

**FOR PUBLICATION & UPLOAD  
IN THE DISTRICT COURT OF THE VIRGIN ISLANDS**

**DIVISION OF SAINT CROIX**

KARIMA GORDON,

Plaintiff,

Civ. No. 2001/132

v.

BECHTEL INTERNATIONAL,

Defendant

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**ORDER DENYING DEFENDANT'S MOTION  
TO DISQUALIFY PLAINTIFF'S COUNSEL**

THIS MATTER is before the Court on defendant Bechtel International's [BINT] motion to disqualify Lee J. Rohn of the Law Office of Lee J. Rohn [Rohn], plaintiff's counsel in this matter. Plaintiff filed opposition in response to the motion and BINT replied to such opposition.

**FACTUAL BACKGROUND**

On February 8, 2001, Rohn wrote a letter to Patrick Casey, Human Relations Manager of BINT, informing him that she had been contacted by plaintiff Karima Gordon, an employee of BINT, regarding charges of sexual harassment at the HOVENSA refinery on St. Croix. On February 21, 2001, Rohn again wrote to Mr. Casey stating that she had been contacted by Deon Malone on February 8, 2001, and that Malone complained of retaliatory action against him for his role in reporting Gordon's allegations of sexual harassment to the management of BINT. Rohn described Malone as Gordon's "direct supervisor." The day following his

contact with Rohn, Malone was suspended for two weeks.<sup>1</sup>

BINT's counsel responded by letter dated March 1, 2001, voicing concern about the potential conflict presented by Rohn's simultaneous representation of Gordon and Malone. Further correspondence ensued and on August 17, 2001, Rohn filed Gordon's complaint for employment discrimination against Bechtel. On August 15, 2001, Rohn filed Malone's employment claims against Bechtel (D.Ct. StX Civ. 01/142). Rohn currently represents both Gordon and Malone.

In its motion to disqualify Rohn, filed on September 4, 2001, BINT argues that Rohn is in violation of Rules 4.2 and 1.7 of the ABA Model Rules of Professional Conduct by virtue of her communication with Malone while he was still an employee of BINT.<sup>2</sup> It argues that Malone was a managerial employee with the authority to bind the corporation. BINT also argues that the concurrent representation presents a conflict of interest. BINT further argues that as a result of Rohn's advice to Gordon regarding Gordon's refusal to cooperate with BINT's internal investigation of her allegations of sexual harassment, Rohn may be called as a fact witness, in violation of Rule 3.7.

Plaintiff counters that disqualification is not warranted because neither Rule 4.2 nor 1.7 are implicated by Rohn's contact with Malone and the statement that

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<sup>1</sup>Malone's suspension was based, ostensibly, on his unpermitted use of the company's vehicle.

<sup>2</sup>Malone worked with BINT until July 2001.

Rohn may be called as a “necessary witness” is without merit.

## DISCUSSION

This court is faced with the issue of disqualification of an attorney for *ex parte* communication with a current employee of an adverse corporation and simultaneous representation of an employee and that employee’s supervisor. BINT argues that Rohn violated ABA Model Rule 4.2 when she communicated with Malone while still an employee of BINT.

Rule 4.2 of the ABA Model Rules of Professional Conduct states:

### ***Communication with Persons Represented by Counsel***

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 by law to do so.

In the case of an organization, the Rule prohibits communication with persons having managerial responsibility on behalf of the corporation, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of liability or whose statement may constitute an admission on the part of the organization. Comment 4. The purpose of the rule is to prevent lawyers from taking advantage of uncounseled laypersons by using their superior skills to elicit unwise statements or privileged information from them. *Michaels v. Woodland*, 988 F.Supp. 468, 470 (D.N.J. 1997) quoting *Goff v. Wheaton Industries*, 145 F.R.D. 351, 354 (D.N.J. 1992). On the other hand,

courts caution against using the no-contact rule to impose “automatic representation” designed to deter investigation into the facts of the case. *DiOssi v. Edison*, 583 A.2d 1343, 1344 (Sup.Ct. Del. 1990). Imputation of liability should be examined on a case by case basis, and courts are cautioned against claims of imputation which are hypothetical and remote. *Curley v. Cumberland Farms*, 134 F.R.D. 77 (D.N.J. 1991).

BINT maintains that Malone has managerial responsibility and, thus, his conduct may subject BINT to liability. The term “managerial responsibility” has generated a great deal of confusion in the circuits.<sup>3</sup> Application of the rule depends on how much authority the person has. This Court adopts the definitions contained in the line of cases which seeks to link managerial responsibility with the ability to exercise significant individual judgment outside of established policies and guidelines. *Carter-Herman v. City of Philadelphia*, 897 F.Supp. 899, 903-4 (E.D. Pa. 1995). Accordingly, a managerial employee must have the “right to speak for, and bind, the corporation.” *Wright v. Group Health Hospital*, 691 P.2d 564, 569 (Sup.Ct. Wash. 1984). In *Johnson v. Cadillac Plastic Group, Inc.*, 930 F.Supp. 1437, 1442 (D.Colo. 1996), the court defined such responsibility as the “authority to commit the organization to a position regarding the subject matter of

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<sup>3</sup>In attempting to clear up the ambiguity presented by the term “managerial responsibility” the courts in New Jersey have revised the ABA Rule Comment 4 to prohibit communication with current employees in “the litigation control group”, which is interpreted to mean those employees of the organization responsible for management of the case or matter in question”; and employees “whose conduct, in and of itself, establishes the corporation's liability.”

representation.” Therefore, where the individual’s work is limited by departmental rules and regulations, even though he or she may supervise others, that individual is not considered to have “managerial responsibility.” *Carter-Herman*, 897 F.Supp. at 904.

To be covered by the rule, Malone must have been an employee possessing the legal authority to bind BINT in a legal evidentiary sense; i.e., a "person authorized by [BINT] to make a statement concerning the subject" of Gordon’s claims. Fed.R.Evid. 801(d)(2)(C). *Palmer v. Pioneer Hotel & Casino*, 19 F.Supp.2d 1157,1165 (D.Nev. 1998). The rationale is premised on the likelihood that the corporation’s attorney would have spoken with such a person, whose statements would constitute an admission. *Palmer*, 19 F.Supp.2d. at 1163.

In his affidavit, Malone avers that, as “Operator Equipment Foreman”, he exercised some supervisory duties with regard to Gordon. He states he would sometimes tell her where to place a load; receive reports regarding maintenance of the trucks she drove; and give her rides to the gate at the end of the work day. Gordon avers that Malone sometimes assigned her work; and as equipment supervisor, she had received training from him on at least one occasion.

Although BINT has the burden of establishing that Malone should come within the ambit of 4.2, it has not explained Malone’s authority within the BINT heirarchy. BINT appears to rely on Malone’s purported “admission” that he was

plaintiff's "direct supervisor". Despite BINT's adoption of this characterization, it does not establish how Malone's position afforded him the "authority to commit the organization to a position regarding the subject matter of representation."

Additionally, BINT has not asserted that any legal strategy regarding the Gordon matter was discussed with Malone or that Malone possesses privileged information which can be divulged to Rohn. It appears from the facts that Malone contacted Rohn on or about February 8, 2001, after he was threatened with suspension in connection with the complaints of Karima Gordon. In her letter immediately following such contact, Rohn informed BINT, directly, of her representation of Malone. BINT responded on March 1, 2001, through its attorney, regarding what it perceived as a conflict in representation.<sup>4</sup> In any event, if Malone did nothing more than supply BINT management with the facts of the Gordon matter, those facts are not privileged. See, *Marinnie v. Nabisco Brands Inc.*, 1993 WL 267453 \* 2 (E.D. Pa. July 12, 1993). Malone's position appears to be similar to a foreman who supervises a small group of workers and receives instructions regarding assignments from a superior. See *Carter-Herman*, 897

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<sup>4</sup>Plaintiff argues that 4.2 was not implicated because no formal action had commenced when Rohn was initially contacted by Malone. The commentary to the rules establish that a formal action need not have been initiated for the rule to apply. See, *United States v. Jamil*, 546 F.Supp. 646 (E.D.N.Y. 1982) rev'd on other grounds 707 F.2d 638 (2d Cir. 1983). However, it does require the attorney to have "actual knowledge of representation" and such knowledge may be inferred from the circumstances. *Annotated Model Rules of Professional Conduct*, 3d ed. (1996). Such actual knowledge means knowledge that the person is represented regarding the subject of the conversation.

F.Supp. at 903-904. Accordingly, he does not possess the degree of authority which would make him one of the persons covered by the rule. The Court is not convinced that Malone's acts in connection with the complaints made by Gordon could be imputed to BINT.

BINT argues that the court's decision in *Jones v. Daily News, et. al.*, 1999/138, controls the outcome in this case. In *Jones*, this Court found that an attorney's simultaneous representation of an employee suing for wrongful termination and the supervisor who actually did the firing, warranted disqualification of the attorney.<sup>5</sup> In that case, the actual letter of termination was penned by the same supervisor who later also became a client. The Court found that the supervisor "had participated in confidential communications concerning Gross with Daily News' attorney and Executive Editor Lowe Davis." The situation was deemed untenable, as a violation of 4.2.

The situation in *Jones* differs from this case in that the role of the supervisor was much clearer and there was little doubt that the supervisor/manager had speaking authority and could bind the corporation. The court only allowed the representation to continue after the attorney withdrew from the case involving the lower level employee. This court also found that there was no rule against the former supervisor speaking to his own attorney regarding his

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<sup>5</sup>On reconsideration the order was reversed. Such reconsideration was premised upon Rohn terminating her representation of Gross.

case.

Malone retained Rohn after he was threatened with suspension and before BINT had engaged defense counsel with respect to the Gordon matter. Although Malone was aware of Gordon's complaints, BINT has not established that Malone discussed the issue with management or was present during any meetings in which BINT strategy was divulged. Indeed, although Malone remained an employee of BINT until July, it was clear from as early as February, that his interests were adverse to those of BINT. Under such circumstances, it is difficult to imagine that any confidential information was shared with him.

Disqualification being such a drastic remedy, more is required before a plaintiff is made to relinquish his or her attorney of choice. *Amatuzio v. Gandalf Systems*, 932 F.Supp. 113, 116 (D.N.J. 1996)(Because motions to disqualify are often brought for tactical reasons, they should be viewed with caution); *K-Mart v. Saldana*, 2001 WL 826107 (3d Cir. July 23, 2001) (Court's power to discipline attorneys must be exercised with restraint and discretion); *Carlyle Towers Condominium Assoc. v. Crossland*, 944 F.Supp. 341, 344-45 (D.N.J. 1996)(A party seeking disqualification of counsel carries a heavy burden); *McKenzie Construction v. St. Croix Storage Corp.*, 961 F.Supp. 857, 858 (D.V.I. 1997)(Attorney disqualification is a drastic measure because it destroys the attorney-client relationship by prohibiting a party from representation by counsel of

his or her choosing).

Unlike the parties in the *Jones* case, the interests of plaintiff Gordon and Malone do not appear to be adverse. Rule 4.2 does not prohibit an attorney from interviewing factual witnesses of another party. *McCallum v. CSX Transp. Inc.*, 149 F.R.D. 104 (M.D.N.C. 1993); *Cole v. Appalachian Power Co.*, 903 F.Supp. 975, 977 (D.W.Va. 1995)(ex parte interviews of opponent-corporation's employees who are "mere holders of factual information" permitted).

In his affidavit, Malone explains his role with respect to Gordon and states that Gordon reported incidences of sexual harassment to him and he reported them to upper management although he was not her immediate supervisor. He concedes that he may be a witness in the Gordon case, however, he believes he was retaliated against because of his perceived sympathy with Gordon. Plaintiff Gordon corroborates that statement by stating that she did report her complaints to Malone, although he was not her "day-to-day supervisor", but because she did not trust her immediate supervisor, Angel Linqvist. Thus, there appears to be no adversity between Malone and Gordon and Rohn's representation of them is not a violation of the ABA rules. This fact clearly distinguishes this case from the *Jones* case where the interests of Gross, the lower level employee were adverse to Jones, his supervisor.

### **Violation of Rule 3.7**

Next, BINT claims that Rohn should be disqualified because she advised Gordon not to cooperate with the BINT investigation, and may be called as a witness in that regard. ABA Rule 3.7 prohibits a lawyer from being an advocate in a trial where the lawyer is “likely to be a necessary witness.” In fact, one of the rationales for prohibiting the dual lawyer-witness situation in a contested proceeding is to prevent confusion by the trier of fact with regard to the separate roles of an advocate and a witness. That rationale is explained as follows:

“Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client. The opposing party has proper objection where the combination of roles may prejudice that party's right in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.”

*In the Matter of the Estate of Elizabeth B. Waters*, 647 A.2d 1091, 1097 (Sup. Ct. Del. 1994). However, “[w]here the party seeking disqualification is also the one wanting to call the attorney as a witness, the court 'must be especially sensitive to the potential for abuse.' ” *LeaseAmerica Corp. v. Stewart*, 876 P.2d 184, 191 (D.Kans. 1994). The party seeking disqualification must establish the necessity of the testimony from this particular witness. *Chappell v. Cosgrove*, 916 P.2d 836, 839 (N.M. 1996). This said, this court must now determine whether it is likely

that Rohn will be a “necessary witness” if she is allowed to remain as Malone’s lawyer.

In support of its argument that Rohn will be called as a witness, BINT merely states that Gordon did not cooperate with the investigation and Rohn failed to respond to correspondences regarding Gordon’s lack of cooperation, thus, making Rohn a “material witness”. To satisfy this Lawyer as Witness rule, BINT must show that the testimony to be elicited is material and cannot be obtained from any other source. *Kehrer v. Nationwide Insurance Co.*, 1994 WL 805877 (Pa. Ct. Com.Pl. Aug. 09, 1994). The rule applies only if the attorney is necessary; the opponent’s intention of calling the lawyer as a witness is not grounds for disqualification. *Purtle v. McAdams*, 879 S.W.2d 401 (Ark. 1994).

In any event, the rule only applies to trial and the attorney may continue to represent the client up to trial. Based on BINT’s representations, and because this matter is still in the initial stages with no discovery having been completed, this Court will suspend ruling on whether Rohn’s testimony is material or necessary herein. See, *George v. Wausau Ins. Co.*, 2000 WL 276915 (E.D.Pa., Mar. 13, 2000)(collecting cases); *Chapman Eng. v. Natural Gas Sales Co.*, 766 F.Supp. 949 (D.Kan. 1991). BINT may refile this motion if it becomes necessary.

## CONCLUSION

The Court is mindful of the strong concern in this circuit to respect a

litigant's choice of counsel. See, *Leonard v. University of Delaware*, 1997 WL 158280, \* 3 (D.Del. April 20, 1997). Courts are required to "preserve a balance, delicate though it may be, between an individual's right to his own freely chosen counsel and the need to maintain the highest ethical standards of professional responsibility." *McCarthy v. Southeast Pennsylvania Transportation Authority*, 772 A.2d 987 (Sup. Ct. Pa. 2001). This balance is essential if the public's trust in the integrity of the Bar is to be preserved. *Id.* When a violation is alleged, the overriding concern is not punishment of the attorney but, rather, protection of the litigants' right to a fair trial. *McCarthy*, 772 A.2d at 991. See also, *K-Mart v. Saldana*, 2001 WL 826107 (3d Cir. July 23, 2001).

The Court is troubled that, notwithstanding the applicable ethical rules, attorneys are willing to communicate with persons who may be represented by counsel. On the other hand, the fact that an organization has a general counsel does not prevent communication with all current employees. *In re Doe*, 876 F.Supp. 265 (M.D.Fla. 1993). Therefore, the Court takes this opportunity to remind all counsel to follow the procedures outlined in ABA Rule 4.3 before speaking to such an individual.

Now, therefore, it is hereby ORDERED AS FOLLOWS:

1. that the defendant BINT's motion to disqualify Lee J. Rohn is DENIED.
2. BINT may renew this motion at an appropriate time with regard to any

necessary testimony of Rohn at trial. Plaintiff is on notice thereof and must be prepared for such eventuality.

3. If BINT files a timely appeal of this order all proceedings shall remain in abeyance pending rule by the District Judge on such appeal.

DATED: December 28, 2001      ENTER:

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JEFFREY L. RESNICK  
U.S. MAGISTRATE JUDGE

A T T E S T:  
Wilfredo F. Morales, Clerk of Court  
by: \_\_\_\_\_  
Deputy Clerk

cc: K. Glenda Cameron, Esq.  
Francis J. D'Eramo, Esq.