UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

October 15, 2009

ALBERTO IZQUIERDO, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 09B00016
VICTORIA NURSING & REHABILITATION CENTER, Respondent.	)	

ORDER GRANTING MOTION TO RECONSIDER BUT DECLINING TO EXCLUDE REPRESENTATIVE

I. PROCEDURAL HISTORY

Alberto Izquierdo, a lawful permanent resident of the United States, filed a complaint against Victoria Nursing & Rehabilitation Center, Inc. (Victoria Nursing or the Center), in which he alleged that the Center failed to hire him as a Certified Nursing Assistant because of his Cuban citizenship and national origin, and that the Center refused to honor valid documents he presented to show his eligibility for employment in the United States. The Center filed an answer denying Izquierdo's allegations and raising, inter alia, defenses relating to timeliness. Because it is well settled that employment discrimination filing periods are generally subject to equitable doctrines, *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113-14 (2002), I issued an order giving Izquierdo an opportunity to show why his complaint should not be dismissed as untimely, and an opportunity for Victoria Nursing to respond. Briefing has been completed and the issue will be addressed in a separate order.

Izquierdo's complaint was accompanied by a letter from George M. Santana, J.D., seeking authorization to appear as a lay representative on behalf of the complainant pursuant to 28 C.F.R. § 68.33(c)(3) (2009). The letter said that the complainant Izquierdo is unfamiliar with administrative processes in this country and could not afford to pay an attorney. Santana said that his representation of the complainant would be provided pro bono, and that while he is not a member of the bar, he is a law school graduate, and he is familiar with the administrative

process. Santana's resume indicated that he had work experience with both agencies and courts. Victoria Nursing's answer made no response or objection to the request for authorization, and the representation was approved.

Although Victoria Nursing made no timely objection to Santana's request for authorization to act as a lay representative, it subsequently filed a Motion to Reconsider Representation Order, and now seeks to disqualify Santana from so acting. Izquierdo responded to the motion, and it is ripe for decision. The motion for reconsideration will be granted; however after reconsideration I decline, for the reasons stated herein, to disqualify Santana from acting as a lay representative in this matter.

II. STANDARDS APPLIED

A. Participation and Representation in OCAHO Proceedings

Rules applicable to this proceeding specifically permit the participation of a representative who is neither an attorney nor a law student. 28 C.F.R. § 68.33(c)(3). This is the provision pursuant to which Santana was given leave to participate as a lay representative. Grounds for denial of authority to appear under this provision include a finding that the individual does not possess the qualifications to represent others, is lacking in character or integrity, has engaged in unethical or improper professional conduct, or has engaged in an act involving moral turpitude. The authority for an administrative law judge to exclude or disqualify an attorney or representative is otherwise derived from OCAHO's rule 28 C.F.R. § 68.35(b), and from the authority of an adjudicator to supervise the conduct of persons appearing before the forum. *McNier v. San Francisco State Univ.*, 8 OCAHO no. 1034, 524, 532 (1999)[1]. This rule provides that,

> [t]he Administrative Law Judge may exclude from proceedings parties, witnesses, and their representatives for refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly and ethical conduct, failure to act in good faith, or violation of the prohibition against ex parte communications.

---

[1] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO" or on the website at (http://www.usdoj.gov/eoir/OcahoMain/ocahosibpage.htm#Published).

OCAHO adjudicators have not hesitated to exclude attorneys or representatives, even sua sponte, under appropriate circumstances. *Lee v. AT&T*, 7 OCAHO no. 924, 1, 5 (1997) (lay representative excluded for submitting repetitive and unresponsive filings, failing to comply with pre-hearing orders of the administrative law judge, and failing to attend pre-hearing conference). Such a harsh result is not lightly undertaken, however, and occurs only in the most egregious of circumstances. *See Hsieh v. PMC-Sierra, Inc.*, 9 OCAHO no. 1100, 41 (2003) (reprimanding but not excluding attorney, despite numerous instances of disobedience of orders, unsupported pleadings, frivolous assertions of privilege and other obstructions of discovery).

B. Motions to Disqualify an Opposing Party's Attorney or Representative

Because motions to disqualify an opposing party's counsel or representative are susceptible to use as procedural weapons for strategic or tactical advantage, they must be viewed with extreme caution. *Cf. Richardson-Merrill, Inc. v. Koller*, 472 U.S. 424, 441 (1985) ("the tactical use of attorney-misconduct disqualification motions is a deeply disturbing phenomenon in modern civil litigation") (Brennan, J., concurring). In recognition of their potential for abuse, such motions are subjected to strict scrutiny, and the moving party is held to a high standard of proof. *Santiglia v. Sun Microsystems, Inc.*, 9 OCAHO no. 1104, 4 (2004). Disqualification of a representative is an extraordinary remedy, to be used sparingly. *AlliedSignal Recovery Trust v. AlliedSignal Inc.*, 934 So. 2d 675, 678 (Fla. Dist. Ct. App. 2 2006). Caution must be exercised to be sure the motion is not used for purposes of harassment, *In re Employment Discrimination Litigation Against Alabama*, 453 F. Supp. 2d 1323, 1332 (M.D. Ala. 2001), and the burden of proving the grounds for disqualification falls on the proponent of the motion. *In re BellSouth Corp.*, 334 F.3d 941, 961 (11th Cir. 2003).

III. THE INSTANT MOTION

The Center's motion does not contend that Izquierdo's representative does not possess the qualifications to represent others, is lacking in character or integrity, has engaged in unethical or improper professional conduct, or has engaged in an act involving moral turpitude, any of the grounds for denial of authorization under rule 68.33(c)(3)(iii). Neither does it allege that he refused to comply with directions, used dilatory tactics, refused to adhere to reasonable standards of orderly and ethical conduct, failed to act in good faith, violated the prohibition against ex parte communications, or otherwise engaged in conduct prohibited by the rules of the forum as stated in rule 68.35(b). No violation of the forum's standards has been asserted as grounds for the motion, which is not, despite some snide comments, predicated upon any allegation of past misconduct.

Rather, the motion is anticipatory in nature: Victoria Nursing asserts that the foundation for its motion is the American Bar Association Model Rule 3.7, which has been codified in the Florida Rules of Professional Conduct as Rule 4-3.7, and which provides in relevant part:

(a) When Lawyer May Testify. A lawyer should not act as an advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client unless:

> (1) the testimony relates to an uncontested issue;
> (2) The testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
> (3) the testimony relates to the nature and value of legal services rendered in the case; or
> (4) disqualification of the lawyer would work substantial hardship on the client.

The Center argues that because Izquierdo's responses to discovery indicate that Santana has knowledge of the facts in this case, Santana is likely to be a witness in the matter and should therefore be precluded from acting as a representative because he does not come within any of the exceptions to Rule 4-3.7. The motion says further that Izquierdo should hire an attorney because "having to pay for advice and counsel is no hardship." The motion also appears to be suggesting, without expressly stating, that there is something suspect about the representation because Izquierdo and Santana are friends, or because their mothers are friends. It also poses in addition a question about the extent to which Izquierdo may have received advice from Santana before the representation was authorized.

IV. DISCUSSION

The applicability of the so-called lawyer-witness rule to administrative adjudications is the subject of considerable dispute, and there is a split of authority as to this question. *See generally* Arnold Rochvarg, *The Attorney as Advocate and Witness: Does the Prohibition of an Attorney Acting as Advocate and Witness at a Judicial Trial Also Apply in Administrative Adjudications?*, 26 J. Nat'l Ass'n of Admin. L. Judges 1 (2006). The instant motion neither acknowledges nor discusses this split of authority. For a short history of the rule and its rationales, see Jeffrey A. Van Detta, *Lawyers as Investigators: How Ellerth and Faragher Reveal a Crisis of Ethics and Professionalism Through Trial Counsel Disqualification and Waivers of Privilege in Workplace Harassment Cases*, 24 J. Legal Prof. 261, 272-285 (2000).

Assuming arguendo for purposes of this motion that the rules governing members of the Florida bar are appropriately applied to a lay representative in New York, the Center's motion will be denied as unsupported in law. First, the argument ignores the plain meaning of the rule's language as interpreted by the Florida courts construing the meaning of the term "at a trial," as well as in deciding when a witness is "necessary" within the meaning of the rule. Second, Victoria Nursing's conclusions that Izquierdo's representative is likely to be a witness at any hearing in this matter and that no hardship would result to Izquierdo from the exclusion of his representative amount to little more than speculation. Finally, the motion does not consider or even reference other applicable federal or OCAHO case law, which must be considered in ruling

on such a motion.

Florida courts have made clear that the term "at a trial," as used in the rule, means just that. The term thus does not encompass pre-trial or post-trial proceedings, and does not operate to preclude an attorney's participation in such proceedings. *See generally* J. Anthony McLain, *Lawyer-Witness Rule Not Applicable to Pre-Trial Phase of Litigation*, 61 Ala. Law. 131 (2000). Florida appellate courts routinely quash orders mistakenly disqualifying attorney-witnesses from participation in pre-trial and post-trial matters. *See, e.g.*, *Graves v. Lapi*, 834 So. 2d 359, 360 (Fla. Dist. Ct. App. 4 2003); *Cerillo v. Highley*, 797 So. 2d 1288, 1289 (Fla. Dist. Ct. App. 4 2001); *Columbo v. Puig*, 745 So. 2d 11-6, (Fla. Dist. Ct. App. 3 1999); *Fleitman v. McPherson*, 691 So. 2d 37, 38 (Fla. Dist. Ct. App. 1 1997) (disqualifying attorney-witness from participation in trial, but permitting participation up until and after trial). Accordingly, there would be no basis at this stage of the proceedings for disqualifying even a member of the Florida bar.

The Center's motion ignores as well the views of Florida courts as to the question of when a witness is "necessary" within the meaning of the rule. A necessary witness is one who is an "indispensable" witness or "central figure" in a case. *See Fleitman*, 691 So. 2d at 38. Thus when there is another witness who is available to testify to the same information, the disputed witness is not "necessary" within the meaning of the rule. *Ray v. Stuckey*, 491 So. 2d 1211 (Fla. Dist. Ct. App. 1 1986). The proponent of a motion to disqualify has the burden to prove that the witness is necessary, and that the proposed testimony is relevant, material, not cumulative and not obtainable elsewhere. Douglas R. Richmond, *Lawyers as Witnesses*, 36 N.M. L. Rev. 47, 72 (2006). *See also Hiatt v. Estate of Hiatt*, 837 So. 2d 1132, 1133 (Fla. Dist. Ct. App. 4 2003) (noting that where no evidence was offered, moving party failed to carry burden of showing that counsel was a necessary witness); *accord Quality Air Conditioning Co., Inc. v. Vrastil*, 895 So. 2d 1236, 1238-39 (Fla. Dist. Ct. App. 4 2005).

No evidence has been offered, and no attempt has been made by the moving party, to satisfy that burden of proof here. While the Center contends that Izquierdo's representative is "likely" to be a witness, there is no evidentiary basis for this conclusion, *see Russakoff v. State Dept. of Ins.*, 724 So. 2d 582, 585 (Fla. Dist. Ct. App. 1 1998) (noting also that conclusion lawyer would have to testify was "speculation"), and Izquierdo's response to the motion expressly states that he does not presently intend to call Santana as a witness.

Victoria Nursing's facile suggestion that paying an attorney would be "no hardship" for Izquierdo is similarly unsupported by evidence and is patently insufficient to support such a finding. *See generally* Brian M. Altman and Jordan M. Smith, *Utilizing the Substantial Hardship Exception to Model Rule 3.7*, 15 Geo. J. Legal Ethics 619 (2002). While case law frequently concludes that no financial hardship results from the substitution of one attorney for another, these cases have no application to the different factual situation where, as here, a representative is acting pro bono, and having to hire an attorney would obviously have financial consequences.

Finally, the Center's suggestion that the Florida Rules of Professional Conduct are the only determinative authority in this matter is simply wrong. Because a motion to disqualify is a substantive motion affecting the rights of the parties, federal law, as well as state rules of court, must be considered in deciding such a motion. *FDIC v. U.S. Fire Ins. Co.*, 50 F.3d 1304, 1312 (5th Cir. 1995) (noting that local ethical rules are not the sole authority governing motions to disqualify an attorney in a federal forum); *Cole v. Ruidoso Mun. Sch.*, 43 F.3d 1373, 1383 (10th Cir. 1994) (noting that motion to disqualify is governed by "ethical rules announced by the national profession and considered 'in light of the public interest and the litigants' rights,'" (citing *In re Dresser Indus., Inc.*, 972 F.2d 540, 543 (5th Cir. 1992)). *See also generally* Judith A. McMorrow, *The (F)Utility of Rules: Regulating Attorney Conduct in Federal Practice*, 58 S.M.U. L. Rev. 3 (2005); Fred C. Zacharias and Bruce A. Breen, *Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory*, 56 Vand. L. Rev. 1303 (2003); David Hricik and Jae Ellis, *Disparities in Legal Ethical Standards Between State and Federal Judicial Systems: An Analysis and A Critique*, 13 Geo. J. Legal Ethics 577 (2000).

As explained in *In re Snyder*, 472 U.S. 634, 645 n. 6 (1985),

> The state code of professional responsibility does not by its own terms apply to sanctions in the federal courts. Federal courts admit and suspend attorneys as an exercise of their inherent power; the standards imposed are a matter of federal law (citation omitted).

Standards governing disqualification in the Eleventh Circuit may differ depending upon the particular circumstances. *In re Evergreen Sec.*, 363 B.R. 267, 301 (Bkrtcy M.D. Fla. 2007). *See also* 19 Wright, Miller & Cooper, Fed. Practice and Proc. § 4511 n.105 (2007 pocket part) (citing cases).

While it has generally been found appropriate where ethical issues are raised in OCAHO proceedings to look, among other authorities, to the ethical rules applicable to the bar in the state where the events in question occurred, *Avila v. Select Temporaries, Inc.*, 9 OCAHO no. 1079, 8 (2002), the standards to be applied here are not limited to the Florida rules as the Center suggests.[2] In determining whether disqualification of a representative is necessary, consideration should also be given to the question of whether the representation has had or is likely to have some substantial impact upon the ability of the forum to reach a just and lawful determination of the claim. *Cf. Santiglia*, 9 OCAHO no. 1104 at 6 (citing California law). Disqualification of a representative may not be accomplished based only on an opposing party's imagined scenarios.

---

[2] The Florida Code of Professional Responsibility, moreover, was not designed as a vehicle for a party to create ancillary satellite litigation which in no way addresses the merits or substance of the underlying cause. This is why the principal enforcement mechanism for state codes of professional responsibility lie with a state's disciplinary authority rather than with the courts.

Nothing in OCAHO case law provides any support for the suggestion that the lawyer-witness rule should be applied at any stage of the proceedings other than with respect to the proposed testimony itself, or that the rule is necessarily determinative of the outcome even then. In *United States v. Scandia Interiors, Inc.,* 1 OCAHO no. 271, 1740, 1741-42 (1990), for example, Judge Schneider surveyed federal case law and permitted the attorney to testify at the hearing so long as other counsel assumed the role of advocate during the attorney's actual testimony, noting that the question was within the broad discretion of the forum, and that in the particular case, the testimony of the attorney was the best, if not the only, evidence as to the affirmative defense in question. No suggestion was made in that case that the testimony of the attorney constituted grounds to bar the attorney from participation or representation during the pre-hearing or post-hearing phases of the proceeding. *But see United States v. Chaudry*, 3 OCAHO no. 588, 1911, 1912 (1993) (*Chaudry I*) (permitting lay representation but disallowing, without analysis or citation, any participation by representative as an interpreter or witness).

In view of some of the language in the instant motion, it should be emphasized as well that there is no prohibition against representation in this or any other forum by friends or family members, and that disqualification on the basis of such a relationship has expressly been held to be an abuse of discretion by the Florida courts. *Srour v. Srour*, 733 So. 2d 593, 594 (Fla. Dist. Ct. App. 5 1999). OCAHO precedent too, clearly permits such representation. *See United States v. Chaudry*, 4 OCAHO no. 666, 648, 671-72 (1994) (*Chaudry II*); *Chaudry I*, 3 OCAHO no. 588 at 1912 (permitting a party's brother to act as lay representative). Indeed, absent some relationship such as a friend, relative, neighbor, coworker, or clergy, there would be few pro bono representatives. Any suggestion therefore, as in the instant motion, that friendship between the complainant and his representative, or between their mothers, has any relevance to the question of qualification is inappropriate, as are the respondent's gratuitous comments on the complainant's living arrangements. The suggestion that it was improper for Santana to provide Izquierdo any assistance before being authorized as a representative is similarly inappropriate.

V. CONCLUSION

I conclude that the motion to disqualify Izquierdo's representative at this stage of the proceedings is without legal support, whether measured by the standards of the Florida courts or by federal standards. It is deeply troubling, moreover, that the instant motion advocates a result that would be contrary to the decisions of the Florida courts interpreting Rule 4-3.7, the identical ethical rule cited as the "foundation" for the motion. Florida rules of professional conduct also provide, as do those of every state, that an attorney may not knowingly fail to disclose legal authority known to be adverse to a client's position. *See Albritton v. Ferrera*, 913 So. 2d 5, 10 (Fla. Dist. Ct. App. 1 2005); Florida Bar R. 4-3.3(3). I would not lightly presume this obligation to have been disregarded, nor would I lightly conclude that the motion was filed with the intent of leading me into error, or of intimidating the complainant or his representative. I conclude only that the adequacy of the research undertaken before filing the motion may not have been

sufficient.

Pleadings in this forum are expected to be in harmony not only with the governing case law, but also with the Federal Bar Association's Standards of Civility in Professional Conduct, a copy of which was included with the Notice of Hearing. Accordingly, future pleadings are expected to acknowledge adverse authority where appropriate, and to be free from gratuitous personal innuendo.

ORDER

The motion for reconsideration is granted. After reconsideration, the request to disqualify Izquierdo's representative is denied.

SO ORDERED.

Dated and entered this 15th day of October, 2009.

_____
Ellen K. Thomas
Administrative Law Judge