SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HON. SIDNEY F. STRAUSS** MM PART 51
Justice

I HENG NGAN, Plaintiff,	:	Index No.: 10510/05
	:	Motion Date: 07/25/06
- against -	:	
WEI SU, Defendant	:	

The following papers numbered 1 to 13 read on this order to show cause and cross motion:

	PAPERS NUMBERED
Order to Show Cause-Affidavits-Exhibits-Memo of Law...	1 - 5
Cross Motion-Affirmation-Memorandum of Law-Exhibits...	6 - 10
Answering Affirmation.....	11 & 12
Replying Affirmation.....	13

Upon the foregoing papers, defendant moves for an order disqualifying the firm of Wong, Wong & Associates as plaintiff's counsel in this matrimonial action. Defendant also seeks legal fees and court costs associated with making the instant motion, a stay of the proceedings pending determination of the motion, and an order temporarily restraining defendant's counsel from using any confidential information gathered from defendant. Plaintiff opposes the motion and, alleging that defendant's motion is frivolous and without basis in fact or law, cross-moves seeking legal fees, court costs and sanctions.

Plaintiff commenced this action for divorce, through her attorney Malan Lentini, by the filing of a Summons and Verified Complaint on May 10, 2005. Defendant was served with same on May 11, 2005. Defendant thereafter engaged Xian Feng Zou, Esq. to represent him in this matter; Mr. Zou remains defendant's counsel to date.

A number of procedural and case management items thereafter ensued, including service of an Amended Verified Complaint, an Answer, a Reply and a Request for Judicial Intervention. Preliminary and compliance conferences were held through May 4, 2006, when it first appears that James Hong, Esq. appeared on plaintiff's behalf at a compliance conference held on that date. A retainer agreement and Consent to Change Attorney were executed by plaintiff and Raymond Wong on behalf of Wong, Wong & Associates on that same date.[1] Defendant alleges he was unaware that plaintiff's new attorney, James Hong, was a member of Wong, Wong & Associates until June 21, 2006 when his counsel so informed him. On June 22, 2006, defendant alleges that he made a request through counsel that Wong, Wong & Associates voluntarily excuse itself from representing plaintiff. Said request was denied, resulting in the instant application.

Defendant alleges that, as part of the process of selecting an attorney to represent him in this matrimonial action, he had a one (1) hour and twenty (20) minute consultation with Raymond

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[1] It does not appear as though the foregoing substitution was filed with the court until June 22, 2006 when Wong, Wong & Associates was officially substituted in as plaintiff's counsel in place of Mr. Lentini.

Wong, a principal in the firm of Wong, Wong & Associates, and another attorney from that firm on or about May 23, 2005. Defendant contends that he divulged appreciable confidences during the course of this meeting, including information regarding the parties' employment, education, property, their marriage, defendant's expectation of the action's result, as well as possible legal strategy. The foregoing serves as defendant's factual predicate for the instant motion.

Plaintiff, in opposition, contends that defendant's revelations to counsel were cursory and more in the nature of an interview with Wong, Wong & Associates and that Mr. Wong has the same type of interview with many potential clients and can not reasonably be expected to retain relevant information regarding each potential, as yet unripe, representation.

Although the issue of attorney disqualification does not often arise, it is significant in that it represents a conflict between the competing principles of a party's right to freely retain counsel of his or her choosing and a lawyer's obligation to not represent a client where there may be even the appearance of a conflict of interest. At the outset, it bears note that it is well settled that the disqualification of an attorney is within the sound discretion of the trial court. Zutler v DriverShield Corp., 15 AD3d 397, 790 NYS2d 485 (2d Dept 2005). Moreover, the disqualification is imputed to both current and former members of the same firm. Grunstein v Grunstein, 201 AD2d 621, 607 NYS2d 974 (2d Dept 1994); see also, Nemet v Nemet, 112 AD2d 359, 491 NYS2d 810 (2d Dept 1985) (principle of attribution used to disqualify plaintiff's law firm in addition to the

individual attorney).

Defendant herein never entered into a formal, contractual relationship with Wong, Wong & Associates, presenting an unusual application of the stated principle. The question before the court is thus whether an initial consultation of the type held between defendant and Wong, Wong & Associates is sufficient to establish a relationship that creates a conflict of interest in Wong, Wong & Associates' representation of plaintiff in this matrimonial action.

In Burton v Burton, (39 AD2d 554, 527 NYS2d 53 [2d Dept 1988]), a case with facts substantially similar to those found here, the court held that the initial consultation created a relationship between defendant and the disqualified firm that made it improper for that firm to represent the plaintiff.

Here, it is uncontroverted that defendant met with two (2) attorneys, the name partner and another attorney from Wong, Wong & Associates, for approximately one (1) hour twenty (20) minutes in May 2005. That part of Mr. Wong's affirmation in which he alleges that it would be "impossible" for him to recall the details of defendant's circumstances given the "large numbers" of consultations he conducts is unpersuasive. One never knows what event will stimulate one's memory and bring recollections to the surface. Counsel's opposition premised on a lapse of memory will not assuage the concern that Wong, Wong & Associates' continued representation of plaintiff may well present a clear conflict of interest. Moreover Wong, Wong & Associates' representation at the meeting in question by two (2) attorneys at least doubles the

likelihood that at least one of these matrimonial practitioners may well recall, at the very least, some of what transpired during the course of this not insubstantial eighty (80) minute consultation. In addition, contrary to the limited scope of the conversation in Burton,[2] defendant here claims that he discussed all of the relevant issues surrounding his pending matrimonial action including the parties' employment, education, property, their marriage, defendant's expectation of the action's result, as well as possible legal strategy.

Plaintiff further contends that defendant fails to allege facts with enough specificity to support his contention that confidential information was disclosed to Wong, Wong & Associates during the May 2005 consultation. However, as in Burton, "it is reasonable to infer that, during the course of the interview with the defendant [the attorney] obtained confidential or strategically valuable information about the parties respective financial conditions . . ." Id. at 555, 54. Given the unusual nature of matrimonial practice, it is often necessary for a party to provide this type of sensitive and confidential information to a prospective attorney before the two agree on representation and a retainer agreement is executed. To compel the defendant in this action to allege with specificity the actual confidential matters discussed with Wong, Wong & Associates would not only vitiate the protection provided by the attorney-client relationship but would require the disclosure of the very confidential, personal matters sought to be protected. Accordingly, the court finds that defendant has alleged a

[2] The factual bases for grounds were never alleged to have been discussed in the Burton consultation.

sufficient factual predicate to support his application.

Lastly, and perhaps most significantly, the Burton court specifically held that "it makes no difference that the defendant did not formally retain him." Id. at 555, 54; see also, Desbiens v Ford Motor Co.,81 AD2d 707, 439 NYS2d 452 (3d Dept 1981) (plaintiff entitled to "freedom from apprehension" from defendant's retention of law firm that had previously examined plaintiff's file but was never retained); Kaufman v Kaufman, 63 AD2d 609, 405 NYS2d 79 (1st Dept 1978) (disqualified attorney representing defendant was personal friend of plaintiff, to whom "he imparted all the facts and circumstances surrounding his financial and matrimonial problems"). In light of the foregoing, the consultation in question established, at a minimum, a relationship between defendant and Wong, Wong & Associates that violates the notion of forestalling even the appearance of a potential conflict of interest, which makes it improper for that firm to represent plaintiff in this action. See, Edelman v Levy, 42 AD2d 758, 346 NYS2d 347 (2d Dept 1973). To hold otherwise would effectively strip litigants of any assurances of confidentiality when interviewing prospective attorneys and would severely compromise the adversarial process in matrimonial matters.

In light of all the foregoing, defendant's application is granted. James Hong and Wong, Wong & Associates are disqualified from continuing to represent the plaintiff in this action and are hereby restrained from disclosing or otherwise using any confidential information gathered from defendant during the May 2005 consultation. The outgoing attorneys are reminded of their

ongoing obligations to uphold both the letter and the spirit of the confidentiality rules embodied in the Code of Professional Responsibility, specifically DR 5-108 (22 NYCRR 1200.27) and DR 9-101 (22 NYCRR 1200.45).

That part of defendant's motion seeking attorney's fees is denied. Plaintiff's cross motion is denied.

All proceedings are stayed for a period of thirty (30) days from the date of service of a copy of this order with notice of entry upon the plaintiff, I Heng Ngan, which shall serve as a CPLR 321(c) notice to appoint another attorney, as well as the outgoing firm of Wong, Wong & Associates. Defendant is directed to effect said service by both regular and certified mail, return receipt requested.

Dated: October , 2006

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SIDNEY F. STRAUSS, J.S.C.