

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

RICHARD A. BELOTE	:	CIVIL ACTION
	:	
v.	:	
	:	
MARITRANS OPERATING PARTNERS, L.P.	:	NO. 97-3993

**MEMORANDUM AND ORDER**

Yohn, J.

March 20, 1998

The plaintiff, Richard Belote ("Belote"), claims that he was injured while on board the "OCEAN-115," the defendant's barge. Invoking the Jones Act, 46 U.S.C. § 688 (Supp. 1997), he filed suit against the defendant, Maritrans Operating Partners ("Maritrans"), to recover for his injuries. During the discovery period, the plaintiff's counsel sent an investigator to speak with Captain Whitmore ("Whitmore"), the captain of the barge upon which Belote was injured. Maritrans then filed the instant motion to disqualify the plaintiff's counsel and assess costs and fees against him, arguing that this interview violated Rule 4.2 of the Pennsylvania Rules of Professional Conduct. I will grant in part and deny in part the defendant's motion.

**BACKGROUND**

Maritrans claims that, after the plaintiff filed a complaint against Maritrans and Maritrans filed an answer through counsel, plaintiff's counsel sent an investigator to speak with Whitmore, an employee of Maritrans and the captain of the barge on which the plaintiff was allegedly injured. (Def.'s M. Dsqfn.) The plaintiff's counsel undertook this interview without providing notice to or obtaining the consent of Maritrans' counsel.

(Id.) Moreover, the defendant claims that the investigator did not reveal that he was working for the plaintiff until he completed the interview. (Id.)<sup>1</sup>

The plaintiff's counsel's efforts proved quite fruitful. During the interview, Whitmore made and signed a statement describing how the conditions of the barge contributed to the plaintiff's injury. (Id. Ex. C, Witness Statement.) Whitmore specifically noted that on the night of Belote's accident, the temperature was below freezing, the deck was wet and, though there were salt pebbles on board, Whitmore did not use them on deck that night. (Id.) In fact, the statement perfectly complements the plaintiff's expert's opinion that Belote's injury was caused by the captain's failure to use de-icing measures on the barge. (See id. Ex. E, Expert's Report.)

According to the defendant, this conduct allegedly violated Rule 4.2 of the Pennsylvania Rules of Professional Conduct which governs a lawyer's communications with adverse parties. The plaintiff raises two defenses. First, he alleges that Whitmore is not a represented party within the meaning of Rule 4.2. Second, he claims that § 60 of the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51 et seq. (1986), preempts Rule 4.2, thereby allowing this type of conduct.

## **DISCUSSION**

### **I. Whitmore constitutes a "party" under Rule 4.2 of the Pennsylvania Rules of Professional Conduct**

Rule 4.2 provides, in full:

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<sup>1</sup> The plaintiff claims that the investigator revealed that he worked for the plaintiff prior to conducting this interview. (Pl.'s Resp. Def.'s Reply.)

In representing a client, a lawyer shall not communicate about the subject matter of the representation with a party 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.

PA. RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1997). The Eastern District has adopted Pennsylvania's Rules of Professional Conduct. See LOC. R. CIV. P. E.D. PA. 83.6 (Rule IV)(1995).

The Comment to Rule 4.2 addresses how it applies to organizations:

[T]his Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability, or whose statement constitutes an admission on the part of an organization.

PA. RULES OF PROFESSIONAL CONDUCT Rule 4.2 cmt. (1997).

Although many courts have attempted to distill the Rule and its comment into a single standard, see e.g., Pa. B.A. Comm. on Professional Ethics and Professional Responsibility, Formal Op. 90-142 (1990),<sup>2</sup> this district, in the absence of guidance from the Third Circuit or the Pennsylvania Supreme Court, has opted to employ the tests laid

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<sup>2</sup> In the case of current employees, rules for *ex parte* contacts range from "blanket" bars, to the "scope of employment" test, to the "managing-speaking- agent" test and its variant, the "alter-ego" test, the "control group" test, and the "case-by-case balancing" test, which balances the need for the information against the dangers of generating evidentiary admissions. Pa. B.A. Comm. on Professional Ethics and Professional Responsibility, Formal Op. 90-142 (1990). Although the plaintiff argues that the "control group" test applies here he fails to identify any case from this district which uses this test. (See Pl.'s Response Mem. at 8.) Nevertheless, Whitmore meets the criteria of all of the tests, except, possibly, for the control group test. The application of this test requires more information than is currently available to the court.

out in the plain language of Rule 4.2 and its comment. See e.g., Berryman v. Consolidated Rail Corp., No. CIV.A. 94-3668, 1995 WL 517642, \*2 (E.D. Pa. Aug. 28, 1995); Coleman v. National R.R. Passenger Corp., No. CIV.A. 94-4526, 1995 WL 395924 (E.D. Pa. 1995); Lothead v. AMTRAK, No. CIV.A. 93-1707, 1994 WL 558874 (E.D. Pa. 1994); Garrett v. National R.R. Passenger Corp., No. 89-8326, 1990 U.S. Dist. LEXIS 10868 (E.D. Pa. Aug. 14, 1990). As such, I have analyzed the issue of Whitmore's status according to the guidelines laid out in Rule 4.2, its comment, and the interpretative case law.

#### **A. Managerial Employee**

As an employee with managerial responsibility on behalf of Maritrans, Whitmore is a party within the meaning of Rule 4.2. Carter-Herman v. City of Philadelphia, 897 F. Supp. 899, 904 (E.D. Pa. 1995), held that employees who supervise a large number of subordinates and who must exercise a significant amount of individual discretion to carry out their duties are "managerial employees." For example, police lieutenants are managerial employees because they command an assigned shift within a police district, a responsibility that entails both the supervision of many employees and the use of substantial discretion. Id.; see also Berryman v. Consolidated Rail Corp., No. CIV.A. 94-3668, 1995 WL 517642, at \*2 (E.D. Pa. Aug. 28, 1995) (railroad foreperson in charge of a group of employees is a "managerial employee").

Maritrans' Fleet Operations Manual bestows Whitmore with significant responsibility. As captain of a barge, Whitmore

has responsibility for and authority over all persons on board his vessel; therefore, all persons on board must obey his orders. His authority extends to areas such as vessel maintenance and upkeep; cargo transfer operations; safety; . . . ; interpreting and complying with local, national and international laws, rules, and regulations; and the proper care and custody of all cargoes carried.

(Def.'s M. To Disqualify Ex. C, Maritrans' Fleet Operations Manual ¶ 5.4.1). Like the police lieutenant, Whitmore supervises employees and all other individuals on board. Moreover, as the ultimate authority on board, Whitmore must exercise substantial discretion. Whitmore, therefore, is a managerial employee within the meaning of Rule 4.2.

### **B. Imputed Liability**

The comment to Rule 4.2 also defines a party as an individual whose act or omission in connection with the plaintiff's injury can be imputed to the defendant organization. In Berryman, 1995 WL 517642, at \*2, the plaintiff, a Conrail employee, claimed that he was injured by the negligence of his co-employees and sued his employer, under FELA, for failing to provide a safe workplace. Specifically, the plaintiff claimed that his two co-employees, Donovan and West, "were doing something to the end spring at the time of the accident." Id. at \*4. FELA renders an employer liable for the injuries negligently inflicted on its employees by the employer's officers, agents, or employees. See Hopson v. Texaco, Inc., 383 U.S. 262 (1966). Because the events surrounding the end spring were at issue, Donovan's and West's acts "might be imputed to Conrail for the purpose of civil liability." Berryman, 1995 WL 517642, at \*7-8. Thus, the court held that the plaintiff's attorney must contact Conrail prior to speaking with

either of these employees. See id.

Invoking the Jones Act,<sup>3</sup> Belote also claims that his injuries were caused by “the negligence of the defendant, its agents, servants, workmen, and employees . . . .” (Pl.’s Compl.) The plaintiff’s expert opined that the plaintiff “was injured due to the failure of the barge captain to use de-icing measures to remove the ice on the deck of the barge.” (Def.’s M. Dsqfjn. Ex. E., Expert’s Report.) As the highest authority on the barge, Whitmore is responsible for vessel maintenance and upkeep. (See Def.’s Reply Mem. Ex B, Maritrans’ Fleet Operations Manual ¶ 5.4.1). In light of these responsibilities, it is his actions with respect to the maintenance of the barge which will be at issue. Whitmore, therefore, is a person whose act or omission in connection with the plaintiff’s injury may be imputed to the organization.

### **C. Admissions**

Whitmore also meets the third prong of Rule 4.2's test, which prohibits *ex parte* contact with persons whose statement may constitute an admission on the part of the organization. An admission is “a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.” FED. R. EVID. 801(d)(2)(D); see also University Patents, Inc. v. Kligman, 737 F. Supp. 325, 328 (E.D. Pa. 1990) (adopting 801(d)(2)(D)’s definition of

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<sup>3</sup> The Jones Act, the liability scheme applicable to the instant case, incorporates FELA’s standards. See 45 U.S.C. § 688. FELA renders an employer liable for the injuries negligently inflicted on its employees by its “officers, agents, or employees.” Hopson v. Texaco, Inc., 383 U.S. 262 (1966).

"admission" for Rule 4.2's purposes).<sup>4</sup>

Whitmore's statement addresses the conditions of the deck when the plaintiff injured himself. (Def.'s M. Dsqfn. Ex. C., Witness Statement). As the barge captain, vessel maintenance and safety were matters within the scope of his employment. (See Def.'s Reply Mem. Ex. B, Maritrans' Fleet Operations Manual ¶ 5.4.1). Whitmore's statement, therefore, constitutes an admission. See Garrett, 1990 U.S. Dist. LEXIS 10868, at \*4 n.2 (statement of railroad defendant's employee concerning his actions on the date of the accident constitute an admission).

As captain of the barge, Whitmore is a represented party within the meaning of Rule 4.2. The plaintiff's counsel, therefore, may not contact Whitmore unless he has the defendant's counsel's consent or is otherwise authorized by law to do so.

## **II. 45 U.S.C. § 60 does not preempt Rule 4.2 of the Pennsylvania Rules of Professional Conduct**

The plaintiff argues that the *ex parte* communications at issue are "otherwise authorized" under FELA.<sup>5</sup> The relevant FELA provision provides, in part, as follows:

### **§60. Penalty for suppression of voluntary information incident to accidents; separability of provisions**

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<sup>4</sup> The plaintiff, in fact, agrees that *ex parte* contact with a person whose statements may constitute admissions is prohibited. In his reply memorandum, he states that the underlying purposes of Rule 4.2 are "threatened when the subject of the interview is the corporation itself, that is, when the subject . . . *may make statements in the interview or execute documents in the interview which will legally bind the corporation.*" (Pl.'s Reply Mem. at 11) (emphasis supplied). Thus, the plaintiff admits that *ex parte* contacts with employees whose statements could legally bind the corporation are prohibited.

<sup>5</sup> The Jones Act incorporates FELA's provisions. See 46 U.S.C. § 688(a).

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished . . . .

45 U.S.C. § 60.

The plaintiff argues that § 60 preempts Rule 4.2 because it prevents employees from voluntarily furnishing information by allowing the employer's attorney to withhold his or her consent to an interview. See e.g., Blasena v. Consolidated Rail Corp., 898 F. Supp. 282, 285 (D.N.J. 1995). This reasoning, however, misunderstands Rule 4.2. The Rule allows an attorney to communicate with an adverse party if the attorney has opposing counsel's consent or is "otherwise authorized by law" to do so. In the event opposing counsel withholds consent to an interview, the attorney can access the desired information through traditional discovery methods, such as depositions or other statements taken in the presence of counsel. See e.g., Queensberry v. Norfolk and W. Ry. Co., 157 F.R.D. 21, 25 (E.D. Va. 1993). These communications with adverse parties are permissible because they are "otherwise authorized by law." See e.g., FED. R. CIV. P. 30(a). Thus, contrary to the plaintiff's understanding, Rule 4.2 does not prevent parties from gaining desired information. Instead, it merely prescribes the conditions under which that information can be accessed.

The second argument put forth as to why § 60 preempts Rule 4.2 is that the

presence of the company's attorney at employee interviews would intimidate employees, thereby infringing on their ability to provide information voluntarily. See e.g., Blasena v. Consolidated Rail Corp., 898 F. Supp. 282, 286 (D.N.J. 1995). Thus, § 60 excuses plaintiff's attorneys from notifying opposing counsel of their intentions to speak with adverse parties. See id.

Addressing this argument requires the court to resort to § 60's legislative history. When interpreting statutes, courts should refer to legislative history only if a statute is ambiguous. See Patterson v. Shumate, 504 U.S. 753, 761 (1992). A statute is ambiguous if it is susceptible to more than one reasonable interpretation. See Brown v. Gardner, 513 U.S. 115, 117 (1994). Ultimately, however, ambiguity is not "a creature of definitional possibilities but of statutory context." Brown v. Gardner, 513 U.S. 115, 117 (1994).

Considered in the context of Rule 4.2, § 60 is ambiguous. The statute prohibits laws and rules that "prevent employees . . . from furnishing *voluntarily* information to a person in interest . . ." 45 U.S.C. § 60 (emphasis supplied). Smith v. United States, 508 U.S. 223 (1993), instructs courts to construe the words of a statute according to their common and ordinary meaning. "Voluntarily," using its most common definition, means "of one's own free will." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2564 (1981). While an attorney's presence in an interview may be limiting, it is a substantial leap to hold that this presence deprives an employee from offering information of his or

her own free will.<sup>6</sup> As such, the statute's ambiguity with respect to its preemptive effect on Rule 4.2 must be resolved through resort to its legislative history. See Patterson v. Shumate, 504 U.S. 753, 761 (1992).

Based on the legislative history, § 60 was not intended to preempt Rule 4.2. See Garrett v. National Rail Passenger Corp., No. CIV.A. 94-4526, 1995 WL 395924 (E.D. Pa. June 28, 1995). First, the objective of the bill was to prohibit "the promulgation or enforcement of rules which penalize railroad employees for giving information concerning accidents to the injured person or his representative." Sen. R. No. 76-661, at 2 (1939). In other words, Congress understood an employee to be voluntarily furnishing information if that employee would be free from penalty or a threat of penalty for cooperating with an investigation. Cf. Gonzalez v. Southern Pac. Transp. Co., 755 F.2d 1129 (5th Cir.), *opinion withdrawn on other grounds*, 773 F.2d 637 (5th Cir. 1985) (discharging an employee for furnishing information violated § 60); Sheet Metal Workers Intern. Ass'n v. Burlington N. Ry. Co., 736 F.2d 1250, 1253 (8th Cir.

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<sup>6</sup> Section 60's susceptibility to differing interpretations in the context of Rule 4.2 is also borne out by the conflicting outcomes from the many courts considering the issue. Compare Garrett v. National R.R. Passenger Corp., No. CIV.A. 89-8326, 1990 U.S. Dist. LEXIS 10868 (E.D. Pa. Aug. 14, 1995) (§ 60 does not void Rule 4.2) and Coleman v. National R.R. Passenger Corp., No. CIV.A. 94-4526, 1995 WL 395924 (E.D. Pa. June 28, 1995) (same), and White v. Illinois Cent. Ry. Co., 162 F.R.D. 118 (S.D. Miss. 1995) (same), and Tucker v. Norfolk and W. Ry. Co., 849 F. Supp. 1096 (E.D. Va. 1994) (same), and Branham v. Norfolk and W. Ry. Co., 151 F.R.D. 67 (S.D.W. Va. 1993) (same) with Blasena v. Consolidated Rail Corp., 898 F. Supp. 282 (D.N.J. 1995) (§ 60 preempts Rule 4.2), and Shaffer v. Union Pac. R.R., No. CIV.A. 95-631, 1996 WL 76157 (D. Or. Feb. 14, 1996) (same), and United Transp. Union Local 385 v. Metro-North Commuter R.R., No. CIV.A. 94-2979, 1995 WL 634906 (S.D.N.Y. Oct. 30, 1995) (same), and Mayfield v. Soo Line R.R., No. CIV.A. 95-2394, 1995 WL 715865 (N.D. Ill. Dec. 4, 1995) (same).

1984) (railroad's articles suggesting arbitration as desirable alternative to suit contained nothing coercive or threatening and, therefore, railroad did not violate § 60); Hendley v. Central Ga. Ry. Co., 609 F.2d 1146, 1150-51 (5th Cir.1980) (conducting a disciplinary investigation solely for the purpose of punishing an employee for furnishing information was sufficiently coercive such that it violated § 60), cert. denied, 449 U.S. 1093 (1981). Rule 4.2, however, does not penalize nor does it threaten to penalize employees for offering information. It merely ensures that interviews between an adverse party and opposing counsel will be conducted according to procedures authorized by law.

This prohibition on penalizing employees was actually a tool to effect the Act's broader goals. Responding to the railroad's domination of information surrounding personal injury suits, the Senate Report stated:

When an employee is injured, the claim agent promptly endeavors to procure statements from all witnesses to the infliction of the injury, . . . , and obtains all available information considered necessary to protect the railroad company against a possible suit for damages.

On the other hand, the claimant may be seriously handicapped in his attempt to procure the information necessary to the determination of the question of liability. For example, a substantial number of the railroads subject to the Employer's Liability Act have promulgated rules which prohibit employees from giving information concerning an accident to anyone excepting certain specified company officials and claim agents.

The purpose of the amendment under consideration is to prohibit the enforcement of such rules and permit those who have information concerning the facts and circumstances . . . to give a statement . . . . In relation to the investigation of facts upon which claims for injuries are based, humanity and justice demand that injured railroad men be accorded as much freedom of action as their employers enjoy.

S. Rep. No. 76-661, at 5 (1939) (emphasis added). In sum, Congress passed § 60 in order to "equalize access to [the] information available to the highly efficient claims

departments of the railroads and to the individual FELA claimants.” Cavanaugh v. Western Md. Ry. Co., 729 F.2d 289, 293 (4th Cir. 1984) (citing S. Rep. No. 76-661, at 5 (1939)).

Rule 4.2 does not undermine this goal. As explained, Rule 4.2 does not prevent plaintiffs from obtaining the desired information, it merely prescribes the proper procedures for accessing it. See infra at 8. Thus, any apparent tension between this statute and the rule can be easily resolved without doing violence to the language or spirit of either.

In sum, when applied to the instant situation - that is, when the plaintiff’s attorney contacts a represented party after the complaint and answer have been filed - I find that 45 U.S.C § 60 does not preempt Rule 4.2 of the Pennsylvania Rules of Professional Conduct.

### **III. Sanctions**

One of the inherent powers of any federal court is the discipline of attorneys practicing before it. See Matter of Abrams, 521 F.2d 1094, 1099 (3d Cir.), cert. denied, 423 U.S. 1038 (1975). As part of this power, the court has the ability to prohibit or remedy litigation practices which constitute ethical violations. See University Patents, Inc. v. Kligman, 737 F. Supp. 325, 327 (E.D. Pa. 1990). While the court’s authority in disciplinary matters is quite broad, it is not without limits. See Matter of Abrams, 521 F.2d at 1099 (citing In re Ruffalo, 390 U.S. 544, 547 (1968)). Its proper exercise must strike a balance between several competing considerations. See Ex parte Burr, 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. On the other hand, it is the judiciary's responsibility to ensure that the integrity of the profession is maintained. See id. Finally, the court must balance the plaintiff's right to retain counsel of his or her choice against the opposing party's right to prepare and try a case without prejudice. See University Patents, Inc. v. Kligman, 737 F. Supp. 325 (E.D. Pa. 1990).

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 University Patents, Inc. v. Kligman, 737 F. Supp. 325, 329 (E.D. Pa. 1990). As shown, given the conglomeration of conflicting cases on this question, see infra n.6, this issue is clearly unsettled. Moreover, the plaintiff's counsel actually represented a party in Garrett v. National R.R. Passenger Corp., 1990 U.S. Dist. LEXIS 10868. In that case, counsel was the recipient of an adverse decision which held that § 60 does not exempt attorneys from Rule 4.2's requirements. See id.

In light of the question surrounding the propriety of this interview, plaintiff's counsel should not have unilaterally contacted Whitmore. See e.g., id. at \*7. Instead, counsel should have informed opposing counsel of his intent to speak with the captain or sought leave of court to do so. See University Patents, 737 F. Supp. at 329; Cagguila v. Wyeth Labs., 127 F.R.D. at 654. In spite of this violation of Rule 4.2, there is not sufficient evidence to conclude that the defendant has been so severely prejudiced that

disqualification is warranted. See University Patents 737 F. Supp. at 328; cf. 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). Rather, the problem may be cured by precluding the plaintiff from using during the course of the trial any information obtained through counsel's or his representative's *ex parte* contacts with any represented parties, including Whitmore. See Berryman, 1995 U.S. Dist. LEXIS 12768, at \*8; Garrett, 1990 U.S. Dist. LEXIS 10868, at \*7. To ensure that these statements will not be put to such use, the court also directs plaintiff's counsel to destroy both Whitmore's original statement and any copies of it that he has knowledge of. Being mindful of the plaintiff's right to prepare and try his case, the court will not preclude the plaintiff from calling Whitmore as a witness or attempting to discover comparable information through the discovery process. See Garrett, 1990 U.S. Dist. LEXIS 10868, at \*7.<sup>7</sup>

As a final note, I caution the parties, who have now had the benefit of my judgment on the law applicable to plaintiff's counsel's conduct, that further violations of Rule 4.2 that occur in cases before this court may incur stronger penalties.

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<sup>7</sup> Maritrans also requests that this court order plaintiff's counsel to reimburse the defendant for the costs and fees associated with the motion. The defendant does not cite any authority authorizing the court to impose monetary sanctions in this situation. Although 28 U.S.C. § 1927 allows the court to assess legal costs and fees in instances of unreasonable delay, see Poulis v. State Farm Fire and Casualty Co., 747 F.2d 863, 869 (3d Cir. 1984), it does not address whether the court may impose these sanctions in the absence of dilatory conduct. In the absence of any argument for the imposition of costs and fees, this court, at this time, declines to impose them.

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

RICHARD A. BELOTE	:	CIVIL ACTION
	:	
v.	:	
	:	
MARITRANS OPERATING PARTNERS, L.P.	:	NO. 97-3993

**ORDER**

AND NOW, this 20th day of March, 1998, upon consideration of the defendant's Motion to Disqualify and for Sanctions, the plaintiff's response thereto, the defendant's reply, and the plaintiff's surreply, it is hereby ORDERED that the defendant's motion is GRANTED IN PART and DENIED IN PART, as follows:

- (1) The defendant's Motion to Disqualify Marvin I. Barish, Esq., from representing the plaintiff, Richard A. Belote, in this action is denied;
- (2) The plaintiff will be precluded from using any information obtained through *ex parte* contacts with Captain Harley Whitmore;
- (3) The plaintiff must destroy both Whitmore's original statement and any copies of that statement within ten days of the date of this order;
- (4) The plaintiff will not be precluded from calling Captain Harley Whitmore as a witness at trial or from obtaining comparable information through the discovery process;
- (5) The defendant's Motion for Sanctions is denied.

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William H. Yohn, Jr., J.

