

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

KIMBERLY FROCK,
Plaintiff,

v.

DAVIS, DAVIS & ASSOCIATES LLC,
Defendant.

Case No. 3:20-cv-954-BJD-JRK

**DEFENDANT’S VERIFIED MOTION TO DISQUALIFY PLAINTIFF’S COUNSEL
AND MOTION FOR SANCTIONS**

COMES NOW the Defendant, DAVIS, DAVIS & ASSOCIATES LLC, by and through the undersigned Counsel, and hereby moves this Honorable Court for the entry of an Order, disqualifying Plaintiff’s Counsel and for the entry of an Order, imposing sanctions upon the Plaintiff and her Counsel, and in support thereof, states the following:

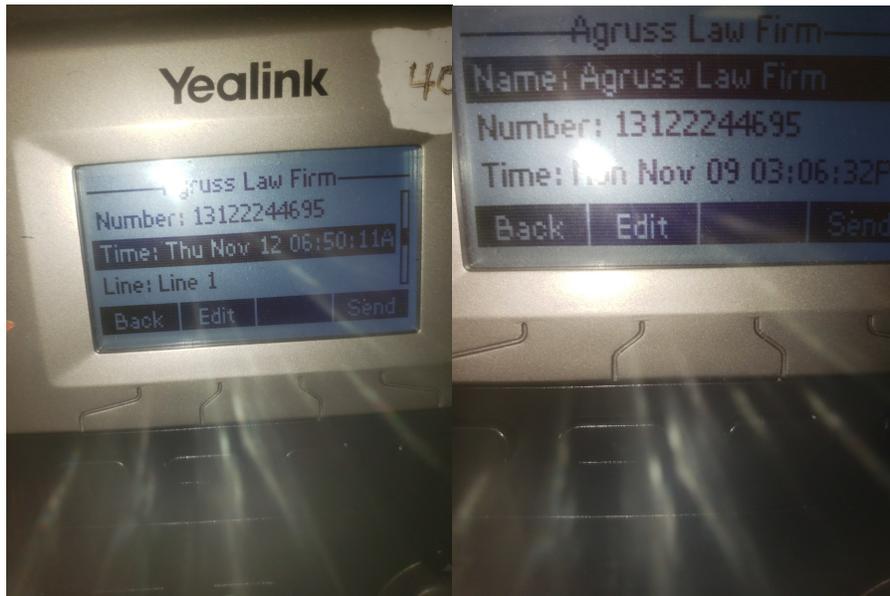
1. Plaintiff KIMBERLY FROCK commenced this action by filing Plaintiff’s Complaint (Doc. 1) on August 25, 2020.
2. The undersigned Counsel filed an Appearance of Counsel (Doc. 12) on Friday, October 30, 2020.
3. After the Court set aside a Clerk’s Default (Doc. 14), the Defendant filed its Answer on November 3, 2020 (Doc. 15).
4. Plaintiff alleges that Defendant violated the Fair Debt Collection Practices Act by, *inter alia*, calling the Plaintiff and leaving a voicemail message for her. *See generally* (Doc. 1).
5. Plaintiff is represented by Counsel who has two email addresses: one associated with NorcrossLawFirm.com and another associated with AgrussLawFirm.com.

6. Additionally, Plaintiff's Counsel appears to be local counsel for two attorneys who work in the Chicago offices of the Agruss Law Firm, which has advised the undersigned Counsel of its intent to appear *pro hac vice* in this action.

7. Defendant has brought to undersigned Counsel's attention that the Agruss Law Firm has contacted Defendant directly via telephone twice this week: first on Monday, November 9, 2020 at 3:06 p.m., and then again today, November 12, 2020 at 6:50 a.m.

8. When a lady from Agruss Law Firm contacted Defendant directly on Monday, November 9, Defendant's employee, Debra James, answered the phone. The lady with the Agruss Law Firm asked Ms. James questions about Defendant, including what type of business Defendant is, whether Defendant has a website, and other related questions – all of which would be relevant questions at a trial of this action.

9. Debra James discerned from the caller identification that the caller was from the Agruss Law Firm:



10. However, when Ms. James asked the lady if she was with a law firm, the lady denied that she was affiliated with a law firm. In other words, Plaintiff's Counsel, while speaking

with Defendant (a represented, opposing party in litigation), Plaintiff's Counsel attempted to mislead the Defendant into believing that Plaintiff's Counsel was not an attorney.

11. Kevin Davis, Defendant's principal, overheard the conversation between Ms. James and the lady caller from the Agress Law Firm.

12. The two screenshots embedded above, reflect Agruss Law Firm's name, as well as the date and time of their phone call to Defendant and the telephone number of the Agruss Law Firm.

13. Prior to filing the instant Motion, undersigned Counsel conferred with Counsel for Plaintiff, who confirmed that Plaintiff's Counsel had indeed contacted Defendant directly. Plaintiff's Counsel advised that they "were investigating a claim for another client . . ." Without explanation, Plaintiff's Counsel believes, "There's no basis for sanctions."

14. Needless to say, Plaintiff's Counsel has committed an egregious violation of the rules of ethics and has undermined the integrity of the judicial process.

15. On the undisputed facts described above, Defendant respectfully requests the following relief:

- a. Disqualification of Plaintiff's Counsel, including the Norcross Law Firm, the Agruss Law Firm, and all attorneys affiliated with either of the two firms; and
- b. Sanctions, in the form of an award of attorney fees incurred in responding to Plaintiff's Counsel's behavior, payable jointly and severally by Plaintiff and her Counsel.

MEMORANDUM OF LAW

I. DISQUALIFICATION

“Disqualification is based on violation of the maxim that attorneys must avoid even the appearance of professional impropriety and Rules 4–1.6, 4–4.2, 4–8.4(c) and 4–8.4(d), Fla.Bar Code of Prof. Conduct.” *Rentclub, Ind. V. Transamerica Rental Fin. Corp.*, 811 F.Supp. 651, 653 (M.D. Fla. 1992). “A district court has the responsibility for controlling the conduct of attorneys appearing before it and has broad discretion in deciding motions for disqualification . . .” *Id.* at 654 (citing *Cronin v. Eighth Jud. Dist. Ct.*, 105 Nev. 635, 781 P.2d 1150 (1989)). FLA. BAR. CODE OF PROF. COND., 4-8.4(c) prohibits attorneys from directly communicating with adverse parties, including employees or former employees of the corporate parties represented by counsel. *Id.*

In *Norton v. Tallahassee Memorial Hospital*, 689 F.2d 938, 941 (11th Cir.1982), the Eleventh Circuit adopted a two-prong test for disqualification under Canon 9 (which prohibited the appearance of professional impropriety under the formerly operative Florida Rules of Professional Responsibility). First, although no proof of actual wrongdoing is required, there must exist a reasonable possibility that some specifically identifiable impropriety in fact occurred. Second, the likelihood of public suspicion must outweigh the social interest that will be served by counsel's continued participation.

Rentclub, Inc., 811 F.Supp. at 654.

In the present case, it appears that Plaintiff’s Counsel does not dispute that it contacted the Defendant twice. While the parties do not disagree about these facts, surprisingly, we do disagree about the wrongfulness of Plaintiff’s Counsel’s behavior. Defendant is has been a represented party in this action for two weeks. Plaintiff and her Counsel have known of such representation, because Plaintiff’s Counsel received the ECF notification of undersigned Counsel’s appearance. In spite of such knowledge, Plaintiff’s Counsel contacted Defendant directly *twice*. Plaintiff’s Counsel misled Defendant about who Counsel was and why Counsel was calling, and Counsel proceeded to elicit information from Defendant. There could hardly be a more direct violation of

Rule 4-8.4(c). Defendant respectfully believes that both prongs of the disqualification analysis are satisfied. Proof of Plaintiff's Counsel's conduct is undisputed. Moreover, (a) the egregiousness of the violation, (b) Plaintiff's Counsel's complete lack of remorse or even acknowledgement of the violation, and (c) the prejudice to Defendant that results from the information provided to Plaintiff's Counsel outside the presence of undersigned Counsel, all favor disqualification.

II. SANCTIONS

Courts possess the inherent power to protect the orderly administration of justice and to preserve the dignity of the tribunal. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764–65, 100 S.Ct. 2455, 2463, 65 L.Ed.2d 488 (1980). “The inherent power of a court to manage its affairs necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it.” *Flaksa v. Little River Construction Co.*, 389 F.2d 885, 888 (5th Cir.1968); see *Miranda v. Southern Pacific Transportation Co.*, 710 F.2d 516 (9th Cir.1983); Note, Civil Procedure—Power of Federal Courts to Discipline Attorneys for Delay in Pre-trial Procedure, 38 NOTRE DAME L. 158, 161–66 (1963). A trial judge possesses the inherent power to discipline counsel for misconduct, short of behavior giving rise to disbarment or criminal censure, without resort to the powers of civil or criminal contempt. [fn omitted] *Flaksa*, 389 F.2d at 888 n. 10. The court's power to impose appropriate sanctions on attorneys practicing before it “springs from a different source than does the power to punish for criminal contempt.” *Pope & Talbot, Inc.*, 307 F.2d at 735–36 (Biggs, C.J., dissenting); See also *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 512, 22 L.Ed. 205 (1873) (discussing the source and scope of a court's power to cite for contempt or disbar attorneys).

The authority of a court over officers of its bar is at least as great as its power over litigants. *Roadway Express*, 447 U.S. at 766, 100 S.Ct. at 2464 (citing *Flaksa*). Since misconduct by a party courts the risk of outright dismissal, lesser sanctions undoubtedly attend the court's inherent power to discipline intentional attorney misconduct of the sort involved in this case. See *id.* Such sanctions include assessment of attorneys' fees and costs, *id.*; disqualification of counsel, *Flaksa*, 389 F.2d at 887; and monetary penalties payable to the clerk of the court, *Burden v. Yates*, 644 F.2d 503, 505 (5th Cir. Unit B 1981); *Woodham v. American Cystoscope Co.*, 335 F.2d 551, 557 & n. 15 (5th Cir.1964).

Kleiner v. First Nat. Bank of Atlanta, 751 F.2d at 1209 (11th Cir. 1985).

Defendant respectfully believes that Plaintiff and her Counsel should be sanctioned for their behavior in contacting Defendant directly twice, questioning Defendant's employees about

their business practices, and attempting to mislead the Defendant into believing that Plaintiff's Counsel was not an attorney, much less the attorney for Plaintiff who had sued the Defendant.

WHEREFORE, Defendant DAVIS, DAVIS & ASSOCIATES LLC respectfully requests the entry of an Order, disqualifying Plaintiff's Counsel, imposing sanctions upon the Plaintiff and her Counsel, awarding Defendant all attorney fees it reasonably incurred in connection with responding to Plaintiff's Counsel's wrongful conduct, and providing such other and further relief as this Honorable Court deems just and proper.

Dated November 12, 2020.

THE BONDERUD LAW FIRM, P.A.

/s/ Andrew Bonderud
Andrew M. Bonderud, Esq.
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Counsel for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on November 12, 2020, I filed the foregoing document with the Clerk of Court via the CM/ECF system, which will send a true and accurate copy thereof via email to

Shireen Hormozdi, Esq.
Hormozdi Law Firm, LLC
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Norcross, GA 30093
Shireen@agrusslawfirm.com
Shireen@norcrosslawfirm.com
Counsel for Plaintiff

/s/ Andrew Bonderud
Attorney

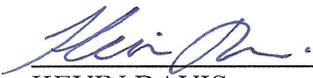
**DECLARATION OF KEVIN DAVIS,
AS REPRESENTATIVE OF DAVIS, DAVIS & ASSOCIATES, LLC**

I, KEVIN DAVIS, declare that:

1. I am over the age of 18 and am competent to make this declaration.
2. I make this declaration based on my own personal knowledge.
3. I am authorized by Davis, Davis & Associates, LLC to make this declaration on its behalf.
4. I have reviewed the foregoing Motion, and the facts alleged therein are true and correct to the best of my knowledge, information, and belief.

I declare under penalty of perjury that the foregoing is true and correct.

Dated November 12, 2020.



KEVIN DAVIS,
As Representative of
Davis, Davis & Associates, LLC