Third-Party Defendants Bonnie and Jamila Gordon do not
6 have standing to move to disqualify Mr. Ivey. If the Court adopts
7 the minority view, Bonnie and Jamila Gordon, under the proper
8 circumstances, have standing to bring a motion to disqualify Mr. Ivey
9 based on an alleged conflict of interest between Plaintiff and Mr.
10 Ivey. Under the minority view, Bonnie and Jamila Gordon must show
11 "the ethical conflict at issue here sufficiently impacts the 'just
12 and lawful determination' of their claims and that the conflict
13 involved is so intertwined with the current litigation that this
14 Court must consider [the] motion to disqualify[.]" *FMC Techs., Inc.*,
15 2006 WL 624454, *3. Assuming, without deciding, that Bonnie and
16 Jamila have standing to bring this motion to disqualify, the Court
17 proceeds to review the merits of the motion.

18 **2. Disqualification of Floyd Ivey**

19 When faced with an allegation that an attorney's representation
20 presents a conflict of interest, it is "the duty of the district
21 court to examine the charge, since it is that court which is
22 authorized to supervise the conduct of the members of its bar." *Gas-*
23 *A-Tron of Ariz. v. Union Oil Co. of Calif.*, 534 F.2d 1322, 1324 (9th
24 Cir. 1976). The Local Rules for the Eastern District of Washington
25 do not specifically adopt the provisions of the Washington Rules of
26 Professional Conduct as ethical rules governing the practice of

1 lawyers before the courts in this district. However, the Local Rules
2 grant the Court authority to discipline any attorney who violates the
3 Washington Rules of Professional Conduct.¹ Thus, the Washington
4 Rules of Professional Conduct shall govern the Court's
5 disqualification analysis.

6 Here, Bonnie Gordon alleges Mr. Ivey participated in numerous
7 conversations with the Plaintiff regarding spamming, including
8 conversation related to Impulse Marketing. Further, she points to
9 several emails in which Mr. Ivey and the Plaintiff communicated about
10 the possibility of Mr. Ivey assisting the Plaintiff in filing
11 lawsuits for violations of Washington's anti-spam statute. Mr. Ivey
12 acknowledges he provided legal services to the Plaintiff in the past,
13 but contends those services were unrelated to the pending litigation.
14 With respect to the current litigation, Mr. Ivey contends his
15 communication with the Plaintiff included an exchange of general
16 statements, but there was never any formal representation.

17 These allegations implicate Rule 1.9 of the Rules of
18 Professional Conduct, which states:

19 A lawyer who has formerly represented a client in a
20 matter shall not thereafter:

21 (a) Represent another person in the same or a
22 substantially related matter in which that person's
23 interests are materially adverse to the interests of the
24 former client unless the former client consents in writing
25 after consultation and a full disclosure of the material
26 facts; or

¹ See LR 83.3 ("This Court may impose discipline on any attorney practicing before this Court, ... who engages in conduct violating applicable Rules of Professional Conduct of the Washington State Bar, or who fails to comply with the rules or orders of this Court.").

1 (b) Use confidences or secrets relating to the
2 representation to the disadvantage of the former client,
except as rule 1.6 would permit.

3 Wash. Rules of Prof'l Conduct R. 1.9 (2005). Under Rule 1.9(a), the
4 significant elements include (1) whether the conflict involves a
5 *former client*; (2) whether the subsequent representation is
6 *materially adverse* to the former client; and (3) whether the matters
7 are *substantially related*. *Id*; see also *Trone v. Smith*, 621 F.2d
8 994, 998 (9th Cir. 1980).

9 Here, it is clear Plaintiff has not consented to Mr. Ivey's
10 representation of Impulse Marketing, but it is not clear whether
11 Plaintiff was ever a "former client" of Mr. Ivey. Assuming, without
12 deciding, that Plaintiff was a former client of Mr. Ivey, Bonnie and
13 Jamila Gordon must also show the matters currently at issue are
14 substantially related to the subject matter of the former
15 representation. *Sanders v. Woods*, 121 Wash.App. 593, 597-98, 89 P.3d
16 312 (Div. 3, 2004); *Trone*, 621 F.2d at 996 ("The relevant test for
17 disqualification is whether the former representation is
18 "substantially related" to the current representation.") The
19 determination of whether the two representations are substantially
20 related turns on whether the lawyer was so involved in the former
21 representation that he can be said to have switched sides. *Sanders*,
22 121 Wash.App. at 598, 89 P.3d 312.

23 Here, the facts of the case reveal that on September 22, 2003,
24 Plaintiff sent Mr. Ivey an unsolicited email in which Plaintiff
25 outlined the procedural steps he had taken to reduce the spam he had
26 been receiving. Plaintiff also explained in this email that he had

1 drafted a complaint and was "seeking an attorney to 'perfect' [his]
2 complaint so that [he could] file it in District Court." (Ct. Rec.
3 283-2, at 52.). In the alternative, Plaintiff stated he "may want to
4 hire an attorney to represent [him] in court." *Id.* (emphasis added).
5 In response, Mr. Ivey said he was interested but encouraged Plaintiff
6 to contact the Attorney General. *Id.* In response, Plaintiff
7 forwarded Mr. Ivey a copy of an email Plaintiff previously sent to
8 the Attorney General. In the email to the Attorney General,
9 Plaintiff explained he had received over 12,000 unsolicited
10 commercial email (spam) in the past month, that he had successfully
11 identified the origin of some of those emails, and that he had sent
12 demand letters to the senders, citing the Washington anti-spam
13 statute. Plaintiff suggested to the Attorney General that the State
14 of Washington "turn this proverbial lemon into lemonade--making spam
15 a "profit center" for the State of Washington as well as other
16 organizations within the State." (Ct. Rec. 283-2, at 56).

17 On September 25, 2003, Plaintiff sent another email to Mr. Ivey.
18 (Ct. Rec. 283-2, at 57). Plaintiff explained that the amount of spam
19 he was receiving was becoming an imposition on his business and on
20 his personal use of the internet and that he believed Washington's
21 anti-spam statute was designed to prevent the "abuse" he was
22 experiencing. *Id.* Plaintiff closed his email by thanking Mr. Ivey
23 for considering the issues. *Id.* at 58. Mr. Ivey responded by
24 stating that his attorney services would cost \$225 per hour and that
25 he could not guarantee a solution. Mr. Ivey closed his email by
26 stating there would be a "real budget needed ... to commence the

1 effort. Please advise if you want to examine the prospect of going
2 forward." *Id.* at 57.

3 On September 30, 2003, Plaintiff sent another email to Mr. Ivey,
4 in which Plaintiff explained that he had email documentation showing
5 the violations he alleged and had drafted two complaints. (Ct. Rec.
6 295-1, at 15). Plaintiff asked Mr. Ivey how he would like to proceed
7 and requested Mr. Ivey identify the proposed costs. *Id.* Plaintiff's
8 next email is dated December 30, 2003. (Ct. Rec. 295-1, at 17).
9 From the context of that email, it appears Plaintiff chose to proceed
10 *pro se* and filed the complaints in superior court against two
11 companies. In the email, Plaintiff told Mr. Ivey that a superior
12 court had granted Plaintiff's request for temporary restraining
13 orders against these two companies. *Id.* Plaintiff asked Mr. Ivey if
14 he was still interested and in what way he envisioned assisting the
15 Plaintiff. *Id.* Beyond these emails, the record does not reveal any
16 other contact between Mr. Ivey and Plaintiff.

17 After reviewing these emails, the Court concludes Mr. Ivey's
18 representation of Impulse Marketing is not substantially related to
19 any previous representation of Plaintiff. The emails reveal Mr. Ivey
20 never offered any formal legal advice and never reviewed any legal
21 pleadings for Plaintiff. Further, it appears Plaintiff declined to
22 examine the prospect of hiring Mr. Ivey and chose instead to proceed
23 *pro se* with his anti-spam case. In determining whether a conflict of
24 interest exists, the "underlying concern is the possibility, or the
25 appearance of the possibility, that the attorney may have received
26 confidential information during the prior representation that would

1 be relevant to the subsequent matter in which disqualification is
2 sought." *Sanders*, 121 Wash.App. at 599, 89 P.3d 312. Here, the
3 emails produced by Mr. Ivey show no confidential information was
4 disclosed. Further, Bonnie and Jamila Gordon have not presented any
5 evidence providing even the appearance of the possibility that
6 confidential information was disclosed. For these reasons, the Court
7 determines Mr. Ivey's representation of Impulse Marketing does not
8 present a conflict of interest. Therefore, Bonnie and Jamila
9 Gordon's motions to disqualify Floyd Ivey are denied.

10 ***Impulse Marketing's "Second" Motion to Compel***

11 On April 18, 2006, Impulse Marketing re-noted for hearing its
12 "First Motion to Compel." The Court previously denied this motion to
13 compel, directing the parties to meet and confer in an attempt to
14 resolve their discovery problems. It is not clear from the record
15 whether the parties did in fact "meet and confer" but Impulse
16 Marketing continues to argue Plaintiff is not providing adequate
17 responses to Defendant's discovery requests. Plaintiff objects to
18 the motion to compel, arguing the alleged "deficiencies" in
19 Plaintiff's responses are actually Impulse Marketing's "improper
20 demands." The Court determines it is appropriate and necessary to
21 refer the parties' discovery dispute to a discovery master.
22 Therefore, Impulse Marketing's motion to compel is denied and an
23 Order referring this matter to a discovery master will be
24 forthcoming.

25 ***Third-Party Defendants' Motions to Compel and for Sanctions***

26 Third-Party Defendants each allege Impulse Marketing failed to

1 make the "required Rule 26 disclosures" and "provided evasive,
2 incomplete disclosure, answer, or response to discovery propounded
3 by" [sic] Third-Party Defendants. In support of their motions to
4 compel, Third-Party Defendants provided copies of some of their
5 interrogatories and Impulse Marketing's answers. In response to many
6 of Third-Party Defendants' interrogatories, Impulse Marketing
7 asserted the standard ambiguous, irrelevant and overbreadth
8 objections. Because Third-Party Defendants failed to cite any legal
9 authority or provide any legal analysis in response to Impulse
10 Marketing's objections to the propounded discovery requests, it is
11 difficult for the Court to analyze and resolve the discovery dispute.
12 Thus, the Court determines it is necessary to refer the parties'
13 discovery dispute to a discovery master. Therefore, Third-Party
14 Defendants' motions to compel are denied and an order referring this
15 matter to a discovery master will be forthcoming. Accordingly,

16 **IT IS HEREBY ORDERED:**

- 17 1. Impulse Marketing's Motion to Compel and Motion for
18 Sanctions (**Ct. Rec. 235**) is **DENIED**.
- 19 2. Motions to Compel and Request for Sanctions brought by
20 Third-Party Defendants James Gordon, III, (**Ct. Rec. 298**), Jonathan
21 Gordon (**Ct. Rec. 300**), Bonnie Gordon (**Ct. Rec. 256**), Robert Pritchett
22 (**Ct. Rec. 259**) are **DENIED**.
- 23 3. Amended Motions to Compel and Request for Sanctions brought
24 by Bonnie Gordon (**Ct. Rec. 274**) and Jamila Gordon (**Ct. Rec. 270**) are
25 **DENIED; Bonnie and Jamila Gordon's request to disqualify Floyd Ivey**
26 **are denied.**

1 4. Defendant's Motion to Strike (Ct. Rec. 325) is MOOT.

2 5. Bonnie Gordon's Motion to Expedite (Ct. Rec. 337) is MOOT.

3 6. Bonnie Gordon's Motion to Strike (Ct. Rec. 339) is MOOT.

4 7. Jamila Gordon's Motion to Expedite (Ct. Rec. 342) is MOOT.

5 8. Jamila Gordon's Motion to Strike (Ct. Rec. 344) is MOOT.

6 **IT IS SO ORDERED.** The District Court Executive is hereby
7 directed to enter this Order and furnish copies to counsel **AND to the**
8 **Third-Party Defendants who are proceeding pro se.**

9 **DATED** this 15th day of May, 2006.

10 s/ Fred Van Sickle
11 Fred Van Sickle
United States District Judge