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

ELIZABETH B. MATSUNAGA)	Civil Action No. 97-43
)	
Plaintiff,)	
)	
v.)	
MARIA CYNTHIA MATSUNAGA)	ORDER DISQUALIFYING
)	COUNSEL
Defendant.)	
)	

On February 7, 1997, this Court heard Defendant Maria Cynthia Matsunaga's (Cynthia) motion for disqualification of Plaintiff Elizabeth B. Matsunaga's (Elizabeth) counsel, Douglas F. Cushnie Esq. and Robert Jones Esq. from this matter. Mr. Bruce Berline, Esq. appeared on Cynthia's behalf, and Robert Jones represented Elizabeth. Cynthia alleges that Doug Cushnie's and Robert Jones' (hereinafter Cushnie Office) current representation of Elizabeth in this matter violates Rules 1.9 and 3.7 of the ABA Model Rules of Professional Conduct (hereinafter Model Rules). On the same day, the Court issued an oral ruling^{1/} granting Cynthia's motion and directing Elizabeth to

FOR PUBLICATION

^{1/} The Court's February 7th ruling was based solely on the Court's finding of a Rule 3.7 violation (that the Cushnie Office would be a necessary witness in the trial of this matter). Although the alleged Rule 1.9 violation required further deliberation due to the complexity of the inquiry, exigent circumstances (which included the existence of a 27-day-old TRO) required the Court's issuance of an immediate ruling in order to swiftly remove the disqualification issue so that the request for preliminary injunction could be heard. Although the Court's decision regarding Rule 3.7 was dispositive of the disqualification issue, the Court felt compelled to discuss Rule 1.9 for the sake of possible appellate review of this Order.

1 immediately seek new counsel. In addition, the Court ordered the Cushnie Office to pay Cynthia's
2 costs for bringing the motion for disqualification, and to refrain from charging Elizabeth for any costs
3 or time associated with the Cushnie Office's defense of this motion. The Court now memorializes
4 the February 7th decision in writing.

6 I. FACTS

7 On January 10, 1997, Elizabeth filed a complaint and request for a Temporary Restraining Order
8 from this Court against her daughter-in-law, Cynthia. Elizabeth contends that she loaned approximately
9 \$190,000 over a two month period to her son Francisco (Frank) and her daughter-in-law Cynthia to pay
10 for the family expenses related to Frank's grave illness which required him to be medivaced to the
11 Philippines for treatment. Frank left for the Philippines on September 7, 1996 and after being hospitalized
12 for two months, died in the hospital on November 2, 1996. His body was then flown back to Saipan for
13 burial. When Frank left for the Philippines, he was accompanied by Cynthia and his two sons, Ramon
14 and Thomas. According to Elizabeth, she only authorized Frank and Cynthia to spend the loaned funds
15 on expenses related to Frank's medical treatment and the families living expenses for the period of time
16 they spent in the Philippines. Some of the funds were earmarked for certain expenses: (a) \$22,000
17 cashier's check to Int'l SOS Assistance for transportation expenses; (b) \$25,000 for "additional medical
18 expenses and to return Frank's body to Saipan"; (c) \$20,000 for additional medical bills. However, a
19 total of \$123,000 was given to Cynthia for general expenses. According to Elizabeth, Cynthia has
20 repeatedly promised to repay the money but has not provided any receipts or explanation for where all
21 the money was spent. On January 1, 1997, Cynthia allegedly moved out of the home where she had been
22 living with Elizabeth and her recently deceased husband. Elizabeth's primary request for the injunction
23 stems from her belief that Cynthia has remained in possession of a substantial amount of the funds, and
24 has intentions to spend the remaining funds without reimbursing Elizabeth.

25 Elizabeth has also requested this injunction because she believes that Frank and Cynthia have
26 abused the power of attorney Elizabeth gave Frank over her bank accounts and the funds Elizabeth has
27 received pursuant to a lease agreement with the Diamond Hotel. Finally, Elizabeth has requested this

1 injunction because she allowed Frank to spend \$100,000 of the Diamond Hotel lease money to purchase
2 a Lexis auto and a Maxima auto for his sons; but has subsequently found out that Frank bought the cars
3 for himself and Cynthia.

4 On January 10, 1997, the Court granted Elizabeth a TRO with the following terms:

5 (1) Cynthia shall not transfer any of the funds Elizabeth allegedly loaned to Frank and her;
6 (2) All funds and deposits held in Cynthia's name shall be frozen; (3) Cynthia shall not
7 transfer title to a 1995/96 Lexis auto and a 1995/96 Maxima auto to any person or entity;
8 (4) Cynthia shall not accept any lease proceeds or other funds on behalf Elizabeth; (5)
9 Elizabeth shall post a \$5,000 bond as security; (6) A separate TRO be issued prohibiting
10 Bureau of Motor Vehicles from transferring ownership of a 1995/96 Lexis auto and a
11 1995/96 Maxima auto currently registered in Cynthia's name.

12 A hearing for preliminary injunction was set for January 17, 1997, one day before the expiration
13 of both TROs. Just prior to the commencement of the hearing, counsels for both parties met in chambers
14 to discuss Cynthia's allegation that Elizabeth's counsel had a conflict of interest with Cynthia. Based on
15 the discussion, the Court found good cause to extend the TRO until February 11, 1997 to give the parties
16 an opportunity to brief Cynthia's motion to disqualify. Cynthia's subsequent motion to disqualify alleges
17 that the Cushnie Office's current representation of Elizabeth against Cynthia violates Rules 1.9 and 3.7
18 of the Model Rules. Elizabeth's response denies the existence of any conflict. During the February 7th
19 hearing on disqualification, both parties were given the opportunity to present evidence in their favor.
20 At the close of the hearing, the Court ruled from the bench in favor of disqualification.

21 **II. ISSUES**

- 22 1. Whether the Cushnie Office's representation of Elizabeth against Cynthia violates Rule
23 3.7 of the Model Rules.
- 24 2. Whether the Cushnie Office's representation of Elizabeth against Cynthia violates Rule
25 1.9 or 1.7 of the Model Rules.

1 **III. ANALYSIS**

2 **A. Model Rule 3.7**

3 Model Rule 3.7 proclaims that a lawyer shall not act as an advocate at a trial in which the lawyer is likely
4 to be a necessary witness except where:

5 (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature
6 and value of legal services rendered in the case; or (3) disqualification of the lawyer
would work substantial hardship on the client.

7 Elizabeth's complaint and motion for preliminary injunction allege that Cynthia has failed to repay
8 approximately \$190,000 worth of money Elizabeth loaned to Cynthia and Frank for medical expenses.
9 In defense, Cynthia claims that none of the money she received for Frank's medical needs was a loan.
10 Cynthia contends that Elizabeth's case will require the testimony of both attorneys from the Cushnie
11 Office regarding the central issue of this case: whether or not the funds disbursed to Cynthia for her
12 husbands medical expenses constituted a loan or a gift.

13 As evidence of the Cushnie Office's likelihood to become a witness in this matter, Cynthia points
14 out that the Cushnie Office has admitted that it was responsible for transferring the money at issue in this
15 case to Elizabeth from a trust account which the Cushnie Office held in her name. In response, the
16 Cushnie Office explains that they played no role in Elizabeth's subsequent release of funds to Frank and
17 Cynthia. Due to their limited role, the Cushnie Office contends that their handling of the funds falls under
18 the uncontested issue exception to Rule 3.7, and eliminates any need to question them regarding
19 Elizabeth's dispersal of money to Cynthia and Frank.

20 The Cushnie Office has clearly missed the point of Cynthia's concern. From her papers, it does
21 not appear that Cynthia intends to dispute that the Cushnie Office was the source of the money that
22 Elizabeth gave she and Frank. Rather, Cynthia intends to question the Cushnie Office about the sequence
23 of events that led to their disbursal of money to Elizabeth. In an alleged loan situation such as this where
24 Elizabeth appears to lack any written evidence of a loan, the testimony of those parties who had an
25 opportunity to know about the circumstances surrounding the undocumented transaction takes on a
26 heightened level of importance. In the Court's view, the Cushnie Office, as Elizabeth's long time
27 attorneys, as the holder and disbursing officer of Elizabeth's funds, and as drafter of Frank's power of attorney,

1 stands in a prime position to give information about the conditions and circumstances surrounding the
2 dispersal of funds at issue in this case. It is very likely that the Cushnie Office will be able to offer
3 testimony which will assist the trier of fact in its decision regarding the nature of the transaction.
4 Therefore, the Court deems Mr. Cushnie and Mr. Jones to be necessary witnesses in this matter.
5 Accordingly, pursuant to Rule 3.7, the Court hereby grants Cynthia's motion and disqualifies the Cushnie
6 Office from any further representation of Elizabeth in this matter.

7
8 **A. Model Rule 1.9 and 1.7**

9 Cynthia's motion is also based on Rules 1.9(a) & (b):

10 (a) A lawyer who has formerly represented a client in a matter shall not thereafter
11 represent another person in the same or a substantially related matter in which that
12 person's interest are materially adverse to the interests of the former client unless the
13 former client consents after consultation;

14 (b) A lawyer who has formerly represented a client in a matter or whose present or
15 former firm has formerly represented a client in a matter shall not thereafter:

16 (1) use information relating to the representation to the disadvantage of the former client
17 except as Rule 1.6 or Rule 3.3 would permit or require with respect to the client, or when
18 the information has become generally known; or

19 (2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would
20 permit or require with respect to the client.

21 Several requirements arise from this provision. First, the lawyer must have had an attorney-client
22 relationship with the former client. Second, the present client's matter must either be the same as the
23 matter the lawyer worked on for the first client, or a "substantially related" matter. Third, the interests
24 of the former client must be materially adverse to the interests of the second client. Fourth, the former
25 client must have withheld consent to the representation after consultation. *Nemours v. Gilbane, AETNA,*
26 *Federal Ins.* 632 F.Supp. 418, 422 (D.Del. 1986).

27 At the close of the February 7th hearing, the Court intended to review the evidence related to
28 Cynthia's Rule 1.9 motion and include its Rule 1.9 ruling in a later written decision. *See supra* footnote
1. While the matter remained under advisement, the Court inadvertently discovered and took judicial
notice of a *Notice of Motion and Motion to Withdraw [as Counsel]* (Law Clerk's Copy)(hereinafter

1 Withdrawal Request) filed at the Court by the Cushnie Office on January 16, 1997.² See *State v. Bayliss*,
2 704 P.2d 1363, 1365 (Ariz.App. 1985)(court may take judicial notice of its own records); see also *State*
3 *v. Lowe*, 715 P.2d 404, 408 (Kan. 1986)(court need not give advance notice to parties before taking
4 judicial notice of its own records). The Withdrawal Request concerned a case entitled *CNMI v. William*
5 *Sablan*. As a basis for their withdrawal as Mr. Sablan's counsel, the Cushnie Office cited Model Rule
6 1.7 (conflict of interest involving current client) explaining that Mr. Sablan's accusations against George
7 Matsunaga, precluded their representation of Mr. Sablan because such representation "may be materially
8 limited by responsibilities to [George Matsunaga]." The Cushnie Office's motion reads in pertinent part:

9 The [Cushnie Office] was appointed by the court to represent Defendant in this matter.
10 In reviewing the discovery materials provided, it appears that Defendant has made
11 accusations relating to the charge at issue in this case against George Matsunaga, among
12 others. It appears that George Matsunaga will be an adverse, if not hostile, witness in this
13 case. . . . *George Matsunaga is currently an inmate at the Department of Corrections.*
14 *He and his family are longtime clients of the undersigned and the Law Offices of*
15 *Douglas F. Cushnie.* . . . The undersigned therefore respectfully requests to withdraw
16 from representation of Defendant in this case.

17 *CNMI v. Sablan*, Crim. Case No. 96-258 (Withdrawal Request filed Jan. 16, 1997) (emphasis added).
18 Here the Cushnie Office directs the Court to an on going attorney-client relationship with George
19 Matsunaga and the Matsunaga family as evidence of a Rule 1.7 conflict of interest precluding the firm
20 from representing William Sablan in the *Sablan* case.

21 Subsequent to the Court's discovery of this document, Elizabeth retained Anthony Long Esq. as
22 her new counsel, and appeared on February 21st for the preliminary injunction hearing. During the
23 hearing, Cynthia testified at length about all aspects of the case against her. During specific testimony
24 identifying recent drivers of the Lexis automobile at issue in the preliminary injunction, Cynthia revealed
25 that one of her stepsons, George Matsunaga, had not been driving the Lexis because he currently was
26 serving a sentence in the CNMI jail. In later testimony, Elizabeth confirmed that her grandson George
27 was currently in jail. Having combined the information in the Withdrawal Request, and the February
28 21st testimony identifying George Matsunaga as a member of the Matsunaga family currently before the
Court, it is abundantly clear that the Cushnie Office used their representation of Frank's son and

² Judge Bellas subsequently granted the motion on January 17, 1997.

1 Cynthia's stepson, as well as their current representation of the Matsunaga Family as a whole to form the
2 basis for their withdrawal from *CNMI v. Sablan*. Nevertheless, less than one month later, the Cushnie
3 Office has chosen to defend its representation of a faction of the Matsunaga family by denying that it ever
4 represented a particular member of the Matsunaga Family.

5 The Court cannot allow such inconsistent representations to go unnoticed. The Cushnie Office
6 took advantage of their purported blanket representation of George and the Matsunaga Family to earn
7 a withdrawal from Judge Bellas on January 17th in the *CNMI v. Sablan* matter. Six days prior to this
8 representation, the Cushnie Office filed a complaint in the present matter and secured a temporary
9 restraining order against Cynthia, George's stepmother. Though not a blood relative of the Matsunaga
10 clan, it can hardly be said that Cynthia has not been treated by the Cushnie Office as a member of the
11 Matsunaga family. The record reflects that Cynthia was married to Frank Matsunaga for eight years prior
12 to his recent death and continued to live in the Matsunaga family residence with Elizabeth until January
13 1, 1997, nine days prior to the commencement of this lawsuit. She has received counsel from the Cushnie
14 Office, via Frank, regarding her immigration status^{3/} and was invited to take part in a substantial number
15 of the *Diamond Hotel* meetings between Frank and the Cushnie Office. In addition, several
16 disbursements representing both legal service payments and Diamond Hotel Lease payments were sent
17 between the Cushnie Office and Frank and Cynthia's joint checking account. Accordingly, this Court
18 finds that Cynthia Matsunaga was a member of the Matsunaga family represented by the Cushnie Office
19 at the time of Frank's death in late 1996. Further, since there is no evidence in the record that the
20 Cushnie Office ever informed Cynthia that it no longer considered her a member of the Matsunaga family
21 prior to January 10, 1997, the Court finds that Cynthia remained a Matsunaga family member, and thus
22 a client of the Cushnie Office at the time this case was filed.

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25 ^{3/} The Court is somewhat troubled by the Cushnie Office's portrayal of legal advice concerning the
26 immigration status of a man's wife as merely establishing an attorney-client relationship between the man
27 and the law firm. Such a characterization negates any fiduciary responsibility to the human being most
28 closely affected by the advice, and comes shamefully close to the viewpoint that nonresident partners of
CNMI residents are mere chattel.

1 Despite the Cushnie Office's recent self-portrayal as "longtime" counsel to the Matsunaga family.
2 on February 7, 1997, Attorney Jones stated under oath that [the Cushnie Office] is not the Matsunaga
3 family counsel.^{4/} Since their recent representation to Judge Bellis earned them a court approved
4 withdrawal from *William v. Sablan*, this Court feels compelled to hold the Cushnie Office to its own
5 words. Accordingly, the Cushnie Office is disqualified from representing Elizabeth in this matter pursuant
6 to Model Rule 1.7. In the Court's view, the Cushnie Office should not have begun representation of
7 Elizabeth in this matter because such representation was directly adverse to another member of the
8 Matsunaga family they represent, Cynthia. For the reasons stated above, the Court will not consider
9 Cynthia a former client for purposes of this motion, and thus Model Rule 1.9 is inapplicable here.

11 IV. CONCLUSION

12 For the foregoing reasons, it is hereby **ordered** that:

- 13 1. Cynthia's Motion for Disqualification is **granted** as to the Cushnie Office's violation of Model
14 Rule 3.7 and **denied** as to the Cushnie Office's violation of Model Rule 1.9
- 15 2. The Cushnie Office has violated Model Rule 1.7 by representing a client (Elizabeth) with interests
16 directly adverse to another current client (Cynthia) without obtaining consent from each client after
17 consultation.
- 18 3. The Cushnie Office has violated Model Rule 3.3 by knowingly offering evidence which it knew
19 to be false.
- 20 ~~4.~~ Elizabeth shall immediately seek new counsel.^{5/}

23 ^{4/} In addition to violations of Model Rules 3.7 and 1.7, the Court considers the Cushnie Office's
24 failure to disclose their recent withdrawal from *William v. Sablan* due on the basis of their current
25 Matsunaga Family representation to be a violation of Model Rule 3.3 Candor Toward the Tribunal. In
26 the Court's view, the Cushnie Office either misrepresented facts to Judge Bellas on January 16th or to
this Court on February 7th.

27 ^{5/} The Court is aware that prior to this written decision, Elizabeth has successfully obtained new
counsel, Anthony Long Esq.

1 4 The Cushnie Office must pay attorney fees for Cynthia's motion for disqualification, and must
2 refrain from charging Elizabeth for any costs or time associated with the Cushnie Office's defense of
3 this motion.

4 6 Pursuant to Canon 3(B)(3) of the Code of Judicial Conduct for the Commonwealth Judiciary, the
5 Court shall initiate appropriate disciplinary measures against the Cushnie Office by forwarding this
6 matter to the Disciplinary Committee of the Northern Marianas Bar Association.

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8 So **ORDERED** this 27th day of March, 1997.

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13 ALBERTO C. LAMORENA III, Special Judge
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