

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EQUAL EMPLOYMENT OPPORTUNITY	:	CIVIL ACTION
COMMISSION,	:	
	:	
Plaintiff,	:	
and	:	
	:	
MANESSTA BEVERLY,	:	
	:	
Intervenor,	:	
	:	
v.	:	
	:	
HORA, INC. (d/b/a “Days Inn”) and MARSHALL	:	
MANAGEMENT, INC.,	:	
	:	
Defendants.	:	NO. 03-cv-1429

**MEMORANDUM and ORDER**

June 8, 2005

PRATTER, DISTRICT JUDGE

I. INTRODUCTION AND SUMMARY OF DECISION

The pending motion to disqualify the Intervenor’s counsel from participation in this case as an attorney and advocate presents the Court with the unwelcome task of considering whether a lawyer’s conduct merits her removal from this case over her client’s objection.

Defendants HORA, Inc. (“HORA”) and Marshall Management, Inc. (“Marshall”), have filed a Joint Motion to Disqualify Jana R. Barnett, Esq., as counsel for Intervenor Plaintiff Manessta Beverly (“Intervenor” or “Ms. Beverly”). Defendants’ motion has two basic features: first, that Ms. Barnett’s pre-litigation tactics far over-stepped ethical boundaries and principles,

and, second, that as a result of this conduct she is now likely to be called by Defendants as a witness at trial to undercut the validity of the Plaintiffs' claims.<sup>1</sup> Thus, the motion posits Ms. Barnett's disqualification on the basis of Pennsylvania's Rules of Professional Conduct, specifically Rules 3.7, 4.2, 4.4 and 8.4. Not surprisingly, Ms. Barnett disputes the allegations and accusations and argues that disqualification is neither appropriate nor warranted. The Equal Employment Opportunity Commission (the "EEOC"), as primary plaintiff, argues against Ms. Barnett's disqualification, primarily on the grounds that her removal would be prejudicial to the Intervenor.

The Court accords heavy deference to a party, such as Intervenor Beverly, in choosing her own counsel. Nonetheless, that right necessarily must be equitably balanced against the rights of the other parties and the ethical considerations and concepts discussed herein. The Court has both the power and obligation to protect and promote the integrity of the legal system and legal profession and to monitor the conduct of counsel appearing before it.

Reluctantly, for the reasons discussed in some detail below, the Court grants the motion to disqualify. The evidence presented to the Court demonstrates that counsel for the Intervenor, perhaps succumbing to her unrestrained ardor to advance her client's interests, lost sight of her other duties during the initial pre-pleading stages of this dispute and thereafter failed to respect the legal rights of others and disregarded her obligation to comport herself with professional dignity and independence. As a result, her continued involvement as trial counsel for a party in this case would pose either actual or potential conflicts of interest that risk further impeding the

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<sup>1</sup> As discussed *infra*, the Court has by no means concluded that Defendants will be permitted to call Ms. Barnett as a witness or, if they are, what will be the permissible scope of questioning. Those decisions must await at least the final pretrial conference, if not the actual trial.

fair and orderly progress of the case. Therefore, Ms. Barnett will be precluded from future formal involvement in this litigation, other than to facilitate the efficient and expeditious transfer of the representation of Intervenor Beverly to new counsel and to remain available to be a witness at trial, if necessary.

## II. FACTUAL BACKGROUND AND EVIDENTIARY CONCLUSIONS

This litigation concerns allegations brought by the EEOC against HORA and Marshall. HORA owns, and Marshall managed, the Days Inn Hotel (the “Hotel”) in Reading, Pennsylvania. The EEOC claims that HORA and Marshall engaged in unlawful employment practices by subjecting Ms. Beverly and other female employees at the Hotel to a sexually hostile work environment and then wrongfully terminating Ms. Beverly’s employment. The claim is that Ms. Beverly’s supervisor/trainer, Nelson Garcia, a male employee with bookkeeping and accounting duties at the Hotel, made unwanted sexual advances toward Ms. Beverly and other women on the Hotel office staff, but neither HORA nor Marshall took steps to prevent such acts even though they knew of them or knew of complaints about them. The EEOC also alleges that HORA and Marshall retaliated against Ms. Beverly by terminating her employment after she complained of the alleged sexual harassment. Ms. Beverly individually also asserts a Pennsylvania Human Relations Act claim. Ms. Barnett is Ms. Beverly’s counsel in connection with that claim.

Some seven months before this suit was filed and before commencement of any EEOC investigation into the matters at issue, Jana Barnett, as counsel for Ms. Beverly, began to communicate with Deborah Richardson who was the administrative assistant to the Hotel’s General Manager, Daryl Carr, and to HORA’s part-owner and senior on-site officer, Anna

Koutroulelis. These communications are documented in a series of e-mails sent and received between approximately August 1, 2002 and September 12, 2002.<sup>2</sup> At the time, other than Ms. Richardson, Ms. Koutroulelis and Mr. Carr, the Hotel had only several other administrative or office employees. Mr. Garcia, whose alleged conduct is the subject of Ms. Beverly's and the EEOC's claims, was one of those employees. At the time in question, Ms. Barnett was Ms. Beverly's legal counsel, but she was not, at that time or ever, Ms. Richardson's legal counsel or legal counsel for any other HORA or Marshall employee. Ms. Richardson herself has voiced no personal claim of sexual harassment or retaliation and, according to her deposition testimony, apparently did not personally witness any such actionable or objectionable conduct.

Immediately following Ms. Beverly's July 23, 2002 termination as a trainee for the Hotel administrative staff, Richardson decided to help Ms. Beverly pursue a claim against HORA and Marshall. Thus, sometimes acting alone, and at other times with the help of co-worker Tammy Schneider, Richardson began to gather information about other HORA employees, about Mr. Garcia and about her employer's knowledge of Mr. Garcia's background. For example, Ms. Richardson and Ms. Schneider looked for a copy of the HORA sexual harassment policy that Ms. Beverly had signed and also looked for evidence pertaining to the reasons that Ms. Beverly had been sent home before the end of her shift on the day of her complaint to Hotel management about Mr. Garcia. Ms. Richardson also reviewed her personal copy of TV Guide to locate the listing for "Dangerous Touch", the HBO movie that Beverly said Mr. Garcia purportedly was

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<sup>2</sup> These e-mail communications began essentially at the same time Ms. Barnett transmitted notice of her client's claim to the EEOC. Information from these e-mails later made its way, largely without attribution or qualification, into a lengthy letter of November 18, 2002 from Ms. Barnett to the EEOC that purported to be background factual information supporting Ms. Beverly's claim and was intended to spur the EEOC to initiate significant litigation against HORA and Marshall.

watching during Ms. Beverly's last night at the Hotel and that Ms. Beverly found offensive.

Ms. Barnett suggests that Ms. Richardson did all of these things before either Ms. Beverly or Ms. Richardson ever contacted Ms. Barnett. Barnett Verified Statement, ¶1. Ms. Barnett suggests that Ms. Richardson was acting on her own initiative throughout the investigatory process rather than at the instigation of Ms. Barnett. Ms. Barnett apparently believes that if such a characterization could be supported by the record thus presented, it should insulate her from criticism inasmuch as Richardson could be seen as a self-motivated conduit for unsolicited, albeit helpful, information relative to Ms. Beverly's complaint. However, the record before the Court presents a significantly different version of events. Ms. Barnett's claim that the information she received was unsolicited and provided without her encouragement is seriously undermined and contradicted by the documented written e-mail exchanges between Barnett and Richardson in which Barnett *explicitly* encouraged Richardson's disclosures.

In the lengthy e-mail exchanges that apparently prompted this motion, Ms. Barnett either sought or received information from Ms. Richardson that Ms. Barnett, as an attorney practicing in the field of employment law, knew or should have known was the Hotel's and Marshall's confidential business and personnel information. As an attorney familiar with employment litigation, Ms. Barnett also knew or should have know that some of that information was directly related to the Hotel's and Marshall's defense of Ms. Beverly's complaint. Furthermore, Ms. Barnett knew or should have known at the time of these communications that Ms. Richardson was a secretly, but vehemently, disgruntled Hotel employee who occupied a position of intimate business trust at the high level of Hotel management. Richardson was the sole and direct, personal assistant to senior HORA and Marshall managers who, unlike Ms. Barnett, apparently

were then unaware of Richardson's negative attitude about the Hotel operations and management. In many ways relating to the day-to-day operation of the Hotel, Ms. Richardson was the eyes, ears, voice and legs of on-site Hotel management, and as such, while she did not independently wield management powers or have the institutional power to technically bind either of the Defendants, as a legal evidentiary matter, she did have continuous exposure and direct access to extensive and relevant confidential and privileged information of the Defendants and Hotel personnel.

The evidence supports a conclusion that Ms. Barnett knew, or surely should have known, that Richardson had the means and motivation to share secretly with Ms. Barnett, *inter alia*, (a) her embellished surmises about her employers and Hotel personnel and litigation defense issues, (b) negative goals with regard to the efficacy of both HORA's and Marshall's management and business practices and, more problematically, (c) certain documents (or detailed descriptions of such documents) and other confidential and privileged information learned by Richardson, or told to Richardson by others, in the course of her employment and to which she had been entrusted with access. From a review of the e-mail traffic alone, it seems that Ms. Barnett must have recognized that Ms. Richardson was a well-placed, potentially useful "mole." She also was viewed by Barnett as a potential client and referral source for other potential clients. In any case, on the record here, Ms. Barnett was unabashed and unreserved in her exploitation of Ms. Richardson's position and of Ms. Richardson's obvious personal agenda.

As mentioned above, Ms. Barnett describes herself as the fortuitous recipient of unsolicited information, most of which she emphasizes would be and in fact was produced later during the regular, somewhat more orderly, discovery process. These are insufficient excuses for

Barnett's conduct in this Court's view, given what the available evidence discloses. The Court is constrained also to acknowledge that nothing has been presented to the Court to indicate that Ms. Barnett ever *discouraged* Ms. Richardson from providing materials and information to her well before and outside the normal rules and channels of discovery. It also appears to be an inescapable conclusion that Ms. Barnett had or should have had a complete and accurate appreciation of the motivations for Ms. Richardson's assembling this information, thus raising what should have been cautionary concerns about Richardson's "information" and information gathering methods. The Court has no doubt that had Defendants in the summer of 2002 known of such behavior by their trusted administrative assistant for senior Hotel management, including the subsequent disclosure by her of private defense information to Ms. Barnett, they very likely would have sought to sever or otherwise close off this information pipeline, leaving the process of appropriate disclosures for the inevitable litigation process.

It bears emphasizing that Ms. Richardson testified during her deposition that she never personally observed Mr. Garcia acting inappropriately toward any Hotel employee, including Ms.

Beverly:

Q: Do you know whether Mr. Garcia made any sexual overtures to any employee at Days Inn, **from your own personal knowledge?**

A: **No**

...

Q: What is the **factual basis** for your belief that Manessta [Beverly] was fired because she complained of Nelson Garcia's sexual harassment?

A: Because of the note that she left for Anna, Daryl, and myself and that is where it has in there the sexual harassment.

Q: So **your belief that she was fired** because she complained about Mr. Garcia's sexual harassment is **predicated upon the note that Manessta wrote**; is that correct?

A: **That's correct.**

Q: **But you don't have personal knowledge** of any of the incidents that

comprised that note, do you?

A: **No.**

...

Q: Now, during the time that Manessta Beverly worked [at the Hotel], did you have an opportunity to evaluate her performance?

A: No.

(Def. Motion, Ex. 2, at 56-58, 62-63) (emphasis added).

Richardson also admitted to having no first hand knowledge of anything that transpired between Garcia and Beverly:

Q: My question is, since you weren't on the shift with Ms. Beverly and Mr. Garcia, you have no firsthand information about anything that transpired between those two employees, do you?

A: **I have no idea what went on between Nelson and Manessta.**

(Def. Motion, Ex. 2, at 65) (emphasis added).

Moreover, Ms. Richardson admitted to behaving disloyally due to her intense dislike for her superiors at the Hotel:

Q: Is it fair to say, by the way, that as of the date of this e-mail, which is August 31, 2002, is it fair to characterize **your attitude towards Days Inn as fairly bitter?**

A: **Towards management, yes.**

Q: That's a fair statement?

A: I was very upset with what was going on there, yes, because I thought it was very unfair.

Q: **You were angry towards management?**

A: **Yes.**

(Def. Motion, Repl. Ex. 2, at 18) (emphasis added).

Specifically, Ms. Richardson did not like her boss, the Hotel General Manager, Daryl Carr. Richardson described her relationship with Carr as "stormy," that they "never s[aw] eye to eye on anything," and that she was of the opinion that Mr. Carr performed his job poorly. (Def. Motion, Repl. Ex. 2, at 30).



The significance of the foregoing testimony disclosing the limits on Richardson's bona fides as a source of information is that either Ms. Barnett made no effort to assess Richardson's credibility before mining her for information, or Barnett knew, but ignored, that Richardson presented very significant credibility and competence issues.

Additional specific excerpts from the e-mail exchange will explain the context of the Court's concerns and the basis for the seemingly severe evaluation and ruling here.

In her first e-mail message, dated August 1, 2002, 4:10 p.m., Ms. Barnett thanked Ms. Richardson for her "encouraging letter" and for providing Barnett with a copy of the Hotel's employment handbook. Ms. Barnett also educated Richardson to Barnett's views as to the conditions under which the two of them could continue communications about Ms. Beverly and inside information about the Hotel, telling Richardson that they could freely communicate if (1) Richardson became Barnett's client or (2) Richardson was not in a "management position." Richardson did not accept Barnett's legal representation solicitation, but she obviously understood the hinted management/non-management distinction and quickly told Barnett she was not a "manager." Therefore, she apparently and immediately accepted the invitation to feel "free to communicate" with Barnett, stating:

I am willing to help Manessta in any way that I can. I have made copies of her time sheets showing that [Manessta] left early on several occasions. . . . I am probably on limited time there now so if I can help with anything let me know. Perhaps I will be hopping on Manessta's wagon too . . . . Thank you for helping us out.

(Def. Motion, Ex. 1, at 13-15.)<sup>3</sup>

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<sup>3</sup> Copies of Ms. Beverly's actual time sheets were not provided by Richardson to Ms. Barnett, but the information contained in them was communicated.

Less than a week later, on August 7, 2002, Ms. Barnett e-mailed Ms. Richardson with an update on the status of Ms. Beverly's EEOC administrative charge. (Def. Motion, Ex. 1, at 13).<sup>4</sup> In that e-mail, Ms. Barnett expressly encouraged Ms. Richardson to remind the Hotel that retaliation is prohibited and again pressed the question of whether Richardson wanted Barnett to represent her. Ms. Barnett closed this e-mail by offering: "[l]et me know what I can do to protect you." (Def. Motion, Ex. 1, at 13). At no time did Ms. Barnett inform Richardson the extent to which Richardson might be jeopardizing her job by acting counter to her fiduciary duties to her employer. Likewise, it appears from the extensive e-mail exchanges that Ms. Barnett did not bother to explain to Richardson that Richardson and Beverly well could have conflicting interests as matters continued to develop.

After the Defendants were served with the EEOC Charge of Discrimination, they initiated an internal investigation during which several Hotel employees, including Richardson, were interviewed by senior Marshall and Hotel personnel as guided by counsel. These private interviews became one of the subjects of the lengthy e-mail discussion between Ms. Barnett and Ms. Richardson, including a recounting of much of the content of the interviews and the resulting feedback from the Hotel's management. For example, Ms. Richardson wrote to Ms. Barnett:

I want to add here that [Anna Koutroulelis, HORA's Treasurer] **was in on all the interrogations** and she is also aware of my complaint to Mike Marshall [of Marshall Management] . . . She wanted to know why I didn't come to her with this and I told her because I'm not sure which way she would go with it . . . **Anna did state that the outcome on the 22nd (the night they fired Manessta)] was not the outcome that she wanted. What she exactly meant**

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<sup>4</sup> The Court can only assume for present purposes that Barnett had her client's authority to share this--and other--information with Richardson, although Barnett has provided no evidence to confirm that assumption. However, in the absence of any submission to the contrary, the Court is not considering that there has been any violation of R.P.C. 1.6 concerning the maintenance of client confidences.

**by that I don't know . . . I left there feeling that they are not going to believe anything Manessta said . . . I'm sorry but I have to go now. Wil [sic] try to keep you posted unless I get a GAG [sic] order.**

(Def. Motion, Ex. 1, at 10-12) (emphasis added).

Ms. Barnett's response to this information was to reply to Richardson on August 8 by asking Ms. Richardson to increase her efforts to provide additional and more detailed information:

If you think of anything else that was said during the interviews, or if you find out that additional people were interviewed, would you make notes?

(Def. Motion, Ex. 1, at 8).<sup>5</sup>

Ms. Barnett contends that there was "nothing improper" with regard to this request because she was thinking at the time that "memories do fade", and she "wanted to make sure that there was a complete record of who was interviewed and what was said during the interviews." See Intervenor's Response to Defendants' Motion to Disqualify, at 5. However, at that point in time, Barnett, as an experienced lawyer familiar with the litigation process, should have recognized Richardson as a likely future deponent and, possibly, trial witness. Nevertheless, rather than leaving such a potential witness in a "pristine" state, in this same e-mail to Richardson, Barnett endeavored to further encourage and manipulate Richardson by telling her

Anna [Koutroulelis, Richardson's boss and a Hotel owner and officer,] apparently turned a blind eye to previous complaints of discrimination, and someone took personnel files, so you shouldn't be embarrassed or [feel] guilty by your lack of trust in her.

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<sup>5</sup> This statement seriously undermines Ms. Barnett's response to Defendants' argument that she did not encourage Ms. Richardson to disclose "all information she learned on the job, including a privileged client-lawyer conversation, and . . . that [Ms. Barnett] could not ethically receive the intercepted communications." To the contrary, from the e-mail traffic one can conclude that Ms. Barnett went to some length to plant the seeds of encouragement for Ms. Richardson to report to Ms. Barnett everything Richardson deemed helpful to Ms. Beverly's case.

(Def. Motion, Ex. 1, at 8-9). Barnett apparently sensed that Richardson was concerned about possibly losing her job because she then listed in the e-mail a number of reasons why loss of a job may actually be beneficial. In addition, Barnett attempted to stir up more litigation by suggesting to Richardson the option of filing a “charge of discrimination (retaliation is a form of discrimination) with the EEOC and PHRC.”

In the course of the e-mail exchanges, Ms. Richardson also disclosed to Ms. Barnett that she, Richardson, had reviewed Mr. Garcia’s personnel file at least twice for evidence of written discipline, but did not discover any such evidence. (Def. Motion, Ex. 1, at 11-12).<sup>6</sup> Richardson also had earlier revealed to Barnett the following tidbit when she reported to Barnett that Garcia had been fired:

Are you aware that Nelson is apparently on parole? From what I have gathered it was in New Jersey that a woman had a restraining order out on him for

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<sup>6</sup> Ms. Barnett claims that “Ms. Richardson never told me that she reviewed the personnel file of Nelson Garcia for written disciplines but did not locate any. She did tell me that it was her job to file such documents, and that she had not filed any for Mr. Garcia.” (Barnett Verified Statement, ¶8). However, the e-mail correspondence between Richardson and Barnett provides a somewhat different story. In Ms. Richardson’s August 31, 2002, e-mail to Barnett, Richardson states:

Letting you know **again** that **there is nothing in Nelson’s file pertaining to any written warning** that he supposedly received from Manessta and Myndi’s complaints. So nothing better show up there all of a sudden.

(Def. Motion, Ex. 1, at 1) (emphasis added).

In a previous e-mail to Barnett, Richardson also indicated that she had direct knowledge of Garcia’s personnel file:

Why give a written warning if there was [no basis for previous allegations against Nelson Garcia]? [Mike Getzy] also stated that Daryl gave Nelson another written warning in Manessta’s case. Another written warning after he already has given one seems unusual because **that is something I do believe should be kept in their personnel file.**

(Def. Motion, Ex. 1, at 11-12) (emphasis added). Together, these statements to Ms. Barnett, at a minimum, intimate that Ms. Richardson was informing Barnett that she had, at some time in the past, maintained and/or reviewed Nelson Garcia’s personnel file.

harassment.

(Def. Motion, Ex. 1, at 4).

Barnett's August 9, 2002 e-mail reply to this obvious office gossip shows, at a minimum, her unlawyer-like disregard for the reputation of a third party, namely, Nelson Garcia, or the legitimate hospitality industry business interests of the Defendants. Barnett wrote:

Thanks for the update. I'm very glad that they took this step. Although it's clear that you cared about your co-workers, you were most concerned about *the unsuspecting [Hotel] female guests who were sleeping and unaware of the fact that an ex-con had been given access to the keys to their rooms. While we don't know what he was convicted of, his behavior towards his co-workers indicated that he didn't respect boundaries*, so your fears had free reign.

(Def. Motion, Ex. 1, at 3-4). (emphasis added). Richardson's e-mails had made no prior mention of such concern about "female guests," and no evidence has been presented that the Hotel had ever had complaints from its clientele in such regard.<sup>7</sup>

While Richardson was away on vacation in mid-August 2002, the e-mail traffic slowed, resuming when she returned. Ms. Barnett's e-mail of August 20, 2002, to Richardson requested that Richardson photocopy the TV Guide containing the title and description of the movie the alleged harasser purportedly had playing on the television in the Hotel lobby during the last night of Ms. Beverly's employment there. (Def. Motion, Ex. 1, at 2). Ms. Beverly had reportedly found the program to be a disquieting part of the alleged harassment. Ms. Barnett repeated this request in a September 1 e-mail to Richardson in which she also invited Richardson to come to

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<sup>7</sup> Because the discovery process later produced documentation that Mr. Garcia apparently had been convicted on a stalking charge, Ms. Barnett contends that the information provided to her by Ms. Richardson proved to be "consistent" with certain allegations against Mr. Garcia, and there was nothing improper about Ms. Richardson sharing the information about Mr. Garcia's personnel file. Regardless of what one might think about Richardson's intermeddling, the primary issue here is Ms. Barnett's responsibility as a lawyer, not Richardson's behavior, except as it was encouraged and exploited by Ms. Barnett without any apparent effort of restraint.

her home office. (Def. Motion, Ex. 1, at 20). Ms. Richardson complied. (Def. Motion, Ex. 1 at 21; Def. Motion, Repl. Ex. 2, at 14, 19).

On August 31, 2002, Ms. Richardson wrote to Ms. Barnett disclosing the substance of an apparently private attorney-client conversation between HORA's owners and HORA's legal counsel. Apparently, this conversation had been reported to Richardson by Tammy Schneider, a co-worker who eavesdropped on the **three-hour** legal consultation between Hotel management and counsel:

On Thursday evening Anna, her father and her brother had a 3 hour meeting at the hotel with **an attorney**. Tammy overheard part of it that being Anna stating that **she knew there was a problem with Nelson at one time** but she didn't realize that it was an ongoing situation.

(Def. Motion, Ex. 1, at 1) (emphasis added). Thus, Barnett knew what she was receiving via Richardson (i.e., her opponents' client confidences communicated to opposing counsel) and the dubious nature of the filters through which the information made its way to her. The subsequent e-mails show no effort by Barnett to disabuse Richardson or her other secret sources of this means of funneling the opponents' privileged information to her.

That same day, Richardson also described to Ms. Barnett a confidential document from Marshall addressed to HORA in response to the EEOC charge. Richardson wrote:

Oh and by the way . . . **the little bit that I did see of the fax on Wednesday** gave **specifics that need to be forwarded to EEOC** ([i.e.,] written warnings, any written documentation from an employee regarding their complaint[, ] etc) by Marshall and/or Daryl.<sup>8</sup>

(Def. Motion, Ex. 1, at 1) (emphasis added). Ms. Richardson also had previously recounted to Barnett an earlier fax from Marshall to the Hotel General Manager about the receipt of the EEOC

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<sup>8</sup> Daryl Carr was a Marshall employee serving as the General Manager of the Hotel at the time in question.

notice, reporting that she was “ecstatic” as a result of that development. (Def. Motion, Ex. 1, at 1-2).

In the final Barnett-Richardson e-mail produced to Defendants, Richardson wrote to Ms. Barnett on September 12, 2002, regarding certain confidential information that Marshall was preparing to send to the EEOC. Defendants contend that this information was not subject to disclosure to the Intervenor Plaintiff under EEOC regulations. The EEOC’s protocols on the proper handling of such a disclosure is open to interpretation on this point. While it is conceivable that the EEOC might at some point disclose a witness’s statement to a complainant or complainant’s counsel, at the time she received Richardson’s rendition of the information, Barnett had no way of knowing what the EEOC would eventually decide to share and what would be withheld. In fact, Barnett could not even then know whether what was being disclosed to her by Richardson was a draft of a respondent’s reply to the EEOC that had yet to be discussed with or reviewed by counsel:

Today a fax came through to Daryl from Mike Getzy<sup>9</sup> that had Daryl’s reply to the EEOC. I only got a brief glance but what I did see was Daryl stating that on the 20th he received several calls at home from both Manessta and Nelson and one of the calls from Manessta was regarding the TV incident. He also states that he spoke with Manessta several times about her attitude and her appearance. He states that because of her attitude he had decided that she was not proper material to be working the desk representing the hotel and that she was terminated during her probationary period.

(Def. Motion, Ex. 1, at 18). Ms. Barnett contends that Ms. Richardson did not provide a copy of Mr. Carr’s statement to her, she merely had knowledge of its utterance. Barnett also argues that Mr. Carr’s statement was later disclosed by counsel for the Hotel during the discovery process.

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<sup>9</sup> Michael Getzey is the Executive Vice-President of Marshall Management, Inc.

As a result of the above factual information learned during discovery regarding the relationship between Ms. Barnett and Ms. Richardson, defense counsel formally notified Ms. Barnett in a joint letter dated February 25, 2005, that if she failed to voluntarily withdraw from this case, Defendants would move for her disqualification. Offered the opportunity to voluntarily withdraw, Ms. Barnett chose not to do so. The filing of the disqualification motion followed. Given the nature of the dispute, the Court provided all parties the opportunity for a hearing, oral argument and briefing.

### III. ANALYSIS

#### **A. Standard of Review**

The Court has “substantial latitude” when deciding whether to disqualify an attorney. Wheat v. United States, 486 U.S. 153, 163-64 (1988). The Court’s power to disqualify an attorney is derived from its inherent authority to supervise the professional conduct of attorneys appearing before it.

The party seeking to disqualify opposing counsel bears the burden of showing clearly that continued representation would be impermissible. J&J Snack Foods Corp. v. Kaffrissen, 2000 WL 562736 at \*2 (E.D. Pa. May 9, 2000), citing Cohen v. Oasin, 844 F.Supp. 1065, 1067 (E.D. Pa. 1994). Nevertheless, our circuit court has suggested that if the district court has any doubts regarding the existence of a violation of the professional conduct rules, those doubts should be resolved *in favor of* disqualification as a response to the need to maintain public confidence in lawyers and other participants in the administration of justice. See Imbesi v. Imbesi, 2001 WL 1352318, at \*2 (E.D.Pa. 2001); J&J Snack Foods, 2000 WL 562736 at \*2,



citing Int'l Bus. Mach. Corp. v. Levin, 579 F.2d 271, 283 (3d Cir. 1978) (emphasis added).

The maintenance of public confidence in the propriety of the conduct of those associated with the administration of justice is so important a consideration that **we have held that a court may disqualify an attorney for failing to avoid even the appearance of impropriety.** Kramer v. Scientific Control Corp., 534 F.2d 1085, 1088-1089 (3d Cir. 1976); Richardson v. Hamilton International Corp., 469 F.2d 1382, 1385-1386 & n.12 (3d Cir. 1972), cert. denied, 411 U.S. 986, 93 S.Ct. 2271, 36 L.Ed.2d 964 (1973). See also, Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1387 (2d Cir. 1976). Indeed, the courts have gone so far as to suggest that **doubts as to the existence of an asserted conflict of interest should be resolved in favor of disqualification.** Hull v. Celanese Corp., 513 F.2d 568, 571 (2d Cir. 1975); Chugach Elec. Assn v. United States D.C. for Dist. of Alaska, 370 F.2d 441, 444 (9th Cir.), cert. denied, 389 U.S. 820, 88 S.Ct. 40, 19 L.Ed.2d 71 (1967).

Int'l Bus. Mach. Corp., 579 F.2d at 283 (emphasis added). The Court of Appeals for the Third

Circuit has also advised that a district court

should disqualify an attorney only when it determines, on the facts of the particular case, that disqualification is an appropriate means of enforcing the applicable disciplinary rule. It should consider the ends that the disciplinary rule is designed to serve and any countervailing policies, such as permitting a litigant to retain the counsel of his choice and enabling attorneys to practice without excessive restrictions.

Miller, 624 F.2d at 1201, citing United States ex rel. Sheldon Electric Co. v. Blackhawk Heating & Plumbing Co., 423 F.Supp. 486 (S.D.N.Y. 1976); Baglini v. Pullman, Inc., 412 F.Supp. 1060 (E.D.Pa. 1976), affirmed, 547 F.2d 1158 (3d Cir. 1977). While Ms. Barnett argues that the controlling case law does not support a court's reliance exclusively upon violations of professional rules to disqualify counsel, the Court disagrees. Indeed, as indicated above, in some instances courts have found that even the *appearance* of ethical impropriety can support

disqualification.<sup>10</sup> Here, the Court finds not only the appearance, but also the existence of improper professional behavior by Ms. Barnett.

By using Ms. Richardson as an informational mole and subsequently representing the information from Ms. Richardson's reports as factually true as part of her campaign with the EEOC, Ms. Barnett has not only violated her adversaries' legal rights that permit an appropriately calculated and sometimes negotiated flow of information through the traditional discovery process, but she also contemporaneously risked undermining the EEOC's official role and thwarted policies underlying a number of ethical rules.

Ms. Barnett conducted a surrogate-like EEOC investigation without the knowledge of the Hotel, Marshall or their lawyers. Had the Hotel's or Marshall's lawyers known of Ms. Barnett's actions, they very likely would have taken appropriate action to attempt to govern the flow of information to both Ms. Barnett and the EEOC.<sup>11</sup> They are entitled to undertake such efforts if they are undertaken honestly and in compliance with applicable rules. The Hotel or Marshall

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<sup>10</sup> The Court is mindful that, unlike some other states' ethics rules and unlike many judicial codes of conduct, the Pennsylvania Rules of Professional Conduct do not presently contain an express "appearance of impropriety" proscription. However, the Court's evaluation of a lawyer's conduct must give consideration to inescapable "appearances" if the Court is to be attentive to the duty to help maintain "public confidence in the propriety of the conduct of those associated with the administration of justice . . ." See *IBM v. Levin*, *supra* at 283. The Court must also acknowledge an inescapable and overarching purpose of the Rules of Professional Conduct, namely, to promote a high level of recognizable integrity and confidence in the persons licensed to practice law so that observers of lawyers will not have cause to see a profession peopled by practitioners for whom the ends always justify the means.

<sup>11</sup> Defendants have not specified the exact misrepresentations that were made by Ms. Barnett to the EEOC, but it is clear from the record before the Court that a significant amount of information that was gleaned by Ms. Barnett to support the allegations in her November 18, 2002 letter to the EEOC resulted from improper communications (mostly e-mails) with Ms. Richardson and that Ms. Barnett surely should have known that much of Ms. Richardson's information was either improperly disclosed or based only on second- or third-hand office gossip. Ms. Barnett's letter to the EEOC, however, gives no hint of the actual nature or reliability of her sources of information. Ms. Barnett concedes that on November 18, 2002, approximately two months after the last e-mail with Ms. Richardson, she "sent the EEOC's investigator a nine page letter which recommended that the EEOC interview various women, shared her understanding of what various people knew, and transmitted various documents." Intervenor's Response to the Joint Motion to Disqualify at 8.

should have been given this opportunity.

Every litigator knows that the discovery process has certain formal and informal rules. Ms. Barnett broke or ignored many of them. While some lawyers look at discovery with something of a Darwinian eye, the ethical rules should not be perused as if they were on an à la carte menu. Ms. Barnett is not permitted to pick and choose which ethical rules to ignore or misinterpret simply because avoidance or abuse of those rules seems conveniently more beneficial to her client.

## **B. Standards for Lawyer Conduct**

Lawyers admitted to practice in Pennsylvania take an oath, *inter alia*, to

Employ, for the purpose of maintaining the causes confided to me, such means only as are consistent with truth and honor . . .

[and]

. . . abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged . . .

Supreme Court of Pennsylvania Attorney's Oath.

The Rules of Professional Conduct adopted and promulgated by the Pennsylvania Supreme Court<sup>12</sup> apply to all Pennsylvania-admitted attorneys and are made operative in this Court by Local Rule of Civil Procedure 83.6, R. IV. As expressly stated in the Preamble to the Rules, the Rules themselves are rules of reason, to be “interpreted with reference to the purposes of legal representation and of the law itself.” While some of the Rules set forth specific “do’s

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<sup>12</sup> The present formulation of the Pennsylvania Rules of Professional Conduct was adopted by the Pennsylvania Supreme Court by order dated August 23, 2004, with an effective date of January 1, 2005. The conduct at issue here predates the 2004 amendments, but none of those amendments changes the text of the rules referred to in this Memorandum and Order.

and don't's", many of them are less precise. Some are aspirational instead of mandatory. This makes the Rules perhaps less easy to apply in some circumstances, but it does not make them any less efficacious for gauging lawyer conduct. Often, the ethics rules identify occasions on which a lawyer has some discretion, even though the Rules themselves provide no guidance on how to exercise that discretion.<sup>13</sup> However, as is also recognized in the Preamble to the Rules, the nature of the legal profession is to present lawyers with conflicting responsibilities "to clients, to the legal system and to the lawyer's own interest in remaining an upright person" which "must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying these Rules." Preamble to the Rules of Professional Conduct ¶8.<sup>14</sup>

A lawyer who exalts his or her responsibility as a client's agent to the point of ignoring the lawyer's responsibilities flowing from the lawyer's simultaneous, and equally important, role as officer of the court and as a professional whose conduct affects the quality of justice and public perception of the legal profession does not meet the letter or spirit of the rules of ethics or the expectations of the Court. Such a lawyer contributes to the causes for the scorn so many laypersons now seem to have for lawyers and the reportedly widespread distrust of our legal system. The standards of conduct applicable to and expected of lawyers require more than merely comporting oneself to escape discipline. Stated differently, the ethical rules ought not be read as an intellectually meager, uninspiring statement of minimum standards to be abused by those who would argue that lawyers need only meet those minimum standards. Escaping

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<sup>13</sup> In this regard, lawyers can often glean greater specificity--and, in some respects, more restrictive guidance--from the American Law Institute's RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS.

<sup>14</sup> See also RPC 2.1 (in counseling a client "a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant...").

discipline is not the measure of professionalism. The Rules represent a framework or floor for absolute minimum standards of professional conduct. Unlike corporate law theory's ongoing ideological debate whether companies engage in a race to the "top" (or perhaps, the "bottom") with regard to corporate governance, because a lawyer's professional conduct obligations include the corollary duty of earnest advocacy, a race to achieving the pinnacle of the standards of professionalism should be a lawyer's only competitive concern. Thus, calculating one's behavior to merely comply with the wording of the professional rules, while doing violence to their spirit, is fundamentally inconsistent with a lawyer's responsibilities to the parties, to the community at large and to the Court.

A discussion of the rules and principles that Ms. Barnett transgressed in this case follows.

**C. Communication with Person Represented by Counsel—Pennsylvania Rule of Professional Conduct 4.2**

Pennsylvania Rule of Professional Conduct 4.2 and its annotated comments state:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

See also, Local R. Civ. P. 83.6, R. IV. With regard to organizations, the comments state:

...

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to

obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

...

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

In turn, Rule 4.3, "Dealing with Unrepresented Person," states:

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.

(b) During the course of a lawyer's representation of a client, a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the lawyer knows or reasonably should know the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.

(c) When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer should make reasonable efforts to correct the misunderstanding.

In the absence of specific guidance on this particular issue from the Court of Appeals for the Third Circuit or the Pennsylvania Supreme Court, district courts have employed tests consistent with the plain language of Rule 4.2 and its comment. See Belote v. Maritrans Operating Partners, L.P., 1998 WL 136523 at \*2 (E.D.Pa. Mar. 20, 1998) (citations omitted). The purpose of Rule 4.2 is to prevent attorneys from taking advantage of "uncounselled lay persons and to preserve the efficacy and sanctity of the lawyer-client relationship." Dondore v. NGK Metals Corp., 152 F.Supp.2d 662, 666 (E.D.Pa. 2001); Carter-Herman v. City of Phila., 897 F.Supp. 889, 901 (E.D.Pa. 1995) (citing G.C. Hazard, Jr. & W.W. Hodes, *The Law of Lawyering* 730 (2d ed. 1990); C.W. Wolfram, *Modern Legal Ethics* § 11.6 at 612-13 (1986)). See also, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99.

Here, the correspondence between Ms. Barnett and Ms. Richardson is somewhat

analogous to the issues presented in Belote.<sup>15</sup> In Belote, plaintiff's counsel sent an investigator to speak to the captain of a ship on which the plaintiff had been injured. However, the interview was conducted without providing notice to or obtaining the consent of counsel for defendant Maritrans. Id. at \*1. Maritrans also claimed that the plaintiff's investigator failed to reveal to the interviewee, Captain Whitmore, that the investigator was working for the plaintiff, Belote. As is true in the instant matter, in Belote, "plaintiff's counsel's efforts proved quite fruitful."

It is clear here that Barnett at least sensed that she was trekking in ethically challenging terrain by communicating with Richardson. Barnett's consideration of the issue, however, was limited to a "control group" test that she used to lead Richardson away from a self-description of being a member of Hotel management. The Comment to Rule 4.2 focuses on individuals whose act or omission with regard to the Plaintiff's injury can be imputed to Defendants. See also, Belote, 1998 WL 136523 at \*3. Here, as discussed above, the broad nature of Ms. Richardson's responsibilities as the close assistant to the Hotel General Manager may have placed Richardson in such a position as to impute liability to Defendants.<sup>16</sup> To be sure, as a threshold analysis, one of the concerns in assessing the instant matter was determining Ms. Richardson's level of responsibility consistent with her employment at the Hotel. From the record, it does not appear

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<sup>15</sup> The instant matter is inapposite to the issues presented in Faragher v. National Railroad Passenger Corp. ("AMTRAK"), 1992 WL 25729 (E.D. Pa. Feb. 7, 1992). In Faragher, the court found that no parties existed at the time of the allegedly *ex parte* communications because, at the time plaintiff's counsel spoke to the Amtrak employees, no complaint had been filed. Here, however, Ms. Barnett continued to correspond with Ms. Richardson after Barnett filed a complaint with the Pennsylvania Human Relations Commission on behalf of her client, current Intervenor, Manessta Beverly, and after she had initiated the EEOC's processes. See id. at \*1-2. Litigation against HORA and Marshall was foreseeable

<sup>16</sup> On August 1, 2002, Ms. Barnett indicated to Ms. Richardson that "[i]f you agree that you do not hold a management position, then we're free to communicate with each other. . . . If we can communicate ethically, I look forward to it." (Def. Motion, Ex. 1, at 16). As discussed supra, because of the small, intimate nature of the Hotel's staff and Ms. Richardson's demonstrated level of access and responsibility, Barnett's reliance on Richardson for such an ethical determination, without further investigation, was not appropriate.

that the Hotel is a large operation. It does not have many employees. Therefore, it is reasonable to assume that “managerial” responsibilities and discretion are spread amongst workers who may not necessarily have traditional titles given to those in managerial roles. This is not an organization with a large, hierarchical command structure, such as a police department, where the lines of managerial responsibility are clearly delineated. See cf. Carter-Herman, 897 F.Supp. at 904. From her repeated references to her role *vis á vis* Hotel personnel files, Ms. Richardson had responsibilities that might be consistent with someone with human resources oversight.

Moreover, Richardson obviously occupied a position central to management operations given the fact that she was the sole assistant to the most senior managers responsible for the Hotel’s day-to-day operations and had access to confidential information and materials as a result. While the standard for determining who has “speaking authority” or “authority to bind” a business entity is somewhat imprecise,

it includes employees below the level of corporate management because otherwise the third category of employees mentioned in Rule 4.2 would be redundant to the employees described in the first category of Rule 4.2 (“persons having a managerial responsibility on behalf of the organization”).

See Weeks v. Indep. Sch. Dist., 230 F.3d 1201, 1209 (10th Cir. 2000). Thus, the issue does not evaporate with a dismissive inquiry about job titles. Ms. Barnett should have proceeded with much greater caution. Section 102 of the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, which precludes a lawyer seeking information from non-clients who are under some duty not to reveal such information, raises at least cautionary flags that should have tempered Barnett’s giddy exchanges with Richardson. See § 102, comment d. At a minimum, Ms. Barnett should have considered awaiting the institution of proper discovery procedures, notifying the



Hotel or Marshall of her interest to speak with Ms. Richardson without representation (after advising Richardson of her right to representation) or considering other appropriate actions to prevent possible spoliation of evidence.

**D. Legal Rights of Defendants–Pennsylvania Rule of Professional Conduct 4.4**

Rule 4.4, “Respect for Rights of Third Persons” states:

- (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
- (b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Here, the Defendants and their employees, including Nelson Garcia, are considered third persons.

It is clear to this Court that Ms. Barnett obtained evidence by methods that violated the legal rights of the Defendants. Specifically, through Ms. Richardson, Ms. Barnett obtained purported confidential and proprietary information belonging to the Hotel and Marshall, as well as Nelson Garcia, such as (1) the employee handbook, (2) the contents of Garcia’s personnel file, (3) Daryl Carr’s statement to the EEOC, (4) the EEOC’s inquiries to Defendants, and (4) other attorney-client privileged information that Ms. Schneider, one of Ms. Richardson’s co-workers, learned while eavesdropping on a lengthy conversation between Defendants and their legal counsel. That the improperly obtained information was provided in hard copy or its substantive elements were relayed by paraphrasing in an e-mail or voice communication does not alter the

fact that the information was improperly obtained.<sup>17</sup>

With regard to Ms. Schneider overhearing, or as Defendants' counsel describes it, "eavesdropping", on Defendants' attorney-client communications, Ms. Barnett cannot rely on her unusual theory that Ms. Schneider may be considered a "stranger" under the law, thereby vitiating Defendants' privilege argument. See Montgomery County, 175 F.3d at 301, citing Rhone-Poulenc, 32 F.3d at 862. At the time, Ms. Schneider was Defendants' employee.

The comment to Rule 4.4 states that an attorney's responsibility to her client requires the attorney to subordinate the interests of others to those of the client, but that responsibility does not imply that an attorney is entitled to disregard the rights of third persons. The rights of third persons include "legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship."

It is clear from the e-mails produced to this Court that Ms. Barnett encouraged Ms. Richardson to disclose to her *all* information she learned while working with the Hotel. There is no evidence in this record, other than Ms. Barnett's verified statement, that Ms. Barnett told Ms. Richardson and Ms. Schneider that relaying an opponent's attorney-client conversation is improper. Nor did Ms. Barnett discourage Ms. Richardson from such continued improprieties. See (Def. Motion, Ex. 1, at 8) (where Ms. Barnett requested of Ms. Richardson, "if you think of anything else that was said during the interviews, or if you find out that additional people were interviewed, would you make notes?"). Thus, on this record, it is not clear to this Court that Ms.

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<sup>17</sup> Ms. Barnett alleges that this Court should question Defendants' credibility with regard to the employee handbook because they made no such claims when the EEOC requested it and Defendants did not object to its disclosure during discovery. Such an argument belies the fact that, at the time of Ms. Beverly's complaint, it is clear from their submissions to this Court that Defendants were entitled to assess the propriety of Ms. Barnett using an internal mole to gather information in an attempt to bolster Ms. Beverly's claims, without Defendants' being able to protect their legal rights.

Barnett properly disclosed or emphasized to Ms. Richardson that it was, in fact, an ethical violation for her to receive or relay such intercepted communications.

Consistent with this rule, Ms. Barnett should have refrained from maintaining correspondence with Defendants' employee, Ms. Richardson, instead giving Defendants the opportunity to determine their legal rights *vis á vis* Ms. Barnett's justifiable desire to gather evidence with regard to her submission(s) to the EEOC. Furthermore, the discovery rules are necessary because once information has been improperly obtained, it is nearly impossible to return the parties to the equitable position that existed prior to the improper disclosure. Here, the Court is in the position of requiring the barn to be locked after much of the livestock has been given away by a farmhand and butchered.

In the instant matter, Defendants may be seeking the opportunity at trial for the jury to determine whether Ms. Barnett misrepresented Ms. Richardson's admittedly hearsay evidence to the EEOC, and thus to the Defendants and this Court, because such information was previously presented as factual, first-hand evidence of Ms. Beverly's accusations against Mr. Garcia. In fact, as Ms. Richardson admitted during her deposition: (1) she had no first-hand knowledge of any interaction between Ms. Beverly and Nelson Garcia; (2) she never witnessed Mr. Garcia harassing any employee; and (3) her correspondence may have been tainted by her hostility toward her employers at the Hotel.

Another aspect of Barnett's violation of the rights of others merits mention, namely, the gossipy approach she pursued to tar Mr. Garcia's reputation by her thinly-veiled suggestion that Hotel guests were at serious risk of harm by Garcia--even though Barnett had absolutely no knowledge of Garcia's background. She virtually accused him of being a dangerous prowler

lurking at the doors to guests' rooms. Such commentary was unwarranted and out of order.<sup>18</sup>

In conclusion, this Court shares Defendants' deep concerns that Ms. Barnett misrepresented Ms. Richardson's allegations as factual and those statements have been repeated to the parties and to the Court; thus, it is also appropriate that Ms. Barnett should be disqualified pursuant to Rule 4.4.

**E. Inducement to Engage In Ethical Violations–Pennsylvania Rule of Professional Conduct 8.4**

Rule 8.4, "Misconduct" states:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

...

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

....

Here, Ms. Barnett knowingly violated Rule 8.4 by surreptitiously inducing Richardson to assist Barnett in violating the ethical rules by providing privileged documents and information without

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<sup>18</sup> Cf. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 106, comments b, c and d. Another ethics rule, Rule 3.4, "Fairness to Opposing Party and Counsel", is implicated here as well. As a technical matter, the Court is not aware of any violation by Ms. Barnett of the specific prohibitions set out in that Rule. While one might argue under Rule 3.4(a) that the Barnett-Richardson communications operated to so manipulate Richardson's potential as a witness that they amount to an obstruction of Defendants' access to evidence, the Court makes reference to Rule 3.4 here because its "basic fairness" tenor reminds advocates that, in the words of the comment to the Rule, "[t]he procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery, and the like."

Defendants' permission. Ms. Barnett's repeated manipulation of Ms. Richardson, as is apparent to this Court from the record, is a blatant violation of Pennsylvania's professional rules. Thus, disqualification of Ms. Barnett pursuant to this Rule is also appropriate.

**F. Defendants Intend to Call Attorney Jana Barnett as a Trial Witness**

Defendants also raise the possibility that Ms. Barnett may be a material witness in this case because, during the initial stages of her investigation on behalf of her client, Ms. Barnett was not only gathering information but also formulating facts with Ms. Richardson's assistance, who was not (and never has been) her client. Defendants also likely would intend to argue that Barnett's extensive commentary and communication with Richardson irrevocably colored at least Richardson's (and possibly others') testimony.

Even though a discussion of Ms. Barnett's possible role as a trial witness and the applicable ethical Rule is included here, the Court has by no means concluded that Defendants will be permitted to call her as a witness or, if they are, what the scope of questioning of her may be. Defendants do argue that it will be important for the jury to be able to learn, first-hand, how Ms. Barnett investigated and generated certain purported pieces of factual information, including (a) how and why Barnett contacted Richardson and (b) other information Barnett may have learned from the numerous contacts with Richardson, but the content of which (i) are not contained in the e-mail exhibits, (ii) have not been borne out during depositions, or (iii) cannot be testified to by Ms. Richardson. Defendants have also stated their intention to present evidence that the information elicited by Ms. Barnett from Ms. Richardson had a material effect on (and possibly negatively colored) both the EEOC processes and proceedings as well as the litigation

itself.

As long as Defendants' theories and arguments are relevant and not overly prejudicial, it is not for this Court to question or dictate pre-trial litigation strategy to the Defendants. They may be earnestly intending to try to present evidence to the jury consistent with their belief that the EEOC relied upon Ms. Barnett's representations, whether factually-based or not, in bringing its claims against Defendants. However, the Court is singularly wary of the opportunity for mischief--or worse--by being too quick to allow counsel to try to turn opposing counsel into a witness unless there is an undeniably compelling need for her testimony. Thus, no decision about Barnett being a witness has been made. The applicable ethical rule bears discussion, however.

With certain specific exceptions not pertinent here, Rule 3.7 prohibits a lawyer from acting as an advocate at trial in which she is likely to be a necessary witness. The Restatement also addresses this situation. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 108. Consistent with this rule, the Court of Appeals for the Third Circuit recently observed that "it is often impermissible for an attorney to be both an advocate and a witness." United States v. Merlino, 349 F.3d 144, 152 (3d Cir. 2003). Additionally, "disqualification may also be appropriate where it is based solely on a lawyer's personal knowledge of events likely to be presented at trial, **even if** the lawyer is **unlikely** to be called as a witness." Id. (emphasis added); see also, United States v. Locascio, 6 F.3d 924, 933 (2d Cir. 1993). Nevertheless, Rule 3.7 may only bar the lawyer-witness's participation at trial. See George v. Wausau Insurance Co., 2000 WL 276915 at \*2 (E.D.Pa. Mar. 13, 2000). Thus, if the only matter at hand was to determine whether Ms. Barnett is a potential trial witness, without the implication of the professional

conduct rules, discussed supra, the plain language of Rule 3.7 supports the conclusion that an attorney presumably may continue to represent a client in an action where the attorney may be called as a witness, until the actual trial. See id. (citing Lebovic v. Nigro, 1997 WL 83735 (E.D.Pa. Feb. 26, 1997); accord Rounick v. Fireman's Fund Ins. Co. of Wisconsin, 1996 WL 269495 (E.D.Pa. May 20, 1996); Electronic Laboratory Supply Co., Inc v. Motorola, Inc., 1990 WL 96202 (E.D.Pa. July 3, 1990)).

Here, defense counsel states their intention to call Ms. Barnett as a witness to testify about her influence over the facts provided to the EEOC and Barnett's lack of first-hand information with regard to the EEOC investigation. From the record, it appears that Ms. Barnett had personal knowledge of the sources of the allegations (and their genesis) presented to the EEOC because Barnett was intimately involved in cobbling together these allegations with Ms. Richardson's assistance. At this stage and on the established record before the Court, both Ms. Barnett and Ms. Richardson may seem to be material, complementary witnesses in this matter, especially with regard to Defendants' theory that Ms. Barnett's manipulation of Ms. Richardson caused Richardson to take on the role of a corporate informational mole within the Hotel's chain of command, providing Ms. Barnett with information regarding the Hotel and Marshall that the Defendants consider confidential and proprietary.<sup>19</sup> The record thus developed also supports

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<sup>19</sup> Pursuant to American Bar Association Formal Opinion 92-368 (1992), an attorney who receives documents that are privileged or confidential on their face should avoid reading the materials, notify the attorney who transmitted the materials and obey that attorney's instructions with respect to the confidential information. This Formal Opinion analogizes inadvertent disclosure to the receipt of another person's property, and concludes that the receiving attorney may not make unauthorized use of the confidential / privileged communications. However, the Philadelphia Bar Association, Opinion 91-19 (1991), has concluded that attorneys who receive confidential information *through no fault of their own* or of their client's, may use the information at trial. The facts here are distinguishable from the assumption in the Philadelphia Bar opinion, as Ms. Barnett received certain confidential and/or privileged information by her own fault and did little, if anything, to prevent continued disclosure. During oral argument, however, Ms. Barnett suggested, in response to the Court's questions, that she thinks she must have orally admonished the eavesdropper not to do that again. Hr. Tr. at 55-58.

Defendants' contention that Ms. Richardson seemed eager to provide any and all information, regardless of the parties' respective rights and the record contains virtually no indication that Ms. Barnett discouraged such behavior.

Defendants also make a credible argument that Ms. Barnett's testimony may serve as a crucial supplement to Ms. Richardson's testimony with regard to a presentation to the jury by Defendants that the information provided to the EEOC resulted from Ms. Barnett facilitating or fueling a potential personal vendetta by a disgruntled Ms. Richardson, who testified that she was angry with management and did not get along with the Hotel's General Manager.

In summary, even absent the violations of the professional conduct rules discussed above, the Court, in consideration of Defendants' motion, was mindful of the possible need to disqualify Ms. Barnett because the nature of her representation of Ms. Beverly may have required disqualification, as the parties move closer to trial, as a result of Barnett's role as a potentially necessary witness.

#### **G. Sanctions**

Federal courts have the inherent power to discipline attorneys practicing before it. See Matter of Abrams, 521 F.2d 1094, 1099 (3d Cir.), cert. denied, 423 U.S. 1038 (1975). Consistent with this power, this Court may prohibit or remedy litigation practices which constitute ethical violations or seriously undermine the integrity of a proceeding. See University Patents, Inc. v. Kligman, 737 F.Supp. 325, 327 (E.D.Pa. 1990). See also, Restatement (Third) of the Law Governing Lawyers § 6, comment i. While the Court's authority in such matters is quite broad, it does have limits. See Abrams, 521 F.2d at 1099 (citing In re Ruffalo, 390 U.S. 544, 547 (1968)). The proper exercise of this power must strike a balance between several competing



considerations. See Ex parte Burr, 9 Wheat. 529, 22 U.S. 529, 529-30 (1824). First, the unfettered practice of law is of great importance and it should not be intruded upon lightly. See id. Nevertheless, it is the judiciary's responsibility to ensure the integrity of the profession. See id. Moreover, the Court must balance plaintiff's right to counsel of her choice against her adversary's right to prepare and try a case without prejudice. See University Patents, 737 F.Supp. at 325. Thus, when imposing sanctions "for ethical violations in *unclear* areas of law, the relevant issue to consider is not whether the plaintiff's counsel incorrectly interpreted the law, but whether counsel ignored the unsettled nature of the law." See Belote, supra at \*6-7 (citing University Patents, 737 F.Supp. at 329 (E.D.Pa. 1990)).

Giving Ms. Barnett the benefit of the doubt, many of the professional conduct issues in the instant matter may be considered by some practitioners to be unsettled. Nonetheless, considering the questionable propriety of Ms. Barnett's continued correspondence with Ms. Richardson, Barnett should not have unilaterally communicated with her for such an extended period. See e.g., id. Instead, Ms. Barnett should have informed the Hotel's or Marshall's counsel of her intent to speak with Ms. Richardson. See University Patents, 737 F.Supp. at 329; Cagguila v. Wyeth Labs., Inc., 127 F.R.D. 653, 654 (E.D.Pa. 1989). Similarly, using Richardson as the cornerstone for urging EEOC action without having considered Richardson's obvious credibility issues bespeaks a recklessness that bodes ill. Cf. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 57, comment f; § 110

Here, unlike the result in Belote, disqualification is warranted because the record clearly shows that the Defendants have been sufficiently prejudiced by being unaware of and without the ability to control the Barnett-Richardson communications to the extent permitted by both the rules of discovery and professional conduct. See United States v. Miller, 624 F.2d 1198, 1201

(3d Cir.1980) (disqualification appropriate only when it serves the purposes of the relevant disciplinary rule); cf. University Patents, 737 F.Supp. at 328.

Furthermore, the Court has weighed heavily the proposition that Ms. Beverly might suffer substantial hardship if Ms. Barnett is disqualified. See Pa. R.P.C. 3.7(a)(3). However, the Court is confident that Ms. Beverly's federal claims will be adequately represented by the EEOC and its counsel. Furthermore, the Court will give Ms. Beverly the opportunity to find new counsel with regard to her state claim. Nevertheless, because of the apparent ethical violations by Ms. Barnett, consistent with the law in this circuit, with regard to any doubts as to the existence of a violation of the rules, it is prudent to resolve those doubts *in favor of* disqualification. See J&J Snack Foods, 2000 WL 562736 at \*2, citing Int'l Bus. Mach. Corp., 579 F.2d at 283.

#### IV. CONCLUSION

The Court finds that Defendants have provided ample evidence to substantiate Ms. Barnett's disqualification. Ms. Barnett has engaged in and exhibited what can be termed nothing less than reckless behavior, with regard to respecting the legal rights of others, including her client's adversaries. Therefore, for the reasons stated above, attorney Jana Barnett is disqualified from representing Intervenor Manessta Beverly in this case. Ms. Beverly shall be permitted Ms. Barnett's assistance in locating substitute counsel, and Ms. Barnett is expressly permitted to cooperate fully in the prompt transfer of the case to new counsel to whom she may impart the whole of her knowledge of the case, including her file as it exists as of the date of the accompanying Order, with the express exception of any notes Barnett may have made concerning any discussions with Richardson or Schneider which have not been disclosed to Defendants.

An appropriate Order follows.

BY THE COURT:

/S/ \_\_\_\_\_  
GENE E.K. PRATTER  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EQUAL EMPLOYMENT OPPORTUNITY	:	CIVIL ACTION
COMMISSION,	:	
	:	
Plaintiff,	:	
and	:	
	:	
MANESSTA BEVERLY,	:	
	:	
Intervenor,	:	
	:	
v.	:	
	:	
HORA, INC. (d/b/a "Days Inn") and MARSHALL	:	
MANAGEMENT, INC.,	:	
	:	
Defendants.	:	NO. 03-cv-1429

**ORDER**

June 8, 2005

PRATTER, DISTRICT JUDGE

AND NOW, this \_\_th day of June, 2005, upon consideration of the Defendants' Joint Motion to Disqualify Jana R. Barnett, Esq., as Counsel for Intervenor (Docket No. 43), Intervenor's Response to the Joint Motion to Disqualify (Docket No. 45), the EEOC's Letter Response in Opposition to the Joint Motion to Disqualify (Docket No. 46), and each of the parties' supplemental memoranda of law (Docket Nos. 55, 56 and 58) submitted following the hearing and oral argument held on April 15, 2005, IT IS ORDERED that because the Court finds violations of Pennsylvania Rules of Professional Conduct 4.2, 4.4 and 8.4, consistent with the reasoning discussed in the accompanying memorandum, Jana R. Barnett is DISQUALIFIED from further involvement in this matter, save her necessary assistance in locating substitute counsel. Thus, Ms. Barnett is expressly permitted to cooperate fully in the prompt transfer of the case to new counsel to whom she may impart the whole of her knowledge of the case, including

her file as it exists as of the date of the accompanying Order, with the express exception of any notes Barnett may have made concerning any discussions with Richardson or Schneider which have not been disclosed to Defendants.

It is further ORDERED that, with due consideration of the pending Defendants' Motion for Summary Judgment (Docket No. 44) and to permit new counsel for the Intervenor to familiarize herself or himself with this matter and to determine whether to file supplemental materials with regard to the Motion and the docket responses, all parties to the above-captioned matter shall have until September 1, 2005 to file supplemental materials with regard to the pending Motion.

BY THE COURT:

/S/ \_\_\_\_\_  
GENE E.K. PRATTER  
UNITED STATES DISTRICT JUDGE