In re Armaluuk, 4 ROP Intrm. 182 (1994)
IN THE MATTER OF
FRANCISCO ARMALUUK,
Respondent.

DISCIPLINARY PROCEEDING NO. 4-92

Supreme Court, Disciplinary Tribunal
Republic of Palau

Decision
Decided: April 8, 1994

BEFORE: JEFFREY L. BEATTIE, Associate Justice; LARRY W. MILLER, Associate Justice; PETER T. HOFFMAN, Associate Justice

PER CURIAM:

The formal complaint in this disciplinary proceeding alleges Francisco Armaluuk, T.C., violated Model Rule 4.2, which prohibits ex parte communication with a represented party.

Armaluuk represents Sumang Rengiil, the defendant in a suit brought by Gregorio Ngirausui. Ngirausui's complaint alleged Sumang bought a car from him for $3,500 but failed to make payments pursuant to the purchase agreement. Ngirausui sought $4,324 in damages, which included the full cost of the car plus $824 on another debt which Sumang allegedly owed.

Ngirausui moved for summary judgment, alleging by affidavit that Rengiil had failed to make payments and that the amounts listed in the complaint were still due and owing. Rengiil told Armaluuk that he was no longer making payments because Ngirausui had repossessed the car. Rengiil also told Armaluuk that he had spoken with Jane Albert, Ngirausui's ex-secretary, and that Albert told him she knew that Ngirausui had repossessed the car.

Based on this information, Armaluuk called Albert at her store, which is located in the same building as Ngirausui's business, G & N Construction, a sole proprietorship. In addition to corroborating Rengiil's claim that Ngirausui had repossessed the ⊥183 car, Albert also told Armaluuk that a Ngirausui employee, Thomas Nakama, told her that Ngirausui's primary interest in suing Rengiil was to collect on another outstanding debt that Rengiil owed.

When Armaluuk pressed her on this point, Albert handed the phone to Nakama, who was standing nearby. Nakama confirmed that Ngirausui had repossessed the car and claimed that Ngirausui was really suing to collect outstanding rental fees on an unrelated matter. Armaluuk encouraged Nakama to inform Ngirausui's attorney, David Shadel, that the car had been repossessed so that Shadel could amend the complaint.

When Shadel heard about these two conversations he filed the ethics complaint which led

to this hearing.[1]

DISCUSSION

Pursuant to ROP Disciplinary Rule 2(h), a member of the Palau Bar may be subject to disciplinary action for violating any provision of the ABA Model Rules of Professional Conduct. Model Rule 4.2 prevents a lawyer from communicating about the subject of his representation with a party he knows to be represented by another lawyer.[2] The rule serves the twin purposes of ⊥184 "protect[ing] represented parties from the dangers of dealing with adverse counsel," *Wright v. Group Health Hosp.* , 691 P.2d 564, 569 (Wash. 1984), and of "prevent[ing] the inadvertent disclosure of privileged information." *Lang v. Superior Court* , 826 P.2d 1228, 1230 (Ariz. App. 1992).

As a threshold matter, we find that the rule applies, subject to considerations discussed below, to employees of sole proprietorships such as G & N Construction. Although the American cases available in Palau only discuss the reach of the rule vis-a-vis employees of corporations, see, e.g., Wright, supra, there is no principled reason to exclude employees of sole proprietorships from the rule's coverage. The Comment to the rule does not restrict its scope to corporations, but rather discusses the rule's application to "an employee or agent of a party" and to "organizations." Regarding the latter, the Comment states that a lawyer may not communicate ex parte with anyone having "managerial responsibility," or with anyone whose act or omission may be imputed to the organization, or with anyone whose statement may constitute an admission on the part of the organization. These broadly stated considerations can as easily apply to employees of sole proprietorships as they can to employees of corporations. The relevant focus, then, as the ensuing discussion will explain, is on ⊥185 the employee's relationship with the represented party, rather than on how the party chooses to organize his business.

Addressing the two conversations in turn, we first hold that Armaluuk's communication with Albert did not violate Rule 4.2. As a former employee, Albert could not have "managerial responsibility" at G & N. Former employees are covered by the rule prohibiting ex parte communications if their acts or omissions gave rise to the underlying litigation, see *Lang* 826 P.2d at 1233, or if their statements involve privileged communications, see, e.g., *Action Air*

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[1] The Disciplinary Panel is troubled by the fact that although counsel made the effort to file an ethics complaint, he apparently made no effort at that time to determine whether the complaint and motion for summary judgment he had filed were indeed factually erroneous. The merits of the underlying civil action are not before this panel, however, and any concerns in this regard are best addressed by the trial judge before whom the case is pending to the extent he deems appropriate.

[2] The full text of Model Rule 4.2 reads,

> 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.

Freight, Inc. v. Pilot Air Freight, Inc. , 769 F. Supp. 899, 904 (E.D. Pa. 1991), but such concerns are not relevant here.

Armaluuk's communication with Nakama presents a closer question because, as general manager, Nakama ostensibly has "managerial responsibility" at G & N. But courts applying the ex parte communication rule to organization employees uniformly hold that the rule extends only to those upper-level officers and employees who have "speaking authority" for the organization. See, e.g., *Wright*, 691 P.2d at 569. The rule is meant to cover those employees who serve as the "alter ego" of the organization. Lawyers' Man. on Prof. Conduct (ABA/BNA) ¶ 71.304 (1991) quoting ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1410 (1978) ("If the officers and employees that a lawyer proposes to interview could commit the corporation because of their authority as corporate officers or employees . . . then they, as the alter egos of the corporation, are parties for purposes of [Model Rule 4.2]."). In other words, the rule only applies to ⊥186 those "top management" employees "responsible for making final decisions and those employees whose advisory roles to top management are such that a decision would not normally be made without their advice or opinions or whose opinions in fact form the basis of any decision." Id.

It makes sense to limit the rule's application in this way. The rule, after all, is not a prophylactic meant to protect parties from the "revelation of prejudicial facts." *Wright*, supra. Rather, its limited purpose is to "prevent situations in which a represented party may be taken advantage of by adverse counsel." Id. at 567. From this premise, it is fair to conclude that the rule need only extend to those employees with enough responsibility or authority to, in effect, be considered the equivalent, or the alter ego, of the party. Extending the rule's reach beyond this limited group of employees might unnecessarily impede the legitimate gathering of evidence. We therefore adopt the limitations enunciated in the preceding paragraph.

We also prospectively adopt the rule common to many American jurisdictions that when a lawyer communicates with an employee of a represented party he must disclose to such employee his identity and the fact that he represents a party with a claim against the employee's employer. See, e.g., Nebraska Bar Association Advisory Opinion No. 91-3 (1991) (Before interviewing present or former employees, a lawyer "should identify him/herself as an attorney for [an adverse party] and identify the litigation so that the individual clearly understands counsel's role.").

⊥187 At the hearing on this matter, Nakama testified that although he occasionally signs checks in Ngirausui's absence he has no power to initiate or settle cases. Nakama further testified that all contracts are prepared by Ngirausui and that he (Nakama) can sign a contract in Ngirausui's absence only if Ngirausui has expressly given him the power to do so. Albert also testified that when Ngirausui was away Nakama would recommend that they wait until he returned to resolve any problems that arose in his absence.

Given these facts, it is clear that Nakama does not have "speaking authority" for G & N. That is, he has no authority to commit G & N to a course of action, nor is he responsible for making final decisions. Since Nakama's opinions do not necessarily form the basis of any of G

& N's final decisions, it cannot be said that Nakama is the "alter ego" of G & N, even in Ngirausui's absence. Thus, Armaluuk was entitled to speak with Nakama without Shadel's consent, as long as the two did not discuss privileged communications.

For the reasons stated above we find that Francisco Armaluuk's communications with Jane Albert and Thomas Nakama did not violate Model Rule 4.2. The complaint against him is therefore DISMISSED.

We thank the Disciplinary Counsel for his assistance in this matter.