

1 **FOR PUBLICATION**

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5 **IN THE SUPERIOR COURT**

6 **OF THE**

7 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

8
9 **COMMONWEALTH PORTS**
10 **AUTHORITY,**

11 **Plaintiff,**

12 **vs.**

13 **DOUGLAS F. CUSHNIE,**

14 **Defendant.**

) **Civil Action No. 07-0374**
)
)

) **ORDER(s):**
)

) **DENYING DEFENDANTS’ MOTION**
) **TO DISMISS**

) **DENYING DEFENDANT’S MOTION**
) **FOR SANCTIONS**
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)
15 _____)

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18 THIS MATTER came for hearing on December 13, 2007 at 1:30 p.m.. Defendant Douglas
19 Cushnie appeared on his own behalf. Counsel Robert Torres appeared on behalf of Plaintiff
20 Commonwealth Ports Authority (hereinafter referred to as “CPA”). Having examined the pleadings, the
21 parties’ arguments, and applicable law, the Court now renders its decision and ruling.

22
23 **I. PROCEDURAL BACKGROUND**

24 The basis for the hearing was a motion to dismiss filed by Defendant Cushnie. According to the
25 complaint, which serves as the basis for the above-captioned action, CPA alleges that Cushnie
committed professional malpractice while retained as counsel for CPA when Cushnie by and through his
professional office overbilled CPA by an amount exceeding \$200,000. Moreover, CPA alleges in its

1 complaint that Cushnie’s overbilling, and subsequent failure to restore the amount allegedly overbilled
2 amounts to a breach of fiduciary duty and a breach of contract.

3 In its action for Professional Malpractice, CPA specifically alleges that Cushnie owed a duty of
4 care to CPA which incorporated the following requirements:

5 (a) submit accurate billings; (b) safeguard client property; (c) keep CPA reasonably informed
6 about the status of ongoing matters and promptly comply with reasonable requests for
7 information; (d) to hold in trust , separate from Cushnie’s own property, the property of CPA
8 and to maintain complete records for any attorney trust account(s) and general accounts into
9 which CPA property was placed or otherwise deposited; and to return to CPA any and all
10 its property upon demand.

11 CPA’s Complaint, at ¶ 22.

12 CPA then alleged that Cushnie violated his duty of care through the following actions:

13 (a) failed to insure that an employee, invested with the authority to handle client funds and
14 over whom he exercised direct supervisory authority, handled those funds including CPA
15 funds in a manner compatible with his professional obligations or in violation of the
16 applicable lawyer code if engaged in by a lawyer; (b) failed to safeguard client property; (c)
17 failed to return client property, despite demand therefor; (d) failed to maintain accurate
18 records governing the disposition of client property; and (e) inflated or permitted to be
19 inflated billings from his Law Office for services to CPA

20 [H]e failed to supervise a non-lawyer assistant who overbilled clients and who
21 misappropriated client funds; when he failed to implement adequate safeguards to prevent
22 the overbilling of clients; and/or when he failed to implement a monitoring system to ensure
23 review for accuracy of bills or to prevent fraud.

24 CPA’s Complaint at ¶¶ 23-24.

25 In addition to setting forth allegations regarding Cushnie’s alleged duty of care, and Cushnie’s
alleged breach of that care, the Complaint refers to the Model Rules Of Professional Conduct, which are
issued by the American Bar Association and adopted by the CNMI. Particularly, CPA identifies the Model
Rules of Professional Conduct, then cites to the Restatement (Second) of Torts which provide that violation
of a law or administrative regulation which has also been adopted by a court as defining a reasonable man,
constitutes negligence. Moreover, Plaintiff also alleges that a violation of the Commonwealth Rules of
Professional Conduct is relevant and material to determining the standard of professional care of an attorney
in the CNMI, and an attorney’s failure to comply with such rules can be used as evidence to demonstrate
a breach of that standard of care. Lastly, CPA alleges in its complaint that Cushnie’s conduct with regard

1 *Adoption of Magofna*, 1 N.M.I. 449, 454 (1990); *Enesco Corp. v. Price/Costco, Inc.*, 146 F.3d 1083,
2 1085 (9th Cir. 1998). In reviewing the sufficiency of the complaint, the “issue is not whether a plaintiff
3 will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.”
4 *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686 (1974).

5 In other words, dismissal is only proper if the complaint fails to allege sufficient facts to support
6 a “cognizable legal theory.” *See Ballistreri v. Pacifica Police Dept.*, 901 F.2d 696, 700 (9th Cir. 1990).
7 Because CPA has alleged sufficient facts to substantiate a legally cognizable claim of professional
8 negligence, even without reference to the Commonwealth Rules of Professional Conduct, Cushnie’s
9 motion to dismiss must be denied.

10 Cushnie argues in his motion that CPA bases its entire first claim for relief on Cushnie’s
11 supposed violation of the Model Rules of Professional Conduct. However, Cushnie incorrectly portrays
12 the claim for relief. CPA’s first claim for relief alleges that Cushnie, through his actions committed
13 professional malpractice or professional negligence. The Restatement (Third) on The Law Governing
14 Lawyers sets forth the elements for the civil claim of professional malpractice or negligence:

15 [A] lawyer is civilly liable for professional negligence to a person whom the lawyer owes
16 a duty of care within the meaning of § 50 or § 51, if the lawyer fails to exercise care within
17 the meaning of § 52 and if that failure is a legal cause of injury within the meaning of § 53,
18 unless the lawyer has a defense within the meaning of § 54.
19 RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS § 48.

20 In other words, barring any defense, an attorney is civilly liable to his/her client, within the scope of
21 representation, if the attorney fails to exercise the “competence and diligence normally exercised by
22 lawyers in similar circumstances,” and such failure is the legal cause of the client’s injuries. *See Id.*, §§
23 50, 52 and 53. Accordingly, any complaint alleging professional malpractice/negligence must allege
24 facts which support the above elements, which are a wordy rendition of the common law negligence
25 elements: duty, causation, damages. Here, CPA fulfills its minimal pleading obligations.

26 First, Plaintiff establishes the duty element by pleading facts that allege that Cushnie and CPA
27 enjoyed a lawyer-client relationship. According to the Restatement, the creation of lawyer-client

1 relationship imputes a duty upon the lawyer to engage in a particular standard of care; i.e., to exercise
2 the “competence and diligence normally exercised by lawyers in similar circumstances.” *See*
3 RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS §§ 50 and 52. CPA therefore has pleaded
4 sufficient facts to establish the “duty” element.

5 Secondly, CPA alleges that Cushnie’s conduct in relation to billing and securing client funds fell
6 beneath the standard of care owed by lawyers to clients. Specifically, CPA’s allegations in paragraphs
7 23-24, in sum, allege that Cushnie failed to adequately secure CPA property, failed to adequately
8 supervise his own employees in relation to CPA property, failed to keep proper records with regard to
9 CPA property, and failed to prevent improper billing of CPA, among other things. CPA further alleges
10 that Cushnie’s acts or omissions fell below the standard of care owed by a lawyer to his client, thus
11 supporting the element of “breach”.

12 Lastly, CPA pleaded that Cushnie’s acts and omissions which allegedly deviated from the
13 standard of care governing a lawyer-client relationship were the legal or proximate cause of CPA’s
14 injuries. In so pleading, CPA alleges that Cushnie’s acts and omissions legally caused Cushnie to
15 overbill CPA in an amount exceeding \$200,000, that Cushnie has since refused to return such property
16 to CPA, and that such overbilling was the legal cause of CPA’s deficit of funds in the amount of
17 \$265,144.76. Accordingly, CPA has sufficiently plead the minimal prima facie case for negligence in a
18 professional context, and therefore has stated a claim upon which relief can be granted.

19 Cushnie, in his motion to dismiss fails to attack the sufficiency of the pleadings discussed above.
20 Instead Cushnie’s motion attacks the pleadings because they include several paragraphs which refer to
21 the Commonwealth Rules of Professional Conduct, which adopt the ABA Model Rules of Professional
22 Conduct. Particularly, Cushnie complains that CPA’s Complaint improperly bases its professional
23 malpractice/negligence count on an allegation that Cushnie’s acts violated the Commonwealth Rules of
24 Professional Conduct. Cushnie further argues that because the drafters of the ABA Model Rules
25 admonish against using them from using the rules as a basis for a legal action against a lawyer or create

1 any presumption of professional negligence, CPA should not be able to base its cause against Cushnie
2 on them. True, the ABA Model Rules drafters explicitly disapprove of the use of the Model Rules as a
3 basis of creating liability:

4 *Violation of a Rule should not itself give rise to a cause of action against a lawyer nor*
5 *should it create any presumption in such a case that a legal duty has been breached. In*
6 *addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy,*
7 *such as disqualification of a lawyer in pending litigation. The Rules are designed to provide*
8 *guidance to lawyers and to provide a structure for regulating conduct through disciplinary*
9 *agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of*
10 *the Rules can be subverted when they are invoked by opposing parties as procedural*
11 *weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning*
12 *a lawyer under the administration of a disciplinary authority, does not imply that an*
13 *antagonist in a collateral proceeding or transaction has standing to seek enforcement of the*
14 *Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's*
15 *violation of a Rule may be evidence of breach of the applicable standard of conduct.*
16 ABA MODEL RULES OF PROFESSIONAL CONDUCT, Preamble, para. 20.

17 However, Cushnie's attack misses the mark. CPA bases its complaint on a theory of professional
18 malpractice/negligence. CPA does not base its complaint on allegations that Cushnie violated the
19 Commonwealth Rules of Professional Conduct. Instead, CPA's complaint merely refers to the Rules,
20 and Cushnie's possible violation of the Rules as possible evidence that Cushnie's acts and omissions
21 with regard to CPA fell below the standard of conduct required of a lawyer in Cushnie's position.
22 Moreover, the drafters of the Model Rules, though admonishing against using the Rules as a basis for a
23 cause of action or a presumption that any legal duty has been breached, fail to admonish against using a
24 violation of the Model Rules as evidence of a breach of conduct by a lawyer.

25 Indeed, the Restatement, though disallowing the use of rules or statutes regarding the conduct of
lawyers as bases for actions, unequivocally allows the use such rules of evidence of a breach of the
standard of care:

(2) *Proof of a violation of a rule or statute regulating the conduct of lawyers:*
(a) does not give rise to an implied cause of action for professional negligence or
breach of fiduciary duty;
(b) does not preclude other proof concerning the duty of care in Subsection (1) or the
fiduciary duty; and
(c) *may be considered by a trier of fact as an aid in understanding and applying the*
standard of Subsection (1) or § 49 to the extent that (i) the rule or statute was designed for

1 *the protection of persons in the position of the claimant and (ii) proof of the content and*
2 *construction of such a rule or statute is relevant to the claimant's claim.*

3 RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS, §52 (*emphasis added*).

4 As CPA has not specifically identified the particular Rules it may use as evidence of a standard of care
5 and Cushnie's breach of it, the Court will refrain from ruling whether CPA will be allowed to present
6 such evidence to the trier of fact. As of this moment in the litigation, the language in CPA's complaint
7 referencing the Commonwealth Rules of Professional Conduct is superfluous and does not warrant
8 dismissal of CPA's well-pleaded allegation of professional malpractice/negligence.

9
10 **B. Sanctions Are Not Appropriate at This Time**

11 Defendant Cushnie filed a separate motion seeking sanctions against CPA pursuant to Rule 11 of
12 the Commonwealth Rules of Civil Procedure. In his motion, Cushnie alleges that CPA's complaint
13 falsely presented several allegations as fact. Particularly, Cushnie takes issue with CPA's
14 characterization of the retainer agreed to between the parties, and Cushnie's actions in relation to the
15 retainer:

16 The first allegation (¶ 6) is that plaintiff agreed to "deposit" a monthly retainer of \$5000.00
17 with the defendant. The retainer agreement executed by the plaintiff and defendant does not
18 require any such "deposit". The next allegation (¶ 9) is that defendant agreed to "deposit"
19 the monthly retainer payments into his trust account. No such language appears in the
20 retainer agreement. The final allegation (¶ 11) in this series is that the \$5000.00 monthly
21 payments were deposited in defendant's client trust account. That statement is false. The
22 original \$5000.00 checks are with plaintiff.

23 CPA's Memorandum in Support of Motion for Sanctions Pursuant to Rule 11 Com. R. Civ. Proc.

24 According to Rule 11, sanctions *may* be awarded if a party violates any of the requirements
25 imposed under subsection (b). Cushnie argues that by making the statements quoted above, CPA
violated subsection (b)(3) which requires the attorney preparing the filing to "certify that to the best of
the person's knowledge, information, and belief formed after an inquiry reasonable under the
circumstances, (3) the allegations and other factual contentions have evidentiary support or, if

1 specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further
2 investigation or discovery Com. R. Civ. P. 11.

3 In support of his claims that CPA's attorney made false statements, Cushnie directs the Court's
4 attention to the Retainer Agreement entered into by the parties, copies of checks which were presumably
5 fraudulently cashed by his former employee Lucy DL Guerrero, and the fact that Cushnie has filed suit
6 against Ms. Guerrero and the Bank of Hawaii for their respective roles in the misappropriation of client
7 funds.

8 Though the Court agrees that Cushnie's presentation of these items of evidence appears to refute
9 CPA's claims regarding what was to be done, and what actually was done with the \$5000/per month
10 retainer fee charged by Cushnie to CPA, the Court nevertheless views Cushnie's request for sanctions as
11 premature. First, to award sanctions at this moment, the Court would be forced to act as fact-finder
12 before the other party has been afforded an opportunity to discover evidence supporting its claims or
13 refuting the evidence presented by Cushnie. In essence, to rule on Cushnie's motion at this time would
14 force the Court to prematurely weigh evidence before a factfinder has been identified to try the case.

15 Moreover, the Court interprets Rule 11 as implicitly requiring some demonstration of bad faith
16 accompanying a false statement. Here, the alleged facts which Cushnie's evidence appears to refute are
17 hardly scandalous in nature or material. By all appearances, it would be reasonable for a person to
18 assume that a retainer agreement that required \$5000.00 monthly payments would require that the client
19 "deposit" \$5000 per month with the attorney. Furthermore, it is also a reasonable understanding that a
20 responsible attorney would deposit any retainer remitted by a client into a separate trust account in order
21 to segregate the client's property from the attorney's property, and because most rules of practice
22 mandate it. Though CPA's attorney at present may have been aware that Cushnie has accused others for
23 complicity in his office's alleged overbilling of CPA, CPA's complaint is directed at Cushnie, and not at
24 those individuals whom Cushnie holds responsible for overbilling and misappropriation of client
25 property. In sum, the Court cannot detect any bad faith or unseemly ulterior motive behind CPA's

