

**IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
JUDICIAL DISCIPLINARY TRIBUNAL**

**IN THE MATTER OF ASSOCIATE JUSTICE JOHN
RECHUCHER,**

Respondent.

Cite as: 2018 Palau 18
Judicial Disciplinary Proceeding No. 18-001

Decided: October 4, 2018

Disciplinary Counsel	Johnson Toribiong
Counsel for Respondent	Pro se

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice
KATHERINE A. MARAMAN, Associate Justice
DENNIS K. YAMASE, Associate Justice

DECISION AND ORDER

PER CURIAM:

[¶ 1] On April 26, 2018, *Tia Belau* published an article complaining that this Court’s Associate Justice John Rechucher (“Respondent”) engaged in the practice of law when he participated as a *pro se* defendant in *Ked Clan/Lineage v. Paula Kumangai*, Civil Action No. 15-007 (the “Ked Clan/Lineage case”). A similar complaint appeared in another *Tia Belau* article on April 30, 2018. The Code of Judicial Conduct provides that “[a]nyone may complain to the Chief Justice about the conduct of a judge.” ROP Code of Judicial Conduct Canon 7.2. As a result of the complaints in the articles, the Chief Justice empaneled a Judicial Disciplinary Tribunal (“Tribunal”) and appointed Disciplinary Counsel, Johnson Toribiong, to investigate and report back to the Tribunal with his findings. *See* Order Appointing Judicial Disciplinary Counsel *and* Order Empaneling Tribunal. The Disciplinary Counsel filed his Findings and Recommendation Report on June 13, 2018. After reviewing the report, the Tribunal determined that a

hearing was necessary in this matter and directed Disciplinary Counsel to file a formal complaint, which he timely filed on July 3, 2018. Respondent filed his answer on July 23, 2018. A hearing was held on September 14, 2018. The following constitutes the findings and final decision of the Tribunal.

BACKGROUND

[¶ 2] Respondent was one of four named defendants in the Ked Clan/Lineage case, which was filed on January 22, 2015.¹ In that litigation, the plaintiffs originally asserted that Kuyroi Arurang was buried on a stone platform known as Bangkur in Ngerutoi Hamlet, Ngardmau State, without plaintiffs' consent and despite their objection. *See* Ked Clan/Lineage case Compl. ¶¶ 10, 21, & 25. The plaintiffs claimed to have the right to the property and the authority to determine who may be buried there. *Id.* They sought a temporary restraining order requiring the removal of Arurang's remains from Bangkur, damages, issuance of a preliminary injunction "restraining Defendants and any of their agents from occupying or using any portion of Bangkur land for residency, burial, or any use without consent of plaintiffs," and a declaration from the Court that "Defendants are not members of Ked Clan/Lineage and have no right or authority to bury Kuyroi or anyone on Bangkur land without the consent of the Plaintiffs." Ked Clan/Lineage case Compl., Prayer for Relief.

[¶ 3] On January 30, 2015, the plaintiffs filed an amended complaint seeking the same relief as in their original complaint and a temporary restraining order to stop the burial of another man, Lorenzo Temol, that was to take place at the stone platform in Bangkur that same day. *See* Ked Clan/Lineage case Am. Compl. ¶ 21–23.

[¶ 4] Respondent, a defendant in the case, appeared as counsel for all defendants in the Ked Clan/Lineage case. During the pendency of that case, he was appointed to the position of Associate Justice of the Appellate Division of the Supreme Court. *See* Motion to Withdraw as Defendants' Counsel ¶ 1 (discussing August 18, 2016 appointment to the Court). On

¹ The First Amended Verified Complaint, filed on January 30, 2015, also named as defendants "John Does I thru V." *See* Ked Clan/Lineage case Am. Compl., Caption. It does not appear that the case proceeded against any of the John Does.

September 1, 2016, he moved to withdraw as counsel for the defendants. *Id.* That motion was granted. *See* Oct. 6, 2016 Order. Following Respondent’s motion, the other defendants in the case proceeded *pro se*. Paula Kumangai, with permission of the Court, acted as representative for defendants Magdalena Imetuker and Ereong Remeliik. *See* Nov. 28, 2017 Order. Days prior to the trial, Respondent received notice of the trial. Trial commenced on April 23, 2018, and Respondent appeared and represented himself, while Kumangai appeared, continuing to represent herself, Imetuker, and Remeliik. Preliminary injunctive relief was denied, and the case was decided by the Trial Division on August 3, 2018.

[¶ 5] In the Complaint in this matter, the Disciplinary Counsel asserts that Respondent violated five canons of the Code of Judicial Conduct by representing himself in the Ked Clan/Lineage case, namely canons 4.4, 4.8, 4.11, 14.19.6, and 6.1. *See* Compl. ¶¶ 23–26. We address each allegation in turn in the Discussion section below.²

APPLICABLE STANDARD

[¶ 6] Allegations of violations of the Republic of Palau Code of Judicial Conduct must be proven by clear and convincing evidence. ROP Code of Judicial Conduct Canon 7.8. “Clear and convincing evidence requires the Tribunal be convinced that the allegations are highly probable or reasonably certain, but falls short of proof beyond a reasonable doubt.” *In re Shadel (Shadel II)*, 22 ROP 154, 157 (Disc. Proc. 2015), citing *In re Shadel*, 16 ROP 244, 249 (Disc. Proc. 2009). “If the Tribunal finds that the allegations of misconduct under the Code are true, it shall impose an appropriate sanction or a combination of sanctions.” ROP Code of Judicial Conduct Canon 7.11. The decision of the Tribunal shall be final. *Id.* Canon 7.10.

² The ROP Code of Judicial Conduct does not contain a section 14.19.6. For purposes of this Entry, the Tribunal assumes Disciplinary Counsel meant to refer to Section 4.10.6, which states that “[s]ubject to the proper performance of judicial duties, a judge may engage in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.” ROP Code of Judicial Conduct Canon 4.10.6.

DISCUSSION

I. Canon 4.4

[¶ 7] Disciplinary Counsel alleges that Respondent violated Canon 4.4 of the Code of Judicial Conduct because “[t]he participation of Respondent *pro se* in the [Ked Clan/]Lineage Case in collaboration with Defendant Paula Kumangai, who was representing herself and two other Defendants, played a key role in the trial and determination [sic] the outcome of the case.” Compl. ¶ 23.

[¶ 8] Canon 4.4 reads as follows:

A judge shall not participate in the determination of a case in which any member of the judge’s family represents a party or is associated with the litigation. The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge.

ROP Code of Judicial Conduct 4.4.

[¶ 9] Canon 4.4 addresses a judge’s role as arbiter. Rather than address generalized participation, its focus is a judge’s participation “in the determination of a case.” *Id.* In the Ked Clan/Lineage case, the Respondent was not acting in his capacity as decision maker. He had no authority or role in determining the outcome of the case. Rather, he was named as a defendant and participated solely in that role, presenting argument and evidence.

[¶ 10] Because Canon 4.4 does not address a judge’s participation in a case as a party, it is inapplicable here. As a result, the Tribunal does not find a violation of Canon 4.4 of the Code of Judicial Conduct.

II. Canon 4.8

[¶ 11] Disciplinary Counsel also contends that Respondent violated Canon 4.8 of the Code of Judicial Conduct because “[e]ven though Respondent was technically not representing the other Defendants, for all practical purposes, he was defending and advancing the private interests of all Defendants who are members of his family, since all Defendants have common interests and defenses in the case.” Compl. ¶ 24.

[¶ 12] Canon 4.8 states, in part, that “[a] judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge’s family, or anyone else.” ROP Code of Judicial Conduct Canon 4.8. A violation of this Canon occurs when a judge puts forward his status as a judge to gain preferential treatment. The Commentary on the Bangalore Principles of Judicial Conduct and the ABA Model Code of Judicial Conduct, both of which this Court turns to in interpreting and applying its Code of Judicial Conduct, *see* ROP Code of Judicial Conduct Canon 8.3, contain similar provisions. The Commentary on the relevant Bangalore Principle includes the following examples that illustrate when a judge is using the prestige of his office to advance his private interests:

For example, a judge should not use judicial letterhead to gain an advantage in conducting his or her personal business. . . . If stopped for an alleged traffic offence, a judge should not volunteer his or her judicial status to the law enforcement officer. A judge who telephones a prosecutor to inquire “whether anything could be done” about a ticket given to a court clerk for a traffic violation is giving the appearance of impropriety even if no attempt is made to use the judicial position to influence the outcome of the case.

U.N. Office of Drugs and Crime, *Commentary on Bangalore Principles of Judicial Conduct*, ¶ 145 (September 2007) [hereinafter *Commentary*]. The ABA Model Code of Judicial Conduct presents similar examples: “[I]t would be improper for a judge to allude to his or her judicial status to gain favorable treatment in encounters with traffic officials. Similarly, a judge must not use judicial letterhead to gain an advantage in conducting his or her personal business.” ABA Model Code of Judicial Conduct R. 1.3 cmt.

[¶ 13] Such circumstances are not present in this case, and Disciplinary Counsel has not provided sufficient evidence to support his contention that Respondent used or lent the prestige of his judicial office to advance his interests or those of his co-defendant family members. Disciplinary Counsel relies on one argument: Respondent violated Canon 4.8 of the Code of Judicial Conduct because “[e]ven though Respondent was technically not representing the other Defendants, for all practical purposes, he was defending and advancing the private interests of all Defendants who are

members of his family, since all Defendants have common interests and defenses in the case.” Compl. ¶ 24. While it is true that the defense Respondent presented in the Ked Clan/Lineage case could equally defend the interests of his co-defendants, Disciplinary Counsel has failed to present evidence that defending oneself is the type of improper judicial influence prohibited by Canon 4.8. Unlike the forementioned examples, there is no evidence in the record that Respondent attempted to leverage his office to gain favorable treatment or advantage to, for example, manipulate the trial judge or get the case dismissed. Absent such evidence, a violation of Canon 4.8 is not supported.

III. Canon 4.11

[¶ 14] Disciplinary Counsel argues that Respondent “violated [Canon] 4.11 because, for all practical purposes, he represented members of his family [in the Ked Clan/Lineage case]. Compl. ¶ 25.

[¶ 15] Canon 4.11 prohibits a judge from “serving as [a] family member’s lawyer in any forum,” but expressly provides that “a full-time judge may act *pro se* and may, without compensation, give legal advice to and draft or review documents for a member of the full-time judge’s family.” ROP Code of Judicial Conduct Canon 4.11. Respondent withdrew as counsel for co-defendants in the Ked Clan/Lineage lawsuit, and claims to have “stopped discussing the case with co-defendants” after his withdrawal. Answer ¶ 26. Respondent’s co-defendants prepared and filed their own documents, including a motion for summary judgment and closing arguments. *See* Mot. for Summ. J. *and* Defendant Imetuker, Remeliik, and Kumangai’s Closing Arg. (Respondent did not file a summary judgment brief at all.) Respondent’s co-defendants also separately presented their own defenses and evidence at trial and examined and cross-examined witnesses themselves. *See* Findings and Recommendation of Judicial Disciplinary Counsel ¶ 20.

[¶ 16] Although Canon 4.11 permits a judge to represent himself *pro se*, such representation raises concerns when the judge is a co-party. Canon 4.11 is designed to allow a judge to defend his interests in court and, we think, his interests only. This is not possible where a judge shares a common interest with his co-defendants. As Respondent admitted at the hearing, he could not avoid representing his family’s interests while representing himself. Given

his common interest with the co-defendants and the fact that he was the only lawyer involved in the case, Respondent's *pro se* representation presented a clear advantage to the co-defendants, likening his *pro se* appearance to "serving as [a] family member's lawyer." See ROP Code of Judicial Conduct Canon 4.11. Moreover, while there is no evidence that Respondent attempted to leverage his position, he should have known that his self representation might, at the very least, appear to intimidate plaintiffs and lend prejudicial weight to the defendants in the proceedings. Although the trial judge in the matter denied the plaintiffs' motion to disqualify Respondent, Compl. ¶ 14 (citing Ex. 6),³ Respondent should have nonetheless recognized the need to afford some distance between himself and his family during the proceedings. He should have considered hiring his own counsel. Instead, as Disciplinary Counsel asserts, "for all practical purposes," Respondent represented the other co-defendants in the Ked Clan/Lineage case. Compl. ¶ 25. The Tribunal finds that Disciplinary Counsel has shown by clear and convincing evidence that Respondent violated Canon 4.11.

IV. Canon 4.10.6

[¶ 17] Disciplinary Counsel also claims that Respondent violated Canon 4.10.6 of the Code of Judicial Conduct. This Canon requires that "[s]ubject to the proper performance of judicial duties, a judge may engage in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties." ROP Code of Judicial Conduct Canon 4.10.6. The Commentary to the Bangalore Principles of Judicial Conduct defines activities for purposes of its Principle 4.11.4, which is analogous to Canon 4.10.6, as extrajudicial community-based activities:

A judge may engage in appropriate extrajudicial activities so as not to become isolated from the community. A judge may, therefore, write, lecture, teach and speak on non-legal subjects and engage in the arts, sports and other social and recreational activities if such

³ Exhibit 6 to the Complaint does not discuss the plaintiff's motion to disqualify Respondent. For purposes of this Order, the Tribunal assumes that such a motion was made in open court during the trial and was denied during that proceeding.

activities do not detract from the dignity of the judge’s office or interfere with the performance of the judge’s judicial duties.

Commentary ¶ 166; *see also* ABA Model Code of Judicial Conduct R. 3.1 cmt. (discussing and covering the same and similar community activities).

[¶ 18] Disciplinary Counsel does not make an argument specifically addressing extrajudicial activities other than Respondent’s participation in the Ked Clan/Lineage Case. Rather, he argues that Respondent placed his personal interests and the interests of his family above his official duties “[b]y withdrawing first as legal counsel for all Defendants, including himself, then reappear[ing] *pro se* to defend his own interests in the [*Ked Clan/Lineage Case*, which is identical in all material respects to the interests of all other Defendants.”⁴ Compl. ¶ 26. Disciplinary Counsel, however, has failed to present authority that persuades us that in-court legal representation of the interests of a judge, or a judge’s family members, is the type of activity contemplated by Canon 4.10.6. Absent such authority, the Tribunal is not convinced that the allegations show a “highly probable or reasonably certain” violation of Code of Judicial Conduct Canon 4.10.6. *See Shadel II*, 22 ROP at 157 (citation omitted).

V. Canon 6.1

[¶ 19] In the same way, Disciplinary Counsel claims that Respondent violated Canon 6.1: He again relies on the argument that Respondent’s participation in the Ked Clan/Lineage case violated the Code. Canon 6.1 requires that “[t]he judicial duties of a full-time judge take precedence over all other activities.” ROP Code of Judicial Conduct Canon 6.1.

[¶ 20] ABA Model Code of Judicial Conduct Rule 2.1 similarly prescribes that the duties of judicial office “shall take precedence over all of a

⁴ Disciplinary Counsel also mentions that “Respondent did not inform the Chief Justice or obtain leave of the Supreme Court regarding his decision to participate in the trial of the [*Ked Clan/Lineage Case* as defendant *pro se*.” Compl. ¶ 12. There is, however, no requirement in the Code of Judicial Conduct that Respondent inform the Chief Justice or obtain leave of the Supreme Court to participate *pro se* in a trial in which a judge is named as a defendant. Nonetheless, Respondent indicates that he “informed [his] chamber clerk that [he would] be in court for five (5) days and instructed her to prepare [his] leave without pay.” Answer ¶ 12.

judge’s personal and extrajudicial activities.”⁵ The Comment on Rule 2.1 provides limited insight into interpreting Canon 6.1. It contains the following two parts:

[1] To ensure that judges are available to fulfill their judicial duties, judges must conduct their personal and extrajudicial activities to minimize the risk of conflicts that would result in frequent disqualification. See Canon 3.

[2] Although it is not a duty of judicial office unless prescribed by law, judges are encouraged to participate in activities that promote public understanding of and confidence in the justice system.

ABA Model Code of Judicial Conduct R. 2.1 cmt.

[¶ 21] The first comment addresses a judge’s involvement in activities that might present conflicts of interest that would require recusal from acting as arbiter in a case, and the second recommends that a judge participate in particular types of activities—those that “promote public understanding of and confidence in the justice system.” While both goals in the comments are laudable, they discuss circumstances not present here. Because Disciplinary Counsel has not provided sufficient evidence to explain why Canon 6.1 may have been violated by Respondent, the Tribunal cannot conclude that Disciplinary Counsel met his burden of proving, by clear and convincing evidence, that such a violation occurred.

FINDINGS AND DECISION

[¶ 22] The Tribunal finds that Respondent violated Canon 4.11. The Tribunal, furthermore, does not find that Respondent violated Canons 4.4, 4.8, 4.10.6, and 6.1.

[¶ 23] “[When] the Tribunal finds that the allegations of misconduct under the Code are true, it shall impose an appropriate sanction or a combination of sanctions.” ROP Code of Judicial Conduct Canon 7.11. As in

⁵ Although the language of Bangalore Principle of Judicial Conduct 6.1 is nearly identical to our Section 6.1, its Commentary focuses on extra-judicial governmental activities and activities involving monetary compensation and is not directly applicable here. *See Commentary* ¶ 195.

attorney disciplinary actions, this Tribunal must determine a sanction that “impose[s] the discipline that is necessary to protect the public, the legal profession, and the Courts.” *In re Tarkong*, 4 ROP Intrm. 121, 132 (Disc. Proc. 1994). The Tribunal considers several factors in imposing a sanction, including “whether the misconduct is an isolated incident or part of a pattern of misconduct” and “the presence or absence of mitigating or aggravating circumstances.” ROP Code of Judicial Conduct Canon 7.12. Respondent has not engaged in a pattern of misconduct, and there is no evidence of aggravating circumstances. Respondent’s self representation occurred in one trial, and as a mitigating circumstance, he has since acknowledged that, in representing himself, he also represented the interests of the co-defendants.

[¶ 24] The Tribunal hereby sanctions Respondent as follows: The Tribunal issues Respondent a warning that he shall not appear *pro se* in any civil proceeding where his appearance seems to benefit or actually benefits co-parties. The Tribunal further reminds Respondent of his duty to know the contents of the Code of Judicial Conduct. Respondent shall pay the fees and costs of investigating and prosecuting this matter. *See* ROP Code of Judicial Conduct Canon 7.11.5. Within thirty days of this order, Disciplinary Counsel shall submit an accounting of his costs and time to the Tribunal and shall serve a copy on Respondent. Respondent shall have ten days to file a written objection to Disciplinary Counsel’s accounting. Absent objection, Respondent is directed to pay the amount no later than thirty days after service upon him of Disciplinary Counsel’s accounting. Where Respondent objects, “a single member of this [Tribunal] shall resolve the fee dispute.” *In re Brungard*, 15 ROP 144, 149 (Disc. Proc. 2008).

CONCLUSION

[¶ 25] The Tribunal concludes its analysis of the Complaint against Respondent. This decision is final. The Tribunal expresses its appreciation to Mr. Johnson Toribiong for having accepted the appointment to Disciplinary Counsel in this matter. The Tribunal acknowledges that serving as Disciplinary Counsel is especially difficult when the Complaint is against a sitting Justice of the Supreme Court.

SO ORDERED, this 4th day of October, 2018.