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FOR PUBLICATION

**IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

**SAIPAN ACHUGAO RESORT
MEMBERS' ASSOCIATION,**

Plaintiff/Counter-Defendant

v.

WAN JIN YOON,

Defendant/Counter-Claimant.

Civil Action No. 03-0187E

**ORDER STRIKING PORTION OF
MENDIOLA'S TESTIMONY BASED ON
ATTORNEY-CLIENT PRIVILEGE**

I. INTRODUCTION

On September 5, 2005, the final phase of the bench trial between Saipan Achugao Resort Members' Association ("Plaintiff" or "SARMA") and Wan Jin Yoon ("Yoon") resumed after a multi-month continuance. Richard Pierce and Edward Manibusan appeared for Yoon. Robert O'Connor and Gregory Koebel appeared for Plaintiff.

II. BACKGROUND

During the course of the resumed trial, Richard Mendiola ("Mendiola"), an employee of Yoon's corporation, was called as a witness. During Mendiola's cross-examination, conducted by Plaintiff's attorney, Robert O'Connor, Mendiola testified about several communications Mendiola witnessed,

1 some between Mr. Yoon and his Attorney, Joseph Arriola, and others between Mr. Yoon and a third
2 party, who was not a licensed attorney. After Mendiola concluded his testimony, Yoon's current
3 attorney, Richard Pierce, moved to strike Mendiola's testimony in its entirety based on the attorney-
4 client privilege. Plaintiff responded by filing a pocket brief opposing Yoon's motion to strike, asserting
5 that the communications, upon which Mendiola testified, were not privileged.

6 Yoon replied to Plaintiff's opposition by also claiming that Mendiola's testimony should be
7 stricken from the record based on Yoon's accusations of misconduct under the Model Rules of
8 Professional Conduct Rule 4.2, in addition to Yoon's evidentiary argument that Mendiola's testimony
9 violated the attorney-client privilege. Plaintiffs filed a timely response opposing each ground
10 supporting Yoon's motion to strike Mendiola's testimony.

11 III. DISCUSSION

12 A. **Rule 4.2 of the Model Rules of Professional Conduct Apply Only to Ex Parte 13 Communications With a Person Represented by an Attorney in the Matter at Issue.**

14 Defendant Yoon in his reply to Plaintiff's brief opposing Yoon's motion to strike, in part relied
15 on Rule 4.2 of the Model Rules of Professional Conduct. While Yoon's assertion that the Model Rules
16 of Professional Conduct apply in the Commonwealth is correct, Com. Disc. R. 2 (adopted Feb. 24,
17 1999), his reliance on Rule 4.2 as grounds to have Mendiola's testimony stricken is misguided.

18 Rule 4.2 simply prohibits an attorney representing a client from communicating about the
19 subject matter of representation with a person whom the attorney knows is represented in the same
20 matter by a lawyer, unless the attorney has the consent of the other lawyer. MODEL RULES OF PROF'L
21 CONDUCT R. 4.2 (1983). Therefore, for the prohibition upon communication to even apply, two
22 threshold elements must be met. First, the communication must concern the subject of representation.
23 Second, the person with whom the attorney seeks to communicate must be known to be represented in
24 the matter by another attorney.

25 Here, Yoon contends that by questioning Mendiola about Mendiola's observations of Yoon's
26 discussions in the presence of his Attorney, Mr. O'Connor violated the bar against unwaived ex parte
communications. It is true that the subject matter of Mr. O'Connor's questioning concerned his
representation of SARMA, because it concerned communications between Mr. Yoon and his attorney

1 about the Plumeria Resort, and therefore satisfied the first element. Yet, Mr. Mendiola was *not*
2 represented in this matter by an attorney. Consequently, no ex parte communication occurred between
3 Mr. O'Connor and Mr. Mendiola, and Yoon may not seek sanctions of any form against SARMA based
4 on a violation of Rule 4.2.

5 Though Yoon, in his brief, implies that O'Connor's line of questioning aimed deliberately at
6 eliciting potentially privileged communications between Mr. Yoon and his counsel, Mr. O'Connor's
7 questioning did not violate the strict language of Rule 4.2 which prohibits "a lawyer [from]
8 communicat[ing] about the subject of the representation with a person the lawyer knows to be
9 represented by another lawyer in the matter." For the purposes of Rule 4.2, Mr. O'Connor's intentions
10 are immaterial.

11 **B. The Attorney-Client Privilege Excludes From Evidence Conversations Involving Third**
12 **Parties Where the Third Party is "Reasonably Necessary" to the Communication.**

13 Plaintiff argues that because Mendiola was present at the meeting between Yoon and Attorney
14 Arriola, the attorney-client privilege is waived. However, the attorney-client privilege is an important
15 component of the common law contribution to evidentiary rules. The attorney-client evidentiary
16 privilege is supported by a policy, which promotes the free and candid discussion of all matters related
17 to the provision of legal services between attorney and client. *Swidler & Berlin v. United States*, 524
18 U.S. 399, 403, 118 S. Ct. 2081, 2084, 141 L. Ed. 2d 379, 382 (1998) ("The privilege is intended to
19 encourage 'full and frank communication between attorneys and their clients and thereby promote
20 broader public interests in the observance of law and the administration of justice.'" (*quoting Upjohn*
21 *Co v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 682, 66 L. Ed. 2d 584, 589 (1981))). For this
22 reason, the presence of some third parties during normally privileged discussions between an attorney
23 and client will not automatically waive that privilege when the third party is an agent of the client or
24 the attorney.

25 For instance, *In McCaffrey v Estate of Brennan*, 533 S.W.2d 264 (Mo. Ct. App. 1976), the court
26 held that the presence of a client's agent and personal secretary, who performed various services for the
client both private and business affairs, did not destroy the attorney-client privilege when the client

1 communicated instructions to the attorney regarding preparation of a will. *See also, In re Busse's*
2 *Estate*, 75 N.E.2d 36 (Ill. App. Ct. 1947) (holding that a client's statements made in front of a third
3 party who handled the client's personal affairs was protected by the attorney-client privilege.).
4 However, an agent's presence will not defeat the privilege, only if the agent's "participation is
5 reasonably necessary to facilitate the client's communication with a lawyer . . . and if the client
6 reasonably believes that the person will hold the communication in confidence." RESTATEMENT (THIRD)
7 OF THE LAW GOVERNING LAWYERS § 70 cmt. f (2000).

8 Here, Mendiola acted as Yoon's agent by facilitating Yoon's discussions in English with
9 attorney Arriola. Although it is certainly clear that Mendiola's agency did not fit neatly within the role
10 of an interpreter, because Yoon evidently spoke English and Mendiola could not speak Korean,
11 Mendiola nevertheless facilitated the privileged discussions by assisting Yoon's communications in
12 English. In any event, there is nothing to suggest that Mr. Mendiola's presence during Mr. Yoon and
13 Mr. Arriola's conversation was orchestrated to evade giving testimony. As such, his presence alone
14 does not waive the confidentiality of Yoon's communications with attorney Arriola. Having determined
15 that Mendiola was an "agent" whose presence did not waive the attorney-client privilege, it is next
16 essential to determine whether Mendiola's trial testimony articulated any privileged communications
17 between Yoon and his attorney.

18 Plaintiff argues that the communications testified to by Mendiola were, in fact, never privileged
19 communications because Yoon was acquiring services from Attorney Arriola that "any literate person
20 could have written." *Pocket Brief Opposing Motion to Strike Mendiola's Testimony*, filed Sept. 9, 2005,
21 pg. 2, para. 8. Indeed, the attorney-client privilege is not an expansive privilege that applies to all
22 communications between a client and his attorney. Rather, the privilege is confined within the
23 narrowest possible limits consistent with its purpose of allowing a client to place in his lawyer
24 unrestricted and unbounded confidence. *In re Horowitz*, 482 F.2d 72, 81 (2nd Cir. 1973); *see also, In*
25 *re Grand Jury Investigation*, 599 F.2d 1224 (3rd Cir. 1979) (because the attorney-client privilege
26 obstructs the search for the truth, it must be strictly confined within the narrowest possible limits).

1 Therefore, the attorney-client privilege only applies to communications made while an attorney was
2 present. Here, Mendiola testified only to one exchange in the presence of Mr. Arriola:

3 **Q [BY MR. O’CONNOR]:** So did Mr. Ho Jin Yoon and you go to Mr.
4 Arriola’s office, and didn’t he, Mr. Ho Jin Yoon ask Mr. Arriola to send
another anonymous concerned citizen letter to DPW?

5 **A [BY MR. MENDIOLA]:** Yes, sir.

6 *Reply In Support of Pocket Brief Opposing Motion to Strike Mendiola’s Testimony*, filed Sept. 22, 2005,
7 pg. 2, fn. 1 (transcribed Tape No. 1284, Side B). As this is the sole communication before an attorney,
8 this is the only exchange subject to be stricken on account of the attorney-client privilege.

9 While the privilege is subject to a narrow interpretation, the attorney-client privilege doctrine
10 is based on a public policy of “insuring the right of every person to freely and fully confer and confide
11 in one having knowledge of law, and skilled in its practice, in order that the [client] may have adequate
12 advice” *Baird v. Koerner*, 279 F.2d 623, 629 (9th Cir. 1960). The ability of a literate layperson
13 to draft a similar communication does not exclude the communication from the privilege.

14 The text of the resulting document is not the determinate factor on whether the communications
15 that led to the document’s creation are privileged. A client “cannot be compelled to answer the
16 question, ‘What did you say or write to the attorney?’” *Philadelphia v. Westinghouse Elec. Corp.*, 205
17 F.Supp. 830, 831 (E.D. Pa. 1962). It follows that the client’s agent, whose presence does not destroy
18 the privilege, also cannot be asked ‘what did the client say or write to the attorney?’.

19 **IV. CONCLUSION**

20 The bulk of Mendiola’s testimony was in regard to communications made when attorney Arriola
21 was not present. Clearly, those communications and the resulting testimony are not subject to any
22 privilege and will not be stricken. The communications testified to where Attorney Arriola was present,
23 involved drafting of documents by Arriola at Yoon’s request. As a result, that testimony is subject to
24 the attorney-client privilege and shall be STRICKEN from the record.

25 SO ORDERED this 1st day of November 2005.

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/s/
David A. Wiseman
Associate Judge