

NELA'S Ethics Survival Kit:
The Rules, Opinions & Decisions All NELA Members
Should Have At Their Fingertips:
Motions For Disqualification–Defense And Offense

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INTRODUCTION

This paper provides the ethical rules that are commonly addressed in motions for disqualification along with an analysis of several court decisions that interpret the ethical rules when ruling on the motions for disqualification.

REVIEW OF ATTORNEY-CLIENT PRIVILEGED OR CONFIDENTIAL DOCUMENTS

Lewis v. Capital One Services, Inc.,
2004 U.S. Dist. LEXIS 26978 (E.D. Va. 2004)

Attorney and his law firm were disqualified in this case allegedly for reviewing attorney-client privileged and confidential documents received from their client, Melanie Lewis. Lewis was an executive employee of Capital One's Human Resources department, and in this role she had access to documents that were attorney-client privileged and confidential. Capital One learned that Lewis possessed the attorney-client privileged and confidential documents because she returned them to the company immediately after filing her individual and class charge of gender discrimination with the EEOC. Attorney and his law firm also represented another Capital One employee, Jannon Pierce, in her individual and class claims against the company.

Generally regarding motions for disqualification, the Eastern District of Virginia stated as follows:

When a court is determining whether to disqualify counsel, the general rule is that the trial court should prevent even the appearance of impropriety, and resolve all doubts in favor of disqualification. The Fourth Circuit has explained that the court “is not to weigh the circumstances ‘with hair-splitting nicety’ but, in the proper exercise of its supervisory power over the members of the bar and with a view of preventing ‘the appearance of impropriety,’ it is to resolve all doubts in favor of disqualification.”

A party moving to disqualify opposing counsel bears a “high standard of proof” in light of an individual’s right to freely choose counsel. However, the right of a party to retain counsel of the party’s choosing must be balanced with “the Court’s duty to maintain the highest ethical standards of professional conduct to insure and preserve trust in the integrity of the bar.” Courts have warned, however, that the conflict must be “actual or likely” and not just conjectural.

(Citations omitted).

With respect to the attorney-client privilege, the District Court also stated that “[a]s a general rule, a company owns all privileged information and once an employee becomes adverse to the company, that employee’s access to the privileged communications ends.” Sandberg v. Virginia Bankshares, 979 F.2d 332, 351 (4th Cir. 1992). The District Court also stated that “the attorney-client privilege only protects disclosure of communications; but does not protect disclosure of the underlying facts by those who communicated with their attorney.” Upjohn Co. v. United States, 449 U.S. 383, 395-396 (1981).

Practice tips from this case:

1. If you come to possess employer documents that are attorney-client privileged, protected by the work product doctrine, or are otherwise confidential, you should consider carefully what to do with these documents before reviewing them. It is likely that you will be required to return the documents. Of course, this applies to paper copies of documents and those in electronic format as well.
2. Even if your alleged behavior does not violate any rules of professional conduct applicable to attorneys who practice in your jurisdiction, the court may still grant the motion for disqualification. The rules of professional conduct “provide a framework for the ethical practice of law” and do not “govern or affect judicial application of either the attorney-client or work product privilege.” Preamble to the Virginia Code of Professional Responsibility.
3. You should consider challenging whether the documents in question are protected by the attorney-client privilege, work product doctrine, or are otherwise confidential. On a related

note, it may be appropriate for your client to share with you facts disclosed in communications that are protected by the attorney-client privilege or work product doctrine, even though she may not share the communications themselves.

ABA MODEL RULE 1.7 - CONFLICT OF INTEREST: CURRENT CLIENTS

Rule 1.7

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

ABA MODEL RULE 1.9 - DUTIES TO FORMER CLIENTS

Rule 1.9

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

- (1) whose interests are materially adverse to that person; and
 - (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;
- unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

- (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

ABA MODEL RULE 1.10 - IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

Rule 1.10

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based upon a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a), or (b), and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefore;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

FORMER CLIENT; IMPUTED DISQUALIFICATION

National Union Fire Ins. Co. v. Alticor, Inc.,
472 F.3d 436 (6th Cir. 2007).

Attorney worked for the Plunkett & Cooney law firm and represented the plaintiffs. Attorney left Plunkett & Cooney to work for the Wilson Young law firm, who represented the defendants. Plaintiff moved to disqualify the Wilson Young law firm on the basis of imputed disqualification pursuant Michigan Rules of Professional Conduct 1.9 and 1.10, which are similar but not identical to ABA Model Rules 1.9 and 1.10.

Initially, the Sixth Circuit disqualified Wilson Young based on MRPC 1.9(a) “because [Attorney] *himself* formerly represented [the plaintiff] in this very matter,” and because, under MRPC 1.10(a), the Wilson Young law firm was therefore disqualified as well, with no opportunity for screening Attorney from participation in the matter.

Because the Michigan Supreme Court amended MRPC 1.10(a), the Sixth Circuit vacated its original disqualification order and granted the plaintiff’s motion for disqualification on different grounds. The amendment required the Sixth Circuit to ensure that the law firm’s conduct was appropriate under MRPC 1.10(b), which states that, under these circumstances, the Wilson Young law firm is disqualified unless (1) the disqualified lawyer is screened from the matter and does not receive any fee from the matter, and (2) “written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.” The Sixth Circuit ultimately disqualified Wilson Young because the law firm had not notified the Court in writing of Attorney’s job change from Plunkett & Cooney to Wilson Young or Attorney’s former representation of the plaintiff in this matter.

Practice tips from this case:

1. Carefully review and learn the rules of professional conduct that apply in the jurisdiction(s) in which you practice as they differ from jurisdiction to jurisdiction.
 2. If you are considering making a job change or hiring another attorney to work with your firm, review and analyze these conflict of interest rules and potential disqualification issues as a part of your decision making process.
 3. Pay attention to who is employed with opposing counsel law firms to see if there are any conflict of interest/disqualification issues to raise with opposing counsel and before the tribunal.
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IMPUTATION OF CONFLICT OF INTEREST; OF COUNSEL ATTORNEY

Hempstead Video, Inc. v. Incorporated Village of Valley Stream,
409 F.3d 127 (2nd Cir. 2005)

Valley Stream was represented by the law firm of Jaspan Schlesinger Hoffman ("Jaspan"). Attorney was of counsel to Jaspan because he was in the process of retiring, and he was transitioning many of his cases to Jaspan. As an individual attorney, Attorney represented Hempstead Video and its owner Alessandria in defense of a pregnancy discrimination claim brought by a former employee. Hempstead Video moved to disqualify Jaspan from representing Valley Stream.

Generally regarding motions for disqualification, the Second Circuit stated as follows:

The authority of federal courts to disqualify attorneys derives from their inherent power to "preserve the integrity of the adversary process." In exercising this power, we have attempted to balance "a client's right freely to choose his counsel" against "the need to maintain the highest standards of the profession." Although our decisions on disqualification motions often benefit from guidance offered by the American Bar Association (ABA) and state disciplinary rules, such rules merely provide general guidance and not every violation of a disciplinary rule will necessarily lead to disqualification (disqualification is only warranted where "an attorney's conduct tends to taint the underlying trial," because other ethical violations can be left to federal and state disciplinary mechanisms).

One recognized form of taint arises when an attorney places himself in a position where he could use a client's privileged information against that client. The standard for disqualification varies depending on whether the representation is concurrent or successive. In cases of concurrent representation, we have ruled it is "prima facie improper" for an attorney to simultaneously represent a client and another party with interests directly adverse to that client. The attorney "must be prepared to show, at the very least, that there will be no actual or *apparent* conflict in loyalties or diminution in the vigor of his representation." In cases of successive representation, we have held that an attorney may be disqualified if:

- (1) the moving party is a former client of the adverse party's counsel;
- (2) there is a substantial relationship between the subject matter of the counsel's prior representation of the moving party and the issues in the present lawsuit; and
- (3) the attorney whose disqualification is sought had access to, or was likely to have had access to, relevant privileged information in the course of his prior representation of the client.

An attorney's conflicts are ordinarily imputed to his firm based on the presumption that "associated" attorneys share client confidences.

(Citations omitted).

The Court is required to determine whether the attorney is associated with the law firm; if she is, there is a rebuttable presumption that client confidences were shared between the law firm and the attorney. Then, in order to defeat a disqualification motion, the attorney and law firm must rebut the presumption that client confidences were shared.

The Second Circuit considered and rejected a per se rule that all of counsel attorneys and their law firms have an imputed conflict of interest under these circumstances. Rather, the Second Circuit stated as follows:

We believe the better approach for deciding whether to impute an "of counsel" attorney's conflict to his firm for purposes of ordering disqualification in a suit in federal court is to examine the substance of the relationship under review and the procedures in place. The closer and broader the affiliation of an "of counsel" attorney with the firm, and the greater the likelihood that operating procedures adopted may permit one to become privy, whether intentionally or unintentionally, to the pertinent client confidences of the other, the more appropriate will be a rebuttable imputation of the conflict of one to the other. Conversely, the more narrowly limited the relationship between the "of counsel" attorney and the firm, and the more secure and effective the isolation of nonshared matters, the less appropriate imputation will be. Imputation is not always necessary to preserve high standards of professional conduct. Furthermore, imputation might well interfere with a party's entitlement to choose counsel and create opportunities for abusive disqualification motions.

...

We agree with the magistrate judge that [Attorney's] relationship with Jaspan was too attenuated and too remote from the matter in question to attribute [Attorney's] potential conflict to the firm. [Attorney] became "of counsel" for the limited purpose of providing transitional services for several selected clients. He continued representing all his other clients, including HV and Alessandria, in his independent capacity. Moreover, the Jaspan firm had no access to the confidences of [Attorney's] private clients. [Attorney] maintained separate files for those clients in his private office, and Jaspan did not have access to the files. It is undisputed that Alessandria never discussed the present case with [Attorney], and [Attorney] never discussed the details of either the present case or the EEOC case with anyone at Jaspan. As soon as Jaspan learned of the potential conflict, it instructed [Attorney] not to discuss the EEOC case with anyone at the firm and to continue maintaining a separate file.

Consequently, the Second Circuit upheld the magistrate order denying Hempstead Video's motion to

disqualify the Jaspan law firm from representing Valley Stream.

Practice tips from this case:

1. An order denying a motion for disqualification is not immediately appealable. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981).
 2. Carefully review and analyze binding precedent regarding the conflict of interest issues. In Hempstead Video, the Second Circuit discussed and rejected opinions from other jurisdictions on similar conflict of interest issues, thereby demonstrating that different jurisdictions address these issues very differently.
 3. Again, if you are considering making a job change or hiring another attorney to work with your firm, review and analyze these conflict of interest rules and potential disqualification issues as a part of your decision making process.
 4. And again, pay attention to who is employed with opposing counsel law firms to determine if there are any conflict of interest/disqualification issues for you to raise with opposing counsel and before the tribunal.
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REPRESENTING MULTIPLE CLIENTS; CONFLICT WAIVER; SAME TREATMENT FOR LAW FIRMS AS FOR INDIVIDUAL ATTORNEY; APPEARANCE OF IMPROPRIETY

Bayshore Ford Truck Sales, Inc. v. Ford Motor Co.,
380 F.3d 1331 (11th Cir. 2004)

Several Ford dealerships (“the dealerships”) sued Ford Motor Company (“Ford”) for breach of contract. The dealerships also moved to disqualify Ford’s local counsel, Sutherland, Asbill & Brennan (“Sutherland”), from representing Ford in the matter because Attorney, who had joined Sutherland during 1998 as a lateral partner, represented one of the dealers, Peach State Ford Truck Sales, Inc., and its owner, and brought these clients with him to Sutherland. Sutherland had represented Ford for more than 30 years, and, therefore, Sutherland represented Ford on this matter after it was filed on July 1, 1999. The potential conflict of interest was discovered, Peach State and its owner declined to waive any conflict of interest, and Sutherland released Peach State and its owner as clients during November 1999.

The district court denied the disqualification motion because Sutherland had promptly withdrawn from representing Peach State and its owner, and because “no confidential information about Peach State was communicated to Ford’s litigation counsel.” The district court required Sutherland to set up a Chinese Wall preventing information to be communicated to the attorneys representing Ford regarding Peach State and its owner.

The Eleventh Circuit also considered the issue of appearance of impropriety:

The Dealers argue that Sutherland's continued representation of Ford also created the appearance of impropriety, a situation which justified disqualification. While it is true that proof of actual impropriety is not demanded before disqualifying counsel under this theory, "there must be at least a reasonable possibility that some specifically identifiable impropriety did in fact occur." *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976) (discussing appearance of impropriety as set forth in Canon 9 of the Code of Professional Responsibility); *see also Waters v. Kemp*, 845 F.2d 260, 266 n.13 (11th Cir. 1988) (noting the Code's replacement by the Model Rules of Professional Conduct but reiterating the *Woods* test for finding appearance of impropriety). The Dealers have not alleged a reasonable probability that any identifiable impropriety may have occurred; on the contrary, the Dealers state that "we will never know whether or how Ford benefitted and Peach State suffered as a result of Sutherland, Asbill continuing as Ford's counsel against its client Peach State." Appellants' Brief, at 14. Further, while the Dealers argue that Sutherland was in possession of information about Peach State's ownership, operation of dealership, tax matters, and the Reynolds' estate planning matters, the Dealers only posit that this information was worthwhile as impinging on matters of credibility. The dealers do not appear to allege that any information in [Attorney's] possession would have given Sutherland insight into the breach of contract claim. Further, corporate and estate matters are not the same subject matter as breach of contract. *Cf. Crawford W. Long Memorial Hosp. of Emory University v. Yerby*, 258 Ga. 720, 373 S.E.2d 749 (1988) (finding motion to dismiss for appearance of impartiality should have been granted where attorney sought to bring tort claim against very hospital he had previously defended against the same claim, and representation grew out of an event which occurred during time of representation of former client).

The Eleventh Circuit affirmed the district court's order denying the dealerships' motion to disqualify the Sutherland law firm.

Practice tips from this case:

1. The appellate court reviews the district court's findings of fact for clear error and reviews *de novo* the district court's application of ethical standards.
 2. If opposing counsel files a disqualification motion against you, capitalize on the cases that allow attorneys or law firms who represent corporate clients to continue their representation of one of the corporate clients when a conflict of interest is alleged.
 3. Focus on the appearance of impropriety issue, both when considering whether your own conduct is appropriate and whether to file a disqualification motion against opposing counsel.
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ABA MODEL RULE 3.7 - LAWYER AS WITNESS

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
- (1) the testimony relates to an uncontested issue;
 - (2) the testimony relates to the nature and value of legal services rendered in the case; or
 - (3) disqualification of the lawyer would work substantial hardship on the client.
- (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

LAWYER WITNESS

Muncy v. City of Dallas,
335 F.3d 394 (5th Cir. 2003).

City employees sued the City of Dallas regarding demotions they received. Because certain city attorneys might be called as witnesses in the case, the city attorneys moved to withdraw as counsel of record. The district court granted the motion. The city employees moved to bar the city attorneys who had withdrawn from participating in the case in any fashion, which the district court granted in part. The city attorneys appealed the ruling that they were prohibited from any participation in the case.

The Fifth Circuit addressed the difference between the district court's ruling on a motion to withdraw and ruling on a motion for disqualification:

Thus, the district court understood its ruling on the motion to bar to be an enforcement of its early ruling withdrawing the CAO Attorneys. Our analysis here is distinguished from that which would be applicable in the context of a motion to disqualify. **Were this an instance in which the district court disqualified a party's counsel of choice, ethical rules of conduct would govern the court's discretion to limit a party's right to the counsel of his choice.** Here, however, the party in question moved the court to withdraw his counsel, and therefore no finding of disqualification was required for the attorney to be removed from the case. We note further that although it might have, the motion to withdraw fails to specify that the CAO Attorneys wished to be withdrawn from representation, but not from participation, in the case. Instead, the motion indicates only that the CAO Attorneys would be withdrawn as counsel of record. Moreover, it is not a clearly erroneous conclusion to surmise that attorneys who have been voluntarily withdrawn as counsel of record from a case are similarly withdrawn altogether from the case.

(Emphasis added). The Fifth Circuit affirmed the district court's ruling on the motion to withdraw/motion to bar, stating that it did "not constitute an abuse of discretion."

Practice tips from this case:

1. A party's right to counsel of her choice is of the utmost importance when considering motions for disqualification on any issue.
 2. The Fifth Circuit discussed the applicability of Texas Disciplinary Rules of Professional Conduct 3.08(a) to this matter and stated that "Rule 3.08(a) governs the conduct of Texas attorneys, not the conditions under which a district court may bar participation by an attorney." ("Rule 3.08(a) . . . provides that attorneys who may be called to testify are barred from representation before the Court, but not from participation in the case.") Consequently, you must be aware of and comply with the rules governing your conduct as an attorney and the law on disqualification in your jurisdiction.
 3. The city employees had moved to ban the entire city attorney's office from representing the city on this matter. Of course, the rules and precedent that address attorney disqualification do not apply in the same manner to a city attorney's office or some other government agency.
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ABA MODEL RULE 4.2 - COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

Rule 4.2 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.

ABA MODEL RULE 4.2 - COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL – COMMENT

Rule 4.2

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[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. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of

obtaining the consent of counsel by closing eyes to the obvious.
[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.

REVERSAL OF DISQUALIFICATION UNDER RULE 4.2

Equal Employment Opportunity Commission v. Hora, Inc.,
239 Fed. Appx. 728 (3rd Cir. 2007).

Attorney was disqualified from representing a plaintiff in a sexual harassment matter based on her "allegedly improper contact with another HORA employee, Debbie Richardson." The Third Circuit reversed the disqualification order.

The primary issue involved was Rule 4.2 of the Pennsylvania Rules of Professional Conduct and comment 7 thereto, which are identical to ABA Model Rule 4.2 and its Comment 7. Since Richardson was an administrative assistant whose conduct did not fall within the categories addressed in Comment 7, the Third Circuit found that it was appropriate for Attorney to communicate with Richardson about the subject of the representation.

The Third Circuit also discussed that disqualification of an attorney is draconian:

Moreover, even if Richardson were covered by Rule 4.2, the district court did not indicate how Defendants were prejudiced by [Attorney's] communications with Richardson. See *Univ. Patents*, 737 F. Supp. at 329 (stating that, "[i]n determining the proper sanction or remedy [in the case of a Rule 4.2 violation], the court must consider the client's right to be represented by the counsel of his choice, as well as the opposing party's right to prepare and try its case without prejudice," and concluding that there was "not sufficient evidence . . . to conclude that plaintiff has been so severely prejudiced that the draconian measure of disqualification of counsel" was warranted) (internal quotations omitted). Defendants conceded at the hearing on the motion to disqualify [Attorney] that all of the information that [Attorney] received from Richardson was disclosed during discovery. Because Defendants accordingly were not prejudiced by [Attorney's] communications with Richardson, the draconian measure of disqualification was not warranted.

Practice tips from this case:

1. Consider obtaining an advisory opinion from the court regarding *ex parte* communications with current employees of the employer.
2. Research your judge's prior rulings on Rule 4.2 issues.

MAGISTRATE JUDGE ORDER REGARDING DISQUALIFICATION - PUTATIVE CLASS MEMBER WHO WAS MANAGER FOR DEFENDANT CONTACTED PLAINTIFFS' COUNSEL

Hammond v. City of Junction City, KS,
167 F. Supp.2d 1271 (D. Kan. 2001).

Attorneys represented Plaintiff Hammond on individual and class charges of race discrimination against the City of Junction City, Kansas ("the City"). During this representation, the Director of Human Resources for the City, Al Hope, Sr. ("Hope"), contacted Attorneys to have them represent him on his claims of race discrimination as well. Attorneys communicated with Hope, and Hope retained Attorneys to represent him.

The City moved to disqualify attorneys from representing Hammond on his individual and class claims because of the communications that occurred between Attorneys and Hope. The Magistrate Judge granted the motion for disqualification because he determined that Attorneys had had improper *ex parte* contacts with Hope under Kansas Rule of Professional Conduct 4.2 (which is substantially similar to ABA Model Rule 4.2) and that there was no exception to the applicability of Rule 4.2 in this case.

Quoting Biocore Med. Techs., Inc. v. Khosrowshahi, 181 F.R.D. 660, 664 (D. Kan. 1998) (citations and quotations omitted), the Court outlined the following standard on the motion for disqualification:

The Court has the power to disqualify counsel at its discretion for violations of professional standards of ethics. Ethical violations do not automatically trigger disqualification. Because disqualification affects more than merely the attorney in question, the Court must satisfy itself that this blunt remedy serves the purposes behind the ethical rule in question.

The Court must determine a motion to disqualify counsel by measuring the facts of the particular case. The moving party must show proof that is more than mere speculation and sustains a reasonable inference of a violation. The essential issue is whether the alleged misconduct taints the lawsuit. The Court should not disqualify unless the offending attorney's conduct threatens to taint the underlying trial with a serious ethical violation. Because the interests to be protected are critical to the judicial system, the Court should resolve doubts in favor of disqualification. The Court must balance several factors, however, including society's interest in ethical conduct, [a party's] right to choose their counsel, and the hardship which disqualification would impose on the parties and the entire judicial process.

Attorneys opposed the motion for disqualification on several bases:

1. Attorneys argued that they and Hope did not communicate “about the subject of the representation.” The Court stated that the subject of the representation includes anything to do with the litigation process. The Court found that since Attorneys spoke with Hope regarding his role in the production of documents in the Hammond matter, the City’s shredding of documents that were related to the Hammond matter, the fact that there were other responsive documents that the City had not yet produced in the Hammond matter, and the race discrimination claims of other employees of the City, Attorneys and Hope had communicated “about the subject of the representation.”

2. Attorneys argued that Hope was not within the scope of Rule 4.2. The Court concluded that Hope was within the scope of Rule 4.2 because he had managerial responsibility and because he had speaking authority that could bind the City.

3. Attorneys argued that there should be an exception to Rule 4.2 based on the fact that Hope was a member of the putative class in the Hammond matter. On this issue, the Court stated that “[i]t is fairly well-settled that *prior to* class certification, no attorney-client relationship exists between class counsel and the putative class members” and that “once a class is certified, the ethical rules governing communications apply because each class member is deemed a client of class counsel.” (Citations omitted). Consequently, the Court found that there was no applicable exception to Rule 4.2 based on the fact that Hope was a putative class member in the Hammond matter.

4. Attorneys argued that there should be an exception to Rule 4.2 based on the fact that Hope had retained Attorneys to represent him on an individual basis. The Court stated as follows:

But that relationship was only created as a result of the improper *ex parte* communications with Mr. Hope. From the *very first conversation* with Mr. Hope, [Attorney] knew, or at the very least, should have known, that Mr. Hope had managerial responsibilities on behalf of the City that rendered him off-limits. At that point, no further *ex parte* communications should have ensued. Had no further *ex parte* communications taken place, no attorney-client relationship would have been created.

Therefore, the Court found that there was no exception to Rule 4.2 on this basis.

5. Attorneys argued that there should be an exception to Rule 4.2 because Hope initiated contact with them. The Court rejected this argument as well.

The Court disqualified Attorneys from representing Hammond on his individual and class race discrimination claims, and also prohibited Attorneys from representing anyone else on claims based on the class allegations asserted in the Hammond matter. Attorneys were allowed to continue to represent Hope in an individual action against the City that was separate from the Hammond class allegations.

The Court also took “other actions to lessen the prejudicial effect and the taint to the lawsuit that the ex parte communications ha[d] created.” These actions included the following:

(a) The City was required to provide Attorneys with a list of employees “who have been employed by the City at any time during the pendency of this lawsuit who the City contends fall within the scope of Rule 4.2,” not including Hope.

(b) Attorney was required to “file and serve an affidavit indicating whether she [] had any ex parte contact with any of the employees identified on the Rule 4.2 List. If she [] had any such ex parte contact, her affidavit [was required to] identify the employee(s), give the date(s) of the communication, and provide a brief explanation of the communication(s).”

(c) Attorney was required to “produce to the Court for *in camera* inspection the originals of any affidavits or statements of any employee identified in the Rule 4.2 List that she or her firm ha[d] taken or possesse[d]. If no such affidavits or statements exist[ed], Attorneys’ affidavit [was required to] so state.”

(d) Hammond and Attorneys were required to “produce to the Court for *in camera* inspection the originals of any statements or affidavits of Al Hope, Sr., that Plaintiff’s counsel or firm ha[d] taken or possesse[d].”

(e) Hammond and Attorneys were required to “produce to the Court for *in camera* inspection the originals of any notes, recordings, memoranda, correspondence or other documents that discuss[ed] or relate[d] to, or that were generated during, any discussions or meetings between Al Hope, Sr., and Plaintiff’s counsel, and the originals of any documents that Al Hope, Sr., [] provided to Plaintiff’s counsel.”

(f) Attorneys were required to “file and serve an affidavit stating whether they directed or otherwise caused Plaintiff to obtain any statements or affidavits from any employees identified on the Rule 4.2 List, and [were required to] identify each employee from whom any such statement or affidavit was obtained.”

(g) “[T]he Court shall exclude from evidence in this case any statements, affidavits, recordings, documents, or other evidentiary materials that could be introduced at trial, which were generated or created as a result of Plaintiff’s counsel’s ex parte contacts with Al Hope, Sr.”

(h) Attorneys “are prohibited from disclosing to any individual or party, without prior consent of the Court, the following information and documents, except in the course of representing Mr. Hope in connection with his *individual* claims: (i) information regarding any discussions or meetings they had with Al Hope, Sr., including the contents of any such discussions or meetings and any information they learned or obtained during the course of any such discussions or meetings; and (ii) to the extent they exist, any notes, tape recordings, memoranda, or other documents or recordings discussing, relating to, or generated in, any such discussions or meetings.”

(i) The Court ordered that a copy of this Order be sent to the Kansas Disciplinary

Administrator.

(j) The Court granted the City's request for sanctions in the amount of \$5,000 in a subsequent order. Hammond v. City of Junction City, KS, 2002 U.S. Dist. LEXIS 5645 (D. Kan. 2002).

The Tenth Circuit ultimately affirmed the Magistrate Judge's orders regarding the Rule 4.2 violation and the sanctions imposed. Hammond v. City of Junction City, KS, 126 Fed. Appx. 886 (10th Cir. 2005).

Practice tips from this case:

1. Consider asking opposing counsel or the court for permission to speak with the employee who may fall within the scope of Rule 4.2.
 2. It may be appropriate to conduct a limited interview of the employee to determine her managerial status. Do not proceed beyond those questions if you have any concern at all that the employee falls within Rule 4.2.
 3. The duty of zealous advocacy is tempered by the obligation not to conduct *ex parte* communications that run afoul of Rule 4.2.
 4. "[A] disqualification order is not immediately appealable, and may only be appealed, and reviewed, after trial on the merits." Hammond v. City of Junction City, KS, 2003 U.S. App. LEXIS 25862 (10th Cir. 2003).
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