In re Law Office of Kirk and Shadel, 3 ROP Intrm. 285 (1993)

IN THE MATTER OF THE
LAW OFFICE OF KIRK AND SHADEL,
Respondent.

DISCIPLINARY PROCEEDING NO. 7-92

Supreme Court, Disciplinary Tribunal
Republic of Palau

Decision and order
Decided: September 21, 1993

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; JEFFREY L. BEATTIE, Associate Justice; LARRY W. MILLER, Associate Justice.

PER CURIAM:

This disciplinary proceeding arises out of respondent law firm's commencement and conduct of Civil Action No. 209-91. It began with a referral by Justice Sutton, before whom that case was pending, and eventuated in the filing of a formal complaint by Disciplinary Counsel, David W. Kirschenheiter. A hearing was held on August 30, 1993, and this opinion constitutes the findings of the Disciplinary Tribunal pursuant to Rule 5(g) of the Disciplinary Rules and Procedures for Attorneys and Trial Counselors Practicing in the Courts of the Republic of Palau.

The ethical violations alleged to have been committed by respondent law firm fall into two broad categories: violations of the conflicts of interest rules contained in Rule 1.7 of the ABA Model Rules of Professional Conduct, [1] and violations of Rule ⊥286 4.2 forbidding communications with a party represented by counsel. [2] These alleged violations are addressed in Parts I and II of this opinion, respectively. Finding that some of those violations have been proven, we address the matter of sanctions in Part III.

I. ALLEGED VIOLATIONS OF RULE 1.7

The facts relevant to the claimed violations of conflicts of interest rules are in the main undisputed, having been stipulated by Disciplinary Counsel and respondent's counsel prior to the hearing. Respondent and its predecessor have served as counsel to Klai Clan since approximately 1984. Ngetuai Ngirachereang is the senior female member and titleholder of the Klai Clan. Although respondent has represented and continues to represent Klai Clan in litigation in which Ngetuai was named as the trustee or representative of the Clan, neither

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[1] Although the Formal Complaint also alleged a violation of Rule 1.9, Disciplinary Counsel moved at the beginning of the August 30 hearing to withdraw those allegations for lack of evidence. That motion is hereby granted.

[2] The allegations with respect to Rule 4.2 are pleaded alternatively as violations of Rule 8.4. *See* n.12 *infra*.

respondent nor its two partners "have ever represented Ngetuai in her individual capacity in any matter whatsoever, nor has any attorney-client relationship ever existed between any of them and Ngetuai in her individual capacity" or between any of them and Ngetuai's adopted son, Ronnie Ngirachereang. Stipulated Facts, ¶¶ 10, 11.

In May 1991, respondent filed a lawsuit against Ronnie on behalf of the Klai Clan, Geggie Anson, Moded Esther Baules and Toshikatsu Ngirachereang, the natural children of Ngetuai and ⊥287 each strong members of the Clan. The lawsuit, Civil Action No. 209-91, sought to set aside a deed conveying a piece of land from Ngetuai, as titleholder of the Clan, to Ronnie and to enjoin Ronnie from clearing and beginning construction on the land. Respondent neither consulted nor sought the consent of Ngetuai or Ronnie before commencing the lawsuit.

Although Ngetuai was not named as a defendant in the complaint filed by respondent, Ronnie's counsel, Moses Uludong, subsequently moved to add her to the case as an additional defendant. That motion was granted (over the opposition of respondent) by Justice Sutton in August 1991. Respondent remained counsel to plaintiffs in the lawsuit, and served interrogatories on Ngetuai and Ronnie on their behalf.

Against this background, Disciplinary Counsel alleges that respondent violated both Rule 1.7(a) and Rule 1.7(b) of the ABA Model Rules of Professional Conduct, [3] which provide in pertinent part:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
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> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
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> (2) each client consents after consultation.
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> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by ⊥288 the lawyer's responsibilities to another client or to a third person, ... unless:
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> (1) the lawyer believes the representation will not be adversely affected; and
>
> (2) the client consults after consultation . . . .

The Tribunal first addresses Rule 1.7(b), which it finds is inapplicable by its terms to these circumstances. The Formal Complaint asserts that respondent's representation of the plaintiffs in Civil Action No. 209-91 was materially limited by respondent's representation of Klai Clan, as represented by Ngetuai. *Id.* ¶ 33.[4] We believe this allegation has not been proven

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[3] Pursuant to Disciplinary Rule 2(h), those Rules govern the conduct of attorneys and trial counselors practicing in Palau.

[4] The Complaint also asserted that respondent was materially limited by its representation

for two reasons, one legal and one factual.

As a legal matter, we note that the Comment to Rule 1.7 explains that paragraph (b) is meant to govern "[s]imultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants". Without deciding that paragraph (b) has no application outside of those circumstances, we find, in any event, that as a factual matter the dilemma which that paragraph is meant to avoid is not present here:

> "Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client." Comment to Rule 1.7.

⊥289 In order to find the conflict alleged by the Complaint, we would have to find that respondent's ability to represent the plaintiffs in Civil Action No. 209-91 was somehow compromised by its obligations to the Klai Clan in other pending litigation. But we have not been pointed to nor do we see any inconsistency in the two representations. The earlier litigations pitted Klai Clan against third parties. *See* Stipulated Facts ¶¶ 9(a-f). By contrast, Civil Action No. 209-91 is an internecine battle between members of the Clan. We [sic] aware of no position taken in the former litigations that would foreclose respondent from taking any position beneficial to its clients in the latter litigation.[5]

A trickier question is presented by Rule 1.7(a), which imposes a flat ban on representing one client against another client absent the consent of both: "[A] lawyer may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated." Comment to Rule 1.7. The Formal Complaint alleges that respondent's representation of the plaintiffs in Civil Action No. 209-91 was directly adverse to one or more of respondent's clients without their consent: Klai Clan as represented by Ngetuai (Complaint ¶ 29); Ngetuai herself (*id.* ¶ 30); Ronnie in his capacity as a member of the Klai Clan ⊥290 (*id.* ¶ 31); and Ronnie as Ngetuai's representative as head of the Klai Clan (*id.*).

The last of these allegations relies on the fact that at the time Civil Action No. 209-91 was brought, there was outstanding a power of attorney (executed at about the same time as the disputed deed) purporting to transfer from Ngetuai to Ronnie her power as senior titleholder of the Klai Clan. The theory behind this allegation seems to be that whatever client relationship Ngetuai had with respondent in her role as titleholder was passed down to Ronnie by the execution of the power of attorney. However, whatever the validity of the power of attorney, the lawsuit commenced as against Ronnie was against him in his individual capacity as the recipient of land under the deed signed by Ngetuai. That deed did not depend in any way upon the separate power of attorney and the lawsuit challenging the deed did not attack the power of

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of Ngetuai herself. *Id.* ¶ 34. We deem that allegation withdrawn in light of the stipulation that respondent has never represented Ngetuai in her individual capacity. *See* p. 2 *supra*.

[5] The converse is also true: we do not believe that any position taken by respondent in the intra-Clan litigation, Civil Action No. 209-91, should disable it from presenting a unified front on the Clan's behalf in the other litigations.

attorney in any way. Since it is conceded that Ronnie in his individual capacity was not respondent's client, we reject Disciplinary Counsel's theory in this respect.

We also find that although Ronnie is a member of the Klai Clan and although Klai Clan is respondent's client, that fact, in and of itself, is insufficient to declare Ronnie to be respondent's client with respect to Rule 1.7(a). Rule 1.13(a) explains that "[a] lawyer employed or retained by an organization represents the organization acting through its duly organized ⊥291 constituents" (emphasis added). Without addressing the full impact of the application of Rule 1.13 to clans, we are confident that an attorney for a clan should not, without more, be considered the attorney for each of its members.

We turn then to the allegations regarding Ngetuai. With respect to the suggestion that Ngetuai herself was respondent's client, we again deem the allegation withdrawn (*see* n.4 *supra*) in light of the stipulation that Ngetuai was not a client in her individual capacity. *See* p.2 *supra*.

There remains, therefore, the allegation that a conflict existed between respondent's representation of the plaintiffs in Civil Action No. 209-91 and its concurrent representation of Klai Clan as represented by Ngetuai. Here the question is not whether the latter is respondent's client --it plainly is -- but rather whether its representation of plaintiffs in Civil Action No. 209-91 was directly adverse to its representation of the Clan through Ngetuai. Disciplinary Counsel contends that having represented the Clan through Ngetuai in previous litigation, it was not permitted to represent the Clan through other members in Civil Action No. 209-91 in order to attack actions taken by her as titleholder. Respondent counters that, regardless of the named representative, its client at all times was the Clan as a whole, and that its actions in seeking to set aside the transfer to Ronnie were taken for the benefit of the Clan to preserve the Clan's property.

⊥292 We believe that the correct analysis lies between these two positions. On the one hand, we agree with respondent that whoever the named representative, the client of an attorney who represents a clan is the clan itself. As reflected in Rule 1.13, a clan, like any other organization, must act through one or more of its members. But neither that fact, nor the practice of naming in captions the persons claiming the authority to act on behalf of the organization, can alter the fact that the real party in interest -- and, for present purposes, the client -- is the organization itself. Thus, the fact that Ngetuai had been a named representative in earlier litigation commenced by respondent did not in and of itself create any special duty to Ngetuai or bar respondent from acting on the Clan's behalf through other representatives.

At the same time, we believe that respondent oversimplifies the matter when it asserts that its actions in prosecuting Civil Action No. 209-91 were solely for the benefit of the Clan. In fact, that lawsuit was one in which some members of the Clan were contesting an action taken by another member of the Clan purportedly in her role as senior titleholder. Although respondent elected not to name Ngetuai as a defendant in the first instance, the relief sought in Civil Action No. 209-91 was nevertheless the rescission of an action -- the granting of the deed and the resulting transfer of Clan land -- that Ngetuai had purported to take on the Clan's behalf. Thus, unlike the ⊥293 previous litigation which respondent had litigated, Civil Action No. 209-91 was not simply Clan versus third party, but rather a battle between two factions, each claiming the

right to speak on behalf of the Clan.[6]

The question then is whether respondent was entitled to choose the side it did or even to choose sides at all in undertaking to represent the plaintiffs in No. 209-91. We find that it was not, guided in large part by an ethics opinion of the American Bar Association with respect to partnerships that has been provided to the Tribunal by respondent:

> "It is ... clear that, under Rule 1.7(a), the partnership's attorney could not, without the informed consent of both the partnership and all adverse partners, represent the interests of one partner against other partners with respect to a matter involving the partnership's affairs." ABA Formal Ethics Opinion 91-361 (July 12, 1991)

Considering the strong members of a clan as most closely analogous to partners for purposes of Rule 1.7, we believe that the clan's attorney should not (without consent) ⊥294 become involved in a dispute between its strong members over clan matters. [7] Here, although it is conceded that Ngetuai had never been respondent's client in her individual capacity, it is also undisputed that the clan was its client and that the firm provided legal representation and counsel to her in her role as titleholder. In such circumstances, we believe it was improper for respondent to commence litigation in which it was required to challenge actions she had taken in that role.

We do not believe that this result conflicts with either Rule 1.13(a) or with the general rule that no conflict is presented when an attorney for an organization is called upon to bring suit against one of the organization's constituents. *E.g., U.S. Indus. v. Goldman*, 421 F. Supp. 7 (S.D.N.Y. 1976) (suit against former director); *Meehan v. Hopps*, 310 P.2d 10 (Cal. App. 1956) (suit against former chairman). Rather, to the extent that analogies to the corporate context are useful, we believe that this case is more akin to one in which some members of a corporation's board of directors are complaining that other ⊥295 members have acted on the corporation's behalf without a necessary quorum. In that circumstance, we think it clear that the lawyer who had previously acted for the entire board should not take the part of either side.

For these reasons, we find that Disciplinary Counsel has demonstrated a violation of Rule 1.7(a) by respondent.[8]

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[6] Respondent's position that it was acting in the best interest of the Clan, *see* Respondent's Memorandum of Law at 19-20, rests on the notion that it was surely better for the Clan to retain the land in dispute than to have it become the individual property of Ronnie. But it is for the Clan to decide whether to retain or transfer property it owns. Where two factions of strong members of a clan disagree on this question, an attorney who represents one of the factions is clearly not representing the clan.

[7] We leave open the question whether a clan attorney may properly defend some strong members of a clan where there is a real question whether the parties attacking them are strong members of the clan at all.

[8] We leave to the trial judge to determine, in light of the current alignment of the parties and the prospect of settlement, whether respondent should now be disqualified.

II. ALLEGED VIOLATIONS OF RULE 4.2

The second set of charges against respondent allege violations of Rule 4.2 of the Model Rules:

> "In representing a client, a lawyer shall not communicate about the subject 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."

The Complaint alleges three violations of this Rule, each relating to documents prepared by the firm and delivered to Ngetuai and/or Ronnie during the course of the proceedings in Civil Action No. 209-91.

The facts underlying the first two alleged violations are again largely undisputed. Outside the presence of respondent, with the encouragement of Justice Sutton, Geggie and Moded spoke with Ngetuai in an attempt to reach an out-of-court settlement. ⊥296 *See* Stipulated Facts ¶¶ 30, 31. In late October or early November 1991, Geggie and Moded went to respondent's office and told one of its attorneys that Ngetuai had told them, among other things, that she had not wished to transfer ownership of the disputed land to Ronnie nor to transfer her powers as titleholder to him, that she did not want to be represented by Moses Uludong any longer, and that she wanted papers prepared saying all of these things. *Id.* ¶ 32. After a second meeting, respondent prepared for Ngetuai's signature a power of attorney (transferring her powers to Moded) and a Statement and provided them to Geggie and Moded. *Id.* Those papers were brought by Geggie and Moded to Ngetuai who eventually signed them in the presence of the Clerk of Courts. *Id.* Respondent did not obtain Mr. Uludong's consent to have Ngetuai review these documents. *Id.* ¶ 34. A similar course of events led to the preparation by respondent of a form of Consent, which was again brought by Geggie and Moded to Ngetuai and which Ngetuai signed in January 1992, again without the knowledge or consent of Uludong. *Id.* ¶¶ 37, 40.

Violations of Rule 4.2 require proof of three elements: (1) communication with a party, (2) who is represented by another lawyer, (3) without the other lawyer's consent. The third element has been stipulated to -- there is no question that Moses Uludong was not consulted with respect to the preparation or ⊥297 delivery of any of these documents to Ngetuai. Likewise, we are satisfied that the first element has been established. Although respondent's brief asserts that Geggie and Moded delivered the documents to Ngetuai "on their own initiative", Respondent's Memorandum of Law at 23, that assertion is beside the point. It has been expressly stipulated as to the January document and we find in any event with respect to the November documents that respondent prepared the documents "with the knowledge that Geggie and Moded [were] going to give it to Ngetuai for her review and signature" Stipulated Facts ¶ 39. That fact is sufficient to conclude that the delivery of the documents to Ngetuai constituted "communications" by respondent within the meaning of Rule 4.2.[9]

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[9] *See, e.g., In re Murray*, 287 Or. 633, 601 P.2d 780, 783 (1979) (provision of waiver form to client with expectation that it would be provided to represented third party would violate

Respondent contends, however, that the second element has not been satisfied because -- in its view -- Ngetuai was not represented by another attorney (and thus respondent did not know that she was represented) at the time the November and January documents were delivered to her and signed. According to respondent, Ngetuai's statement to Geggie and Moded that she did not wish to be represented by Uludong and their recitation of that conversation to respondent is sufficient to demonstrate both ⊥298 that Ngetuai was not so represented and that respondent reasonably believed that to be the case. Respondent goes as far as to argue that "there is no evidence before the Tribunal that there was an attorney-client relationship between Ngetuai and Uludong at the time of" the communications. Respondent's Memorandum of Law at 26 (emphasis in original).

We disagree. In our view, the simple fact that Moses Uludong was counsel of record to Ngetuai in Civil Action No. 209-91 at the time of the November and January communications is sufficient to establish both that Ngetuai was represented by another lawyer for purposes of Rule 4.2 and that respondent could not reasonably have believed otherwise. We find inapposite the cases cited by respondent which state that an attorney-client relationship may be terminated at any time.[10] At the time of both communications, Uludong was still counsel of record to Ngetuai with the responsibility and the authority to act on her behalf. The purpose behind Rule 4.2 would be vitiated if attorneys were permitted to disregard the record status of a party's representation, especially where the only basis for their ⊥299 contrary supposition is a statement by their own clients that the other party had become disenchanted with her counsel.[11]

The strictness of this Rule is more than justified by the ease with which an attorney can act in compliance with it. There is simply no good reason why respondent could not and should not have contacted Uludong and sought his consent before providing any documents to Ngetuai. Without imputing any motive to respondent in this instance, the only reason why an attorney might not seek consent would be to forestall opposing counsel from urging a different course of action on his client. But Rule 4.2 exists for the precise reason to protect those parties who might

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Disciplinary Rule 7-104 absent prior consultation with third party's counsel); *see* Rule 4.2, Model Code Comparison (noting that Rule 4.2 is "substantially identical" to Disciplinary Rule 7-104(A)(1)).

[10] One of those cases deals with a dispute over attorney's fees. *Novinger v. E.I. DuPont de Nemours & Co.*, 809 F.2d 212 (3rd Cir. 1987). The other discussed a party's unsuccessful attempt to gain a continuance by firing his attorney on the day of a scheduled hearing. *Kashefi-Zihagh v. I.N.S.*, 791 F.2d 708 (9th Cir. 1986). Neither suggests that a party's intention to terminate her counsel, which here may not even have been communicated to counsel, is sufficient to make her record counsel not so.

[11] We do not believe it relevant that, on the current facts, respondent's clients may have accurately conveyed Ngetuai's wishes. The reasonableness of an attorney's actions must be judged as of the time they were taken. That a violation of Rule 4.2 may turn out to have been harmless does not make it any less a violation. Nor do we mean to suggest that the result would be any different if Ngetuai had communicated her wish directly to respondent. Even there, we believe, Rule 4.2 would have required respondent to contact Uludong before preparing any documents on Ngetuai's behalf.

say or do things without the advice of counsel that they might not say or do if counsel were consulted. Accordingly, with respect to both the November and January communications, we find that respondent violated Rule 4.2.

As to the third alleged violation, we find that it has not been demonstrated. This allegation relates to a settlement ⊥300 document prepared by respondent and delivered by Geggie and Moded to Ronnie. Here again it is stipulated that no consent was sought from Uludong and here there is no assertion that Ronnie was not at all times Uludong's client.

However, in this instance we are not satisfied that the delivery of the settlement document to Ronnie can be deemed a communication from respondent to him. The documents provided to Ngetuai contained only a place for her signature. In that circumstance, we have found that respondent must have expected and intended that the documents would be delivered by its clients to Ngetuai. Here, however, the attorney who prepared the settlement document credibly contends that he believed that the document -- apparently containing signature lines for all of the parties and their counsel -- would be signed by plaintiffs alone and then returned to him, and that he did not instruct or expect his clients to deliver it directly to Ronnie. Although the testimony of Moded appeared to contradict this account, that testimony was itself ambiguous as to whether she told respondent that she intended to provide the document to Ronnie, or merely assumed without stating that that was what she was supposed to do. With that uncertainty, we find that the third alleged violation of Rule 4.2 has not been established by clear and ⊥301 convincing evidence as our rules require, see Disciplinary Rule 5(e), and accordingly must be rejected.[12]

III. SANCTIONS

Having determined to sustain in part the Disciplinary Counsel's allegations with respect to violations of both Rule 1.7 and Rule 4.2, we now turn to the question of sanctions. Given the candor and cooperation of respondent in answering the allegations made against it, and the novelty of some of the questions presented, we believe that an appropriate sanction is a censure of respondent's actions (which this decision should be deemed to constitute), and an assessment of the costs of this proceeding against respondent.[13]

Our rules provide for both public and private censures. *See* Disciplinary Rule 3. We have opted to make this decision public ⊥302 not because we believe respondent deserves a more severe sanction, but because we believe this decision may provide necessary guidance on the questions posed to both the bar and the general public.[14]

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[12] The Formal Complaint asserted that the facts underlying the alleged violations of Rule 4.2 constituted, in the alternative, violations of Rule 8.4. *Id.* ¶¶ 46-48. Given our holdings above, we believe that these allegations are either duplicative or unproven and accordingly deny them.

[13] Upon receipt of an affidavit setting forth the fees incurred and costs expended by Disciplinary Counsel, the Clerk of Courts should certify to respondent the full amount owed, including the fees and costs claimed by the previous Disciplinary Counsel in this matter. Respondent should pay the amount certified to the Clerk of Courts within thirty days thereafter.

[14] We thank the Disciplinary Counsel for his diligence in preparing and prosecuting this

matter.