

Section of Labor and Employment Law

Ethics Corner: Third Circuit Vindicates Plaintiff's Attorney

The Third Circuit recently overturned a district court order disqualifying a plaintiff's attorney who had conducted an *ex parte* interview of the defendant's administrative assistant. *EEOC v. HORA, Inc.*, No. 05-5393, 2007 U.S. App. LEXIS 15705 (3d Cir. June 29, 2007) (unpublished decision). Characterizing the disqualification as "draconian," the Circuit held that the district court abused its discretion because the lawyer did not violate any ethics rules, and, even if she had, there was no prejudice to the defendant.

The plaintiff's lawyer, Jana Barnett, represented Manessta Beverly in a sex harassment and retaliation case against a Days Inn franchise and its management company. During discovery, Barnett conducted an *ex parte* interview of Debbie Richardson, an administrative assistant at the Days Inn. The district court disqualified Barnett for conducting the interview, finding that she violated Pennsylvania Rules of Professional Conduct ("PRPC") Rules 4.2, 4.4, and 5.7.

The Third Circuit reversed, holding that Barnett did not violate Rule 4.2 because the administrative assistant was not a member of the organization with whom *ex parte* contact was forbidden. PRPC 4.2, like its counterparts ABA Model Rule 4.2 and Disciplinary Rule 7-104, prohibits *ex parte* communications between an attorney and a represented party regarding the subject matter of a representation. Where a party is an organization, PRPC 4.2 prohibits contact 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.

PRPC 4.2, cmt. 7.

Richardson did not consult with the Days Inn attorneys regarding the lawsuit, nor did her acts or omissions bind the company, and Days Inn conceded that she did not have any managerial responsibility. Therefore, the interview was not prohibited by rule 4.2.

Moreover, the Third Circuit held, even if the *ex parte* communication had been prohibited, Barnett should not have been disqualified because Days Inn was not prejudiced by the contact. All of the information she obtained through the interview was disclosed by Days Inn during the course of discovery. Absent some showing of prejudice, the circuit court held that "the draconian measure of disqualification was not warranted."

Without addressing whether Barnett violated Rule 4.4, the court held that disqualification under the rule, which prohibits obtaining evidence in a manner that violates the rights of third parties, was not justified absent a showing of prejudice. The court also found that Rule 3.7 (forbidding counsel from acting as an advocate in a matter in which they are a witness), was not grounds for disqualification because it was highly speculative that Barnett would be a witness and the rule allows for an exception when disqualification would result in substantial hardship to the client.

The *HORA* decision may signal a shift away from strict application of attorney disqualification for perceived ethics violations, and towards an equitable application that considers the degree of prejudice resulting from the attorneys' actions. Historically, disqualification has not been an uncommon sanction for similar conduct. *See, e.g., Hammond v. City of Junction City*, No. 04-3082, 2005 U.S. App. LEXIS 3557 (10th Cir. March 2, 2005) (unpublished decision). The Third Circuit's decision is consistent with other recent decisions affirming that parties are entitled to representation by counsel of their choice and that disqualification of counsel is only appropriate where prejudice exists. *See Macheca Transport Co. v. Philadelphia Indemnity Insurance Co.*, 463 F.3d 827, 833 (8th Cir. 2006) ("Because of the potential for abuse by opposing counsel, disqualification motions should be subjected to particularly strict scrutiny. A party's right to select its own counsel is an important public right and a vital freedom that should be preserved; the extreme measure of disqualifying a party's counsel of choice should be imposed only when absolutely necessary.") (internal citations omitted); *DelaRaba v. Suozzi*, CV 06-1109, 2006 U.S. Dist. LEXIS 92813 (E.D.N.Y. Nov. 17, 2006) (refusing to disqualify counsel where there was no showing of prejudice); *ORSO v. BAYER CORP.*, Case No. 04 C 0114 2006, U.S. Dist. LEXIS 73647 (N.D. Ill. Sept. 27, 2006) (finding that counsel's actions were "extremely troubling," but refusing to disqualify based on plaintiff's right to counsel of choice and absence of prejudice); *Muriel Siebert & Co., Inc. v. Intuit Inc.*, 8 N.Y.3d 506 (2007) (affirming reversal of counsel's disqualification where counsel did not seek privileged information and no privileged information was obtained).

Ethics Corner is a regular contribution by the Section's [Ethics and Professional Responsibility](#) Committee.

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