

UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2014-CFPB-0002


In the Matter of:

PHH CORPORATION,
PHH MORTGAGE CORPORATION,
PHH HOME LOANS LLC,
ATRIUM INSURANCE CORPORATION,
and ATRIUM REINSURANCE
CORPORATION

ENFORCEMENT COUNSEL'S
REPLY IN SUPPORT OF ITS
MOTION TO DISQUALIFY
SCHNADER HARRISON SEGAL &
LEWIS LLP

Enforcement Counsel files this reply brief in support of its motion to disqualify Schnader Harrison Segal & Lewis LLP (Schnader) from representing any person in this proceeding.¹

The events described in the briefs and declarations filed in connection with this motion reveal serious conflicts of interest, borne out in the significant influence that Radian is able to exert over Schnader's conduct, including over Schnader's advice to other clients whose actions have the potential to affect Radian's interests. Schnader's representation of Radian's former employees is materially limited by its responsibilities to, and influence by, Radian. Schnader must be disqualified from representing any person for the duration of this proceeding. *See* 12 C.F.R. § 1081.109(a).

Schnader ignores both its involvement in its clients' conduct and the impairment of its ability to continue to represent its clients, and instead seeks to minimize the import of the inconsistencies between their various statements to Enforcement Counsel. First, rather than addressing the contradictions in Mr. Young's statements to Enforcement Counsel, Schnader attacks its own client's credibility, arguing that a trier of fact could disregard his statements because he has a faulty memory and  Schnader Br. at 6-8. But Mr. Young's credibility is irrelevant to the question of whether Mr. Young made conflicting statements, and any role Schnader and its other clients had in causing Mr. Young to do so. Second,

¹ PHH has filed a brief in defense of Schnader's conduct despite having no involvement in or direct knowledge of the underlying events, and no legitimate stake in the outcome of this motion. This reply does not address PHH's brief, except to note that it is premised entirely on mischaracterizations. Most notably, PHH contends that the motion seeks to discredit Mr. Young as a witness "before he is even given a chance to testify." PHH Br. at 2-3. This is false. It is PHH that seeks to discredit Mr. Young – Enforcement Counsel's witness – prior to his testimony by suggesting that the events described in the motion reflect on Mr. Young, rather than on Schnader. Rather, Enforcement Counsel brought Mr. Young's statements and Schnader's conduct to the Tribunal's attention out of a concern that Schnader was deeply conflicted, resulting in the imminent possibility that Mr. Young would alter his testimony as a direct result of the advice he received from his conflicted counsel. The parties, the Tribunal, and the public are entitled to a proceeding free from such irregularity. For the reasons stated in this reply brief, Schnader's brief has only heightened Enforcement Counsel's concerns.

Schnader strains to minimize the inconsistency between the various statements by portraying Mr. Young's later statement as a mere "clarification[]" of a "possible ambiguity," *Id.* at 8, and Mr. Filipp's statement as consistent with Mr. Young's, *id.* at 9-10. As explained below, the statements in question create an obvious conflict. Finally, and most troubling, Schnader suggests that it was appropriate for it to advise Mr. Young to change his story after it began representing him. This highlights the danger of allowing Schnader to continue to represent multiple clients whose interests diverge and virtually confirms the damage that has been done by Schnader.

Mr. Young Made Contradictory Statements

On March 7, 2014, prior to his representation by Schnader, Mr. Young stated to Enforcement Counsel, under penalty of the false statements provisions of 18 U.S.C. § 1001, that

REDACTED

These were simple, unambiguous statements

On March 27, 2014, now represented by Schnader, Mr. Young

REDACTED

The March 27 statement is in direct conflict with the March 7 statement. How Mr. Young came to the understanding he expressed on March 7—

by inference (either sound or mistaken), or otherwise — may be relevant to the weight Mr. Young's testimony should be given by a trier of fact, but it is irrelevant to this motion practice. The salient facts are that

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Schnader is wrong in its assertion that the interview report of the March 7 statement contained a "possible ambiguity." Schnader Br. at 8.

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This is unambiguous and there is no need for any
“clarifications.”

REDACTED

This is not a case of a failure to ask follow up questions that would have revealed a crucial missing detail. *See id.* at 8; *In re Warren*, -- B.R. --, No. 11-679 (dd), 2013 WL 6183869 at *9 (Bankr. D.S.C. Nov. 26, 2013) (counsel failed to ask defendant when she learned of event, which was critical fact in the case). The relevant detail is clearly stated in the interview report and was directly contradicted by the subsequent statement.

The Statements of Mr. Young and Mr. Filippis Are Inconsistent

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The statements of both Mr. Filippis and Mr. Young were captured in Interview Reports which were produced to PHH as hearing exhibits; PHH in turn gave those statements to Schnader. The week after Mr. Filippis spoke to Enforcement Counsel, with Schnader now

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These circumstances are vastly different from those in *Iacangelo v. Georgetown Univ.*, see Schnader Br. at 9, where the law firm's two clients (1) never changed their own stories, and (2) testified consistently with one another. 710 F. Supp. 2d 83, 90-91 (D.D.C. 2010). Most importantly, *Iacangelo* did not involve one client's attempt to influence the second client's statements or testimony, to the detriment of both the second client (whose subsequent statements might constitute a violation of law) and a party to the case. That is precisely the situation here, potentially jeopardizing not only Mr. Young's interests, but the very integrity of the proceeding in which he is expected to testify.³

Schnader's Conflicting Loyalties to Radian, Mr. Filippis and Mr. Young

Schnader should be disqualified for all of the reasons stated in Enforcement Counsel's initial brief. Schnader's opposition brief raises three further reasons for concern. First, it is apparent that Radian arranged to have Mr. Young represented by its counsel. Schnader insists that it did not solicit Mr. Young as a client, but it strongly implies that it was Radian who contacted Mr. Young in order to offer him Schnader's services. Schnader notes that the ethical rules permit *a lawyer* to solicit employment "from a person with whom the lawyer has [a] family or prior professional relationship." Schnader Br. at 13. Schnader nowhere suggests that it had such a prior relationship with Mr. Young. Rather, in the next sentence, Schnader notes that *Radian* "had a 'prior professional relationship' with Mr. Young" and that *Radian* "provid[ed] legal representation to him." *Id.*⁴ This course of conduct only demonstrates the influence that Radian exercised over Schnader's representation of Mr. Young.

³ Contrary to Mr. Fogdall's assertions, Enforcement Counsel has never advised him that Mr. Filippis would not be called as a witness and he remains on Enforcement Counsel's witness list.

⁴ Radian sought counsel for Mr. Young only after it learned that he had spoken to Enforcement Counsel and the testimony that he was likely to provide. Radian knew that it was the subject of a Bureau investigation as of January 2012, and may have known of the predecessor investigation by HUD even earlier. See Schnader Br. at 1. In June 2012, the Bureau served a CID on Radian and in September 2012 Enforcement Counsel identified Mr. Young as one of four Radian custodians on

Second, Schnader implies, again without explicitly confirming, that it advised Mr. Young to “clarify a potentially misleading statement in [Enforcement Counsel’s] summary of his voluntary interview.” *Id.* at 11 n.8. Schnader argues that such advice constitutes “being a good lawyer.” *Id.* (quoting *Gardner v. Galetka*, 568 F.3d 862, 892 (10th Cir. 2009)). This assertion is deeply troubling. As is explained above, it is clear that Mr. Young’s March 7 statement was not ambiguous or otherwise “potentially misleading.” That statement was clear and unequivocal:

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In

Gardner, the prosecutor asked a witness who had testified that “the gun went off” to clarify whether the defendant had pulled the trigger. 568 F.3d at 892. That is simply an attorney asking a witness to elaborate as to what he saw. By contrast, this motion involves a lawyer “advising” a client who has expressed a potentially damaging understanding about the views of the lawyer’s other clients to change his understanding to one more favorable to the other clients, at the risk of violating the law.⁶

the Bureau’s “short list.” *See* Gordon Reply Decl. Ex. A (Sept. 25, 2012 email from N. Vazire to E. Brown-Lee). In June 2013, after a consent order was entered settling the Bureau’s claims against Radian several months earlier, the Bureau again sought, among other things, Mr. Young’s documents from Radian in light of his “substantial involvement with captive reinsurance.” *See* Gordon Reply Decl. Ex. B (June 11, 2013 email from D. Gordon to S. Fogdall). Yet, it was only after PHH informed Schnader of Mr. Young’s statements—which were prejudicial to Radian’s interests—that he received an unsolicited offer of Schnader’s services (nearly 18 months after Schnader learned of the Bureau’s interest in Mr. Young).

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⁶ Schnader only knew about Mr. Young’s March 7 statement because it obtained the report of that interview from PHH. The report is a “document ... prepared by ... the Bureau ... in the conduct of an investigation of or enforcement action against any person,” and as such it is the confidential information of the Bureau, not Radian. *See* Protective Order (P.O.) ¶ 1(h)(iii). Confidential

Third, Schnader's opposition makes clear that it cannot properly protect its three clients' conflicting interests (let alone have explained the potential for conflicts and obtained appropriate waivers, as it purportedly certified to the Tribunal) because it has a total misapprehension of its professional duties. For example, Schnader claims that "[r]epresentation of multiple witnesses in a civil case creates a conflict only where the lawyer would be *presenting* inconsistent testimony of two clients, or cross-examining one to bolster the other." Schnader Br. at 10. Neither the Bureau's Rule 109 nor the applicable ethical rules contain such a limit.

For all of the foregoing reasons, Schnader should be disqualified.

DATED: May 6, 2014

Respectfully submitted,

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Information may not be disclosed to Radian (or any third party). P.O. ¶ 6. Schnader was able to "advise" Mr. Young to change his statement in Radian's favor only because it had (improperly) invoked Radian's supposed right to receive the report from PHH. It is telling that Schnader never sought this Confidential document from its owner, Enforcement Counsel. Schnader is also mistaken in its suggestion that the report should have been given to Mr. Young for his review or is otherwise subject to Rule 207(a). Schnader Br. at 14-15.

Certificate of Service

I hereby certify that on this 6th day of May 2014, I caused a copy of the foregoing
“Enforcement Counsel’s Reply in Support of its Motion to Disqualify Schnader Harrison Segal &
Lewis LLP” to be filed with the Office of Administrative Adjudication and served by electronic mail
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